

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002481-MR

PROGRESSIVE MAX INSURANCE COMPANY

APPELLANT

v. APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 97-CI-00108

CAROLYN S. MORGAN, Administratrix
of the Estate of Kathy Jo Morgan,
Deceased

APPELLEE

OPINION

REVERSING and REMANDING

** ** * * *

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

EMBERTON, CHIEF JUDGE. This case arises from a fatal vehicle accident that claimed the life of eighteen-year-old Kathy Jo Morgan. At the time of the accident, Kathy Jo was a passenger in a vehicle owned by her mother, Carolyn Morgan, and covered by a policy of insurance issued by Progressive Max Insurance Company. With Carolyn's permission, Brandon Begley, also killed in the accident, operated the vehicle. Progressive paid Kathy

Jo's estate \$10,000 under the liability portion of the policy, and after payment of four other claims in the same amount, the \$50,000 liability limit was exhausted. The issue on appeal is whether \$25,000 in underinsured motorist's coverage existing on a second vehicle owned by Carolyn and insured by Progressive is subject to the claims made by Kathy Jo's estate. The trial court entered summary judgment in favor of the estate. We reverse and remand.

Progressive issued one policy to Carolyn covering two separate vehicles, a 1986 Chevrolet involved in the fatal accident, and a GT van. There is no dispute that Kathy Jo resided in Carolyn's household and that Kathy Jo was killed while a passenger in a vehicle owned by Carolyn. The Progressive policy states that Progressive will pay an insured, defined in the policy as including a family member or person occupying the insured's car, damages for bodily injury that the insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle. The policy continues to state that an underinsured motor vehicle does not mean:

- a. Insured under the liability coverage of this policy.
- b. Owned by or furnished or available for regular use by you or a relative.

In Pridham v. State Farm Mutual Insurance,¹ Pridham was injured in a single vehicle accident while a passenger in the vehicle operated by Christopher Smith, the son of Gladys J. Wigginton, who maintained two automobile insurance contracts with State Farm Mutual Insurance Company. State Farm paid Pridham the applicable limits of the liability coverage. The court held that the policy provision, similar to that in the present case, precluded Pridham from seeking UIM benefits:

We agree with the trial court's conclusion that State Farm's policy language is consistent with Kentucky's underinsured motorist statute. The clear language of the policy precludes such coverage in the factual scenario presented by this case. The policies provide UIM protection benefits for the insureds with respect to claims against "the other vehicle."²

Subsequently, the Supreme Court decided Motorist Mut. Ins. Co. v. Glass.³ In accord with the Pridham decision, the court held that the UIM statute contemplates that the tortfeasor will be operating a vehicle different than the vehicle providing the UIM coverage for the injured claimant.⁴

¹ Ky. App., 903 S.W.2d 909 (1995).

² Id. at 910.

³ Ky., 996 S.W.2d 437 (1997).

⁴ Id. at 449.

Most recently in Murphy v. Kentucky Farm Bureau Mutual Insurance Co.,⁵ this court was confronted with a situation similar to that in the present case. Austin Goodpaster was killed in a single car accident while riding as a passenger in a vehicle operated by his brother and owned by his mother with whom Austin resided. After exhausting the liability limits of the mother's policy with Farm Bureau, the estate filed claims against Farm Bureau for UIM benefits available on two vehicles owned by Austin's brother and sister, both vehicles being insured with Farm Bureau. The policies contained a regular use exclusion identical to that involved in the present case. We recognized that regular use exclusions from UIM coverage have been upheld as not being against public policy and that the purpose of such coverage is not to compensate an insured or additional insureds from his own failure to purchase sufficient liability insurance. Quoting from Glass, supra, we stated:

There is nothing ambiguous about this exclusion. A vehicle owned by or furnished or available for the regular use of the named insured or a family member is not an "underinsured vehicle." The obvious reason for the exclusion is that the named insured can avoid the fact of underinsurance by simply purchasing additional liability insurance coverage for his vehicle.⁶

⁵ Ky. App., 116 S.W.3d 500 (2002).

⁶ Id. at 502 (quoting Glass, supra, at 449-450).

Pursuant to the terms of the contract, the GT van insured by Progressive is not an underinsured vehicle. The judgment of the Leslie Circuit Court is reversed and the case is remanded for entry of judgment in favor of Progressive.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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