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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000699-MR

BRETT ALAN LOVELL
AND ANGELA LOVELL — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 10-CI-01452

ST. PAUL FIRE & MARINE
INSURANCE COMPANY;
CINCINNATI INSURANCE
COMPANY; BARBARA FLACK;
AND JEFFREY BEATSCH — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: KELLER, TAYLOR AND THOMPSON, JUDGES.

KELLER, JUDGE: Brett Alan Lovell and Angela Lovell (collectively referred to as the Lovells) bring this appeal from the circuit court's February 4, 2011, Partial

Summary Judgment,[1] and April 1, 2011, Order dismissing the Lovells' claim for uninsured motorist benefits from St. Paul Fire & Marine Insurance Company (St. Paul). For the following reasons, we reverse.

FACTS

Brett was a Deputy Sheriff with the Kenton County Sheriff's Department. On May 6, 2009, Brett was transporting an arrestee to the Kenton County Detention Center in his police cruiser. Along the way, a citizen flagged down Brett, and he stopped to lend assistance. The citizen informed Brett that two individuals were fighting in a pickup truck and indicated that the woman may be injured. Brett inquired as to the precise location of the truck, at which point the truck "jumped the curb" and landed approximately 25 to 30 feet from him before it came to a stop. Brett then approached the truck and instructed the driver to turn off the engine. When Brett was within two or three feet of the truck, the driver accelerated and drove the truck toward Brett. The truck struck Brett, and to prevent being run over, Brett grabbed onto the driver's side door. Brett eventually pulled himself up onto the running board of the truck and attempted to unholster his gun. At this point, the driver of the truck lost control, and Brett struck a telephone pole head first, suffering grave and permanent injuries.

It was ultimately determined that neither the driver of the truck nor the truck was covered by an automobile liability insurance policy. However, the Kenton County Sheriff's Department provided automobile liability insurance

[1] The February 4, 2011, Partial Summary Judgment included Kentucky Rule of Civil Procedure 54.02 language and was subject to immediate appeal.

coverage on all its police cruisers, including uninsured motorist (UM) benefits, through St. Paul.

The Lovells initiated the underlying action in an attempt to recover UM benefits from St. Paul.[2] Both the Lovells and St. Paul filed motions for summary judgment. The trial court granted St. Paul's motion, concluding that Brett was not entitled to recover UM benefits. In so deciding, the trial court initially determined that Brett was not a "named insured" but was an insured of the "second class." As an insured of the second class, the trial court believed that Brett was not "occupying the vehicle" per the four-prong test adopted in *MGA Insurance Co., Inc. v. Glass*, 131 S.W.3d 775 (Ky. App. 2004) and *Ky. Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164 (Ky. 1992). Therefore, the trial court found that Brett was not covered under the UM provision of the policy. This appeal followed.

STANDARD OF REVIEW

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rule of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). In this case, the material facts are undisputed and resolution centers upon an issue of law – interpretation of the automobile liability insurance

[2] The Lovells also brought additional claims against other parties; none of which are at issue in this appeal.

policy issued by St. Paul.[3] Thus, our review proceeds *de novo*. *MGA Insurance Co., Inc.*, 131 S.W.3d 775.

ANALYSIS

On appeal, Brett contends that the trial court erred by concluding that he was not a named insured (first-class insured) but rather an insured of the second class under the UM provision of the automobile liability policy issued by St. Paul. We agree.

The UM provision contained in the automobile liability policy issued by St. Paul provides, in relevant part, as follows:

> Who is Protected Under this Agreement
>
> . . . .
>
> **Partnership, limited liability company, organization.** If the named insured is shown in the introduction as a partnership, limited liability company, organization, or any other form of organization, then the following are protected persons:
>
> - *Anyone in a covered auto or temporary substitute for a covered auto*; and
>
> - Anyone for damages he or she is entitled to recover because of bodily injury to another protected person.
>
> **Anyone else in a covered auto.** *Anyone else while in an auto that's a covered auto or a temporary substitute auto* is protected.

[3] The Motor Vehicle Reparations Act is codified in Kentucky Revised Statutes Chapter 304.39.

(Emphasis added). The named insured on the policy was the Kenton County Fiscal Court.

Kentucky courts have distinguished between "insureds of the first class" and "insureds of the second class" for purposes of UM coverage. As set forth in *James v. James*, 25 S.W.3d 110, 113 (Ky. 2000):

> 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.

"The protection afforded the first class is broad. Insureds of the first class are protected regardless of their location or activity from damages caused by injury inflicted by an uninsured motorist." *Ohio Cas. Ins. Co. v. Stanfield*, 581 S.W.2d 555, 557 (Ky. 1979).

Based on the definitions in the insurance policy, there does not appear to be an insured of the first class. Specifically, there is no first-class coverage because the named insured, the Kenton County Fiscal Court, would have to be in a "covered auto." As set forth in *Dupin v. Adkins,* 17 S.W.3d 538, 543 (Ky. App. 2000), "[t]he insured's status as an insured is alone a sufficient nexus for a claim of [UM] benefits without the insured's actually being in a motor vehicle covered for [UM] under the policy." Kentucky courts have repeatedly stated that "[UM] coverage is personal to the insured and not connected to a particular vehicle." *Id.* Therefore, UM coverage "must follow the insured regardless of whether the

insured is injured as a motorist, a passenger in a private or public vehicle, or a pedestrian, and is only limited by the actual, valid exclusions of each insurance policy." *Id.* Because there is not a first-class insured in this case, the provisions for first-class coverage under the policy are illusory.

"In Kentucky, the exclusionary or limiting language in policies of automobile insurance must be clear and unequivocal and such policy language is to be strictly construed against the insurance company and in favor of the extension of coverage." *Nationwide Mut. Ins. Co. v. Hatfield*, 122 S.W.3d 36, 39 (Ky. 2003). The policy appears to offer first-class coverage; however, it does not. The language limiting coverage to those "in a covered auto," makes all covered persons second-class insureds. That limiting language is in conflict with the language extending coverage to first-class insureds. Put another way, the policy offers first-class coverage but then defines protected persons in such a way that no one receives that coverage. We believe the language limiting coverage to second-class insureds is, within the context of the policy as a whole, unclear, equivocal, and internally inconsistent. Thus, the limiting language should be construed in favor of the insured. Doing so leads us to the conclusion that, to be entitled to UM coverage, Brett was not required to be "in a covered auto" at the time of the accident. Accordingly, we reverse the trial court.

Having concluded that Brett was not required to be "in a covered auto," the Lovell's alternative argument that the trial court incorrectly applied the four-prong

test adopted in *MGA Insurance Co., Inc.*, 131 S.W.3d 775 and *McKinney*, 831 S.W.2d 164, is moot. Therefore, we do not address it.

CONCLUSION

For the foregoing reasons, we reverse the circuit court's February 4, 2011, Partial Summary Judgment and April 1, 2011, Order.

THOMPSON, JUDGE, CONCURS, AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTS, AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: I concur but write to explain my reasons and express my concerns regarding the impact our decision may have on public and private entities faced with increasing insurance rates.

Because it addressed the distinction between a first-class and second-class insured, I believe it is necessary to discuss *Ohio Casualty Ins. Co. v. Stanfield*, 581 S.W.2d 555 (Ky. 1979). In that case, a police officer was injured while riding a police motorcycle and claimed to be a first-class insured under the City of Newport's UM policy. The Court held that he could not *stack* the coverages because the City could not have reasonably expected that the premium paid for UM coverage on each of its 63 vehicles would purchase coverage for all permissive occupants of all vehicles. *Id*. at 559 (quoting *Lambert v. Liberty Mutual Insurance Co*., 331 So.2d 260, 265 (Ala. 1976)).

Two decades after it rendered *Ohio Casualty*, our Supreme Court decided *Philadelphia Indemnity Ins. Co. v. Morris*, 990 S.W.2d 621 (Ky. 1999), where it distinguished *Ohio Casualty* from cases where coverage was sought based on a single vehicle owned by an employer. It stated:

> Although the distinction between insureds of the first and second classes determined the outcome of the claim in *Ohio Casualty,* 581 S.W.2d at 557–559, the distinction does not affect the result of the case *sub judice.* In *Ohio Casualty,* the crucial issue was whether a police officer, who was injured when an automobile driven by an uninsured motorist collided with his police motorcycle, could "stack" the uninsured coverages of all 63 vehicles covered by his employer's automobile fleet insurance plan. 581 S.W.2d at 555. The Court noted that the injured police officer was not a named insured, or an insured of the first class, but rather was an insured of the second class as to his employer's policy since he was merely the driver of a vehicle insured by the policy. *Id.* at 559. As such, he was precluded from stacking the coverages of all vehicles in his employer's policy.

Id. at 626. The Court continued and explained that the doctrine of reasonable expectations is not applicable:

> The "reasonable expectations" argument against stacking in *Ohio Casualty* does not translate effectively into the facts of this case, in which an employee seeks the coverage afforded by a single one of his employer's vehicles. The Philadelphia policy language expressly includes UIM coverage for named insureds as well for anyone else occupying the vehicle. Since the named insured was a corporation and the vehicle insured was a business vehicle which would be forseeably operated by an employee of the corporation, we discern little currency in the argument that the employee was not intended to be benefitted by the UIM coverage bought and paid for by the employer. If we should hold as urged by Philadelphia that UIM coverage was available only to insureds of the

> first class, the coverage here would be utterly illusory as the named insured was a corporation and not a proper person.

Id.

In an unpublished opinion, this Court held that an insurance policy issued to an LLC containing UIM coverage for the named insured, the LLC entity, provided coverage to an LLC member injured while operating a vehicle not specifically covered.[4] Relying on *Morris,* in *Solheim Roofing, LLC v. Grange Mut. Cas. Co.*, 2010 WL 323296, 6, this Court held:

> [W]e disagree with the circuit court's conclusion that a UIM policy issued to a limited liability company cannot be viewed as being issued to the members of that company. While an LLC is a legal entity distinct from its members, as a practical matter naming an LLC as an insured in a UIM policy is essentially meaningless unless coverage extends to some person or persons associated with the company. It would be nonsensical to limit protection solely to the LLC since that entity-standing alone-cannot occupy or operate a motor vehicle or suffer bodily injury or death. Moreover, it would render any UIM coverage provided to that LLC entirely illusory in nature.

Likewise, it is reasonable to conclude that "you" as used in the St. Paul policy is not limited to the Kenton County Fiscal Court because as an entity, it cannot occupy a vehicle, suffer bodily injury or death, or operate a motor vehicle. As in *Solheim Roofing*, there would be no first-class insured and the coverage afforded illusory.

[4] In 2006, a panel of this Court rendered an unpublished opinion holding that a police officer was not afforded UIM coverage under his employer's automobile policy. *Gill v. Specialty Nat. Ins. Co*., 2006 WL 658900. I concede that the two unpublished opinions are irreconcilable but believe that *Solheim Roofing* expresses the better view.

I agree with the majority that under the St. Paul policy as written, Brett is a first-class insured but, I add my concern that if broadly read, our decision could place a financial hardship on public and private entities. However, I believe this result can be avoided by the negotiating process when purchasing the policy. The entity could request that certain individuals be listed as first-class insureds or a provision inserted that there is no first-class insured coverage provided.

Having expressed my reasoning and my concerns stated, I concur.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. Under the UM provision in St. Paul's policy, first-class insureds consist of only named insureds or family members of the named insured household, and second-class insureds are defined as "anyone in a covered auto" or "anyone else in the covered auto." This interpretation of these provisions is consistent with the law of this Commonwealth. *See Ky. Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164 (Ky. 1992)(interpreting UM coverage in relation to "Clause (2)" or second-class insureds). *See also Ohio Casualty Ins. Co. v. Stanfield*, 581 S.W.2d 555 (Ky. 1979); *Transport Ins. Co. v. Ford*, 886 S.W.2d 901 (Ky. App. 1994).

In this case, Brett was clearly not a named insured on the policy or family member of the named insured's household. The named insured on the policy was the Kenton County Fiscal Court. The majority circumvents the named insured limitation, concluding it is "illusory" and that effectively no named insured exists. Thus, Brett is entitled to coverage. In my opinion, this is contrary to established precedent in Kentucky. In *Stanfield*, the Kentucky Supreme Court held that a similar policy issued to the City of Newport did not cover employees as first-class or named insureds, who were thus only covered if injured while occupying a covered vehicle. The employee in *Stanfield* was a policeman who was subject to second-class coverage as he was injured while occupying his police motorcycle. Brett is an employee of the Sheriff's department and was not injured while occupying a covered vehicle.

Accordingly, Brett is clearly not entitled to coverage as a second-class insured. Under the UM provision in the automobile liability insurance policy issued by St. Paul, a second-class insured was entitled to coverage if he was "in a covered auto." And, the UM provision defined "in an auto [as] include[ing] on the auto, getting in or out or off of it." Our Supreme Court has adopted a four-prong test to determine if a second-class insured is "in" or "occupying" a motor vehicle for purposes of UM or UIM coverage:

> (1) There must be a causal relation or connection between the injury and the use of the insured vehicle;
>
> (2) The person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;
>
> (3) The person must be vehicle oriented rather than highway or sidewalk oriented at the time; and,
>
> (4) The person must also be engaged in a transaction essential to the use of the vehicle at the time[.]

McKinney, 831 S.W.2d at 168.

At the time Brett sustained injuries, he had exited his police cruiser and was walking away from the cruiser when he was injured. In fact, his injuries were the result of bodily impact with a truck, not his cruiser. Hence, it is apparent that no causal relation or connection existed between Brett's injury and his police cruiser. Consequently, it cannot be said that he was "vehicle oriented" at the time of his injury. And, Brett was clearly not "engaged in a transaction essential to the use of the vehicle" when he was injured. *Id.* at 168. I must conclude that Brett was not

"occupying" or "in" the vehicle at the time of his accident within the meaning of the UM provision of the policy and not entitled to UM coverage.

I am most sympathetic to Brett and the unfortunate circumstances from which his injuries arose. However, that sympathy cannot control my analysis of the facts or decision in this case. Unfortunately, in my opinion, Brett has no UM claim in this case under the controlling Supreme Court precedents. I would affirm the Kenton Circuit Court.

BRIEFS FOR APPELLANTS:

Steven R. Dowell
James W. Morgan, Jr.
Covington, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

James W. Morgan, Jr.
Covington, Kentucky

BRIEF FOR APPELLEE ST. PAUL FIRE & MARINE INSURANCE COMPANY:

Michael S. Maloney
Justin M. Schaefer
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE ST. PAUL FIRE & MARINE INSURANCE COMPANY:

Michael S. Maloney
Louisville, Kentucky