RENDERED: October 13, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2000-CA-000020-MR

ESTELLA WHITE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NOS. 97-CI-00360,
97-CI-02307 and 97-CI-02309

LIBERTY MUTUAL INSURANCE COMPANY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI, MCANULTY AND TACKETT, JUDGES.

TACKETT, JUDGE: Appellant, Estella White (White), appeals from an order of the Fayette Circuit Court dismissing her claim against appellee, Liberty Mutual Insurance Company (Liberty Mutual). We reverse and remand.

White was involved in an automobile accident with an auto driven by Pedro Rodriguez (Rodriguez). White filed suit against Rodriguez and also sued Liberty Mutual, her underinsurance carrier. White settled with Rodriguez for $18,000, an amount $7,000 less than his policy limits. White then attempted to proceed against Liberty Mutual for her damages in excess of $25,000 (Rodriguez's policy limits), but the trial court granted Liberty Mutual's motion for summary judgment and

dismissed her claim before the matter proceeded to trial. White then filed this appeal.

The sole question raised in this appeal is whether a settlement with an underlying tortfeasor for less than the tortfeasor's policy limits precludes an action for underinsurance benefits. Based upon Metcalf v. State Farm Mutual Auto Insurance Company, Ky. App., 944 S.W.2d 151 (1997), we conclude that such a settlement does not preclude a claim for underinsurance benefits.

The appellant in Metcalf was involved in a three-vehicle accident while driving an automobile for his employer. The employer was insured by Liberty Mutual, both of the other drivers were insured by State Farm, and the appellant also had personal underinsurance coverage with State Farm. The Appellant settled with the tortfeasor for the tortfeasor's policy limits and settled with Liberty Mutual, his employer's insurance carrier, for $50,000, an amount $10,000 less than the policy limits. State Farm then "moved to dismiss the action, contending that because only $50,000 of Liberty Mutual's coverage was actually exhausted, the underinsured coverage provided by its policy did not take effect." Id. at 152. As in the case at hand, the trial court dismissed the claim due to the fact that the settlement with the primary insurance carrier was for less than the policy limits.

This court reversed the trial court's dismissal as follows:

> The appellant's claim is one in the nature of a contract claim in which he need prove the amount of damages caused by the tortfeasor's action. *See Coots v. Allstate Ins. Co.*, Ky., 853 S.W.2d 895, 899 (1993).

> . . . The actual amount paid by the primary carrier due to either settlement, insolvency, or a number of other factors unrelated to appellant's actual damages, does not affect the contract's term. [citation omitted].
>
> We are unable to distinguish this action from the facts presented in *American Automobile Ins. Co. v. Bartlett*, Ky., 560 S.W.2d 6 (1977). In *Bartlett*, the plaintiff was involved in an automobile accident in which she was a passenger in the tortfeasor's car. Total coverage provided by the tortfeasor's insurance carrier was $35,000; however, the plaintiff settled her claim prior to trial for only $25,000. The plaintiff later went to trial seeking uninsured motorist coverage under her personal insurance policy. The jury returned a verdict assessing the plaintiff's damages at $34,000.29. The trial court subtracted $25,000, the amount of the settlement, and entered judgment against the insurance company for $9,000.29, the difference. The Supreme Court of Kentucky reversed the decision, concluding that her excess uninsured policy would be effective only to the extent that the verdict was in excess of $35,000, the primary coverage limits. *Id.*
>
> In the case at hand, the same procedure is appropriate. The appellant must be given the opportunity to prove his entitlement to coverage regardless of prior settlements. To hold otherwise would hinder the long standing policy of encouraging the settlement of disputes outside the litigation process. As a result, the appellant may recover from the appellee if he can show that he has sustained bodily injury in excess of applicable primary coverage, i.e., $120,000.

Id. at 152-53. Similarly, in the case at hand, White may recover from Liberty Mutual if she can demonstrate damages from the accident in excess of Rodriguez's primary coverage, $25,000.[1] This is exactly the scenario envisioned by Kentucky Revised

[1] We are aware that this ruling appears to be in conflict with the statement in Saxe v. State Farm Mutual Automobile Insurance Company, Ky. App., 955 S.W.2d 188, 193 (1997) that "underinsurance motorist coverage is generally not available until a judgment in excess of the tortfeasor's policy limits has been obtained." However, the issue in the case at hand was not presented in Saxe, as that case was concerned with added reparations benefits. Thus, the broad and general statement in Saxe must be regarded as *obiter dictum* and, therefore, not as controlling precedent. See e.g., Utterback's Adm'r v. Quick, 230 Ky. 333, 19 S.W.2d 980, 983 (1929).

Statute (KRS) 304.39-320(5). That statutory subsection provides that "[t]he underinsured motorist insurer is entitled to a credit against total damages in the amount of the limits of the underinsured motorist's liability policies in all cases to which this section applies, *even if the settlement with the underinsured motorist . . . is for less than the underinsured motorist's full liability policy limits*." (Emphasis added).

The judgment of the Fayette Circuit Court is hereby reversed and the matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles A. Taylor
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BRIEF FOR APPELLEE:

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