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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000169-MR

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 06-CI-00211

CARLENE SLUSHER, AS
ADMINISTRATRIX OF THE ESTATE
OF DONALD SLUSHER, DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: State Farm Mutual Automobile Insurance Company ("State Farm") appeals a judgment of the Knox Circuit Court finding that the Appellee, Carlene Slusher, as Administratrix of the Estate of Donald Slusher ("the Estate"),

is entitled to receive uninsured motorist benefits from a policy which it issued to Donald Slusher ("Slusher"). As this is a review of a Kentucky statute and a written contract, our review is *de novo*, and we are not required to give deference to the trial court's conclusions of law. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). We agree with the trial court that the tortfeasor's immunity from liability under the Workers' Compensation Act does not preclude the Estate from recovering uninsured motorist's benefits from Slusher's policy with State Farm.

The parties agree on the following relevant facts. On August 19, 2005, Slusher was working at the Bell County Coal Corporation plant in Bell County, Kentucky, where he was a coal truck driver employed by James Long Trucking. Arlie Napier ("Napier"), also an employee of James Long Trucking and a co-employee of Slusher, parked his coal truck on the haul road directly in front of the building occupied by Slusher. A few minutes after Napier left the coal truck, it rolled down the hill and hit the building which Slusher was occupying, fatally injuring him. Since the accident was related to mining, the Mine Safety and Health Administration ("MSHA") conducted an investigation. The MSHA determined the accident occurred because Napier negligently failed to apply the parking brake before exiting the truck.

In addition, the parties agree that Slusher was duly covered by the Kentucky Workers' Compensation Act. Slusher's estate has sought and received workers' compensation benefits from the employer under that Act. Furthermore, the coal truck involved was insured for liability by a policy with Progressive

Insurance Company issued to its owner, James Long Trucking. Also, Slusher had in effect a policy of motor vehicle insurance through State Farm which covered a 2000 Jeep Cherokee which he owned. The policy included $50,000.00 of underinsured motorists (UIM) coverage. The parties agree that if the UIM coverage applies, the amount of damages sustained by the Estate meets the $50,000.00 limit for UIM coverage under his policy. It should be further noted that, although not expressly stipulated, Slusher's policy also provided $50,000.00 in uninsured motorist (UM) coverage.

On or about April 11, 2006, the Estate filed the initial complaint against State Farm seeking benefits under the UIM portions of Slusher's policy. Subsequently, on or about June 23, 2006, the Estate filed an amended complaint seeking benefits under the UM portion of the Slusher's policy as well as UIM benefits. On October 20, 2006, the Estate filed a motion for summary judgment for recovery of UIM benefits. State Farm filed a timely response. The trial court denied the motion, finding that there was an issue of fact as to whether Napier was negligent in engaging the truck's parking brake before he left the truck. The court did not address the issue of benefits, either UM or UIM, under Slusher's policy. On November 21, 2006, the Estate filed a motion for partial summary judgment relying on its previous memoranda and seeking a ruling solely on the insurance coverage issue, including both UM and UIM benefits. The trial court entered an order on January 17, 2007, granting the Estate partial summary judgment on two issues. First, the trial court determined that Slusher was an insured under an

underinsured/uninsured policy provided by State Farm; and second, the court found that the exclusive remedy provision of the Workers' Compensation Act does not prevent Slusher's estate from recovering the State Farm policy benefits. State Farm appealed that decision. However, this Court subsequently dismissed that appeal as it was not a final order under Kentucky Rules of Civil Procedure ("CR") 54.01 as the trial court had not made a finding as to damages.

Thereafter, on remand, the parties entered an agreed stipulation of facts. Again, however, only the UM benefits were referenced. On January 7, 2008, the trial court ordered damages totaling $50,000.00 for uninsured coverage. Neither party asked the trial court to make any additional findings as to the applicability of UIM coverage under these circumstances.

On appeal, State Farm argues Slusher's policy does not provide UM coverage to his estate because of the exclusive remedy under the Kentucky Workers' Compensation statutes. Kentucky Revised Statutes ("KRS") 342.690(1) provides that "[i]f an employer secures payment of compensation as required by this chapter, *the liability of such employer* under this chapter shall be exclusive and in place of all other *liability of such employer* to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled *to recover damages from such employer* at law . . . on account of such injury or death." (Emphasis added). The employer's exemption from liability extends to co-employees whose negligent acts within the scope of their employment cause the injury or death. State Farm argues that Napier's immunity

under this section would also preclude recovery under the UM or UIM provisions of Slusher's State Farm policy.[1]

Slusher's State Farm policy, as to both UM and UIM coverage, states, "we will pay compensatory damages or bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle." The parties agree that Slusher's death occurred during the course and scope of his employment and is a result of the negligent actions of co-employee Napier, acting in the scope of his employment, using instrumentality owned by Slusher's employer. Furthermore, Slusher was clearly covered by and received benefits under the Workers' Compensation Act. As such, State Farm asserts that KRS 342.690(1) makes the Workers' Compensation Act the exclusive remedy for Slusher's estate, and bars any action against either James Long Trucking or Napier. Since Napier could not be found liable for the injury, State Farm contends that Slusher's estate can never be "legally entitled to collect" damages from him. Consequently, State Farm argues that the Estate is also barred from recovering benefits under the UM or UIM provisions of Slusher's policy.

State Farm also argues that the existence of a liability policy of insurance with Progressive on the truck bars recovery of UM benefits under Slusher's State Farm policy. The Estate made a motion to strike this argument from State Farm's brief as it was not presented to the trial court and was not listed

[1] While the January 7, 2008, judgment was awarded only under the UM provision of Slusher's policy, in its brief, as well as during oral arguments, State Farm contends the result would be the same whether UM or UIM coverage is involved.

as an issue on State Farm's prehearing statement. *See Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989), and CR 76.03(8). We agree with the Estate that the issue is not properly preserved for review. Therefore, we decline to address the issue further.

Relying on *Philadelphia Indemnity Insurance Co. v. Morris*, 990 S.W.2d 621 (Ky. 1999), the trial court found that the exclusivity provision of the workers' compensation statutory scheme does not bar the way for an employee who seeks underinsured motorist benefits that exceed his workers' compensation award, even when the tortfeasor is a co-employee. In *Morris*, a sanitation worker was struck by an insured motorist while loading garbage into his truck. The tortfeasor's insurance company tendered its policy limits pursuant to a settlement agreement. Because the employee's damages exceeded the amount he recovered from the tortfeasor and the workers' compensation benefits combined, he then pursued the UIM benefits from his employer's policy on his garbage truck. The Kentucky Supreme Court allowed the UIM benefit recovery pointing out the contractual nature of the UIM policy and the workers' compensation exclusivity provisions were to benefit the employer not the UIM carrier. *Id*. at 625. Similarly, in *G & J Pepsi-Cola Bottlers Inc. v. Fletcher,* 229 S.W.3d 915 (Ky. App. 2007), this Court recognized the right of an injured employee who received workers' compensation benefits to seek additional coverage not only under his own UIM policy but his employer's as well. We agree this reasoning should apply, whether UIM or UM coverage, even when the tortfeasor is a co-employee, as in this case.

While this is a case of first impression before our Courts, we recognize that numerous other jurisdictions have considered this matter and the majority of states have found that an

> [E]mployee is not entitled to uninsured motorist benefits under his or her own automobile insurance policy for injuries resulting from a coemployee's negligent operation of a motor vehicle, because an uninsured motorist carrier is liable only for the damages which an insured is "legally entitled to recover" from owners or operators of uninsured motor vehicles, and the workers' compensation law grants immunity from suit to a co-employee for injuries compensable by workers' compensation benefits (internal case citations omitted).

82 ALR4th 1096 §6(a).

Although a few states do allow such additional coverage, it is only because such exclusions are expressly prohibited by statute or because, unlike Kentucky, the insurer does not stand in the shoes of the tortfeasor. *Thiel v. Allstate Ins. Co.*, 491 N.E.2d 1121 (Ohio, 1986); *Torres v. Kansas City Fire & Marine Ins. Co.*, 849 P.2d 407 (Okla. 1993).

State Farm argues because both Napier and James Long Trucking are immune from further suit under the Workers' Compensation Act, the Estate is not "legally entitled to recover" from either, nor may it recover under either the UM or UIM provisions of the State Farm policy.

We agree with the trial court that the phrase "legally entitled to recover" is ambiguous when considered in the context of a statutory immunity from liability as provided by KRS 342.690(1). This same language has previously

been construed by our Court to invite "a variety of interpretations." *U.S. Fidelity and Guar. Co. v. Preston*, 26 S.W.3d 145, 147 (Ky. 2000). It is well established that exclusionary or limiting language in policies of automobile insurance must be clear and unequivocal and such policy language is to be strictly construed against the insurance company and in favor of the extension of coverage. *Nationwide Mutual Insurance Co. v. Hatfield*, 122 S.W.3d 36, 39 (Ky. 2003). *See also Louisville Gas & Electric v. American Insurance Co.,* 412 F.2d 908 (6th Cir. 1969); *Eyler v. Nationwide Mutual Fire Insurance Co.,* 824 S.W.2d 855 (Ky. 1992); *Wolford v. Wolford,* 662 S.W.2d 835 (Ky. 1984); *B. Perini & Sons, Inc. v. Southern Ry. Co.,* 239 S.W.2d 964 (Ky. 1951). In general, when interpreting the policy language "legally entitled to recover," the "essential facts" approach is the appropriate method of interpreting ambiguous policy language when an insured is not capable of obtaining a judgment against the tortfeasor. *Preston*, 26 S.W.3d 145, 147 (Ky. 2000). Pursuant to the essential facts approach, an insured must prove: 1) the fault of the uninsured motorist and 2) the extent of damages caused by the uninsured motorist. *Hatfield, supra*.

Applying the essential facts approach to this case, we agree with the trial court that the Estate is entitled to recover UM or UIM benefits from State Farm. First, the parties have stipulated that it was Napier's negligence that caused the accident. Second, the parties have also stipulated that Slusher's damages not only exceeded the workers' compensation limits but further are at least $50,000.00, the policy limits for either UM or UIM benefits under the State Farm policy.

Having satisfied the two prongs of the essential facts approach, recovery of UM or UIM benefits is appropriate. *See Coots v. Allstate Insurance Company*, 853 S.W.2d 895, 899 (Ky. 1993).

Further, when an insured purchases additional coverage such as UIM, there is a "reasonable expectation" that he will receive all the coverage he may reasonably expect to be provided according to the terms of the policy. *Hendrix v. Fireman's Fund Ins. Co.,* 823 S.W.2d 937, 938 (Ky. App. 1991); *Woodson v. Manhattan Life Ins. Co.,* 743 S.W.2d 835, 839 (Ky. 1987). Kentucky case law has clearly expressed an expansive view when deciding the extent of coverage under either UM or UIM benefits, as well as an intention to insure that injured parties are fully compensated. *Hatfield*, *supra*. *See also*, *Wine v. Globe American Casualty Co.,* 917 S.W.2d 558 (Ky. 1996).

The clear intent of the UIM statute is to allow an insured to purchase additional coverage so as to be fully compensated for damages when injured by the fault of another individual; the inability of a tortfeasor to respond in damages for whatever reason is of no consequence. KRS 304.39-320. *Hatfield, supra* at 40.

Accordingly, the judgment of the Knox Circuit Court is affirmed.

CAPERTON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. While the majority opinion is both well written and well reasoned, I do not believe the authority relied upon is sufficient to circumvent the exclusive remedy limitation of

KRS 342.690(1) under the facts of this case. The tortfeasor in this case is a co-employee and not a third party. Neither UM nor UIM benefits are recoverable under Slusher's State Farm policy that covered Slusher's Jeep (which was not involved in the accident), in my opinion.

I am unable to locate any Kentucky Supreme Court opinion that has been published to date that could arguably be extended to permit either UM or UIM recovery under the unique facts of this case. Even the majority acknowledges that most other jurisdictions that have addressed this issue have found that an employee is not entitled to UIM benefits under his own automobile insurance policy for injuries resulting from a co-employee's negligent operation of a motor vehicle.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
John F. Vincent Ashland, Kentucky	Samuel G. Davies Barbourville, Kentucky