IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 10, 2004 Session

BRADLEY C. FLEET, ET AL. v. LEAMON BUSSELL, ET AL.

Appeal from the Circuit Court for Claiborne County
No. 8586 Conrad E. Troutman, Jr., Judge

No. E2003-02788-COA-R3-CV - FILED AUGUST 31, 2004

Bradley C. Fleet and his father, Herbert C. Fleet, Jr., residents of the state of Virginia, sued tortfeasors Leamon Bussell and Clarence Bussell, residents of Claiborne County, seeking damages arising out of an automobile accident in Claiborne County involving vehicles driven by the plaintiff Bradley C. Fleet and the defendant Leamon Bussell. The plaintiffs caused process to be served upon their uninsured motorist carrier, Integon General Insurance ("Integon"). The trial court granted the plaintiffs' motion for summary judgment against Integon, finding that Virginia law – which is indisputably applicable in this case – permits the stacking of uninsured motorist/underinsured motorist ("UM/UIM") coverage. Integon appeals. We reverse the trial court's decree granting the plaintiffs summary judgment. Further, we grant Integon's motion for summary judgment and dismiss the plaintiffs' claim against Integon.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Linda J. Hamilton Mowles, Knoxville, Tennessee, for the appellant, Integon General Insurance.

Philip L. Boyd, Rogersville, Tennessee, and Jeffrey W. Helton, Pineville, Kentucky, for the appellees, Bradley C. Fleet and Herbert C. Fleet, Jr.

OPINION

I.

On July 16, 2000, Bradley C. Fleet, who was then a minor, was involved in a motor vehicle accident with Leamon Bussell. At the time of the accident, the vehicle driven by Bradley C. Fleet was covered by an automobile insurance policy issued by Integon in the state of Virginia; the policy also covered another of the Fleet family's vehicles. The policy was issued to Herbert C. Fleet, Jr.;

Bradley C. Fleet was identified as a driver on the declarations page. The policy was effective from October 6, 1999, through October 6, 2000. The policy had UM/UIM coverage limits of $25,000 per person.

On January 31, 2001, the plaintiffs filed a complaint in the trial court against Leamon Bussell and Clarence Bussell[1], seeking damages for injuries resulting from the accident. Herbert C. Fleet, Jr.'s individual claim is derivative in nature.[2] The plaintiffs also secured service of process on Integon, in its capacity as the plaintiffs' UM/UIM carrier.

The Bussells had an automobile insurance policy issued by Allstate Insurance Company, with liability coverage of $25,000 per person. Ultimately, Allstate settled with the plaintiffs for its policy limits.

On September 7, 2001, Integon filed its motion for summary judgment, alleging that its policy limits were identical to those of the Bussells' policy, and that, accordingly, Tennessee law does not provide for liability on the part of Integon. In response, the plaintiffs filed their own motion for summary judgment, arguing (1) that this is a Virginia-issued insurance policy and, hence, Virginia law applies to the facts of this case; (2) that Virginia law permits the "stacking" of coverage, *i.e.*, the right of an insured, who has UM/UIM coverage on multiple vehicles in a single policy,[3] to add each vehicle's coverage and thereby multiply the coverage available to an insured under the policy; and (3) that the stacking of coverage in this case means that they should be entitled to the benefit of $50,000 in UM/UIM coverage since the plaintiffs had two insured vehicles on their policy, each of which was insured for $25,000.[4]

In December, 2002, the trial court entered an order, granting the plaintiffs' motion for summary judgment and denying Integon's motion, holding that Virginia law was applicable in the instant case, and that Virginia permitted the stacking of UM/UIM coverage. While the trial court reserved all other matters for hearing at a later date, the court entered an agreed order on October 20, 2003, pursuant to Tenn. R. Civ. P. 54.02, making the December, 2002, order a final order for the purpose of appeal. From this order, Integon appeals.

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[1]Clarence Bussell, who was the owner of the vehicle Leamon Bussell was driving at the time of the collision, is now deceased.

[2]The senior Mr. Fleet sued based upon the allegation that "he has lost the services of his son."

[3]It has been held that "stacking," as a concept, also applies to a situation where there are multiple policies each covering a separate vehicle. *See* ***Jones v. Mulkey***, 620 S.W.2d 498, 499 (Tenn. Ct. App. 1981).

[4]The plaintiffs' damages clearly exceed $25,000.

II.

In deciding whether a grant of summary judgment is appropriate, courts are to determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. Courts "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993) (citations omitted).

Since summary judgment presents a pure question of law, our review is *de novo* with no presumption of correctness as to the trial court's judgment. ***Gonzales v. Alman Constr. Co.***, 857 S.W.2d 42, 44 (Tenn. Ct. App. 1993).

III.

The pertinent provisions of the plaintiffs' UM/UIM coverage are as follows:

> **PART IV – UNINSURED MOTORIST INSURANCE**
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> * * *
>
> **I. UNINSURED MOTORISTS COVERAGE**
>
> **(Damages for Bodily Injury and Property Damage)**
>
> The company will pay in accordance with Section 38.2-2206 of the Code of Virginia and all Acts amendatory thereof or supplementary thereto, all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured or property damage, caused by accident and arising out of the ownership, maintenance or use of such *uninsured* motor vehicle. In accordance with Section 38.2-2206 of the Code of Virginia, the company is also obligated to make payment for bodily injury or property damage caused by the operation or use of an *underinsured* motor vehicle, as defined below, to the extent the motor vehicle is underinsured.
>
> * * *

III. LIMITS OF LIABILITY

Regardless of the number of . . . motor vehicles to which this insurance applies,

(a) If the schedule or declarations indicates split limits of liability, *the limit of liability for bodily injury stated as applicable to "each person" is the limit of the company's liability* for all damages because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting "each person" the limit of liability for bodily injury stated as applicable to "each accident", is the total limit of the company's liability for all damages because of bodily injury sustained by two or more persons as the result of any one accident. . . .

* * *

(c) The company shall not be obligated to make any payment because of bodily injury or property damage to which this insurance applies and which arises out of the ownership, maintenance or use of an *underinsured* motor vehicle until after the limits of liability under all bodily injury and property damage liability bonds or insurance policies respectively applicable at the time of the accident to damages because of bodily injury or because of property damage have been exhausted by payment of judgments or settlements.

* * *

(d) Any damages payable under this endorsement because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance shall be reduced by all sums paid because of such bodily injury or property damage by or on behalf of the owner or operator of an *uninsured* motor vehicle. This paragraph (d) (of III. Limits of Liability) does not affect the provisions applicable to *underinsured* motorists coverage as set forth in III. Limits of Liability paragraph (c) of this endorsement

* * *.

V. DEFINITIONS

* * *

> **"Insured motor vehicle"** means a motor vehicle registered in Virginia with respect to which the bodily injury and property damage liability coverage of the policy applies but shall not include a vehicle while being used without the permission of the owner;
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> * * *
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> **"Uninsured motor vehicle"** means:
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> * * *
>
> (d) *an underinsured motor vehicle*.
>
> A motor vehicle is underinsured when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 of Chapter 3 of Title 46.2 of the Code of Virginia (Section 46.2-435 et seq.), is *less* than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

(Capitalization and bold type in original; emphasis added). The definition of "underinsured motor vehicle" in the Integon policy is identical to the definition of this concept found in the Virginia Code. *See* Va. Code Ann. § 38.2-2206(B) (2001).

IV.

Before addressing Integon's issue on appeal and before reaching the other issues raised by the plaintiffs, we first must address the plaintiffs' contention that Integon "was not made a party [to this action] and had no right to proceed in its own name." The plaintiffs base this contention on the fact that, when they named Integon in their complaint, they noted in the complaint's caption that Integon was named "for notice purposes only." Thus, so the argument goes, Integon has no right to appeal the trial court's judgment, and, as the "true" defendants, *i.e.*, the Bussells, did not appeal, the appeal should be dismissed. We disagree.

Tenn. Code Ann. § 56-7-1206(a) (2000) provides as follows:

> Any insured intending to rely on the coverage required by this part shall, if any action is instituted against the owner and operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by

> law, as though such insurance company were a party defendant. *Such company shall thereafter have the right to file pleadings and take other action allowable by law in the name of the owner and operator of the uninsured motor vehicle or in its own name*; . . . .

(Emphasis added). This statute is a complete answer to the plaintiffs' position. It authorizes a UM/UIM carrier to defend "in its own name." This is exactly what Integon did when it filed pleadings in its own name. It acted, pursuant to the statute, "as though," *see* Tenn. Code Ann. § 56-7-1206(a), it were a "party defendant." The statute does not require more. There is nothing in the UM/UIM statutory scheme that even remotely suggests that a UM/UIM carrier must formally apply to the court to be made, in effect, a party. While Integon is not technically a defendant, it is a party. The plaintiffs brought Integon into the lawsuit because they wanted to force the company to pay them under their policy's UM/UIM coverage. The trial court granted them this relief. It is illogical to argue that an entity, who is involved in litigation pursuant to a statutory grant of authority and who will be required to make a monetary payment to a plaintiff if a trial court's judgment is affirmed, is not a party for the purpose of appealing that adverse judgment. Integon's appeal is properly before us.

V.

Integon raises only one issue on appeal, arguing that the trial court erred in holding that it was liable under the plaintiffs' UM/UIM coverage. We agree with Integon.

When interpreting contracts of insurance, we must, as a general rule, apply the same rules of construction as are applicable to other types of contracts. *See* ***McKimm v. Bell***, 790 S.W.2d 526, 527 (Tenn. 1990). Such contracts are to be interpreted as they are written – absent any fraud or mistake – and words in the policy must be given their plain and ordinary meaning. ***Swanson v. Mid-South Title Ins. Corp.***, 692 S.W.2d 415, 419 (Tenn. Ct. App. 1984). The law is well-settled in this state that any uncertainties or ambiguities in an insurance policy "must be construed strongly against the insurer and in favor of the insured." ***Travelers Ins. Co. v. Aetna Cas. & Sur. Co.***, 491 S.W.2d 363, 366 (Tenn. 1973). The interpretation of a contract presents a question of law for the court. ***Union Planters Corp. v. Harwell***, 578 S.W.2d 87, 92 (Tenn. Ct. App. 1978).

Because the insurance policy in the instant case was issued in the state of Virginia to Virginia residents, that state's laws – and not those of Tennessee – control the resolution of this case. On this appeal, Integon does not argue otherwise. Unlike Tennessee, Virginia permits the stacking of UM/UIM coverage, "unless clear and unambiguous language exists on the face of the policy to prevent such multiple coverage." ***Goodville Mut. Cas. Co. v. Borror***, 275 S.E.2d 625, 627 (Va. 1981) (hereinafter referred to as "***Borror***"). Accordingly, in order to determine if stacking is permitted in the instant case, we must examine the language of the policy to determine if there is "clear and unambiguous language . . . on the face of the policy to prevent such multiple coverage." ***Id***.

The unreported Ohio case of ***Bautista v. Kolis*** addresses a factual scenario and an insurance policy essentially identical to the facts and policy in the case at bar, and, thus, is quite instructive. In ***Bautista***, the plaintiffs were injured when their vehicle collided with a vehicle driven by the defendant; the collision occurred in Ohio. ***Bautista v. Kolis***, No. 02 CA 70, 2002 WL 32060489, at *1 (Ohio Ct. App., filed March 13, 2002). The plaintiffs, who were Virginia residents, had an automobile insurance policy issued by State Farm in the state of Virginia. ***Id.*** The policy, which covered four vehicles, had UM/UIM policy limits of $50,000 per person and $100,000 per accident. ***Id.*** The defendant, an Ohio resident, had an insurance policy through another company with policy limits that were identical to those of the plaintiffs' UM/UIM limits. ***Id.*** The plaintiffs filed suit against both the defendant and State Farm, ultimately settling their claim against the tortfeasor for the policy limits of $50,000. ***Id.*** At this point, the plaintiff and State Farm each filed a motion for summary judgment. ***Id.*** The trial court ultimately found for the plaintiffs, and State Farm appealed. ***Id.***

Because the insurance policy was issued in Virginia to Virginia residents, the Ohio Court of Appeals recognized the applicability of Virginia law. ***Id.***, at *2. Quoting the Virginia Code, the court noted that a vehicle is considered underinsured when the total amount of coverage available to pay for the bodily injury or property damage of another party is less than the total amount of the injured party's UM/UIM coverage. ***Id.***, at *3; *see also* Va. Code Ann. § 38.2-2206(B). Further, the court stated the long-standing rule in Virginia that, "when a single automobile insurance policy covers multiple vehicles, then the UM/UIM coverage provided on each vehicle may be stacked to determine whether a motorist is underinsured." **Bautista**, 2002 WL 32060489, at *3; *see* ***Cunningham v. Ins. Co. of N. Am.***, 189 S.E.2d 832 (Va. 1972); ***Lipscombe v. Sec. Ins. Co.***, 189 S.E.2d 320 (Va. 1972). "In order to prevent this type of stacking, a policy must 'plainly, explicitly and unmistakably' prohibit it." ***Bautista***, 2002 WL 32060489, at *3 (quoting ***Cunningham***, 189 S.E.2d at 836).

The court in ***Bautista*** then turned to the ***Borror*** case, which forged a bright-line rule for determining stacking coverage in UM/UIM cases:

> The ***Borror*** court found this language, particularly the phrase "regardless of the number of motor vehicles to which this insurance applies", "is clear and unambiguous and requires the construction that stacking is not permissible." ***Id.*** at [628]. Thus, the "regardless of the number of motor vehicles to which this insurance applies" language plainly, explicitly and unmistakably prohibits stacking of the UM/UIM coverages in a single policy as a matter of Virginia law.
>
> The distinguishing characteristic between ***Lipscombe*** and ***Borror*** is the language at the beginning of the limitation of liability [*i.e.*, the "regardless of the number of motor vehicles" language] which was present in ***Borror*** and absent in ***Lipscombe***. When a single policy covers multiple vehicles and does not contain that or similar

> language, then the policy is like that in ***Lipscombe*** and the UM/UIM coverages on each vehicle within the policy must be stacked. However, when the same kind of policy contains language similar to that in ***Borror***, then that form of stacking is prohibited.

Bautista, 2002 WL 32060489, at *4.

Applying the foregoing to the case before it, the court in ***Bautista*** stated that the plaintiffs had one insurance policy that covered multiple vehicles, and that "separate but unequal premiums were charged for each vehicle." ***Id.*** The plaintiffs' UM/UIM policy in ***Bautista*** contained the "regardless of the number of motor vehicles" language and contained a limitation that was identical to that analyzed in ***Borror***. ***Bautista***, 2002 WL 32060489, at *4. The ***Bautista*** court concluded as follows:

> [The policy] provides the same amount of UM/UIM coverage to the [plaintiffs] regardless of the number of motor vehicles insured by the policy. As the Virginia Supreme Court held in ***Borror***, this language clearly and unambiguously prohibits the stacking of the UM/UIM coverages available on the multiple vehicles contained within this single policy. In addition, like ***Borror***, separate but unequal premiums were charged for each vehicle issued under the policy. Thus, the trial court erred when it allowed those coverages to be stacked. As the amount of [the defendant's] insurance is the same as the total amount of the [plaintiffs'] UM/UIM coverage, [the defendant] was not underinsured as defined by Virginia law. Accordingly, State Farm's assignment of error is meritorious.

Id., at *5.

Turning to the case at bar, we begin by reiterating the striking similarities between it and the ***Bautista*** case. In both cases, the plaintiffs settled with the liability insurance carrier for the limits of the defense's insurance policy, which was $25,000 in the instant case; both sets of plaintiffs' UM/UIM policies had policy limits that were the same as the limits of the defense's respective liability insurance coverage, which was $25,000 in the case at bar; both sets of plaintiffs had a single policy that insured multiple vehicles and both paid separate premiums for each vehicle insured; and both UM/UIM policies contain the identical, crucial language of "regardless of the number of motor vehicles to which this insurance applies." As the court found in ***Bautista***, we find that the language of Integon's policy, *i.e.*, the language – "[r]egardless of the number of motor vehicles to which this insurance applies" in the "Limits of Liability" section of the "Uninsured Motorist Coverage" – "clear[ly] and unambiguous[ly]" prevents stacking. When read together, the pertinent language reads as follows:

> Regardless of the number of . . . motor vehicles to which this insurance applies, . . . *the limit of liability for bodily injury stated as applicable to "each person" is the limit of the company's liability* . . .

(Emphasis added). This language means exactly what it says. The limit for each person is $25,000.

Because we hold that the plaintiffs cannot stack their UM/UIM coverages, they are only entitled to $25,000 of UM/UIM coverage, rather than the $50,000 of coverage argued for by them.

Turning to the definition of "underinsured," we find that a party is underinsured only when

> the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage . . . is *less* than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

(Emphasis added). In the instant case, the Bussells' liability coverage limits is $25,000, which is *equal to*, not less than, the amount of UM/UIM coverage available under the plaintiffs' policy. Accordingly, the Bussells, by definition, are not underinsured, and the plaintiffs are not entitled to receive any portion of their UM/UIM coverage. This holding is consistent with the ***Bautista*** holding, in which the defendant's policy limits equaled the plaintiffs' UM/UIM policy limits.

V.

The plaintiffs raise two additional issues for our consideration. First, they contend that the language of the Integon policy does not permit a set-off of the $25,000 the plaintiffs received from the Bussells against the plaintiffs' UM/UIM coverage. In support of their position, the plaintiffs rely upon the following italicized language found in the UM/UIM section of their policy:

> **III. LIMITS OF LIABILITY**
>
> * * *
>
> (d) Any damages payable under this endorsement because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance shall be reduced by all sums paid because of such bodily injury or property damage by or on behalf of the owner or operator of an uninsured motor vehicle. *This paragraph (d) (of III. Limits of Liability) does not affect the provisions applicable to underinsured motorists coverage as set forth in III. Limits of Liability paragraph (c) of this endorsement.*

(Capitalization and bold type in original; emphasis added). We disagree with the plaintiffs' contention.

The plaintiffs argue that since the first sentence of subsection (d) requires a reduction and since the second sentence says that the "reduction" language does not apply when dealing with underinsured motorists coverage, that this provision must mean that there is no reduction when dealing with an "underinsured" motorist. The problem with this argument is that the second sentence only comes into play when one is dealing with an "underinsured" vehicle. That same second sentence refers back to "paragraph (c) of this endorsement" – as quoted earlier in this opinion – which also refers to an "underinsured motor vehicle." As we have pointed out in the preceding paragraph of this opinion, the Bussells' vehicle was not "underinsured" as that term is defined in the plaintiffs' policy. Thus, the exception described in the italicized second sentence is simply not applicable to the facts of this case and there is nothing in either subsection (c) or subsection (d) implicating the uninsured motorist coverage of the plaintiffs' policy. These policy provisions discuss "an underinsured motor vehicle"; "an uninsured motor vehicle"; and/or "underinsured motorists coverage." The "bottom line" is that the Bussells' vehicle was neither "uninsured" nor "underinsured." These provisions are simply not "in play" under the facts of this case.

In the plaintiffs' second and final issue, they argue that the public policy of Tennessee would be offended if the plaintiffs are not entitled to the stacked coverage of $50,000 under the UM/UIM provisions of their policy, or $25,000 for each covered vehicle and each premium paid. Specifically, the plaintiffs contend that plaintiff, "Herbert Fleet, fully believed that he would receive the benefit of the $25,000 limit under each uninsured motorist coverage available for which he has paid and his carrier has *collected* two separate premiums without advising the [plaintiffs] further." (Emphasis in original). The plaintiffs contend that public policy demands that they receive this double coverage.

Unlike Virginia, the stacking of insurance coverage in Tennessee is prohibited. *See* Tenn. Code Ann. § 56-7-1205 (2000); *see also* ***Jones,*** 620 S.W.2d at 499. Contrary to the plaintiffs' assertion, the failure to stack UM/UIM coverages is not *against*, but clearly consistent with, the public policy of the state of Tennessee. Accordingly, the plaintiffs' final issue is without merit.

VI.

The judgment of the trial court is reversed and the claim against Integon is dismissed. This case is remanded to the trial court for such further proceedings, if any, as may be required. Costs on appeal and costs at the trial level applicable to the claim against Integon are taxed to the appellees, Bradley C. Fleet and Herbert C. Fleet, Jr.

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CHARLES D. SUSANO, JR., JUDGE