

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000342-MR

SAFE AUTO INSURANCE COMPANY

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 00-CI-00353

MYRTLE THOMPSON, Individually, and
as Administratrix of the Estate
of Paul Thompson, deceased

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Safe Auto Insurance Company appeals from a judgment of the Breathitt Circuit Court which determined that Safe Auto must provide underinsured motorist (UIM) coverage to Myrtle Thompson, administratrix of the estate of Paul Thompson. We affirm.

On August 23, 2000, Paul Thompson was a passenger in a vehicle driven by Joseph Stacy. The Stacy vehicle was struck by

a vehicle driven by Michael Miller. Both Stacy and Thompson were killed as a result of the accident.

Miller had liability insurance with Safe Auto, and Stacy also had a policy with Safe Auto. Stacy's policy contained UIM coverage. Paul Thompson lived with his mother, Myrtle Thompson, who had a policy with Farm Bureau which also provided UIM coverage.

Myrtle Thompson, individually and as administratrix of Paul Thompson's estate, filed suit in the Breathitt Circuit Court against Miller, against Farm Bureau as her UIM carrier, and against Safe Auto as Stacy's UIM carrier. Safe Auto paid Thompson the \$25,000 liability limits of Miller's policy. Farm Bureau paid her the \$25,000 UIM coverage limits under her policy. Although Stacy's policy included UIM coverage that applied to passengers, Safe Auto denied Thompson's claim. Specifically, it argued that through the language of Stacy's policy, it escaped liability to passengers, like Thompson, who recover from some other insurance.

Thompson and Safe Auto each moved the circuit court to award it summary judgment on the coverage issue. The circuit court agreed with Thompson and awarded her summary judgment determining that Safe Auto must provide UIM coverage to her. This appeal by Safe Auto followed.

An insurance policy is a contract. Buck Run Baptist Church v. Cumberland Surety Ins. Co., Inc., Ky., 983 S.W.2d 501, 504 (1998). The construction of a written instrument such as a contract is a matter of law for the court. Morganfield Nat. v. Damien Elder & Sons, Ky., 836 S.W.2d 893, 895 (1992). "We review questions of law *de novo* and, thus, without deference to the interpretation afforded by the circuit court." Cinelli v. Ward, Ky. App., 997 S.W.2d 474, 476 (1999).

There is no question that the Stacy policy with Safe Auto contained UIM coverage. Further, the UIM coverage in the policy provided protection for anyone occupying Stacy's covered auto with his permission and afforded them "the same rights and obligations that **you** have under this coverage." Also, the "OTHER INSURANCE" provision in the UIM portion of the policy stated as follows:

If there is other applicable uninsured or underinsured motorists coverage, **we** will pay only **our** share of the **loss**. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits. Any coverage **we** provide shall be excess over any other uninsured or underinsured motorists coverage, except for **bodily injury** to **you** or a **relative** when **occupying a covered auto**.

If there is other applicable insurance available under more than one policy, any recovery for **damages** for **bodily injury** sustained by a person insured may not exceed the highest of the applicable limit of any

one **vehicle** this insurance or any other insurance.

We will not pay for any **damages** which would duplicate any payment made for **damages** under any other insurance.

Safe Auto argues that Thompson's claim for UIM benefits under the Stacy policy is precluded by the "OTHER INSURANCE" provision of that policy.

Safe Auto maintains that the second paragraph of the aforementioned provision in the policy constitutes an escape clause that specifically excludes Thompson's demand for UIM benefits where her own insurer has met its obligation as the primary payor. It asserts that because Thompson accepted the \$25,000 UIM limit of her policy with Farm Bureau, any recovery by her of UIM benefits under the Stacy policy would "exceed the highest applicable limit of any one vehicle under" the Stacy policy or her Farm Bureau policy. Therefore, Safe Auto maintains that it has no liability to Thompson for UIM benefits under the plain language of the policy.

In essence, Safe Auto is arguing that because Thompson had other UIM coverage and recovered under it, Safe Auto's coverage did not extend to her. Safe Auto claims that because its UIM coverage limit was \$25,000 and Farm Bureau's UIM coverage limit under the Thompson policy was \$25,000, then Thompson could not recover anything under the Safe Auto Stacy

policy after she recovered \$25,000 from her policy because to do so would violate the provision that limits recovery to "the highest of the applicable limit of any one vehicle."

Were we to accept Safe Auto's argument, then we would be nullifying the first paragraph of the "OTHER INSURANCE" section of the UIM coverage. As we have noted, that section states that Safe Auto will pay its "share of the loss" and that its share is "the proportion that our limit of liability bears to the total of all applicable limits." Further, that paragraph refers to its UIM coverage as being "excess over any other uninsured or underinsured motorists coverage, except for bodily injury to you or a relative when occupying a covered auto."

In short, to read the second paragraph of the "OTHER INSURANCE" provision in the Stacy policy as Safe Auto would have us to read it would create an ambiguity with the first paragraph which clearly provides excess coverage. "In instances of ambiguity, such contracts are construed against the insurer." Employers Ins. of Wausau v. Martinez, Ky., 54 S.W.3d 142, 145 (2001). Therefore, we construe Stacy's Safe Auto policy to provide UIM coverage for Thompson.

The judgment of the Breathitt Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Diane Conley
Robert L. Steinmetz
Lexington, Kentucky

BRIEF FOR APPELLEE:

Dawn Watts
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