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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001078-MR

SHELTER MUTUAL INSURANCE CO. APPELLANT

APPEAL FROM MONTGOMERY CIRCUIT COURT
v. HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 06-CI-90203

KENTUCKY FARM BUREAU
MUTUAL INSURANCE CO. APPELLEE

AND NO. 2007-CA-001132-MR

SHELTER MUTUAL INSURANCE CO. APPELLANT

APPEAL FROM CLARK CIRCUIT COURT
v. HONORABLE JULIA ADAMS, JUDGE
ACTION NO. 06-CI-00430

STATE FARM MUTUAL AUTOMOBILE
INSURANCE CO. APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: These two appeals involve the priority and apportionment of loss between two automobile insurance policies that provided coverage for the same accident. We reverse.

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On December 17, 2004, Kevin Watkins was driving, with permission, a pick-up truck owned by Leonard and Sandra Watkins. Kevin Watkins negligently collided with a vehicle driven by Kevin Fairchild. Fairchild incurred $2,289.76 in medical expenses and a total of $954.26 in property damage as a result of the accident.

On the date of the accident, Appellant, Shelter Mutual Insurance Co., had issued an automobile insurance policy to Leonard and Sandra Watkins. Kevin Watkins was considered an insured under this policy because he was a permissive driver. Concerning the coverage for personal and property damage resulting from the liability of an insured, the Shelter policy provided:

> If there is other insurance which covers the insured's liability with respect to a claim also covered by this policy, Coverages A and B of this policy will apply only as excess to other such insurance.

The limits for payment under the Shelter policy were $25,000.00 per person and $50,000.00 per accident for bodily injury damage and $25,000.00 per accident for property damage. The Shelter policy also contains a "step down" provision that

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

limits the coverage of permissive drivers to "… the minimum limits of liability insurance coverage specified by the financial responsibility law applicable to the accident…"

On the date of the accident, appellee, Kentucky Farm Bureau Mutual Insurance Co., had an automobile insurance policy issued to Kevin and Sharon Watkins. The Farm Bureau policy's coverage of Kevin extended to his use of any automobile. Regarding the coverage for personal and property damage resulting from liability incurred while driving a non-owned vehicle, the policy stated:

> Any insurance we provide for a vehicle you do not own shall be excess over any other collectible or self-insurance, whether primary, excess, or contingent.

The limits for liability under the policy were $25,000.00 per person, $50,000.00 per accident for bodily injury damage, and $25,000.00 per accident for property damage.

After the accident, Fairchild submitted claims to Shelter for his personal injuries and property damage. Farm Bureau maintained that Shelter provided primary coverage and did not participate in the resolution of Fairchild's claims. On August 23, 2006, Shelter filed a declaratory judgment action in Montgomery Circuit Court as to the priority of coverage between the two policies for the losses suffered by Fairchild. Both parties filed motions for summary judgment. The court granted Farm Bureau's motion and held that Shelter's policy provided primary coverage. Shelter then appealed.

Generally, three basic situations arise from competing insurance clauses. *Government Emp. Ins. Co. v. Globe Indem. Co*., 415 S.W.2d 581-82 (Ky. 1967). "First, one policy contains an 'excess insurance' clause and the other a standard 'escape' clause. Second, both policies contain an 'excess insurance' clause. Third, one policy contains an 'excess insurance' clause and the other contains a 'pro rata' clause." *Id.* The majority of decisions require proration in situations dealing with competing excess insurance clauses. *Id.*

We find that the trial court erred by failing to give effect to the excess insurance clause in Shelter's policy. The reasoning of *Government Emp. Ins. Co.*, supports this result. Farm Bureau argues that the specificity of the excess clause contained in its policy is more akin to the escape clause discussed in *Government Emp. Ins. Co.* We disagree. While both the escape clause in *Government Emp. Ins. Co*. and the excess clause in Farm Bureau's policy contain similar phrasing, the intent of each clause is different when read in its entirety. The escape clause in *Government Emp. Ins. Co.* sought to disclaim all liability when there was "either primary or excess" valid and collectible insurance available to a person other than the named insured. Farm Bureau's does not seek to disclaim all liability in a certain situation, rather it simply states that it will only provide excess coverage when there is "any other collectible or self-insurance, whether primary, excess, or contingent." Shelter's excess clause refers broadly to "other insurance." The degree of specificity in these clauses is irrelevant because they both evince an intention to provide only excess coverage when any other insurance is available.

Therefore, we find that the clauses are mutually repugnant and should be prorated. We reverse the judgment of the Montgomery Circuit Court.

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On January 15, 2005, John Mills was driving, with permission, an automobile owned by Patrick Duff. Mills struck a vehicle driven by Chadwick Bell that was owned by Lou Jean Bell. On the date of the accident, Shelter had in effect an automobile insurance policy issued to Patrick Duff. Mills was considered an insured under the policy because he was a permissive driver. The limits of the Shelter policy were $500,000.00 per accident. However, the Shelter policy contained a "step down" clause that reduced coverage for permissive users to the minimum limits of the applicable financial responsibility law. The Shelter policy also contained the same excess insurance clause as discussed above.

Appellee, State Farm Mutual Automobile Insurance Co., also had in effect an insurance policy issued to Mills on the date of the accident. The limits of the State Farm policy were $100,000.00 per accident. The State Farm policy contained the following clause:

> Subject to items 1 and 2, if a substitute car, a non-owned car or a trailer designed for use with a private passenger car or utility vehicle … has other vehicle liability insurance coverage on it … then this coverage is excess over other insurance.

State Farm's policy also contains a pro rata clause which states " … if other vehicle insurance applies, we are liable only for our share of the damages. Our share is the percent that the limit of liability of this policy bears to the total of all

liability coverage applicable to the accident." Shelter settled the claim for the damage to Bell's vehicle in the amount of $3,014.00 plus a $460.00 towing fee without the participation of State Farm.

Shelter filed a declaratory judgment action in the Clark Circuit Court as to the priority of coverage between the two policies. Both parties filed motions for summary judgment. The court entered a judgment requiring each party to contribute equally to the loss. Shelter then appealed.

Shelter argues that the trial court erred by ordering the party's to contribute equally rather than on a pro rata basis. State Farm argues that the step down provisions contained in Shelter's policy are unenforceable and ambiguous.

In this case, each policy contains an excess clause and State Farm's policy contains an additional pro rata clause. The rule is "… that when a policy containing the pro rata "other insurance" clause conflicts with a policy having an excess "other insurance" clause, the policy with the pro rata provision should be applied first and the excess clause policy would become effective only when the other policy is exhausted…" *Hartford Ins. Co. v. Kentucky Farm Bureau Ins. Co*., 766 S.W.2d 75, 76 (Ky.App. 1989). Therefore, the limits of State Farm's policy should have been applied first and the Shelter policy would become effective only as excess. We reverse the judgment of the Clark Circuit Court.

Conclusion

Accordingly, we reverse the judgment of the Montgomery Circuit Court in 2007-CA-001078-MR and reverse the judgment of the Clark Circuit Court

in 2007-CA-001132-MR. We remand for further proceedings consistent with this opinion.

ALL CONCUR.

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