RENDERED: JULY 6, 2001; 10:00 a.m.
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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000851-MR

TERI O. EADS, GUARDIAN AND NEXT
FRIEND OF JERI O. EADS, MINOR — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 99-CI-00451

SOUTHERN HERITAGE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: The appellant, Jeri O. Eads, as Guardian and Next Friend of her minor daughter, Teri O. Eads, brought a declaratory judgment action against her motor vehicle insurance carrier, Southern Heritage Insurance Company (Southern), to determine their entitlement to coverage under the uninsured motorist (UM) provision of the policy. The Eadses contend that the trial court erred in setting aside the default judgment which was initially entered against Southern and in subsequently granting Southern's motion for summary judgment on the issue of its liability to pay UM benefits. We find that the trial court did not abuse its

discretion in setting aside the default judgment. We further find that the vehicle in which Teri Eads was injured was not uninsured for purposes of UM coverage. Hence, we affirm.

On June 9, 1998, Jeri Eads, who was then age eleven, was a passenger in a car that was being driven by an uninsured, unlicenced ten-year-old named David Pilkington. Sylvester Willard, the vehicle's owner, had not given David permission to use the vehicle. However, two of Willard's children, Brandon McQueen, age eleven, and Randy Willard, age twelve, were also in the vehicle along with Jeri and David. Sylvester had insured the vehicle under a policy with Kentucky Farm Bureau with policy limits of $25,000.00 per person and $50,000.00 per accident.

While David was driving, the vehicle was involved in a single-car accident. Jeri sustained numerous injuries and had to be transported by air to a hospital for treatment. Jeri's mother, Teri Eads, filed a claim against Sylvester Willard for negligently entrusting the vehicle to his children. Kentucky Farm Bureau paid the liability limits of Willard's policy, and the Eadses received $25,000.00.

Teri Eads was insured under a policy provided by Southern. In addition to the liability coverage, the policy provided underinsured motorist (UIM) coverage in the amount of $100,000.00 per person and $300,000.00 per accident and UM coverage in the same amounts. After Kentucky Farm Bureau paid the limits of Willard's policy, Teri Eads filed a claim with Southern to recover under her own UIM coverage. Southern paid Eads $100,000.00 in UIM benefits.

Thereafter, the Eadses brought a negligence claim against David and his parents for David's negligent acts. Their insurance carrier, OMNI Insurance Company, denied coverage because David had not received the permission of the owner of the vehicle to drive it. The Eadses then sought an additional recovery from Southern for UM coverage. The Eadses argued that they were entitled to both UIM benefits (with respect to Willard) and UM benefits (with respect to David). Southern denied their claim for UM benefits.

The Eadses filed a declaratory judgment action against Southern on April 19, 1999. On that same day the Eadses served notice on Southern through the Kentucky Secretary of State's Office.[1] The Secretary of State's office forwarded notice to Southern by certified mail on April 30, 1999. In addition, on April 19, 1999, the Eadses sent a courtesy copy of the complaint to Southern's counsel. Southern, notwithstanding the service of process and the informal notice, filed no answer within the time allowed under CR 12.01. The Eadses moved for default judgment, which the trial court granted on May 25, 1999.

Nine days later, on June 3, 1999, Southern moved to have the judgment set aside. Southern's counsel explained that the recent departure from their office of two associates, the inexperience of two part-time law-student clerks, and counsel's vacation and out-of-town duties had apparently combined to allow the Eadses complaint to escape prompt notice. Although acknowledging that these circumstances would not excuse an

[1] KRS 304.3-230(5).

extreme or a general failure to abide by the civil rules, counsel noted that, with this lone exception, he and his office had been diligent in meeting all deadlines and that he had responded promptly as soon as this mistake had come to his attention.

On July 12, the trial court set aside the default judgment. Citing Thompson v. American Home Assurance Company,[2] the trial court concluded that Southern had shown good cause to have the judgment set aside. After the trial court set aside the default judgment, Southern filed a motion for summary judgment. Southern claimed that Jeri was injured in an insured vehicle since the owner of the vehicle had insurance. Southern further stated that the vehicle owner's insurance carrier had already paid its policy limits. Since the vehicle was insured, Southern denied that it had any liability under the Eadses UM coverage. Southern concluded that no additional amounts were owing.

The trial court granted Southern's motion for summary judgment. Relying upon Commonwealth Fire and Casualty Insurance Co. v. Manis,[3] and Windham v. Cunningham,[4] the court concluded that the vehicle in which Jeri was injured was insured. Since Jeri had been paid the limits of the owner's liability policy and she had received UIM benefits from Southern, she could no longer ask for any benefits under UM coverage.

The Eadses now appeal from the trial court's judgment. They first maintain that the trial court relied inappropriately

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[2] 95 F.3d 429 (6th Cir., 1996).

[3] Ky. App., 549 S.W.2d 303 (1977).

[4] Ky., 902 S.W.2d 838 (1995).

on Thompson and that as a result the court abused its discretion by concluding that Southern had shown good cause to set aside the default judgment. The Eadses argue that Southern was not entitled to relief from the default judgment because it failed to provide a valid excuse for default.

In response, Southern urges this court to adopt as the applicable law the federal rule stated in Thompson. The Thompson court employed a three-part test to determine whether "good cause" had been shown: (1) whether the entry of default was the result of willful or culpable conduct on the part of the defendant; (2) whether setting aside the default judgment would prejudice the plaintiff; and (3) whether the defenses raised following the entry of default are meritorious.[5] Based on this test, Southern argues that the trial court did not abuse its discretion in setting aside the default judgment.

We agree with the Eadses that the trial court erred in applying the test set out in Thompson. The Thompson test does not apply because there are established rules in Kentucky that cover this subject. CR 55.02 provides as follows: "For good cause shown the Court may set aside a judgment by default in accordance with CR 60.02." Among other grounds, CR 60.02 permits a trial court to relieve a party from a judgment which was entered due to "excusable neglect." Good cause may be shown by proving: (1) a valid excuse for default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-

[5] Thompson, 95 F.3d at 432.

defaulting party.[6] Thompson sets out an alternative to the valid-excuse requirement- the absence of willful or culpable conduct- which has not been recognized under Kentucky's rules of procedure.

Nevertheless, we do not agree with the Eadses that the trial court abused its discretion in setting aside the default judgment. While CR 55.02 and 60.02 are the applicable rules of procedure with regard to setting aside a default judgment, CR 59.05 also support the trial court's decision. In this case, the trial court entered the default judgment on May 25, 1999. Southern filed to set aside default judgment on June 3--nine days later. Southern clearly filed their motion within the 10-day reconsideration period allowed by CR 59.05. Under this rule, the trial court retained jurisdiction to set aside its judgment for ten days after the entry of the order.[7] Furthermore, CR 59.05 is not inconsistent with the default judgment rule of CR 55.02.[8]

Because the trial court had the authority to set aside the default judgment under CR 59.05 as well as CR 55.02, the question becomes whether the trial court abused its discretion under the former rule in setting aside the judgment. We do not believe that it did. Trial courts "possess and exercise a very large discretion for the purpose of permitting defense to be made

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[6] Perry v. Central Bank & Trust Co., Ky. App., 812 S.W.2d 166, 170 (1991).

[7] Mingey v. Cline Leasing Service, Inc., Ky. App., 707 S.W.2d 794, 796 (1986).

[8] Granville & Nutter Show v. Florsheim Shoe, Ky. App., 569 S.W.2d 721, 723 (1978).

on the merits."[9] Appellate courts will not interfere with that broad discretion except when abuse is shown.[10]

The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[11] Here, the trial court gave both parties ample opportunity to argue the merits of Southern's motion. Although the Thompson test for finding good cause was not binding, the trial court did conclude that Southern had not acted in bad faith and that the Eadses would not be unfairly prejudiced if the default judgment were set aside. Moreover, the trial court also concluded that Southern had presented a potentially meritorious defense to the Eadses claims. Under these circumstances, we conclude that the trial court did not abuse its discretion in setting aside the default judgment.

The Eadses next argue that the trial court erred in granting Southern's motion for summary judgment. Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court. As did the trial court, we ask whether material facts are in dispute and whether the party moving for judgment is clearly entitled thereto as a matter of law.[12]

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[9] Kidd v. B. Perini & Sons, Ky. App., 233 S.W.2d 255, 257 (1950).

[10] Id.

[11] Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).

[12] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996); *See also* Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991).

The issue on appeal is whether the Eadses are allowed to "stack" their UM coverage with their UIM coverage. The Eadses claim that the relevant factor to determine whether UM coverage should be paid is not the status of the vehicle, but rather the status of the individual. In Estate of Swartz v. Metropolitan Property & Casualty Co.,[13] this Court noted that UM coverage is personal to the insured, while liability insurance follows the vehicle.[14] However, in Swartz, this Court was considering the validity of a policy provision which prohibited an insured from stacking UIM coverage under a policy which, while ostensibly charging a single premium for the protection, in fact based the premium on the number of vehicles insured. In this case, the question presented is whether an insured is entitled to both UIM and UM coverage for the same vehicle.

Likewise, we are not persuaded that the doctrine of reasonable expectations applies to this case. That doctrine can only apply when the policy provisions are ambiguous.[15] The Eadses do not contend that the policy provisions are ambiguous regarding the extent of their coverage.

Rather, KRS 304.20-020(1) and (2) set out standards to determine when a motor vehicle will be considered "uninsured" for purposes of UM coverage. Section (1) of that statute requires that every automobile insurance policy contains provisions for

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[13] Ky. App., 949 S.W.2d 72 (1997).

[14] Id. at 74; *citing* Hamilton v. Allstate Insurance Co., Ky., 789 S.W.2d 751, 753-54 (1990).

[15] Meyers v. Kentucky Medical Ins. Co., Ky. App., 982 S.W.2d 203 (1997); *citing* Simon v. Continental Ins. Co., Ky., 724 S.W.2d 210 (1987).

uninsured motorist coverage unless the insured waives such coverage. Section (2) sets out the circumstances under which a vehicle may be deemed uninsured even when a policy of insurance is in effect for the vehicle:

> For the purposes of this coverage the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an "insured motor vehicle" where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency; an "insured motor vehicle" with respect to the amounts provided, under the bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such "motor vehicle", are less than the limits described in KRS 304.39-110; and an "insured motor vehicle" to the extent that the amounts provided in liability coverage applicable at the time of the accident is denied by insured writing the same.

In each of the three instances set out in the statute, the factor used to determine whether a vehicle is uninsured focuses on the vehicle's coverage and not on the driver's coverage. Furthermore, this Court has held that if the vehicle was insured, the fact the driver was uninsured is irrelevant.[16] Consequently, an insured is not entitled to recover under the UM and UIM coverages of the same policy.[17]

In the case before us, the owner of the vehicle, Sylvester Willard, insured the vehicle through Kentucky Farm Bureau. In fact, Kentucky Farm Bureau paid the Eadses the limits

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[16] Windham v. Cunningham, 902 S.W.2d at 840.

[17] Id.; *See also* Motorists Mut. Ins. Co. v. Glass, Ky., 996 S.W.2d 437, 448-50 (1997).

of that policy for this accident. Therefore, the fact that David Pilkington was an unlicenced, uninsured driver has no relevance here since the vehicle was insured by its owner.

Furthermore, the "purpose of uninsured motor vehicle coverage is to make available to injured parties from their own insurer a stated minimum amount of insurance coverage when no other valid or collectible insurance exists with respect to the vehicle causing the damage."[18] Jeri and Teri Eads have received liability coverage under Willard's policy and UIM benefits under their own policy with Southern. They are not entitled to also recover UM benefits under their policy with Southern. Therefore, the trial court properly found that Southern was entitled to judgment as a matter of law.

Accordingly, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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[18] Commonwealth Fire & Cas. Ins. Co. v. Manis, Ky. App., 549 S.W.2d 303, 305 (1977).