RENDERED: DECEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002333-MR

AUTO-OWNERS INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 07-CI-00134; 07-CI-00176; AND 07-CI-00177

DRUIE A. WOOD; THE ESTATE
OF DEMPLE HAWKINS, BY
AND THROUGH ITS PERSONAL
REPRESENTATIVES, ANGELA
STOUT AND ALON STOUT; THE
ESTATE OF GROVER EVANS, BY
AND THROUGH ITS PERSONAL
REPRESENTATIVE, MARY EMMERT;
THE ESTATE OF ROBERT CALVIN, BY
AND THROUGH ITS PERSONAL
REPRESENTATIVE, STACY
ENGLAND; THE ESTATE OF LARRY
DALE HAWKINS, BY AND THROUGH
ITS PERSONAL REPRESENTATIVE,
LARRY MACK HAWKINS; TERRY
WHEELER IN HIS CAPACITY AS
FATHER AND NEXT FRIEND OF
COY T. WHEELER, A MINOR;
THE BOARD OF SUPERVISORS FOR
THE MONROE COUNTY SOIL AND
WATER CONSERVATION DISTRICT;
J & J SALES, INC.; AND DURATECH
INDUSTRIES INTERNATIONAL, INC.,
F/K/A HAYBUSTER MANUFACTURING, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Auto-Owners Insurance Company (Auto-Owners) brings this appeal from a November 24, 2008, summary judgment entered in favor of Druie A. Wood by the Monroe Circuit Court. We affirm.

The underlying action arose from a fatal motor vehicle accident in October, 2006. At the time of the accident, Grover Evans was driving his motor

vehicle on a hilly road in Monroe County. Demple Hawkins, Larry Hawkins, and Robert Calvin were passengers in Evans' vehicle. After topping a hill, Evans' vehicle collided into the rear of a seed drill being pulled by a farm tractor operated by Druie A. Wood. The impact of the collision rolled Evans' vehicle onto its side into oncoming traffic. All four individuals in Evans' vehicle were killed; Wood survived the accident.

Evans was insured by an automobile policy issued by Auto-Owners; Calvin was also a named insured under an automobile policy issued by Auto-Owners. And, Wood was insured by a farm owner policy issued by Kentucky Farm Bureau (Farm Bureau). Relevant to this appeal, the estates of all four passengers (including Evans and Calvin) filed tort actions against Wood. The estates of Evans and Calvin also filed claims against Auto-Owners for underinsured motorist coverage (UIM).[1] Eventually, Wood reached a settlement agreement with the estates of all four passengers, including Evans and Calvin. Thereunder, Wood's insurer, Farm Bureau, would tender its policy limits of $100,000; each estate would receive $25,000, respectively. In return, the estates would release Wood from additional liability.

Auto-Owners was notified of the proposed settlement with Wood by letter dated April 28, 2008, from counsel for Calvin's Estate to counsel for Auto-Owners. This notification was made "to permit Auto Owners an opportunity to

[1] The Estates of Grover Evans and Robert Calvin initiated an action against Druie A. Wood and Auto-Owners Insurance Company in Monroe Circuit Court, Civil Action No. 07-CI-00176. By order entered November 28, 2007, this action was consolidated into Civil Action No. 07-CI-00134 now on appeal.

protect its right of subrogation." By letter dated May 30, 2008, counsel for Auto-Owners gave notice that it intended to protect its subrogation rights against Wood and would "immediately" be issuing checks. However, Auto-Owners did not tender its substituted payment of $25,000 to the estates of Evans and Calvin until July 29, 2008. Again, these payments by Auto-Owners were intended to preserve its right of subrogation against Wood.

Thereafter, Wood filed a motion for summary judgment against Auto-Owners. Wood pointed out that Auto-Owners "has attempted substitution of [Wood's] offer of settlement so as to maintain a subrogation claim against" Wood. Wood argued that Auto-Owners' attempted substitution was not made within thirty days of receiving notice of the settlement agreement per the terms of Evans' and Calvin's policies of insurance. Thus, Wood maintained that Auto-Owners could not assert subrogation claims against him.

By summary judgment, the circuit court concluded that Auto-Owners was barred from maintaining subrogation claims under the terms of its insurance policies against Wood. This appeal follows.

Auto-Owners contends that the circuit court erred by rendering summary judgment in favor of Wood and by holding that it could not assert subrogation claims against Wood. We disagree.

Summary judgment is proper where the material facts are undisputed and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d

476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Id.*

The relevant provisions of the policies of insurance are found in Section 7 of the Underinsured Motorist Coverage and read as follows:

> If we choose to preserve our subrogation rights, we shall refuse permission to settle the claim and shall then, within thirty (30) days after receipt of notice of the proposed settlement, pay to the injured person the amount of the written offer . . . .

Under the above provision, Auto-Owners "shall" pay the injured person within thirty days from receipt of the notice of the proposed settlement. The provision is clear and unambiguous. In this appeal, Auto-Owners does not argue that it fulfilled its duty under the policies and tendered the required payments within thirty days. Instead, Auto-Owners essentially argues that it can disregard the unambiguous terms of its insurance policies, asserting that it may exercise a common law right of subrogation against Wood irrespective of any policy language to the contrary. Auto-Owners also argues that Wood may not rely upon the terms of the policies with Evans and Calvin because no privity of contract exists with Wood.

As to Auto-Owners' initial allegation that it possesses a "common law" subrogation right, our Supreme Court has recognized that "subrogation rights may be modified by contract, provided violence is not done to established equitable principles." *Wine v. Globe American Cas. Co.*, 917 S.W.2d 558, 565 (Ky. 1996). In this case, Auto-Owners' subrogation right was provided for under

insurance policies drafted by Auto-Owners. And, Auto-Owners' right of subrogation was preserved upon fulfilling the requirement that it substitute payment to the injured party within thirty days of receiving notice of the settlement. Considering this specific contract language, we believe that Evans' and Calvin's policies clearly modified Auto-Owners' "common law" subrogation right by requiring that the substituted payment be made within thirty days. By failing to comply with its own contractual obligation under Evans' and Calvin's policies, Auto-Owners waived its right to pursue a claim against Wood. Additionally, we do not believe the thirty-day requirement did such "violence" to established equitable principles so as to vitiate the contractual terms of subrogation found in the insurance policies. *See Wine*, 917 S.W.2d 558.

We also view as meritless Auto-Owners' allegation that Wood may not rely upon the subrogation terms in the insurance policies because no privity of contract exists between it and Wood. Initially, we note that Auto-Owners' insureds, the estates of Evans and Calvin, are parties to this appeal and filed a combined appellees' brief. Therein, the estates argued:

> Although Auto-Owners claims that Druie Wood may not rely on the provisions of the UIM contract because he is not a "third-party beneficiary" of the contract, clearly Calvin and Evans are parties to the contract because they are both named insureds. Calvin and Evans wish to resolve their claims with Mr. Wood and continue this litigation against the remaining defendants. Auto-Owners seeks to thwart settlement and release of Wood, even though Auto-Owners waived its subrogation rights by failing to comply with its own policy language. Calvin and Evans should be able to rely

> on the terms of their UIM contract and settle their claims with Wood once and for all.

Estate's Brief at 1-2. Moreover, an insurance company is bound by the terms of its insurance policy and must comply therewith. *See Masler v. State Farm Mut. Auto Ins. Co.*, 894 S.W.2d 633 (Ky. 1995); *City of Louisville v. McDonald*, 819 S.W.2d 319 (Ky. App. 1991). Simply put, Auto-Owners is bound by the thirty-day requirement to remit payment as set forth in its policies.

In sum, we conclude that no material issues of fact exist and that Wood was entitled to judgment as a matter of law. The circuit court properly rendered summary judgment in favor of Wood.

For the foregoing reasons, the summary judgment of the Monroe Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bryan E. Bennett
Campbellsville, Kentucky

BRIEF FOR APPELLEE DRUIE A. WOOD:

Patrick A. Ross
Horse Cave, Kentucky

CONSOLIDATED BRIEF FOR APPELLEES STACY ENGLAND, ADMINISTRATRIX OF THE ESTATE OF ROBERT CALVIN AND MARY EMMERT, ADMINISTRATRIX OF THE ESTATE OF GROVER EVANS:

Kevin C. Burke
Louisville, Kentucky

Patrick S. McElhone, Jr.
Louisville, Kentucky