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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2018-CA-000492-MR

APRIL LYNCH — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 14-CI-005676

GEICO GENERAL INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

GOODWINE, JUDGE: Appellant, April Lynch ("Lynch") appeals from the Jefferson Circuit Court's February 28, 2018, order granting summary judgment in favor of Appellee, GEICO General Insurance Company ("GEICO") on her claim for underinsured motorist ("UIM") benefits. After careful review, we affirm.

Lynch was injured in an automobile accident on July 14, 2013. At that time, she was insured by GEICO under a liability insurance policy which included UIM coverage. GEICO paid basic reparations benefits under the policy.

On November 4, 2014, Lynch filed suit against the negligent driver, Brianah Summers ("Summers"). Summers failed to respond to the complaint or the discovery requests and judgment was entered against her on May 12, 2016.

Lynch sent a copy of said judgment to Summers' insurance carrier, AAA Insurance Company ("AAA"). AAA then filed an entry of appearance disclosing policy limits of $50,000. Lynch accepted AAA's offer of policy limits, subject to GEICO's subrogation rights. GEICO waived its subrogation rights.

On November 20, 2016, GEICO denied Lynch's demand for UIM policy limits, stating it had been more than two years since the last PIP payment. Consequently, Lynch moved to amend her complaint to assert those claims against GEICO. Following discovery, GEICO moved for summary judgment, which the Jefferson Circuit Court granted on February 28, 2018. This appeal followed.

Lynch raises five arguments on appeal: (1) *State Farm Mutual Automobile Insurance Co. v. Riggs*, 484 S.W.3d 724 (Ky. 2016), failed to fully examine the issue of accrual in a breach of contract claim; (2) a UIM claim is a contract claim; (3) a contract claim only accrues upon a breach; (4) KRS[1] 304.14-370 prohibits contractual terms that require insureds to commence an action sooner than one year from the claim's accrual; and (5) the policy is ambiguous and must

[1] Kentucky Revised Statute.

be construed in her favor. For those reasons, Lynch contends the trial court erred in granting summary judgment in favor of GEICO. We disagree.

CR[2] 56.03 provides summary judgment is appropriate when no genuine issue of material fact exists, and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc., v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotation marks omitted). "While the Court in *Steelvest* used the term 'impossible' in describing the strict standard for summary judgment, the Supreme Court later stated that that word was 'used in a practical sense, not in an absolute sense.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Perkins v. Hausladen*, 828 S.W.2dd 652, 654 (Ky. 1992)).

Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court's grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010). Under *de novo* review, we owe no deference to the trial court's application of the law to the established facts. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

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[2] Kentucky Rule of Civil Procedure.

Although Lynch seeks to convince us otherwise, the facts of this case are squarely on point with *Riggs*. In *Riggs, supra*, our Supreme Court considered the same policy language at issue in this case. Noting that the insured agreed to the shorter limitations period set forth in the policy, the Supreme Court held that two years from the date of the accident was not unreasonably short and the insurer may require a claim for UIM benefits to be brought by the insured. Lynch asserts her cause of action did not "accrue" until the contract was breached by GEICO, by its refusal to honor her claim. She also argues that the parties in *Riggs* agreed that the UIM claim accrued on the date of the accident. Following *Riggs,* the trial court rejected Lynch's arguments.

The Supreme Court rejected similar challenges raised and concluded the contractual time limitation closely tracked the language of the tort claims limitations period set forth in KRS 304.39-230(6). Following a detailed analysis, the Supreme Court explicitly held that a two-year limitation period is reasonable for a plaintiff to discover the extent of automobile liability insurance coverage the tortfeasor has and whether that coverage will be sufficient for the suffered injuries. *Riggs*, 484 S.W.3d at 728. The Supreme Court recognized predicaments as Lynch alleges where an insured may need to file her UIM claim before the value of her claim has exceeded the tortfeasor's liability policy limits and a UIM claim's viability is more apparent. *Id.* However, this does not bar a plaintiff from bringing

a UIM claim against her carrier, because a "tortfeasor is not an indispensable party in an action between an insured and his UIM carrier, nor does the insured need first obtain a judgment against the tortfeasor before filing suit against his UIM carrier . . ." *Id.* at 729. The insured's UIM claim is independent of the tort judgment, and a plaintiff can proceed against her UIM carrier before she proceeds against the tortfeasor or, proceed against both simultaneously. *Id.* at 729-30.

We are bound to follow the law as stated by the Supreme Court. *See Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 828 (Ky. App. 2014) ("As an intermediate appellate court, this Court is bound by published decisions of the Kentucky Supreme Court. SCR[3] 1.030(8)(a). The Court of Appeals cannot overrule the established precedent set by the Supreme Court[.]").

In accordance with *Riggs*,[4] we find GEICO's policy limitation is reasonable and enforceable. Consequently, Lynch's claim against GEICO for UIM benefits must be dismissed. Therefore, GEICO was entitled to summary judgment.

Thus, we affirm the judgment of the Jefferson Circuit Court entered February 28, 2018.

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[3] Rules of the Supreme Court of Kentucky.

[4] Justice Noble's concurring opinion, and Justice Keller's dissent—joined by Justices Venters and Wright—raise issues not factored into the majority's reasonableness analysis and, thus, *Riggs* will likely have undesired consequences. *See Weird v. State Farm Mutual Automobile Insurance Company*, 2012-CA-000326-MR, 2017 WL 541083, *6 (Acree, J., concurring) (Ky. App. Feb. 10, 2017). As a result, *Riggs* will undoubtedly be revisited. For now, however, it is the law of this Commonwealth and we are bound by its holding.

ALL CONCUR.

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