RENDERED: November 7, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-001823-MR

SHIRLEY MITCHELL — APPELLANT

v. APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
CIVIL ACTION NO. 92-CI-115

SHELTER INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: WILHOIT, CHIEF JUDGE; EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Shirley Mitchell (Mitchell) appeals from an order of the Trigg Circuit Court entered on June 3, 1996, granting summary judgment in favor of appellee, Shelter Insurance Company (Shelter). We affirm.

Mitchell owned a 1989 Dodge Shadow which was insured by Shelter. Under the terms of the policy, coverage was provided for bodily injury in the amount of $50,000 per person/$100,000 per accident and underinsured motorist (UIM) coverage in the amount of $50,000 per person/$100,000 per incident.

The "Exclusions" section of the policy issued to Mitchell provided:

We will not pay . . . any damages an insured is legally obligated to pay to the extent that such damages exceed the minimum limits of liability required by the Kentucky Motor Vehicle Reparations Act because of:

* * * *

(6) Bodily injury to any insured or any member of the family of any insured residing in the same household as the insured. (emphasis deleted)

The UIM endorsement of the policy stated that for coverage purposes, a vehicle "owned by or furnished or available for the regular use of you or a relative" was not an underinsured motor vehicle.

On September 29, 1991, Mitchell and her live-in boyfriend, Phillip Peifer (Peifer) were returning from a family reunion in the Dodge Shadow. Peifer was driving the car and Mitchell was in the passenger seat. Peifer lost control of the vehicle, causing it to flip several times. As a result of the accident Mitchell was ejected from the car and sustained serious disabling injuries. The parties are in agreement that the accident was caused by Peifer's negligence and that Mitchell's damages for medical treatment, permanent disability, and pain and suffering exceed $100,000.00. However, in reliance on the above-referenced exclusions, Shelter paid Mitchell only $25,000 on her claim representing the minimum limits of liability required by the Kentucky Motor Vehicle Reparations Act.

Mitchell filed suit against Shelter on September 5, 1992, seeking to recover an additional $25,000 from Shelter under the liability provisions of the policy and an additional $50,000

under the provisions of the UIM endorsement. In her motion for summary judgment filed with the trial court on March 18, 1996, Mitchell argued that the exclusions in the policy did not apply to her because she had never been given a copy of the policy. Mitchell further argued that the family exclusion clause should be declared invalid, void, and repugnant to public policy. In an affidavit attached to her motion, Mitchell stated that she never "received a copy of [the] automobile insurance policy from Shelter . . . or any document explaining any exclusions in my coverage."

Shelter filed its own motion for summary judgment with the trial court on April 15, 1996. Shelter attached an affidavit of Tom McMurtry (McMurtry), the agent who sold the policy to Mitchell. In his affidavit, McMurtry stated that he gave Mitchell a binder showing the type of coverage purchased and the limits thereof. McMurtry further stated that it was Shelter's policy to mail a copy of the policy to the insured within a short time after the purchase of the policy. Shelter argued that it fulfilled its obligation under the Kentucky Insurance Code by giving the binder to Mitchell, and that it was under no duty to provide her with a copy of the policy. Shelter further argued that the family member exclusion was unambiguous and valid.

In an order entered on June 3, 1996, the trial court granted Shelter's motion for summary judgment. The court found that when Shelter gave Mitchell the binder, it complied with Kentucky Revised Statutes (KRS) 304.39-310 (1), which requires an

automobile insurer to provide its insured with a "certificate or other evidence of insurance" upon issuance of coverage. The trial court stated that Shelter was not required to provide Mitchell with a copy of her policy because in passing KRS 304.39-310(1) the legislature had usurped the area. The trial court held that "the statute is controlling and there is no material issue of fact that the requirement of it has been met." The trial court also upheld the validity of the family exclusions clause. This appeal followed.[1]

KRS 304.39-320 provides in part:

> Every insurer shall make available upon request to its insureds underinsured motorists coverage, whereby **subject to the terms and conditions of such coverage not inconsistent with this section** the insurance company agrees to pay its own insured for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident **because the judgement recovered against the owner of the other vehicle exceeds the liability policy limits thereon**, to the extent of the underinsurance policy limits on the vehicle of the party recovering. (emphasis added)

KRS 304.39-320 (2). This Court has interpreted this section to mean that "the legislature intended to provide additional protection to a victim where the underinsured party was a

[1] One of Mitchell's arguments on appeal was that the trial court erred in holding that the family exclusion clause was not void as against public policy. However, during the pendency of this appeal, the Kentucky Supreme Court invalidated family exclusions clauses in Lewis v. West American Insurance Company, Ky., 927 S.W.2d 829 (1996). As a result of the Lewis decision, Shelter has conceded this issue and has tendered the remaining $25,000 of its liability insurance coverage under the policy to Mitchell.

separate individual, and not the victim herself." Windham v. Cunningham, Ky. App., 902 S.W.2d 838, 840 (1995). In so interpreting the statute, we recognized that the statute defined UIM coverage as uncompensated damages which arise because the judgment recovered against the owner of the other vehicle exceeds his or her policy limits. Windham, 902 S.W.2d at 840. In holding that the plaintiff in Windham was unable to recover under a UIM endorsement where the decedent was killed in a one-car accident, we stated that "[t]he purpose of UIM coverage is not to compensate the insured or his additional insureds from his own failure to purchase sufficient liability insurance." Id. at 841. If we allowed Mitchell to recover under the UIM endorsement in the absence of the exclusionary clauses, we would be compensating her for her failure to purchase adequate liability insurance for herself. As much as we sympathize with Mitchell in that she was seriously injured through no fault of her own, to adopt her argument "simply stretches the purpose and scope of underinsured coverage beyond the bounds of reason or common sense." Id. See also Pridham v. State Farm Mutual Insurance Company, Ky. App., 903 S.W.2d 909 (1995)(denying recovery of UIM benefits to insured injured as result of one-car accident).

Having held that Mitchell is not entitled to UIM benefits under the facts of this case, we need not reach the other issues raised by Mitchell on appeal. The order of the trial court entered on June 3, 1996, granting summary judgment in favor of Shelter is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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