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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000960-MR

ABBIE BROCK, INDIVIDUALLY; ABBIE BROCK, AS EXECUTRIX OF THE ESTATE OF WILEY BROCK, DECEASED — APPELLANT

v.

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 06-CI-00310

BETTY BEGLEY, INDIVIDUALLY; BETTY BEGLEY, EXECUTRIX OF THE ESTATE OF FINLEY BEGLEY, AUTO AUCTION & RIVERSIDE AUTO AUCTION; EMPIRE FIRE & MARINE INSURANCE COMPANY; AND ZURICH INSURANCE GROUP — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; BUCKINGHAM, SENIOR JUDGE.

LAMBERT, JUDGE: Abbie Brock, individually and as executrix of the estate of Wiley Brock, appeals a summary judgment entered in favor of Betty Begley, individually and as executrix of the estate of Finley Begley, Empire Fire and Marine Insurance Company, and Zurich Insurance Group. After careful review, we affirm.

This case involves an accident between a 1989 Ford Aerostar test-driven by Wiley Brock but owned by Riverside Auto Auction, and a 1988 Oldsmobile Cutlass Ciera driven by Willard Shepherd. The accident occurred on October 26, 2004, on Kentucky Highway 82, in Powell County, Kentucky. Kentucky Highway 82 is a two-lane highway with one lane in each direction. The Cutlass Ciera driven by Willard crossed the yellow center line, striking the oncoming Aerostar. Both Willard and Wiley were killed, as well as the passenger and employee of Riverside Auto, Finley Begley.

Shortly after the accident, Abbie Brock, Wiley Brock's widow, retained the law firm of Johnson and Engel to represent the Estate of Wiley Brock and to recover all benefits available. The liability insurance carriers for Shepherd settled the case, and attorneys Johnson and Engel then wrote Empire Fire and Marine Insurance Company (hereinafter "Empire"), a division of Zurich Insurance Group (hereinafter "Zurich") and the insurers of Riverside Auto, on December 10, 2004, advising of their representation and further making a demand for underinsured motorists (hereinafter "UIM") limits. In response to the letter, Empire waived its subrogation interest and then immediately offered its UIM limits of $25,000.00. The offer was accepted and on January 4, 2005, Empire issued check #153738 in the amount of $25,000.00 to the estate of Wiley Brock. Settlement proceeds were distributed and the file was closed by both Johnson and Engel and Empire as settled.

Almost two years passed from the date the file was closed until Betty Begley, Empire, and Zurich were served with an amended complaint regarding the October 2004 accident. Wiley's estate was then represented by Ronald Polly not Johnson and Engel. The amended complaint alleged that Finley Begley, not Wiley Brock, negligently drove the 1989 Ford Aerostar thus causing injury to Wiley, and

therefore sought to recover damages under both liability and UIM policy provisions of the Empire policy.

Betty Begley, Empire, and Zurich filed a motion for summary judgment as to all claims and therewith filed three affidavits as to who was driving the Aerostar. By order entered March 1, 2007, the trial court dismissed the cause of action for loss of consortium and denied all other motions for summary judgment. Upon renewed motion for summary judgment by Betty Begley, Empire, and Zurich, the court entered a summary judgment on April 11, 2007, dismissing all causes of action for liability against Finley Begley as an alleged driver, the partnership auto auction business, and the underinsured causes of action from the liability of the other driver, Willard Shepherd, based upon the court's determination that case law precludes recovery both for underinsured benefits and liability benefits from the same policy. This appeal followed.

"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); CR 56.03. We are mindful that "[t]he 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 Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Abbie first argues that the trial court erred in concluding that UIM coverage and liability coverage were not both recoverable under the Riverside Auto's policy with Empire. We disagree.

KRS 304.39-320 states that:

> every insurer shall make available upon request to its insureds underinsured motorist 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 judgment 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.

"Conceptually, the purpose of the statute is to give the insured the right to purchase additional liability coverage for the vehicle of a prospective underinsured tortfeasor." *See Motorist Mutual Ins. Co. v. Glass*, 996 S.W.2d 437, 449 (Ky. 1999) (citing *LaFrange v. United Services Automobile Association*, 700 S.W.2d 411, 414 (Ky. 1985)). The statute does not, however, authorize recovery against both the liability and UIM coverages of the same policy. *See Glass,* at 449; *Pridham v. State Farm Mutual Insurance Co.,* 903 S.W.2d 909 (Ky.App. 1995); *Windham v. Cunningham*, 902 S.W.2d 838 (Ky.App. 1995). Moreover, since UIM coverage is conceptually additional liability coverage for an insured hit by an underinsured motorist, it would be counterintuitive to hold that UIM and liability could be stacked in light of the history of Kentucky case law finding that liability policies are unable to be stacked. *See Butler v. Robinette*, 614 S.W.2d 944, 947 (Ky.1981) (quoting *Emick v. Dairyland Insurance Company*, 519 F.2d 1317 (4th Cir. 1975)(holding that the basic purpose of liability insurance has always been conceived to be the protection of the policyholder against loss resulting from legal liability caused by his operation of a motor vehicle)).

As part of Abbie's attempt to obtain liability and UIM benefits from the Empire policy, she alleges that Finley Begley was the actual driver of the Aerostar, and therefore she should recover both UIM and liability due to the comparative negligence on Finley Begley's part. However, the evidence, as the trial court stated, "is almost overwhelming that, in fact, Wiley Brock was the driver." The police reports and affidavits of those who saw Wiley and Finley leaving the Riverside Auto lot support that Wiley was the driver. Therefore, even viewing the facts in a light most favorable to

Abbie, we simply cannot say that there exists an issue of fact as to whether Wiley was driving the Aerostar. Accordingly, we find that the trial court did not err in granting summary judgment in favor of Betty Begley, Empire, and Zurich on the issue of collecting both liability and UIM coverage under the same policy.

Abbie additionally contends that she is allowed to "stack" the UIM benefits of the Empire policy, which would have insured far more than just the Aerostar in light of the fact that it was a policy for Riverside Auto Auction's entire inventory. The first question for our consideration then is whether guest passengers are entitled to stack UIM coverage in the same manner as insured persons and members of their family.

> In *Allstate Ins. Co. v. Dicke*, 862 S.W.2d 327 (Ky. 1993), [the Kentucky Supreme Court] held an anti-stacking policy provision void with respect to UIM coverage. In so doing, [it] adopted the logic and rationale of [its] earlier cases dealing with the issue of stacking in the context of uninsured motorist coverage. *See, e.g., Hamilton v. Allstate Ins. Co.*, 789 S.W.2d 751 (Ky. 1990); *Chaffin v. Kentucky Farm Bureau Ins. Co.*, 789 S.W.2d 754 (Ky. 1990); *Ohio Casualty Ins. Co. v. Stanfield*, 581 S.W.2d 555 (Ky. 1979); *Meridian Mutual Ins. Co. v. Siddons*, 451 S.W.2d 831 (Ky. 1970). In those cases, [it] held that, pursuant to the doctrine of "reasonable expectations," when one has paid separate premiums on separate vehicles, he may reasonably expect to be able to stack those coverages.

See James v. James, 25 S.W.3d 110, 113 (Ky. 2000). Abbie argues that both the holding and the rationale of *Dicke* support her contention that she is entitled to stack the UIM coverages from the Empire policy.

Abbie, however, ignores the Kentucky Supreme Court holding in *Ohio Casualty Ins. Co. v. Stanfield*, 581 S.W.2d 555 (Ky. 1979), where it found that the doctrine of "reasonable expectations" supported the injured party's contention that he must be allowed to stack uninsured coverages from his own personal automobile insurance policy, but the Court precluded him from stacking uninsured coverages from his employer's policy, even though the accident occurred while he was using a vehicle

insured by his employer. The reasoning was premised upon the distinction between what the Court called "insureds of the first class" and "insureds of the second class." *Id*. at 557-59.

> Insureds of the first class include the named insured-he or she who bought and paid for the protections and the members of his or her family residing in the same household. Insureds of the second class are those who fall outside the first class, but who are nevertheless entitled to protection for damages from injury inflicted while they are occupying an insured vehicle.

James, at 313 (citing *Stanfield*, at 557). The policy at issue here, like the policy in *Stanfield*, distinguishes between the named insured and his or her relatives on the one hand, and "others" on the other hand.

In *Stanfield*, the Kentucky Supreme Court adopted the reasoning for distinguishing first class insured and second class insured from the Virginia Supreme Court's holding in *Cunningham v. Insurance Co. of North America*, 213 Va. 72, 189 S.E.2d 832 (1972).

> The named insured in a policy receives coverage, and a contract benefit, for which he has paid a consideration. He seeks indemnity based on the payment of that premium and where he has paid separate premiums he is entitled to the additional coverages. However, this argument and reasoning does not apply to a permissive user of a vehicle who pays no premium and does not receive the broader uninsured motorist coverage of a named insured.

Stanfield, at 558 (quoting *Cunningham*, 189 S.E.2d at 836). Therefore, in light of established Kentucky law, we find that the trial court was correct in determining no material issue of law or fact existed as to whether Brock could stack the UIM coverages under the Empire policy.

Brock finally argues that the trial court improperly found that her claim was barred by KRS 411.130. First, KRS 411.130 establishes no such statute of limitations for wrongful death. Instead, KRS 413.140(1)(a) states that "[a]n action for an injury to

the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant" must be commenced within one year after the cause of action is accrued. Therefore, we review this issue in light of KRS 413.140(1)(a) rather than KRS 411.130.

The one-year statute of limitations applicable to personal injury or wrongful death, found in KRS 413.140(1)(a), operates as a general statute of limitations. It does not make mention of motor vehicle accidents specifically. Conversely, KRS 304.39-230(6) is a special statute of limitation, which is part and parcel of an assimilated and extensive statutory scheme, the Motor Vehicle Reparations Act (hereinafter "MVRA"), addressing the rights and liabilities of persons involved in motor vehicle accidents. *See Troxell v. Trammell*, 730 S.W.2d 525, 528 (Ky. 1987); *Worldwide Equipment, Inc. v. Mullins*, 11 S.W.3d 50, 59 (Ky.App. 1999).

The MVRA provides: "[a]n action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs." KRS 304.39-230(6).

> Our rules of statutory construction are that a special statute preempts a general statute, that a later statute is given effect over an earlier statute, and that because statutes of limitation are in derogation of a presumptively valid claim, a longer period of limitations should prevail where two statutes are arguably applicable. Thus the statutory language in KRS 304.39-230(6) applies rather than the statutory language in KRS 413.140(1)(a) in the present situation where the cause of action is both a motor vehicle accident and a [wrongful death] claim.

Worldwide, at 528. As such, the causes of action asserted against Betty Begley, Empire, and Zurich in Brock's amended complaint are not foreclosed by either KRS 304.39-230 or KRS 304.39-060. Pursuant to the authority set forth above, the two-year statute of limitations must necessarily apply, and we agree that the trial court erred in finding otherwise. In light of the issues previously discussed, however, we find the error

harmless, and we accordingly affirm the summary judgment entered in favor of Betty Begley, Empire, and Zurich.

The judgment of the Powell Circuit Court is hereby affirmed.

BUCKINGHAM, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT.

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