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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000809-MR

JERRY WARD — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
2013-SC-000709-DG

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 11-CI-004527

NATIONWIDE ASSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: This matter is before us on remand from the Kentucky Supreme Court to reconsider our previous opinion in light of the Supreme Court's decision in *State Farm Mutual Auto Insurance Company v. Hodgkiss-Warrick*, 413

S.W.3d 875 (2013). Upon further consideration, we conclude the public-policy exception to our traditional conflicts-of-law analysis offers no safe harbor to the appellant under the specific facts of this case and, therefore, the circuit court correctly determined that Virginia law governs this dispute.

Finding our prior recitation of the facts wholly adequate, we recount it, verbatim, here.

On August 5, 2009, Appellant Jerry Ward, a Virginia resident, was involved in an automobile accident with Hannah Hardy, a Kentucky resident, in Jefferson County, Kentucky. Hardy, an intoxicated driver, was traveling the wrong direction on Interstate 65, and ultimately collided with the semi tractor-trailer operated by Ward. Ward was injured.

Ward held a policy of insurance issued by Appellee Nationwide Assurance Company.[1] His insurance policy was issued in Virginia, under Virginia law, and included underinsured motorist (UIM) coverage in the amount of $25,000.00 per person.[2]

Hardy's liability insurance carrier, Allstate Property and Casualty Insurance, settled Ward's claim for $25,000.00, Hardy's liability policy limits. Ward

[1] The insurance policy was not for the semi tractor-trailer involved in the accident, but for Ward's personal automobile.

[2] Ward's policy declarations page refers to the coverage as uninsured motorist (UM) benefits, but the policy later explains that UM coverage includes both uninsured and underinsured motorists.

communicated this to Nationwide, and Nationwide elected to waive its subrogation rights against Hardy.[3]

Ward then demanded UIM benefits from Nationwide. Nationwide denied Ward's claim because, under Virginia law and Ward's insurance policy, Hardy was not an underinsured motorist. Nationwide pointed to the language of Ward's insurance policy, which defines an underinsured motor vehicle as one for which the liability insurance available for payment is less than the total UIM coverage afforded under the policy. Nationwide argued this definition, supported by Virginia statutory authority, entitled it to offset the face amount of Ward's UIM benefits (i.e., $25,000.00) by Hardy's liability policy limits available for payment (i.e., $25,000.00). Based on this, Nationwide deemed Hardy not to be an underinsured motorist and, therefore, declared Ward was not contractually entitled to UIM benefits.

Displeased, Ward sued in Jefferson Circuit Court. Following minimal discovery, the parties filed cross-motions for summary judgment. By order entered March 14, 2012, the circuit court granted Nationwide's summary-judgment motion, and denied Ward's motion. The circuit court, relying on *Poore v. Nationwide Mutual Insurance Company*, 208 S.W.2d 269 (Ky. App. 2006), determined that Virginia law applied pursuant to the "most significant relationship" test utilized by this Commonwealth in resolving contract-based conflicts-of-law issues. And, under Virginia law, the circuit court found

[3] See *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993), now codified in Kentucky Revised Statute (KRS) 304.39-320.

Nationwide properly denied Ward's UIM claim because the UIM coverage Nationwide provided was identical to the liability coverage provided by Hardy and, therefore, under the policy's setoff provision and Virginia law, Nationwide was not contractually obligated to pay Ward any UIM benefits.

Ward thereafter appealed to this Court raising three separate grounds, each justifying the application of Kentucky law. We found his conflicts-of-law argument dispositive and confined our remarks to that issue. Ward conceded in his brief that, applying the "most significant relationship" test, Virginia law controls. (Appellant's Brief at 10); *Saleba v. Schrand*, 300 S.W.3d 177, 181 (Ky. 2009) (Kentucky consistently utilizes the most-significant-relationship standard to resolve choice-of-law issues when a dispute is contractual in nature). However, regardless of the result of that test, Kentucky applies its own laws where the application of the law of another state would violate Kentucky public policy. We refer to this as the public-policy exception to our traditional conflicts-of-law analysis. Invoking this studded exception, we ultimately concluded that, based upon *Philadelphia Indemnity Insurance Company v. Morris*, 990 S.W.2d 621 (Ky. 1999), an UIM endorsement requiring setoff, such as the one contained in Ward's insurance policy, is at odds with Kentucky public policy and, therefore, the circuit court erred in holding Virginia law applied.

Mere days after our original opinion was rendered, the Kentucky Supreme Court handed down *Hodgkiss-Warrick*, *supra*. Thereafter, the Kentucky Supreme

Court vacated the Opinion of this Court and remanded the matter for consideration in light of *Hodgkiss-Warrick*.

Hodgkiss-Warrick involved a choice-of-law dispute – Kentucky law in one corner and Pennsylvania law in the other – related to UIM automobile insurance coverage. The insurance-contract language at issue was a "regular use" proviso that excluded UIM coverage when the insured is injured in an underinsured vehicle owned or regularly used by a resident family member. Initially, this Court concluded that, while Pennsylvania permits this sort of policy exclusion, Kentucky public policy disfavors it and, therefore, Kentucky law prevailed. *Hodgkiss-Warrick v. State Farm Mut. Auto. Ins. Co.*, No. 2010-CA-000603-MR, at p.11 (Ky. App. April 8, 2011). The "public policy" justifying this Court's decision was the KMVRA's[4] general remedial purpose of protecting auto-accident victims from underinsured motorists who cannot adequately compensate them for their injuries. *See State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33, 36 (Ky. 2004). The Supreme Court granted discretionary review and deemed this justification insufficient. *Hodgkiss-Warrick*, 413 S.W.3d at 882.

In its opinion, the Supreme Court cautioned against exploiting the public policy exception simply because the outcome would be different under another state's law or because the contract would be unenforceable in Kentucky according to our public policy. *Id.* There must be something more, said the Court; otherwise, "the mere fact that Kentucky law differed from a sister state's law

[4] Kentucky Motor Vehicle Reparations Act

[would be] enough to require application of Kentucky law" in every case, effectively eradicating all choice-of-law questions. *Id.*

Citing the Restatement (Second) of Contracts § 178 (1979), the Supreme Court implied a two-part framework for determining when it is appropriate to invoke the public-policy exception. First, the court must ascertain whether there is legislation "*expressly* forbidding enforcement" of the contract term. *Hodgkiss-Warrick*, 413 S.W.3d at 880 (emphasis added). Such a "public policy . . . must be found clearly expressed in the applicable law." *Id.* at 881. The search is fairly simple: is there a constitutional provision, statute, or other legislation that directly and unequivocally forbids or declares unenforceable the sort of exclusion at issue? When such legislation exists, "the court is bound to carry out the legislative mandate with respect to the enforceability of the term." Restatement (Second) of Contracts § 178 cmt. a (1979).

Second, absent an *express* prohibition, "a contract term is unenforceable on public policy grounds only if": (a) "the policy asserted against it is clearly manifested by legislation or judicial decision"; and (b) the policy "is sufficiently strong to override the very substantial policies in favor of the freedom of contract and the enforcement of private agreements." *Hodgkiss-Warrick*, 413 S.W.3d at 880. Here, inferences, deductions, and presumptions are permissible. Stated another way, while a public policy may not be expressly stated in legislation, it may be clearly manifested by legislation, permitting the judiciary to

construe the legislation as establishing a public policy disfavoring a certain term, exclusion, or contract provision.

In reversing this Court's decision in *Hodgkiss-Warrick*, the Supreme Court first found no clear expression of legislative prohibition against a regular-use provision that would prevent a claimant from recovering UIM benefits. *Id.* at 881. Neither Hodgkiss-Warrick "nor the Court of Appeals panel has identified any specific provision of the MVRA as forbidding the sort of exclusion from underinsured motor vehicle coverage at issue here." *Id.*

Proceeding to the second part of the test, the Court found that Kentucky judicial precedent has upheld, no less than three times, regular-use exclusions from UIM coverage and, in one case,[5] the Kentucky Supreme Court expressly held that a regular-use exclusion from UIM coverage was ***not*** against public policy. *Id.* at 881-82. Further, the Supreme Court explained that, while there is an implied "overriding public policy" that Kentucky seeks to ensure that victims of motor vehicle accidents on Kentucky highways are fully compensated, this policy relates only to automobile *liability* coverage; "there is no comparable public policy regarding underinsured motorist coverage." *Id.* at 887.

It would have been perfectly proper for the Court to conclude its analysis at this point, for the second subpart of this factor turns on a satisfactory finding of the first subpart. However, the Court went on to address the second subpart anyway, noting "[t]he result would be the same . . . even were we to

[5] *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 450 (Ky. 1997).

construe KRS 304.39-320 as establishing a policy against the sort of exclusion at issue here." *Id.* at 882. This hypothetical finding necessitated further analysis to determine whether such a public policy would be sufficiently strong to override the very substantial policies in favor of the freedom of contract and the enforcement of private agreements. Unfortunately, the Supreme Court offered little guidance here.

We can surmise that it is a balancing test. The Court in *Hodgiss-Warrick* explained that "the fact that a contract, if made in Kentucky, would not be enforceable as a matter of public policy, does not necessarily mean that it is against public policy to enforce such a contract when valid where made." *Id.* Only when it is imperative for Kentucky courts to impose Kentucky law "to protect the morals, safety, or welfare of *our people*" is the policy "sufficiently strong" to override the other "very substantial policies" previously identified. *Id.* at 880, 882-83. *Hodgkiss-Warrick* involved a Pennsylvania tortfeasor, a Pennsylvania victim, and a vehicle garaged in Pennsylvania and covered by an insurance contract entered into in Pennsylvania. The only connections to Kentucky were the accident and an injured Kentucky resident who had settled her claim with Hodgkiss-Warrick and who was not a party to the particular action. In light of those facts, the Supreme Court thought it unnecessary to "interfere with the balance Pennsylvania has chosen for its citizens" because no Kentucky citizen was affected. *Id.* at 883.

This brings us back to the matter before us. We apply the *Hodgkiss-Warrick* framework to ascertain whether the trial court accurately found that

Kentucky law does not override Virginia law in this particular case. We first find that, as in *Hodgkiss-Warrick*, there is no Kentucky legislation expressly forbidding enforcement of a UIM endorsement requiring setoff. We turn to the second part.

The Supreme Court has made clear that Kentucky courts may not "disregard the plain terms of a contract between private parties on public policy grounds absent a clear and certain statement of public policy in *controlling laws* or *judicial precedent*." *Hodgkiss-Warrick*, 413 S.W.3d at 880 (emphasis added). In *Hodgkiss-Warrick* there was neither judicial precedent nor clear expression of public policy forbidding the exclusion at issue. Here, there is. And it is found in the Supreme Court's opinion of *Philadelphia Indemnity Insurance Company v. Morris*, *supra*. In that case, the Supreme Court declared void as against public policy any "UIM endorsement requiring setoff[.]" *Id.* at 627. The Court acknowledged the two "prevailing policy views" on this issue. *Id.*

> Under the narrow view, the insured's UIM coverage is always setoff or reduced by the tortfeasor's liability limits. The purpose of the narrow view is to place the insured in the same financial condition that he would be in if the tortfeasor had liability limits equal to the insured's own UIM limits. Under the broad view, UIM coverage is triggered when the insured's damages exceed the tortfeasor's liability limits, at which point the insured is entitled, if damages require it, to receive the full amount of the UIM policy. The public policy underlying the broad view is to provide full recovery to the injured party.

Id. Prior to 1988, Kentucky adhered to the narrow view. Indeed, KRS 304.39-320 contained language affording "a mandatory setoff of a tortfeasor's liability limits

against the insured's UIM limits." *Id.* However, in 1988 the Kentucky legislature eliminated the mandatory setoff language, transforming KRS 304.39-120 "into a representation of the broad view." *Id.* The *Morris* court concluded that, by this revision, the Kentucky legislature "clearly expressed" the "public policy of this Commonwealth." *Id.* Stated differently, Kentucky's legislature and courts have plainly declared the narrow view, to which Virginia continues to adhere, to be against this Commonwealth's public policy. *Morris*, 990 S.W.2d at 626-27.

But the analysis is not complete. We must still determine "whether the public policy [is] so strong as to require a Kentucky court to interject Kentucky law into a dispute having none but a fortuitous connection with Kentucky." *Hodgkiss-Warrick*, 413 S.W.3d at 882. Ward was a Virginia resident driving a vehicle primarily garaged in Virginia that was insured by an insurance policy issued in Virginia under Virginia law. The accident occurred in Kentucky and involved a Kentucky tortfeasor. However, all legal dealings with the Kentucky resident have concluded. She is no longer part of this case. All that remains, then, is a non-resident victim and an accident that occurred in Kentucky. This is no different than the hypothetical scenario of *Hodgkiss-Warrick* and the reasoning there controls. "Since here no Kentucky resident is affected, nothing requires a Kentucky court to interfere with the balance [Virginia] has chosen for its citizens." *Id.* at 883. We are simply unable to conclude that enforcement of the UIM setoff contained in Ward's insurance policy would be harmful to our own people, thus warranting intervention by Kentucky courts.

In sum, we find that the circuit court correctly declined to apply the public-policy exception to our customary conflicts-of-law analysis. On this issue, we find no error.

Ward presents two other arguments for applying Kentucky law. We did not address these arguments in our original opinion. Because the choice-of-law issue is no longer dispositive, we consider them now.

Ward argues the insurance policy itself requires that Kentucky law be applied because the accident occurred in Kentucky. His policy with Nationwide includes an "out of state coverage" provision that states:

> OUT OF STATE COVERAGE
>
> If an auto accident to which this policy applies occurs in any state or province other than [Virginia], we will interpret your policy for that accident as follows: . . .
>
> > 2. A compulsory insurance or other similar law requiring a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province, your policy will provide at least the required minimum amounts and types of coverage.

(R. at 52). Ward contends that, because the accident occurred in Kentucky, this section imports all coverage available under the KMVRA, including the relevant UIM statutes. Our reading of this provision differs significantly. This section only mandates application of the *compulsory* insurance laws of the state where the accident occurs. UIM coverage is not compulsory in Kentucky. It is optional. KRS 304.39-320; *Hodgkiss-Warrick*, 413 S.W.3d at 881 ("[T]he MVRA

unequivocally provides that underinsured motorist coverage is optional."); *Cain v. American Commerce Ins. Co., Inc.*, 332 S.W.3d 81, 84 (Ky. App. 2009) ("UIM coverage is optional.").

However, Ward further cites KRS 304.39-100 which provides, in pertinent part: "An insurance contract which purports to provide coverage for basic reparation benefits or is sold with representation that it provides security covering a motor vehicle has the legal effect of including all coverages required by this subtitle." KRS 304.39-100(1). Ward asserts that, through the "out of state coverage" provision of his policy and KRS 304.39-100(1), he is entitled to full UIM coverage, without setoff, as permitted by KRS 304.39-320. We disagree.

KRS 304.39-100(1) "requires that all policies covering basic reparation benefits . . . have the legal effect of including all coverages" *required* by the KMVRA. *Dairyland Ins. Co. v. Assigned Claims Plan*, 666 S.W.2d 746, 747 (Ky. 1984). Again, UIM coverage is not required under Kentucky law. KRS 304.39-320(2).

Finally, Ward claims Nationwide judicially conceded that Kentucky law applies. Having done so, Ward contends, Nationwide is estopped from now seeking the protections of Virginia law. Ward roots his argument in the language of Nationwide's answer to his complaint, which pleads in paragraph eight: "[Ward's] claims are subject to and may be barred, in whole or in part, by the provisions of the Kentucky Motor Vehicle Reparations Act. KRS 304.39-010, *et seq.*" (R. at 15).

"A judicial admission is a formal statement concerning a disputed fact, made by a party during a judicial proceeding, that is adverse to that party, and that is deliberate, clear, and uncontradicted." *American Founders Bank, Inc. v. Moden Investments, LLC*, 432 S.W.3d 715, 724 (Ky. App. 2014) (citation omitted). Whether a statement qualifies as a judicial admission is a question of law. *Id.*

Here, Nationwide's declaration in paragraph eight of its answer does not qualify as a judicial admission. Ward ignores or fails to consider the very next paragraph (nine) of Nationwide's answer, which declares that Ward's "claims are subject to or may be barred, in whole or in part, by the provisions of the Commonwealth of Virginia's Uninsured Motorist Insurance Coverage Statute, VA Code Ann § 38.2-2206." Furthermore, in this same pleading, which is styled an "answer and counterclaim," Nationwide asserts a counterclaim premised entirely on the application of Virginia law. Considering the answer and counterclaim as a whole, we are certainly not prepared to say that the representations contained in paragraph eight of Nationwide's answer are "deliberate, clear, and uncontradicted."

We conclude by noting that Ward takes no issue with the circuit court's ruling that, under Virginia law, Ward is not entitled to UIM benefits. Accordingly, we see no reason for this Court to consider whether the circuit court accurately applied Virginia law in this case.

For the foregoing reasons, we affirm the Jefferson Circuit Court's March 14, 2012 order.

ALL CONCUR.

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