

RENDERED: SEPTEMBER 5, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001439-MR

JAMIE BLACK

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 12-CI-003615

NATIONWIDE GENERAL
INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND VANMETER, JUDGES.

LAMBERT, JUDGE: Jamie Black has appealed from the summary judgment of the Jefferson Circuit Court in favor of Nationwide General Insurance Company, ruling that the Underinsured Motorists (UIM) coverage under the insurance policy

did not extend to the motorcycle on which she was a passenger. Finding no error, we affirm the summary judgment entered in this case.

The case arises from a motorcycle accident on August 16, 2010, when Black was a passenger on her husband, Marty Black's, 1990 Kawasaki EX 500 cc motorcycle. This motorcycle was involved in at least two accidents prior to the accident at issue in this case. It was damaged in 2006 or 2007, and then the carburetor was damaged in 2008 when the motorcycle was run over by another car while it was parked in a driveway. In the intervening two years between 2008 and the 2010 accident, the motorcycle had been stored in Mr. Black's grandparents' garage, and Mr. Black and his grandfather worked to repair it. During this time, Mr. Black had permitted the insurance policy on the motorcycle to lapse, and he had not registered it. The motorcycle was repaired and in working order approximately two weeks before the date of the accident.

At a birthday party on August 16, 2010, Black and her husband decided to drive the motorcycle around the block. When they were about three-fourths of the way around, Donald White turned his vehicle in front of them, causing the accident. Black incurred injuries to her cervical and thoracic spine as a result. While Mr. Black had been obtaining quotes to obtain coverage on the motorcycle, he had not yet secured coverage by the date of the accident. At the time of the accident, the Blacks had a policy of insurance from Nationwide, Policy No. 63 16 C 750073, with an effective date of July 15, 2010. The policy declarations page listed two insured vehicles, a 1993 Toyota Camry and a 1998

Oldsmobile Intrigue. The policy also included UIM coverage with split limits of \$25,000.00/\$50,000.00.

Black filed suit against Nationwide on June 29, 2012, seeking damages for the injuries she had sustained that were not covered by Mr. White's insurance. At the time of the accident, Black alleged that she had a policy of insurance through Nationwide that provided UIM coverage and personal injury protection (PIP) benefits, and she demanded that Nationwide pay her these benefits, as well as interest and costs, including a reasonable attorney fee. In its answer, Nationwide raised several affirmative defenses, including the terms and conditions of the insurance policy.

Nationwide filed a motion for summary judgment seeking dismissal of Black's suit on the basis of the exclusion from UIM coverage in the policy and because she was not entitled to PIP benefits under the Kentucky Motor Vehicle Reparations Act. Nationwide argued that the policy of insurance it had issued to the Blacks did not include the motorcycle and that the UIM section of their policy excluded coverage for bodily injury suffered while occupying a motor vehicle owned by, furnished for, or available for their regular use, but not insured for auto liability coverage or UIM coverage. Because the motorcycle was owned by Mr. Black and available for their regular use, the exclusion applied to deny coverage. Nationwide argued that the "regular use" exclusion was not dependent upon the frequency of use and that the undisputed material facts established that Black's husband owned the motorcycle; that Black lived with her husband and had equal

access to the motorcycle; that the motorcycle was under their exclusive ownership, control, and access; and that the motorcycle was available and in working order two weeks prior to the accident. Regarding the PIP benefits portion of the policy, the policy similarly excluded coverage for bodily injury or loss to the policyholder or relative arising while occupying a motorcycle owned by the policyholder or relative that was not covered by insurance. Based upon the clear and unambiguous language of the policy, Nationwide argued that Black was excluded from coverage.

In her response, Black addressed Nationwide's UIM coverage argument, which she incorrectly described as "Nationwide's main and sole argument on summary judgment," and asserted that genuine issues of material fact existed on that issue, precluding the entry of summary judgment. She stated that the motorcycle was both uninsured and unregistered, that it was in complete disrepair, and that it had been stored in Mr. Black's grandparents' locked garage during the relevant times. As a result, Black contended that the motorcycle was not available for regular use and that the exclusion did not, therefore, apply.

In addition, she argued that the doctrine of reasonable expectations should apply to provide coverage. She stated that the policy did not include a definition of "regular use" and that the motorcycle was not available for regular use because it was in disrepair and locked in a garage. Black included an affidavit from her husband detailing the prior accidents and repairs to the motorcycle. Mr. Black stated that he had not registered or insured the motorcycle at the time of the accident because it was not yet fully functional and had not been used for years.

He stated that his wife had never operated the motorcycle and that she did not have access to it because she did not have the key or an alarm code. Black's own affidavit confirmed that she did not have access to where the motorcycle was stored until after the accident. Black argued that Nationwide should have defined the term "regular use" in the policy, but failed to do so, creating an ambiguity that required the court to address the reasonable expectations of the policyholder. She asserted that Mr. Black's decision to test drive the motorcycle on the day of the accident did not constitute regular use, but was more akin to special or occasional use. Black did not address Nationwide's argument that she was not entitled to PIP benefits.

In its reply, Nationwide argued that no ambiguities existed in the policy. Regarding the facts, Nationwide stated that while there might be some dispute as to whether Black had access, there was no dispute that her husband had access to it. Furthermore, Black testified that the motorcycle was in full working order two weeks prior to the accident. Because the motorcycle was available for Mr. Black's regular use, and he was a named policyholder, the exclusion was triggered and coverage was barred. In addition, Nationwide stated that the policy independently excluded coverage for a vehicle owned by the policyholder or spouse, regardless of whether it was available for regular use. Only one of the conditions had to be met, and there was no dispute that Black's husband owned the motorcycle.

The circuit court entered an opinion and order on July 9, 2013, granting Nationwide's motion for summary judgment based upon the exclusions in Black's policy for UIM and PIP coverage. The court found "that the policy exclusions herein are plain and unambiguous and cannot be construed to provide coverage to Black. The doctrine of reasonable expectations cannot be used to invoke coverage since it would not be reasonable of her to expect coverage where the policy language is so clear." On Nationwide's motion, the court included Kentucky Rules of Civil Procedure (CR) 54.02 language to state that the opinion and order was final and appealable by order entered July 22, 2013.¹ This appeal now follows.

On appeal, Black contests the circuit court's ruling that she was not entitled to UIM benefits, arguing that contested issues of material fact remain to be decided regarding the policy exclusion; namely, use of the phrase "regular use." Nationwide continues to argue that the circuit court properly denied coverage based upon the clear and unambiguous language of the exclusion in the UIM portion of the policy.

Before we may reach the merits of Black's appeal, we shall address Nationwide's motion to strike Black's reply brief or for leave to file a sur-reply

¹ We note that Nationwide did not technically need to file a CR 59.05 motion because the circuit court ruled on both of the claims Black made in her complaint when it granted Nationwide's motion for summary judgment; namely, her claims for UIM and PIP benefits under the policy. Therefore, the opinion and order was final and appealable without the necessity of including the CR 54.02 language because all of the claims had been adjudicated. However, the CR 59.05 motion effectively tolled the time for the filing of a notice of appeal until the circuit court entered its July 22, 2013, order. Therefore, Black's notice of appeal was timely filed.

brief, which was passed to the merits panel for a decision. In the motion, Nationwide contends that Black raised an issue in her reply that she had not raised before related to the use of semicolons in the applicable exclusion. In her appellate brief and in her response to the motion for summary judgment below, Black confined her argument to the applicability of the “available for regular use” exclusion in the UIM portion of the policy. In Nationwide’s brief and in its reply to Black’s response below, Nationwide, in addition to addressing the “regular use” portion of the exclusion, asserted that the exclusion applied based solely on Mr. Black’s ownership of the motorcycle, regardless of whether it was available for regular use. Black finally addressed this argument in her reply brief to this Court by discussing the policy’s use of semicolons to separate three clauses in the exclusion. In our view, Black was addressing an argument raised by Nationwide, albeit belatedly, rather than raising an entirely new argument. Therefore, we find no reason to strike Black’s reply brief, nor do we perceive the necessity of Nationwide filing a sur-reply brief in the alternative. Therefore, Nationwide’s motion and alternative motion shall be denied by separate order of this Court.

Turning to the merits of Black’s appeal, we shall first address our standard of review, which is well-settled in the Commonwealth. “The standard of review on appeal when a trial court grants a motion for summary judgment is ‘whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.’” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), *citing Scifres*

v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. Int'l Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, *citing Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors & Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass & Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). "The interpretation of an insurance policy often presents a pure question of law, rendering it appropriate for summary judgment." *Holzknicht v. Kentucky Farm Bureau Mut. Ins. Co.*, 320 S.W.3d 115, 118 (Ky. App. 2010).

The policy exclusion at issue in this case appears on Page UI2 of the Underinsured Motorists Coverage portion of the Blacks' policy, and it reads as follows:

This coverage does not apply to:

.....

4. Bodily injury suffered while occupying or when hit by a motor vehicle:

a) owned by;

b) furnished for; or

c) available for the regular use of you or a relative, but not insured for:

(1) Auto Liability coverage; or

(2) Underinsured Motorists coverage.

Black contends in her brief and reply brief that the terms of the exclusion are both unclear and ambiguous and that, therefore, the doctrine of reasonable expectations applies to extend coverage to her in this case. She also contends that the circuit court made an improper factual finding related to the meaning of “regular use.” In Kentucky, “[t]erms of a policy will be given their plain and ordinary meaning. Where the terms of the policy are clear and unambiguous, they must be enforced as drafted.” *Holzkecht*, 320 S.W.3d at 118. Conversely, where the terms of a policy are ambiguous, the doctrine of reasonable expectations should be applied:

The nature of the doctrine of reasonable expectations is summarized in R.H. Long's *The Law of Liability Insurance*, § 5.10B, which states, in pertinent part:

“The gist of the doctrine is that the insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation.

.....

The doctrine of reasonable expectations is used in conjunction with the principle that ambiguities should be resolved against the drafter in order to circumvent the technical, legalistic and complex contract terms which limit benefits to the insured.”

Simon v. Continental Ins. Co., 724 S.W.2d 210, 212-13 (Ky. 1986). *See also*

Brown v. Indiana Ins. Co., 184 S.W.3d 528, 541 (Ky. 2005).

The basis of Black's argument is that the policy does not define the phrase "regular use" and that reasonable minds can differ on what this phrase means. She cites to BLACK'S LAW DICTIONARY for the definition of "regular use" as follows: "A use that is usual, normal, or customary, as opposed to an occasional, special, or incidental use." BLACK'S LAW DICTIONARY (9th ed. 2009). Black then argues that based upon the supporting affidavits, neither she nor her husband believed that the motorcycle was available for their regular use because it was in disrepair and locked in a garage. She likened the brief test drive, during which she was injured, as more akin to a special or occasional use. Nationwide, on the other hand, points to the evidence of record that the motorcycle had been fully repaired two weeks before the accident and asserts that the language of the exclusion only requires a vehicle to be available for regular use, not that it had to be regularly used. We must agree with Nationwide that no ambiguity exists with regard to the meaning of "regular use" in the policy and that because the motorcycle had been repaired prior to the accident date, it was available for the regular use of at least Mr. Black, who both owned the motorcycle and had access to the garage where it was housed.

We also agree with Nationwide that regardless of whether the motorcycle was available for the Blacks' regular use, the mere fact that Mr. Black owned the motorcycle was sufficient to trigger the exclusion. As we interpret the terms of this provision, the exclusion applies if one of three situations existed; namely, if Black was occupying the motorcycle that was either 1) owned by her or her husband, OR 2) furnished for her or her husband, OR 3) available for the use of her

and her husband AND the motorcycle was not insured for auto liability coverage or UIM coverage. Mr. Black, a policyholder in this case, was undisputedly the owner of the motorcycle involved in the accident and married to Black, and it is undisputed that the motorcycle was not insured at the time of the accident.

Therefore, the exclusion from coverage is triggered by the “owned by” portion of the exclusion provision, and we did not need to reach the “available for regular use” portion. We disagree with Black’s argument in her reply brief related to the use of semicolons and that their use made the UIM exclusion ambiguous and incomplete. Rather, based upon our reading of the statute, we hold that the exclusion language is clear and unambiguous, as the circuit court also found.

Finally, Black contends that genuine issues of material fact remain to be decided about whether the motorcycle was in “regular use” at the time of the accident. Again we disagree with Black, in light of our holding that we do not need to reach the question of whether the motorcycle was available for her regular use.

Because Black has not contested the circuit court’s ruling excluding coverage for PIP benefits, we shall not address that portion of the circuit court’s ruling.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

John Byrnes
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory L. Smith
Anna S. Rueff
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