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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-600

Filed: 20 December 2016

Forsyth County, No. 15 CVS 3315

INTEGON NATIONAL INSURANCE COMPANY, Plaintiff,

v.

SAMMY KING and SAMANTHA COMER, CO-ADMINISTRATORS OF THE ESTATE OF GRADY SAUNDERS KING and BILLY AND CAROLYN HUNT, CO-ADMINISTRATORS OF THE ESTATE OF ROXANN CAROL TURNER, Defendants.

Appeal by Plaintiff from a judgment entered 16 March 2016 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 16 November 2016.

Bennett & Guthrie, P.L.L.C., by Rodney A. Guthrie and Kimberly S. Shipley, for Plaintiff-Appellant.

Ward Black Law, by Nancy R. Meyers, for Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

Integon National Insurance Company (“Plaintiff”) appeals from a 16 March 2016 order granting Defendants’ joint motion for summary judgment and denying Plaintiff’s motion for summary judgment. We affirm.

I. Factual and Procedural History

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On 1 June 2015, Plaintiff filed a Complaint for Declaratory Judgment seeking a declaration regarding motorcycle insurance issued by Plaintiff to Grady King (“King”). On 13 July 2015, the co-administrators of the estate of Roxann Carol Turner (“Turner”) filed a Response to Plaintiff’s Complaint. The co-administrators of the estate of King filed their Response to Plaintiff’s Complaint on 12 October 2015.

Defendants filed a joint motion for summary judgment on 23 February 2016. Defendants argued “the issue in dispute in this declaratory judgment action was previously adjudicated by the Court of Appeals in *N.C. Farm Bureau Mut. Ins. Co. v. Gurley, et. al.*, 139 N.C. App. 178, 532 S.E.2d 846 (2000).” Per this Court’s holding in *Gurley*, “Defendants aver that the Plaintiff Integon’s per-accident underinsured (UIM) limits of \$300,000 apply” If the \$300,000 per-accident limit applied, Plaintiff would be credited for the \$60,000 paid under the Skipper policy. Thus, coverage would be calculated from the \$240,000 available in UIM coverage.

On 4 March 2016, Plaintiff filed its own motion for summary judgment. Plaintiff argued “[t]he clear language of the King Policy establishes that the maximum amount of underinsured motorist insurance available to an ‘insured’ under that policy is \$100,000, minus a credit for what each claimant has received from the tortfeasor or her insurer.” Accordingly, Plaintiff requested that the trial court declare Plaintiff “has no duty or obligation under the King Policy to the Estate of King and the Estate of Turner in excess of its per person UIM limits of \$100,000”

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On 14 March 2016, the parties stipulated to the following facts.

On 17 October 2014, King drove his 2006 Harley-Davidson motorcycle near Siler City, North Carolina. Turner accompanied King on his motorcycle. At the same time, Amanda Dawn Skipper (“Skipper”) drove herself and three passengers in her 2006 Toyota. Skipper lost control of her vehicle and collided with King’s motorcycle.

At the time of this accident, Plaintiff insured Skipper’s car through a personal automobile liability insurance policy (“Skipper Policy”). The Skipper Policy provided liability insurance with limits of \$30,000 per person and \$60,000 per accident. Following the accident, Plaintiff distributed the \$60,000 per-accident coverage afforded under the Skipper Policy amongst the three passengers in Skipper’s automobile and the King and Turner estates. Both the King and Turner estates received \$17,928 under the Skipper Policy. This distribution exhausted the Skipper Policy coverage.

Plaintiff also insured King through a motorcycle insurance policy at the time of the accident. (“King Policy”). The King Policy provided underinsured motorist (“UIM”) coverage with maximum limits of liability for bodily injury at \$100,000 per person and \$300,000 per accident. Under this policy, the King and Turner estates also received \$82,072 in underinsured motorist benefits from Plaintiff. Accordingly, each estate received a total of \$100,000 for the King and Skipper Policies, which

represents the per-person limits of underinsured motorist limits available under the King Policy.

On 14 March 2016, the Forsyth County Superior Court held a summary judgment hearing. At the hearing, Plaintiff admitted both King and Turner died as a result of the collision at issue. Plaintiff argued the maximum limit of liability for all damages should be capped at the per-person limit of \$100,000. Defendants argued the \$300,000 per-accident limit applied to the King policy.

On 16 March 2016, the trial court entered an order granting Defendants' joint motion for summary judgment and denying Plaintiff's motion for summary judgment. Plaintiff filed timely notice of appeal on 12 April 2016.

II. Standard of Review

“Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Analysis

On appeal, Plaintiff contends the trial court erred in granting summary judgment in favor of Defendants. Specifically, Plaintiff argues the King Policy's

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language effectively limits the King and Turner estates to the \$100,000 per-person limits expressed in the King Policy. We disagree.

The Motor Vehicle Safety and Financial Responsibility Act of 1953 declares:

the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.

N.C. Gen. Stat. § 20-279.21(b)(4) (2015).

Our Court resolved this issue of whether the per-person or per-accident limit applies to UIM claims in *N. Carolina Farm Bureau Mut. Ins. Co. v. Gurley*, 139 N.C. App. 178, 532 S.E.2d 846 (2000), *disc. review denied*, 352 N.C. 675, 545 S.E.2d 427 (2000). In *Gurley*, this Court held when the underlying liability policy is exhausted on a per-accident basis, then the per-accident UIM limit applies. *Id.* at 181, 532 S.E.2d 849.

In *Gurley*, Kathryn Gurley's vehicle collided with Charles Fornes's automobile due to Mr. Fornes's negligence. *Id.* at 179, 532 S.E.2d at 847. Ms. Gurley and her two passengers, Sherry Gurley and Wendy Woolard, sustained serious injuries in the accident. *Id.* at 179, 532 S.E.2d at 847. At the time of the accident, Allstate Insurance Company insured Fornes. *Id.* at 179, 532 S.E.2d at 847. The liability policy limited liability to \$25,000 per person and \$50,000 per accident. *Id.* at 179, 532 S.E.2d at 847. Allstate tendered its liability limits of \$50,000 on a per-accident basis. *Id.* at

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179, 532 S.E.2d at 847. Kathryn Gurley received \$17,000, Sherry Gurley received \$17,000, and Wendy Woolard received \$16,000. *Id.* at 179, 532 S.E.2d at 847. All three then sought coverage under Gurley's UIM policy issued by North Carolina Farm Bureau Mutual Insurance Company. *Id.* at 179, 532 S.E.2d at 847. Gurley's Farm Bureau policy limited UIM recovery to \$50,000 per person and \$100,000 per accident. *Id.* at 179, 532 S.E.2d 847.

Farm Bureau initiated a declaratory judgment action to determine whether the per-person or per-accident UIM limits applied to compensate the claimants for their injuries. *Id.* at 179-80, 532 S.E.2d at 847-48. The trial court applied the per-person limit. *Id.* at 180, 532 S.E.2d at 848.

On appeal, this Court concluded:

the applicable UIM limit under N.C. Gen.Stat. § 20-279.21(b)(4) will depend on two factors: (1) the number of claimants seeking coverage under the UIM policy; and (2) whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap.

Quite intuitively, when only one UIM claimant exists, the per-person limit under the policy will be the applicable UIM limit. But when more than one claimant is seeking UIM coverage, as is the case here, how the liability policy was exhausted will determine the applicable UIM limit. In particular, when the negligent driver's liability policy was exhausted pursuant to the per-person cap, the UIM policy's per-person cap will be the applicable limit. However, when the liability policy was exhausted pursuant to the per-accident cap, the applicable UIM limit will be the UIM policy's per-accident limit.

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Id. at 181, 532 S.E.2d at 848–49.

The *Gurley* court also addressed preceding cases which only addressed the language of the policy at issue. *See id.* at 181, 532 S.E.2d at 848. *Gurley* held prior cases relying “on the language of the UIM policy itself, rather than the UIM statute” were not instructive on this issue. *Id.* at 181, 532 S.E.2d at 848.

Following *Gurley*, courts have adhered to the *Gurley* approach: analyzing both the UIM statute and the language of the policy. *Nationwide Prop. and Cas. Ins. Co. v. Gosnell*, No. 5:15-CV-71-D, 2016 WL 4480959, at *3-*4 (E.D.N.C. Aug. 23, 2016); *Nationwide Mut. Ins. Co. v. Haight*, 152 N.C. App. 137, 566 S.E.2d 835 (2002); *Treadaway ex rel. Vierling v. Niebauer*, No. COA05-109, 2006 WL 387945, at *3 (N.C. Ct. App. Feb. 21, 2006); *Horton v. Niebauer*, No. COA05-110, 2006 WL 387946, at *3 (N.C. Ct. App. Feb. 21, 2006).

Here, the “Limit of Liability” provisions of the “COMBINED UNINSURED/UNDERINSURED MOTORISTS COVERAGE” section of the King Policy provides:

The limit of bodily injury liability shown in the Declarations for each person for Combined Uninsured/Underinsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury, including damages for care, loss of services or death, sustained by any one person in any one auto accident.

Subject to this limit for each person, the limit of bodily injury liability shown in the Declarations for each accident for Combined Uninsured/ Underinsured Motorists Coverage is our maximum limit of liability for all damages

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for bodily injury resulting from any one accident. The limit of property damage liability shown in the Declarations for each accident for Combined Uninsured/Underinsured Motorists Coverage is our maximum limit of liability for all damages for property damage caused by an uninsured motor vehicle and resulting from any one accident.

This is the most we will pay for bodily injury and property damage regardless of the number of

1. Insureds;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

There is no dispute regarding the insurance coverage afforded under the Skipper Policy. However, the parties disagree regarding whether the per-person limit or the per-accident limit should govern disbursement of funds under King's underinsured motorist coverage.

Plaintiff contends the language in the King Policy establishes the maximum limit of liability for all damages for bodily injury for each person. Accordingly, Plaintiff argues the per-person limit of \$100,000 applies. Plaintiff contends a ruling in favor of Defendants will result in a windfall for the King and Turner estates.

Defendants argue the per-accident UIM limit of \$300,000 applies. Therefore, since Plaintiff paid \$60,000 under the Skipper Policy, Defendants contend \$240,000 is still available for distribution.

At the outset, we note Plaintiff is entitled to a credit for the amount paid under the Skipper Policy (i.e. the amount paid under the exhausted liability policy) under a

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plain reading of N.C. Gen. Stat. § 20-279.21(b)(4).¹ See also *Onley v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 686, 690, 456 S.E.2d 882, 885, *disc. review denied*, 341 N.C. 651, 462 S.E.2d 514 (1995) (“[A] UIM carrier is entitled to credit for the amounts paid to a claimant under the tortfeasor's liability policy.”). However, the plain language of the statute is not clear regarding which limit of UIM coverage—per-person or per-accident—should apply. Thus, we now turn to *Gurley*.

As this Court did in *Gurley* and its progeny, we first determine which limit of UIM coverage applies, per the statute. As held by this Court in *Gurley*, our determination is dependent on two factors: “(1) the number of claimants seeking coverage under the UIM policy; and (2) whether the negligent driver’s liability policy was exhausted pursuant to a per-person or per-accident cap.” *Gurley*, 139 N.C. App. at 181, 532 S.E.2d at 848. Here, the Skipper Policy was exhausted on a per-accident basis. Thus, consistent with *Gurley*, the applicable UIM limit in this case is the per-accident limit.

Now, we turn to whether the King Policy limits Plaintiff’s statutory obligation. Plaintiff argues the “subject to the limit for each person” language in the King Policy limits Plaintiff’s statutory obligation. In support of this argument, Plaintiff cite *Aills v. Nationwide Mut. Ins. Co.*, 88 N.C. App. 595, 363 S.E.2d 880 (1998).

¹ Defendants also agree Plaintiff is entitled to an offset for the liability payments made to each of the Defendant estates under the Skipper Policy.

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In *Aills*, the policy contained language similar to the language in the King Policy. Specifically, the policy stated the per-accident limits were “subject to” to the per-person limits. *Id.* at 597-98, 363 S.E.2d at 882. Our Court agreed the per-accident limits capped the per-person limits. *Id.* at 597-98, 363 S.E.2d at 882. However, *Gurley* and its progeny make clear *Aills* does not control our analysis. *See Gurley*, 139 N.C. App. at 181, 532 S.E.2d at 848 (rejecting *Aills* as “[not] instructive [] as [it] ultimately relies on the language of the UIM policy itself, rather than the UIM statute.”). *See also Gosnell*, 2016 WL 4480959, at *3-*4 (rejecting the argument *Aills* controls the court’s analysis); *Treadaway*, 2006 WL 387945, at *2-*3 (reaffirming the *Gurley* holding where there are multiple claimants seeking UIM coverage).

Moreover, this Court in *Gurley* said the insurance “policy itself of course could provide more UIM coverage than that required by statute.” *Gurley*, 139 N.C. App. at 183, 532 S.E.2d at 850. However, the *Gurley* holding did not allow Plaintiff’s contention—that is, the argument that a per-person limit should be looked at and applied first, such as was the *Aills* rule. *See id.* at 181, 532 S.E.2d at 848. *See also Gosnell*, 2016 WL 4480959, at *3-*4. Thus, under controlling case law, the applicable limit depends on the *Gurley* analysis. As explained *supra*, the applicable limit in this case is the per-accident limit.

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Next, we address Plaintiff's argument regarding whether applying the per-accident limit results in a windfall for Defendants. Plaintiff argues a result in favor of Defendants would result in the same windfall this Court called "absurd" in *Gurley*.

In *Gurley*, the three Defendants argued the per-person UIM limit should apply, which would result in \$150,000 of total coverage. *Gurley*, 139 N.C. App. at 181, 532 S.E.2d at 848. However, the UIM policy limited liability coverage to \$50,000 per person and \$100,000 per accident. *Id.* at 179, 532 S.E.2d at 847. Thus, applying the result Defendants sought would have allowed Defendants to recover beyond any amount bargained for by the driver with UIM coverage. Accordingly, Defendants would have received "a windfall simply because they were involved in an accident with an underinsured motorist" *Id.* at 182, 532 S.E.2d at 849.

In this case, however, there is not the "absurd" result the *Gurley* court sought to avoid. Distributing the per-accident UIM limit of \$240,000 (which includes a \$60,000 credit to Plaintiff for the amount distributed pursuant to the exhausted Skipper policy) between Defendants does not result in Defendants recovering an amount beyond the bargained-for limit in the King Policy. Under no calculation does the final amount paid by Plaintiff exceed \$300,000. Thus, Defendants are not receiving "a windfall simply because they were involved in an accident with an underinsured motorist" *Id.* at 182, 532 S.E.2d at 849. Accordingly, this argument is without merit.

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Lastly, we turn to the calculation of coverage under the at-issue UIM policy. In *Gurley*, this Court determined the amount of UIM coverage should be calculated using a “simple one-step formula: subtract the amount of liability coverage received from the maximum UIM limit.” *Id.* at 183-84, 532 S.E.2d 850. *See also Haight*, 152 N.C. App. at 142, 566 S.E.2d at 838 (“[W]hen the liability policy is exhausted pursuant to the per-accident limit, then the proper calculation of UIM coverage available is obtained by subtracting the per-accident limit of the tortfeasor's liability policy from the per-accident limit of the UIM policy.”) (citation omitted). Accordingly, this formula requires the \$60,000 per-accident limit of the Skipper Policy to be deducted from the \$300,000 per-accident limit of the King Policy, resulting in \$240,000 of UIM coverage. However, since Plaintiff already advanced a total of \$164,144 to Defendants, Plaintiff is liable only for the remaining \$75,856 under the UIM policy per-accident limit.

IV. Conclusion

For the foregoing reasons, we hold the trial court properly granted Defendants’ joint motion for summary judgment and properly denied Plaintiff’s motion for summary judgment.

AFFIRM.

Judge STROUD and Judge DAVIS concur.

Report per Rule 30(e).