

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2013-SC-000732-D
COURT OF APPEALS NO. 2009-CA-001961



ALLSTATE INSURANCE COMPANY

APPELLANT

v.

CRAIG T. SMITH

APPELLEE

BRIEF FOR APPELLEE, CRAIG T. SMITH

APPEAL FROM JEFFERSON CIRCUIT COURT
CIVIL ACTION NO. 09-CI-00399
HON. IRVIN G. MAZE

CERTIFICATE OF SERVICE

It is hereby certified pursuant to CR 76.12(6) that a copy of this Brief for Appellee was mailed this 21st day of November, 2014 to the Clerk of Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-1229, Judge Angela McCormick Bisig of Jefferson Circuit Court, Division Ten, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202 and to A. Campbell Ewen and William P. Carrell, II, EWEN, KINNEY & ROSING, 1090 Starks Building, 455 South Fourth Avenue, Louisville, Kentucky 40202. It is further certified that the record on appeal has been returned to the Jefferson Circuit Court Clerk's Office by the Appellee.



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INTRODUCTION

This is an underinsured motorist coverage case which was decided on summary judgment in the Trial Court. It raises two issues:

1. Whether the insurer had a duty to provide a notice of the availability of underinsured motorist coverage; and, if so,
2. Whether the insurer met its duty.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee does not request oral argument.

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STATEMENT OF THE CASE

The Appellant, Allstate Insurance Company (“Allstate”) issued automobile insurance policies to Craig Smith (“Smith”) for 32 years. When Smith had his first serious claim in 2006, Allstate denied that he had underinsured motorist (UIM) coverage and asserted that it had no duty to advise him of the availability of such coverage.

On March 16, 2006, Smith was seriously injured in a collision; the other driver was 100% at fault for the collision. Record on Appeal (hereinafter “R.”), p. 170. Safe Auto Insurance Company (“Safe Auto”), the insurer for the said other driver, has paid its policy limits of \$25,000.00 to settle Smith’s claim against its insured. R., p. 171. Allstate rejected the opportunity to advance the settlement funds offered by Safe Auto. R., ps. 173 – 179.

Smith incurred damages which were not covered by the \$25,000 payment received from Safe Auto. R., p. 171. After settling his claim against Safe Auto, Smith made a demand for benefits pursuant to the UIM coverage provided in his Allstate policy. R., ps. 173 – 179. Allstate provided a certified copy of the policy but refused to offer any amount pursuant to the UIM coverage.

At all times and for the past thirty-two (32) years, Smith has dealt with duly authorized agents of Allstate. Smith Depo, ps. 8 – 9. He was never told that he does not have UIM coverage and has always believed the Policy provided such coverage. R., ps. 170 – 171; Smith Depo, ps. 28 – 29, 73. Smith was never told or advised that UIM coverage was optional and that he did not have UIM coverage, and he never received a written communication from Allstate which explained that UIM coverage was optional and that he did not have it. *Id.* Neither the declarations page, the policy, nor the Allstate

agent with whom Smith worked advised Smith that such coverage was available even though he asked on several occasions as to whether he was fully insured or whether there were other risks of which he should be aware. Smith Depo, ps. 28 – 30; R., ps. 170 – 171.

Smith clearly sought the advice of Allstate concerning coverage:

...Again, he covered cars, home, rental property, umbrella liability insurance. They had all our insurance, and that was, you know, all encompassing. So, whatever was going on at the time. If we were buying a house, refinancing, then we would talk about, you know, house coverage.

Smith Depo. p. 19.

Q. How did the subject or how did you get the idea of acquiring an umbrella policy?

A. I am not positive, but I believe he advised that and/or Allstate required that in order to cover the rental properties and have a landlord's rider. So, I may have initiated the conversation by saying, okay, I'm a landlord, I've incurred some liability now, how do you cover me, and they responded by saying umbrella policy or landlord's rider and/or they initiated it. I don't know.

Smith Depo. p. 20.

A. We adjusted coverage, yes, a time or a few over the years usually in response to one of these conversations about, okay, do we need to update things, am I adequately covered, do I need to increase coverage here, could I increase my deductions here and save some premium, am I adequately covered?

Smith Depo. ps. 22, 23.

A. ...I believe, and, again, I'm not an insurance agent, that's what I rely on them for, but I believe the difference between comprehensive and collision is collision is just that, fixing the vehicle as a result of a collision....

Smith Depo. p. 24.

A. If I had a specific question, he always attempted to answer that, we had more than one conversation where I felt assured I was fully covered in all three respects, auto, home, rental property.

Smith Depo. p. 28.

A. Well, I can't give you a date, time, hour that we discussed that topic, but I do recall discussing the fact that my understanding was I was fully covered, including folks that are not adequately insured, be it not enough insurance, be it no insurance at all, my fault, their fault. Everyone knows there's people riding around without a license, without insurance, without citizenship, for that matter, and that's the only way to cover yourself is to insure yourself.

Smith Depo. ps. 29, 30.

A. I would look at the entire policy, look at my premiums, and interpret it as I understood explained by my agent of 34 years, and assume that I was covered for folks that aren't insured, because I'm buying insurance to cover me against uninsured folks.

Smith Depo. p. 46.

A. I don't know. My understanding of my coverage comes from the entire policy, my reading and understanding of it, my reliance on my agent, who is the expert.

Smith Depo. p. 52.

A. I don't know if there is a significant distinction in your mind between personal injury and additional personal injury. My understanding was I was fully covered based on the summary, based on the full reading of the policy, based on the explanation by my agent for liability, collision, comprehension, which includes insurance against folks that are not adequately insured. That is the simple truth.

Smith Depo. ps. 52, 53.

As the above quotes show, Smith had a course of dealing over an extended period of time with Allstate and the agents assigned to Smith. He actively sought and relied upon the advice provided by Allstate.

Allstate seeks to minimize its failure to provide a notice that optional UIM coverage was available and emphasize Smith's alleged failure to request such coverage. A good example is Allstate's parsing of Smith's answer to interrogatory number 2. An accurate quote of the answer provides more accuracy:

If the reference to the ALLSTATE POLICY is to the certified copy of the policy which was attached as an exhibit to Plaintiff's Complaint, then Plaintiff states that he was never informed that he needed to specifically request underinsured motorist coverage. Neither the declarations page, the policy, nor the agent advised Plaintiff that such coverage was available even though he asked on more than one occasion as to whether he was fully insured or whether there were other risks that he should be aware of. Plaintiff has been insured by Allstate for 32 years and he was never informed that he did not have such coverage and the wording of the policy clearly states that he has such coverage.

ARGUMENT

A. ALLSTATE HAD A DUTY TO ADVISE OF THE AVAILABILITY OF UIM COVERAGE

1. KRS Section 304.20-040(13) Imposes a Duty on Insurers to Advise of the Availability of UIM Coverage

KRS 304.20-040(13) provides,

Except where the maximum limits of coverage have been purchased, every notice of first renewal shall include a provision or be accompanied by a notice stating in substance that added uninsured motorist, underinsured motorist, and personal injury protection coverages may be purchased by the insured.

This section has been interpreted by this court in *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245 (Ky. 1992). In *Mullins*, the plaintiff asserted that the insurer

had negligently failed to advise of the availability of UIM coverage. The court examined the issue of whether an insurer has the duty to offer advice concerning optional UIM coverage. Under the particular facts of that case, the court found no duty for the insurer to offer such advice.

In the course of examining the issue, the court considered a then new statute, KRS 304.20-040(12) [now (13)]. After quoting the statute, the Mullins court held,

With this statutory provision, insurance companies now are required to advise their insured of the availability of this protection in the first notice of renewal. While this provision was enacted after this cause of action accrued, the General Assembly expressed its intent in this area by the then applicable statutes.

839 S.W.2d at 250.

The court's careful interpretation of the statute is supported by policy considerations. With the enactment of the Motor Vehicle Reparations Act (MVRA), the legislature set public policy. The intent of the MVRA is to ensure to the extent possible that the victims of motor vehicle accidents are fully compensated. *Nationwide Mutual Ins. Co. v. Hatfield*, 122 S.W.3d 36, 42 (Ky. 2003). The UIM statute is a public policy statement for broad UIM coverage for the same purpose: to insure compensation for victims of motor vehicle accidents. *Philadelphia Indemnity Ins. Co. v. Morris*, 990 S.W.2d 621, 627 (Ky. 1999).

Allstate is held to know the law following the 1992 decision in *Mullins*. Smith's policy was repeatedly renewed following the decision but Allstate failed to provide this notice described in the *Mullins* decision.

In the present case, Smith continually sought reasonable insurance coverage for himself and his family. Smith Depo, ps. 19, 22 – 23. He did not seek minimum

coverage. He had an automobile policy which provided limits of \$100,000 per person and \$300,000 per occurrence. *Id.* at 23. In addition, he had an umbrella policy and insured his home and rental property with Allstate. *Id.* at 19 – 20. He sought to protect himself and thought that he had done so. *Id.* at 28 – 29.

Clearly, Smith was a consumer of insurance who was an intended beneficiary of KRS 304.20-040(13) as interpreted by the *Mullins* court.

Allstate's primary argument has been and continues to be that KRS 304.20-040(13) does not apply to Smith's policy because,

As in *Mullins*, the statute's 1990 enactment postdates the effective date of the original Allstate Policy version by many years, rendering it inapplicable.

R., p. 347.

There is a more reasonable interpretation of the statute. In the first renewal of the policy after the enactment of the statute, Allstate had a statutory duty to give the required notice. Allstate's interpretation would turn the purpose of the Act on its head. The MVRA is remedial legislation which is entitled to a liberal interpretation to provide as much as possible full recovery to the victims of automobile collisions. *Dupin v. Adkins*, 17 S.W.3d 538, 542 (Ky.App. 2000); *Philadelphia Indemnity Ins. Co. v. Morris*, 990 S.W.2d 621, 627 (Ky. 1999).

According to Allstate's interpretation, Smith should be penalized for being a faithful customer of Allstate: Smith was not entitled to the statutory notice but a new customer would be entitled to a notice at the time the first renewal of the policy. Allstate's interpretation of the statute is unreasonable.

When two plausible interpretations of a statute are offered, one reasonable and one unreasonable, a reviewing court will chose the reasonable interpretation.

2. Smith Had a Course of Dealing With Allstate Over Thirty-Two Years Which Imposed a Duty on Allstate to Advise of UIM Coverage¹

As noted *supra*, the issue in *Mullins* was whether an insurer has the duty to advise of the availability of UIM coverage. In examining that issue, the court set the following test:

An implied assumption of duty may be present when: (1) the insured pays the insurance agent consideration beyond a mere payment of the premium, (2) there is a course of dealing over an extending period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on, or (3) the insured clearly makes a request for advice.

839 S.W.2d at 248 (internal citations omitted).

The *Mullins* court also explained:

When an insurance company or an agent “holds itself out” to the public as a counselor and/or advisor, the scope of duty to advise is commensurate with the obligation assumed by the insurance company or agent selling the insurance.

839 S.W.2d at 249.

Allstate continually holds itself out as the “good hands people.” It also regularly claims “you’re in good hands with Allstate.” Smith certainly relied upon this representation; he kept his policies with Allstate for 32 years.

¹ This argument can be considered since it is an alternative theory which supports the Court of Appeal holding that Allstate had a duty to advise Smith of the availability of UIM coverage.

Smith also had a long course of dealing with the individual agents which Allstate assigned to him. He was assigned only three agents over the course of 32 years. Smith Depo, ps. 8, 9. Thus, Smith had a course of dealing with Allstate and its agents over an extended period of time. In addition, his unrefuted testimony shows that he relied on the advice of the Allstate agent and considered him to be an expert. Smith placed all of his insurance coverage with Allstate including cars, home, rental property, and umbrella insurance. Smith Depo, p. 19. Whatever was going on in his life, he would discuss with his Allstate agent. *Id.* Smith asked Allstate how he should be covered as a landlord and Allstate provided the information for that coverage. Smith Depo, p. 20. Over the course of the years, Smith had conversations with his agents concerning the need to update the policy, adequate coverage, and an increase in coverage. Smith Depo, ps. 22, 23. Smith relied on his insurance agent. Smith Depo, p. 24. Smith discussed with the agent his understanding that he was fully covered including others who are not adequately insured. Smith Depo, ps. 29, 30. Smith's understanding of his coverage comes in part from his reliance upon his agent who Smith considered to be the expert. Smith Depo, p. 52.

The above evidence meets the test of course of dealing over an extended period of time to put Allstate and its agent on notice that advice was being sought and relied upon. *See Mullins* at 248. It also meets the test of specific requests for advice.

B. ALLSTATE BREACHED ITS DUTY TO ADVISE SMITH OF OPTIONAL UIM COVERAGE

Allstate argued in the trial court and on appeal that it had no duty to advise Smith of the availability of UIM coverage. In its Brief on Appeal, Allstate devoted two (2) sentences to the argument that it had met the statutory duty. This argument continues to be of secondary importance to Allstate.

Even a cursory review of Form X4093-1 shows why Allstate places so little faith in it. The Form provides in its entirety:

Important Notice

You May Purchase Higher Limits of UM/UIM/PIP

If you have Uninsured Motorist Insurance or Underinsured Motorist Insurance limits that are less than the Automobile Liability Insurance Bodily Injury limits on your policy, you may purchase additional protection up to the limits for Automobile Liability Insurance Bodily Injury shown on your Policy Declarations. You may also increase your Personal Injury Protection for an additional premium.

To purchase additional Uninsured Motorist, Underinsured Motorist, or Personal Injury Protection coverage, or if you have questions about these coverages or your policy in general, contact your Allstate agent or the nearest Allstate sales office. They will be happy to help you.

The headline, “You May Purchase Higher Limits for UM/UIM/PIP”, assumes that the person already has each of the coverages, but may purchase more. The first sentence begins with a proposition, “If you have... Underinsured Motorists Insurance...” so the following information is for those who have the coverage and wish to purchase more. The second paragraph begins in a similar manner, “To purchase additional... coverage....” The above notice is wholly inadequate to advise Smith that UIM coverage is optional and that he does not have it.

In support of its Motion, Allstate relies upon the unpublished opinion in *McKenzie v. Allstate Ins. Co.*, 2005-CA-001893 (Ky. App. 2006).² The *McKenzie* case was decided in 2006. It was first cited by Allstate in its Petition for Rehearing. Allstate was a party to the *McKenzie* case and was represented by its present counsel. The

² Pursuant to Civil Rule 76.28(4)(c), a copy of this unpublished Opinion is attached as Exhibit A.

McKenzie case was not cited by Allstate before filing its Petition for Rehearing. *McKenzie* provides little, if any, support for Allstate's argument.

Compelling factual issues distinguish *McKenzie* from the present case. When coverage was first purchased in *McKenzie*, UIM coverage was explicitly rejected. *McKenzie*, pg. 2. Before each renewal in *McKenzie*, the insured received a written list of available coverages to review. *Id.*, pg. 3. Neither of these important facts are part of the evidence herein.

In addition to the factual issues, there is a significant legal issue. The *McKenzie* court did not examine the interplay between *Mullins* and KRS 304.20-040(13). Instead, the Court held that "Kentucky law does not recognize any affirmative duty on the part of the insurance agent to inform a policyholder of UIM coverage." *McKenzie*, pg. 7. *Mullins* was cited in a footnote to support the said finding. After finding that there was no duty, the *McKenzie* Court added in dicta that Form X4093-1 met the duty. Again, the court did not examine the wording of the form to determine whether it was adequate to meet a duty which was not recognized by the court. The unpublished Court of Appeals decision in *McKenzie* is not persuasive authority herein.

Allstate argues for a narrow and hyper technical reading of KRS 304.20-040(13). This Court initially examined the statute in *Mullins*. After quoting the statute, the Court explained:

With this statutory provision, insurance companies now are required to advise their insured of the availability of this protection in the first Notice of Renewal.

Mullins, pg. 256.

In the present case, the Court of Appeals followed this Court's instruction and found a statutory duty for Allstate to advise "Smith that his policy did not include UIM coverage, but that such coverage could be purchased for an additional premium." Opinion, pg. 12.

In *Mullins*, this Court applied a common sense interpretation of KRS 304.20-040(13). The General Assembly was concerned that consumers be informed that UIM coverage was available. The General Assembly had a legitimate concern that consumers could be unaware that UIM coverage was available. If a consumer was not aware of UIM coverage, he/she could not request it. To interpret the statute as Allstate argues would eliminate the need for an insurer to ever advise of the availability of UIM coverage.

Allstate asserts that the General Assembly had no concern that consumers be informed of the availability of UIM coverage. Instead, the General Assembly saw only a need that consumers be advised that additional coverage could be purchased. Allstate does not suggest why additional UIM coverage was a concern while basic UIM coverage was not.

The Hon. Judge Thomas Wine was accurate when he noted in the Court of Appeals decision herein that, "Allstate has made no argument that it ever gave Smith notice that UIM coverage could be purchased for an additional premium." Given Allstate's failure to articulate an argument that it met its duty, the Opinion by Judge Wine should not be disturbed.

In its first and primary argument herein, Allstate asserts that it had no duty to advise Smith that UIM coverage was available. Allstate's hardened position that it had

no duty undercuts its argument that it complied with its duty. Perhaps Allstate's inflexible position that it had no duty explains the woefully inadequate language of Form X4093-1. If Allstate truly understood its duty, it would have drafted language to advise its faithful customers, such as Smith, of the availability of such coverage.

C. SMITH'S PUNITIVE DAMAGES CLAIM SHOULD BE RESTORED

The Honorable Trial Judge did not give substantive consideration to Smith's punitive damages claim. He simply dismissed that claim because of his finding that Allstate had no obligation to pay UIM benefits. The Trial Judge held:

Further, as a result of the Courts (*sic*) finding above, no claim can be asserted for bad faith against Allstate by Smith and according (*sic*) remaining claims asserted against Defendant, Allstate, must be dismissed.

R., p. 350.

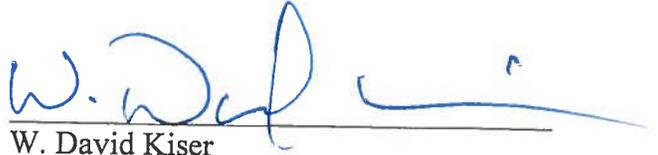
Smith respectfully requests this Court to instruct the trial court to reinstate Smith's punitive damages claim.

CONCLUSION

The Appellee, Craig Smith, respectfully requests the Court to hold that:

- (1) Allstate breached a duty owed by virtue of KRS 304.20-040(13) and/or by virtue of a course of dealing to advise Smith that optional coverage for UIM benefits was available and Smith is entitled to UIM benefits as a result of this breach,
- (2) Reverse the grant of summary judgment to Allstate,
- (3) Direct the trial court to enter summary judgment for Smith, and
- (4) Direct the trial court to reinstate Smith's punitive damages claim.

Respectfully submitted,



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