RENDERED: FEBRUARY 11, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000202-MR

MOTORISTS MUTUAL INSURANCE COMPANY APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 08-CI-00476

GLEN HARTLEY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Motorists Mutual Insurance Company appeals from an opinion and order of the Woodford Circuit Court declaring that an "owned but not scheduled for coverage" exclusion contained in a policy issued by Motorists to

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Glen Hartley is invalid and unenforceable and, therefore, entitling Hartley to underinsured motorists (UIM) benefits under the policy. The issue presented is whether the exclusion is ambiguous or against this Commonwealth's public policy.

On July 18, 2008, Hartley was injured in a motor vehicle collision while operating his 2005 Yamaha motorcycle. The other driver's liability insurer settled on behalf of its insured for the underlying minimum policy limits of $25,000. Hartley also settled with Progressive Insurance Company which insured the motorcycle for its UIM limits of $250,000. The present action concerns Hartley's claim for UIM coverage from Motorists for injuries he sustained in the accident. Thus, we focus on the insurance policy issued by Motorists to Hartley.

Prior to the date of the accident, Hartley and his wife met with the owner of Shryock Insurance, LLC, an independent insurance agency, to discuss the purchase of a homeowner's insurance policy and an automobile policy for their personal automobiles, a 1998 Ford Expedition and a 1998 Nissan Frontier. The policies were to be issued by Motorists. At the time of the meeting, Hartley also owned two motorcycles that were insured under a policy issued by Progressive that afforded $250,000 in UIM coverage.

According to Hartley's answers to interrogatories, he discussed insuring the motorcycles through Motorists but, after he was informed that the premiums would be higher than the existing coverage through Progressive, he continued his UIM coverage through Progressive. Therefore, the declarations page

of the policy issued by Motorists listed only the two vehicles, the Expedition and Frontier.

The Motorists UIM coverage endorsement consists of three pages and includes the following provision:

> We will pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury**:
>
> 1. sustained by an **insured**; and
>
> 2. caused by an accident.

Although Motorists admits that Hartley was generally insured against bodily injury resulting from another's use of an underinsured vehicle, its denial of coverage for Hartley's injuries sustained while operating his motorcycle is premised on the following exclusion from UIM coverage:

> We do not provide Underinsured Motorists Coverage for **bodily injury** sustained by any **insured**:
>
> 1. While **occupying** or when struck by, any motor vehicle owned by you or any **family member** who is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.

Under the general policy provisions "covered auto" is defined as "[a]ny vehicle shown in the Declarations," "[a] **newly acquired auto**," and certain types of trailers. Consequently, Motorists denied UIM coverage pursuant to the exclusion on the basis that the motorcycle was not an insured vehicle under the policy.

Motorists filed a complaint for declaratory judgment seeking a declaration of its rights and obligations under the policy. The circuit court entered declaratory judgment in Hartley's favor concluding that the exclusion was unenforceable. The circuit court refused to address Motorists' claim that the UIM coverage Hartley sought should be declared secondary to any UIM coverage under the Progressive policy because Motorists failed to request such relief in its complaint. This appeal followed.

The interpretation of an insurance policy is a question of law. *K.M.R. v. Foremost Ins. Group*, 171 S.W.3d 751, 753 (Ky.App. 2005)(citing *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App. 1998)). When asked to interpret an insurance policy, we are guided by the legal premise that "[w]here the terms of an insurance policy are clear and unambiguous, the policy will be enforced as written." *Kemper Nat. Ins. Cos. v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 873 (Ky. 2002). However, an insurance policy is to be construed liberally in favor of the insured and any ambiguities are to be resolved in favor of the insured. Furthermore, if an ambiguity exists, under the doctrine of reasonable expectations an insured is entitled to all coverage he may reasonably expect to be provided according to the policy's terms. *Hendrix v. Fireman's Fund Ins. Co*., 823 S.W.2d 937, 938 (Ky.App. 1991).

The exclusion in the Motorists policy unequivocally states that UIM coverage is not afforded for motor vehicles not covered under the policy. The declarations page of the policy lists the insured vehicles as the Expedition and the

Frontier. The motorcycle involved in the accident is not listed as an insured motor vehicle.[2] Thus, we fail to see how the exclusion could not be readily understood by the average person. The UIM coverage was dependent on the condition that Hartley's injury not arise from his use of a vehicle he owned but voluntarily chose not to list and pay premiums for under the Motorists policy.

Despite the unambiguous language in the exclusion, Hartley relies on *Chaffin v. Kentucky Farm Bureau Ins. Companies*, 789 S.W.2d 754 (Ky. 1990), where a similar uninsured motorists (UM) exclusion was ultimately held unenforceable based on public policy grounds. In doing so, in dicta, the Supreme Court described the provision as "nearly incapable of rational construction." *Id*. at 756. The Supreme Court did not elaborate its point but instead turned to the public policy reasons for invalidating the exclusion. We believe the Supreme Court's description of the provision must be read in its factual context. In *Chaffin*, the insured had three separate insurance policies issued by the same insurance company on three separate motor vehicles and each policy had UM coverage. Each of the three insurance policies provided uninsured motorist coverage of $25,000, and separate premiums were paid for each of the items of uninsured motorist coverage. *Id*. at 755. The issue was whether the insured could stack the units of UM coverage contained in the policies on the vehicles not involved in the accident. Thus, the Court indicated that the exclusion was ambiguous where the insured paid premiums for UM coverage for three vehicles, yet, under the

[2] A motorcycle is a motor vehicle for purposes of the Motor Vehicle Reparations Act. KRS 304.39-020(7).

insurance company's interpretation of the statute, the insured could only recover UM benefits under one policy. *Id*. at 756. Significantly, under the circumstances presented, the insurance company had accepted three separate UM premiums from Chaffin while only affording her one item of coverage by writing three separate policies.

The exclusion in this case cannot be said to suffer the same ambiguity. Motorists did not issue separate insurance policies. It issued one policy that clearly excluded motor vehicles not listed as insured from UIM coverage, and Hartley explicitly rejected paying additional premiums for coverage for his motorcycles under the Motorists policy. Thus, the question is whether the "owned but not scheduled for coverage exclusion" in the Motorists policy is void as a matter of public policy.

In *Chaffin*, the Court ultimately held that the exclusion violated public policy because it was repugnant to the insured's reasonable expectations with regard to insurance coverage which had been "bought and paid for." *Id*. at 757. The Court emphasized that under the facts, the "coverage bought, paid for and reasonably expected" was illusory. *Id*.

To the contrary, Hartley explicitly rejected the coverage he seeks because of the higher premiums that would be owed to Motorists for providing insurance coverage for his motorcycles. Hartley argues that the distinction is insignificant and recites the general rule of motor vehicle insurance law that UIM coverage is personal and portable in that it attaches to the insured and applies whenever an

insured person would be entitled to recover damages but for the underinsured status of the negligent motorists. *See Hamilton Mut. Ins. Co. v. United States Fidelity & Guar. Co*., 926 S.W.2d 466 (Ky.App. 1996); *Chaffin*, 789 S.W.2d at 756. It is a rule applicable to UM and UIM coverage. *Coots v. Allstate Ins. Co.,* 853 S.W.2d 895 (Ky. 1995). He contends that in *Hamilton Mut. Ins.*, this Court extended the *Chaffin* holding beyond the unique facts of that case and invalidated an "owned but not scheduled for coverage" exclusion even when the UIM policies are issued by separate companies.

In its well written opinion, the circuit court correctly stated that although in *Hamilton Mut. Ins. Co*. there were three separate carriers that insured three vehicles for UIM, this Court applied the same reasoning expressed in *Chaffin* and held a similar exclusion invalid. However, this Court did so with reservation and stated: "Unfortunately, given the logic and reasoning thus espoused by our Supreme Court, we are unable to conclude that the instant case presents a distinction with a difference. If a different result is to come from these differences, our Supreme Court must direct it." *Hamilton,* 926 S.W.2d at 469. This Court's reservation was undoubtedly linked to the effect of its holding: By not enforcing the exclusionary clause limiting UIM coverage to claims involving the vehicles covered by the policy, an insured who owns multiple vehicles can receive coverage on additional vehicles without paying an additional premium. We remain skeptical that such a result furthers a public purpose. However, we conclude that *Chaffin*

and *Hamilton Mut. Ins. Co*. are distinguishable from the present case and reverse on that basis alone.

Even under the broadest interpretation of *Chaffin*, the present facts do not warrant invalidation of the "owned but not scheduled for coverage" exclusion in the Motorists policy. Although not referred to in the exclusion, consistent with the coverage bargained for between Motorists and Hartley, Hartley's two motorcycles were excluded from UIM coverage. Although Motorists offered UIM coverage, Hartley expressly rejected it as too expensive.

Indeed, it is recognized that motorcycles are more expensive to insure and, consequently, motorcycle exclusions are enforceable. As stated in *Preferred Risk Mut. Ins. Co. v. Oliver*, 551 S.W.2d 574, 577 (Ky. 1977):

> It is common knowledge that motorcycle riders, as a class, are among the highest risk groups conceivable. Motorcycles offer no protection whatsoever from the front, back, sides or top, and leave the rider exposed to every peril of highway travel. The exclusion of such a class from coverage is clearly reasonable where, as here, the assured has the option of avoiding the excluded peril. An assured has no choice in selecting those uninsured motorists who may injure him, but he certainly does elect to ride a motorcycle. This volitional act triggers the exclusion and he accepts the consequences.

Although in *Preferred Risk Mut. Ins. Co*., the Court was dealing with an uninsured motorist, in *Baxter v. Safeco Ins. Co. of America*, 46 S.W.3d 577 (Ky.App. 2001), this Court applied the same logic and enforced an exclusion from UIM coverage when the insured was operating an owned motorcycle. This Court reasoned:

> Kentucky courts have previously upheld insurance policy provisions excluding from underinsured coverage motor vehicles owned by or available for the regular use of the policyholder or any family member. *Motorists Mutual Ins. Co. v. Glass,* Ky., 996 S.W.2d 437 (1997); *Windham v. Cunningham,* Ky.App., 902 S.W.2d 838 (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.
>
> Similar exclusions are present in the policy at issue here. In the Underinsured Motorists Coverage portion of the policy, part C of the insuring agreement states that an "'**underinsured motor vehicle**' does not include any vehicle or equipment . . . [o]wned by or furnished or available for the regular use of you or any **family member** . . . ." In the Exclusions portion of the policy, Safeco states that it does "not provide Underinsured Motorists Coverage for **bodily injury** sustained by any **insured** . . . [w]hile occupying or operating an owned motorcycle or moped." The policy does not, as Baxter asserts, only provide coverage for injuries arising out of automobile accidents. The exclusion of an owned motorcycle from underinsured coverage is just as valid as the exclusion of an owned automobile.

Id. at 578-579.

Our General Assembly has likewise recognized that motorcycles and their increased risk of injuries to an insured distinguish motorcycles from other motor vehicles. KRS 304.39-040 provides that:

> (3) Every insurer writing liability insurance coverage for motorcycles in this Commonwealth shall make available for purchase as a part of every policy of insurance

> covering the ownership, use, and operation of motorcycles the option of basic reparations benefits, added reparations benefits, uninsured motorist, and underinsured motorist coverages.
>
> (4) Notwithstanding any other provisions of this subtitle, no operator or passenger on a motorcycle is entitled to basic reparation benefits from any source for injuries arising out of the maintenance or use of such a motorcycle unless such reparation benefits have been purchased as optional coverage for the motorcycle or by the individual so injured.

Thus, unlike an owner of all other motor vehicles who must opt out of uninsured/underinsured coverage pursuant to KRS 304.20-020, motorcycle owners must affirmatively purchase all optional coverage. The obvious purpose of such a distinction is to relieve insurance companies of being exposed to the financial risk of providing insurance benefits for motorcycles otherwise required for motor vehicles.

It is troubling that the Motorists policy contained an exclusion clause with language that our Supreme Court criticized over twenty years ago, and that Motorists could have avoided litigation if it had included in its policy an exclusion clause for motorcycles. Nevertheless, based on the caselaw and the Motor Vehicle Reparations Act, we cannot reasonably conclude that public policy is violated by the enforcement of the exclusion in the Motorists policy which precludes Hartley from recovering UIM coverage.

Hartley was offered UIM coverage for his motorcycles but rejected it because of the higher premiums. If we were to apply *Chaffin* to the present facts,

Hartley would reap the benefit of the coverage he specifically rejected and for which he paid no premiums. In the context of mandatory liability coverage, this Court has previously recognized the potential windfall to an insured if an "owned but not scheduled for coverage" exclusion were not enforced:

> The appellants also argue that the "owned but not scheduled for coverage" exclusion is invalid because "it explicitly hinges an exclusion of liability coverage upon ownership or regular use of a non-covered vehicle by a 'family member.'" (Appellants' brief, p. 11.) However, that contention 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.

Snow v. West American Ins. Co., 161 S.W.3d 338, 341 (Ky.App. 2004).

Hartley argues that the rationale in *Snow* is inapplicable because it involved liability insurance, which follows the vehicle rather than the person. *Id*. Although an accurate distinction, we conclude that the common sense premise of the Court's reasoning is persuasive in Hartley's case. To afford UIM coverage to Hartley, who did not pay premiums to Motorists for coverage of his motorcycles and who expressly rejected such coverage, would be contrary to public policy because the insurance companies would ultimately raise premiums on all consumers to reflect the increased risk. Although Hartley now regrets his decision to not include his motorcycles on the Motorists policy, it remains that the Motorists policy unambiguously precludes coverage.

Because the Motorists policy does not provide coverage, there is no need for this Court to address the issue regarding whether the Motorists UIM coverage is secondary to the UIM coverage under the Progressive policy.

Based on the foregoing, the declaratory judgment entered by the Woodford Circuit Court is reversed, and the case remanded for entry of a judgment declaring that the Motorists policy does not afford UIM coverage to Hartley as a result of the motorcycle accident.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Drew Byron Meadows
Timothy C. Feld
Michael T. Davis
Lexington, Kentucky

BRIEF FOR APPELLEE:

Joseph A. Bott
John C. Miller
Campbellsville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Drew Byron Meadows
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Joseph A. Bott
Campbellsville, Kentucky