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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002632-MR

GARY WILSON; JOYCE WILSON — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. MCNAMARA, JUDGE
ACTION NO. 05-CI-00986

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY; NATIONAL GENERAL INSURANCE COMPANY, A GMAC INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Gary Wilson and Joyce Wilson appeal from orders of the Franklin Circuit Court granting summary judgment to American National Property and Casualty Company (American National) and National General Insurance Company, a GMAC Insurance Company (National General) upon their claims seeking to collect

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

payments under the underinsured motorist (UIM) provisions contained in vehicle insurance policies issued by the companies to the Wilsons. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 23, 2004, Gary and Joyce were both severely injured in a motorcycle wreck in Fayette County, Kentucky. The wreck was caused by the negligence of Stephanie Viens, whose liability insurance carrier was State Farm Insurance Company. State Farm tendered the liability insurance limits contained in the Viens policy and the Wilsons accepted the settlement

At the time of the wreck the Wilsons had in effect an automobile insurance policy issued by American National which covered four other vehicles owned by the Wilsons and an automobile insurance policy issued by National General which covered a motor home they owned. As further discussed below, both of the policies contained UIM provisions, but each of the policies also contained an exclusion exempting from UIM coverage damages sustained while an insured (including either of the Wilsons) was occupying a vehicle not covered under the policy. The Wilsons' motorcycle was insured by Progressive Northern Insurance Company and was not listed as a vehicle covered under either the American National or National General policies. Moreover, the Progressive Northern policy did not afford UIM coverage.

After settling with State Farm, the Wilsons filed a Complaint in Franklin Circuit Court[2] seeking to collect payments under the UIM provisions contained in the

[2] The Wilsons are residents of Franklin County.

American National and National General policies. In due course the insurance companies moved for summary judgment, arguing that because the motorcycle was not a vehicle listed for coverage under the policies, the exclusion exempting from UIM coverage damages sustained while an insured is occupying a vehicle not covered under the policy barred the Wilsons' claim.

The trial court awarded summary judgment to American National and National General on September 25, 2006, and December 11, 2006, respectively.[3] This appeal followed.

Before us the Wilsons argue that the trial court erred in awarding summary judgment to the insurance companies because (1) the UIM exclusion language contained in the policies is ambiguous and therefore should be construed against the companies and in favor of coverage; and (2) the exclusions are void as against public policy.

STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[4] 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv.*

[3] The Wilson's motion to alter, amend, or vacate the summary judgment award to American National was also denied on December 11, 2006.

[4] Kentucky Rules of Civil Procedure.

Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

AMBIGUITY OF EXCLUSIONS

The Wilsons first contend that the UIM exclusions contained in the two insurance policies are ambiguous and, therefore, the well settled principles that ambiguous language is to be construed against the insurance company and in favor of coverage should be applied. They argue that upon application of these principles the UIM exclusions should not be applied so as to deprive them of coverage under the policies.

> The American National exclusion states as follows:[5]
>
> This coverage [UIM coverage] does not apply to **bodily injury** sustained by an **insured person**:
>
> > 1. while **occupying**, or when struck by, a **motor vehicle** owned by **you** or a **relative** for which insurance is not afforded under this endorsement[.]

The National General exclusion states as follows:

> B. **We** do not provide . . . Underinsured Motorists Coverage for bodily injury sustained:
>
> > 1. By any **insured** while **occupying**, or when struck by, any motor vehicle owned by that

[5] The emphasis in both of the quoted provisions is in the original.

> **insured** which is not insured for this coverage under this policy.

Interpretation of an insurance policy is a question of law which we review de novo. *Cinelli v. Ward*, 997 S.W.2d 474 (Ky.App. 1998). The goal of any court in interpreting a contract is to ascertain and to carry out the original intentions of the parties, *Wilcox v. Wilcox*, 406 S.W.2d 152, 153 (Ky. 1966), and to interpret the terms employed in light of the usage and understanding of the average person. *Fryman v. Pilot Life Insurance Co.*, 704 S.W.2d 205, 206 (Ky. 1986). Unless the terms contained in an insurance policy have acquired a technical meaning in law, they "must be interpreted according to the usage of the average man and as they would be read and understood by him in the light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured." *Id.*; *Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809, 811 (Ky.App. 2000). Furthermore, under the "doctrine of reasonable expectations," an insured is entitled to all the coverage he may reasonably expect to be provided according to the terms of the policy. *Hendrix v. Fireman's Fund Ins. Co.*, 823 S.W.2d 937, 938 (Ky.App. 1991); *Woodson v. Manhattan Life Ins. Co.*, 743 S.W.2d 835, 839 (Ky. 1987).

Moreover, a policy of insurance is to be construed liberally in favor of the insured and if, from the language, there is doubt or uncertainty as to its meaning, and is susceptible to two interpretations, one favorable to the insured and the other favorable to the insurer, the former will be adopted. *St. Paul Fire & Marine Ins. Co. v. Powell-*

Walton-Milward, Inc., 870 S.W.2d 223, 227 (Ky. 1994). But, in the absence of ambiguities or of a statute to the contrary, the terms of an insurance policy will be enforced as drawn. *Osborne v. Unigard Indemnity Co.*, 719 S.W.2d 737, 740 (Ky.App. 1986); *Woodard v. Calvert Fire Ins. Co.*, 239 S.W.2d 267, 269 (Ky. 1951). Although restrictive interpretation of a standardized "adhesion" contract is not favored, neither is it the function of the courts to make a new contract for the parties to an insurance contract. *Moore v. Commonwealth Life Ins. Co.*, 759 S.W.2d 598, 599 (Ky.App.1988).

Giving the phraseology contained in the exclusions its most natural meaning we do not believe there is any ambiguity. The phrasing straight-forwardly excludes from underinsured motorist coverage bodily injuries sustained by an insured while occupying another vehicle owned by an insured which is not covered under the policy.

The declarations page of the American National policy lists the insured property as being a 1996 Lincoln Town Car, a 2002 Ford Explorer, a 1993 Ford F 350, and a 1990 Ford 350. The motorcycle is not listed as an insured vehicle. Similarly, the National General policy insures only a 1994 Safari motor home. The declarations page does not list the motorcycle as a covered vehicle.

While we agree that the exclusions could have been written more perfectly, they are not so inartfully drafted as to become ambiguous. "Only actual ambiguities, not fanciful ones," are required to be construed against the drafter. *True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003); *Snow v. West American Ins. Co.*, 161 S.W.3d 338, 341

(Ky.App. 2004). Because the UIM exclusions contained in the American National and National General policies are not ambiguous, the rules of ambiguity favoring the insured are not applicable in the case at bar. As such, the Wilsons may not rely upon those rules to defeat summary judgment.

The Wilsons, however, cite us to *Chaffin v. Kentucky Farm Bureau Ins. Co.*, 789 S.W.2d 754 (Ky. 1990), in which a somewhat similar uninsured motorist exclusion was described by the Supreme Court, in dicta, as "nearly incapable of rational construction." *See also Hamilton Mut. Ins. Co. v. U.S. Fidelity & Guar. Co.*, 926 S.W.2d 466, 468, (Ky.App. 1996) (citing to the aforementioned dicta).

However, even if we were to agree with the Wilsons that the exclusionary language was ambiguous, we do not believe their claim would be saved by *Chaffin* and *Hamilton*. In *Chaffin* the insured had uninsured motorist (UM) coverage (as opposed to UIM coverage in the present case) on the vehicle involved in the accident as well as two other vehicles written by the same carrier. The issue was whether the insured could stack the units of UIM coverage contained in the policies on the vehicles not involved in the accident despite the policies' anti-stacking provisions. The Supreme Court held that the anti-stacking provisions were void as against public policy. *Hamilton* extended *Chaffin* to apply to UIM coverage written by multiple insurance companies. The case at bar, however, is distinguishable because the motorcycle policy with Progressive Northern did not have UIM coverage, and, hence, there is no underlying unit of UIM coverage upon

which to stack the UIM coverage contained in the American National and National General policies.

Snow v. West American Ins. Co., 161 S.W.3d 338, 341 (Ky.App. 2004) addressed a similar issue in the context of an exclusion which exempted from liability coverage vehicles owned but not listed on the policy as a covered vehicle. Following an accident of an unlisted vehicle the insured sought coverage under the policy. *Snow* stated that requiring coverage would be unreasonable because such

> would allow an insured to obtain insurance and to pay premiums for one vehicle while exposing the insurer to liability for injuries arising from the use of multiple vehicles owned by other family members for which coverage had not been obtained. Extending coverage in this case would provide benefits which were neither paid for nor reasonably contemplated by the named insured or the members of his family.

Id. at 341.

Similarly, the interpretation urged by the Wilsons in this case would produce the unreasonable result in that they would be afforded a windfall by receiving UIM coverage for the motorcycle when they made the deliberate decision not to purchase same. Unfortunately, it seems apparent that the coverage the Wilsons purchased was insufficient to cover the claimed amount of their damages. However, "[t]he insured has the greatest degree of control over the amount of insurance he obtains." *Baxter v. Safeco Ins. Co. of America,* 46 S.W.3d 577, 579 (Ky.App. 2001). It would be manifestly unfair for the companies to bear the burden of the Wilsons' failure to obtain adequate insurance to cover their loss.

PUBLIC POLICY

Again relying upon *Chaffin* and *Hamilton*, the Wilsons contend that the UIM exclusions are void as against public policy. For the reasons previously discussed, we do not believe that the holdings in *Chaffin* and *Hamilton* hold that exclusionary provisions such as the one at bar are against public policy under the present circumstances, but, rather, hold only that such provisions may not be used to prevent the stacking of separately paid for UM and/or UIM coverage. As the motorcycle did not have UIM coverage upon which to stack the units of UIM coverage contained in the American National and National General policies, the cases are inapplicable. Stacking is simply not an issue in this case.

Moreover, Kentucky courts have previously upheld insurance policy provisions excluding from UIM coverage motor vehicles owned by or available for the regular use of the policyholder or any family member. *Motorists Mutual Ins. Co. v. Glass,* 996 S.W.2d 437 (Ky. 1997); *Windham v. Cunningham*, 902 S.W.2d 838 (Ky.App. 1995). The reasoning behind these decisions rests in the purpose of the statute -- "to give the insured the right to purchase additional liability coverage for the vehicle of a prospective underinsured tortfeasor." *Motorists Mutual,* 996 S.W.2d at 449. *Motorists Mutual* upheld as not against public policy the exclusion from the definition of an underinsured vehicle any vehicle "owned by or furnished or available for the regular use of you or any family member." *Id.* at 449-450. *See also Baxter v. Safeco Ins. Co. of*

America, 46 S.W.3d 577, 578 (Ky.App. 2001) (upholding UIM exclusion for bodily injury sustained by any insured while occupying or operating an owned motorcycle).

In summary, under the circumstances of this case, we are not persuaded the UIM exclusion provisions contained in the American National and National General policies are void as against public policy.

CONCLUSION

For the foregoing reasons the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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