RENDERED: AUGUST 10, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000268-MR

BENITA TAYLOR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 15-CI-004698

GEICO CASUALTY COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Benita Taylor appeals from the Jefferson Circuit Court's order granting summary judgment to GEICO Casualty Company, as well as the order denying Taylor's motion to alter, amend, or vacate the judgment. We affirm.

Taylor was involved in a multiple vehicle accident on April 13, 2014, in Jefferson County, Kentucky. According to her deposition, Taylor was traveling

southbound in the far-right lane on I-65 when a pickup truck that was merging onto the highway struck Taylor's right rear quarter panel, causing her to be pushed into the middle lane, where she was hit by a minivan, forced into the left lane, where she hit the wall and a sport utility vehicle. Taylor ended up back in the middle lane, facing the wrong direction. Her car was totaled, although she was able to drive it to her home (which was nearby). Taylor told the police officer at the scene that she was not injured, but she later sought medical treatment for pain in her neck and back. The driver of the pickup truck that first struck Taylor left the scene of the accident and has never been identified.

About a week prior to the incident, Taylor had negotiated insurance coverage with GEICO. She had initially telephoned an agent in Louisville, Kentucky, but after learning that Taylor would soon become a resident of Indiana, the agent referred her to another GEICO office in Carmel, Indiana. Taylor and the Indiana agent came to an agreement; the entire discussion was by telephone, and Taylor paid with a credit card. Taylor and the agent never met. Taylor's Indiana insurance policy was issued four days before the accident. Taylor had not received a copy of the policy before the collision occurred. GEICO paid Taylor the basic reparations benefits but refused further reimbursement because Taylor's policy did not include "hit-and-run" coverage.

Taylor filed suit against Unknown Defendants and GEICO on September 11, 2015. In her complaint, she claimed that the unknown driver of the pickup truck caused the chain reaction which resulted in the damages to herself and the two other vehicles; that she should receive compensation from GEICO under her uninsured and/or underinsured benefits; and that GEICO was in violation of the Unfair Claims Settlement Practices Act of Kentucky. Kentucky Revised Statutes (KRS) 304.12-230. The latter claim was bifurcated for purposes of any jury trial per October 28, 2015, order of the Jefferson Circuit Court.

The parties engaged in discovery over the next year. On September 13, 2016, GEICO moved for summary judgment. After Taylor's response and GEICO's reply, the matter was submitted for the circuit court's ruling. On November 28, 2016, the circuit court issued its Opinion and Order in which it held that GEICO was entitled to summary judgment. In so holding the circuit court found the policy to be unambiguous and concluded that Taylor was not entitled to further compensation:

> The validity of an insurance contract and the rights created are determined by the law of the state which the parties understood was to be the principal location of the insured risk during the terms of the policy, unless some other state has a more significant relationship to the transaction and the parties. *Lewis v. Am. Family Ins. Grp.*, 555 S.W.2d 579, 582 (Ky. 1977). Under both Kentucky and Indiana law, an unidentified motor vehicle exclusion is generally valid and enforceable. In Kentucky, uninsured motorists coverage is a public

> policy mandated by the Kentucky Motor Vehicle Reparations Act. It requires coverage for accidents caused by uninsured vehicles, but not by an "unidentified motor vehicle," e.g., a "hit and run" vehicle, whose insurance status is unknown. *Burton v. Farm Bureau Ins. Co.*, 116 S.W.3d 475, 478 (Ky. 2003). In Indiana, the Indiana Uninsured Motorist Act does not require insurance policies to cover any hit-and-run accidents. *Rice v. Meridian Ins. Co.*, 751 N.E.2d 685, 690 (Ind. Ct. App. 2001). Accordingly, under either state's law, GEICO could properly deny Ms. Taylor's claim.

Taylor then filed a motion to alter, amend, or vacate (Kentucky Rule of Civil Procedure (CR) 59) the summary judgment order. Taylor argued that *Burton* was limited by *Dowell v. Safe Auto Ins. Co.*, 208 S.W.3d 872 (Ky. 2006), and that the hit-and-run exclusion in Taylor's GEICO policy was improper under Kentucky law. The parties were granted time to brief the issues. On January 30, 2017, the Jefferson Circuit Court denied the CR 59 motion, holding that Taylor had not demonstrated any of the required grounds for relief, citing *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005); and *Moore v. Commonwealth*, 357 S.W.3d 470 (Ky. 2011).

Taylor makes three arguments on appeal. She first contends that summary judgment was improper because Kentucky auto insurance policies require hit-and-run coverage unless the insured specifically waives coverage. KRS 304.39-320; *Dowell, supra*. Because she had never completed her intended move

to Indiana, Taylor insists that GEICO issued "an erroneous policy" and should have to provide coverage per its customary Kentucky policies.

This argument belies the following facts to which Taylor testified in her deposition: She specifically requested an Indiana policy; she provided a residential address in New Albany, Indiana, not only to the agent that took her initial information, but also on the post-accident Wage and Salary Verification form; Taylor purchased the GEICO policy because it was the cheapest policy she could find after calling "quite a few places." Given these admissions, the policy Taylor received from GEICO was the policy she had sought and paid for.

The question thus was one of contract interpretation, which was properly determined by means of summary judgment.

> On appeal, we must consider the evidence of record in the light most favorable to the non-movant and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). "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 v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

Sparks v. Trustguard Ins. Co., 389 S.W.3d 121, 124 (Ky. App. 2012).

The relevant terms of Taylor's GEICO "Indiana Family Automobile Insurance Policy," Section IV, stated:

> 5. **Uninsured auto** is a motor vehicle which has no bodily injury liability bond or insurance policy applicable with liability limits complying with the financial responsibility law of the state in which the insured auto is principally garaged at the time of an accident. This term also includes an auto whose insurer is or becomes insolvent or denies coverage.
>
> The term **uninsured auto** does not include:
>
> . . . .
>
> (f) a vehicle whose owner or operator cannot be identified.

Accordingly, the Jefferson Circuit Court properly determined that Taylor's policy specifically excluded coverage of a hit-and-run accident, and that GEICO was entitled to summary judgment. It was irrelevant that Taylor never made the move to Indiana; that decision was made by her after the fact of requesting and receiving the policy and after the accident itself.

Moreover, as GEICO contends, Taylor did not raise the argument concerning the disclaimer of hit-and-run coverage until she made her motion pursuant to CR 59.05. As such, it is not properly before this Court. "A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (citing *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997)).

Taylor next argues that she should receive benefits "reasonably expected from a properly issued Kentucky policy." This argument is viable when there is an ambiguity in the policy itself. *See, e.g., Bidwell v. Shelter Mut. Ins. Co.*, 367 S.W.3d 585, 589 (Ky. 2012). Yet the hit-and-run exclusion language in Taylor's policy was clear and unambiguous.

> This Court has specified that the test in determining reasonable expectations is based on construing the policy language as a layman would understand it, rather than considering the policyholder's subjective thought process regarding his policy. *Estate of Swartz v. Metropolitan Property & Cas. Co.*, 949 S.W.2d 72, 75 (Ky. App. 1997). Only actual ambiguities in the policy language will trigger the doctrine of reasonable expectations. *True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003).

Sparks, 389 S.W.3d at 128. Summary judgment was properly granted, as was the circuit court's order denying Taylor's CR 59.05 motion.

Taylor lastly invites this Court to reconsider the "implications and effect on Kentucky Drivers" of the holding in *Burton*, *supra*. We decline this invitation. "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." Rules of the Supreme Court (SCR) 1.030(8)(a). Also, "[w]hile our General Assembly, through the MVRA,[1] has evinced an overriding public policy in the area of automobile liability coverage, a mandatory form of insurance, there

[1] Motor Vehicle Reparations Act (MVRA), KRS 304.39–010 *et seq.*

is no comparable public policy regarding underinsured motorist coverage, an optional coverage which may be purchased on the 'terms and conditions' agreed to by the parties." *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875, 887 (Ky. 2013).

The Jefferson Circuit Court order granting summary judgment to GEICO and the order denying CR 59.05 relief to Taylor are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Andrew White
Louisville, Kentucky

BRIEF FOR APPELLEE:

Richard W. Edwards
Raymond G. Smith
Louisville, Kentucky