

SUPREME COURT OF KENTUCKY
2007-SC-0078-D
(2005-CA-2338)

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APPELLANT

DEBRA GILBERT

VS.

JEFFERSON CIRCUIT COURT
NO. 2002-CI-3761

PRIME INC., et al.

APPELLEES

BRIEF FOR APPELLANT, DEBRA GILBERT

Respectfully Submitted,

Sitlinger, McGlincy,
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CERTIFICATION

The undersigned hereby certifies a copy of the within was mailed to Mr. Gregory L. Smith, 6010 Brownsboro Park Blvd., Suite B, Louisville, Kentucky 40207 and Hon. Judith McDonald Burkman, Jefferson Circuit Court, Division Nine, 700 W. Jefferson Street, Louisville, Kentucky 40202, and Mr. Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, this 13th day of July, 2007.


Charles E. Theiler, II

INTRODUCTION

This is a case in which the insured Gilbert appeals from a judgment effectively holding that the prospective right of subrogation of the insurer, Nationwide, takes priority over the insured's right to the contractual benefits of her collision coverage.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant, Debra Gilbert, believes that the decision of this Court in this case will have far-reaching implications and for that reason submits that oral argument may be helpful to this Court in deciding the issues presented.

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STATEMENT OF THE CASE

The facts pertinent to this motion for discretionary review can be found in the order entered by the trial court granting Nationwide's motion for summary judgment. The trial court found the operative facts to be as follows:

Gilbert's daughter, Nicole Schindler, was involved in an automobile accident on May 22, 2000 with a tractor-trailer driven by defendant, Michael Baldanza, and owned by Prime, Inc. Gilbert was the owner of the vehicle driven by Schindler.

Schindler filed suit against Prime, Inc. Baldanza and Nationwide for bodily injury and underinsured motorist coverage from Nationwide. No claim for property damage was initially claimed.

Schindler settled her claims with Prime, Inc. on January 13, 2004. On July 29, 2004, Plaintiff Gilbert intervened in this action, claiming Nationwide failed to pay her property damage claim. Nationwide refused to honor her claim for several reasons, including that Gilbert failed to file her complaint for property damage until more than two years after the date of the accident, and that by her voluntary actions or inaction, Gilbert has prejudiced Nationwide's subrogation rights by failing to file suit against the tort-feasor within the statute of limitations. (T.R. 687-688; Appendix 2)

In her order entered July 26, 2005 granting Nationwide's motion for summary judgment, Judge Judith E. McDonald-Burkman held that Gilbert's failure to file suit against the tort-feasor within the two year statute of limitations under KRS 413.125 breached her duty to Nationwide to avoid prejudice to the subrogation rights of Nationwide. That opinion was designated final and appealable. (T.R. 687-688)

Movant's motion to reconsider was denied by the trial court by order entered October 12, 2005. (T.R. 687-688)

A timely notice of appeal was filed on November 9, 2005 preserving the issues raised herein on appeal. (T.R. 769-770)

ARGUMENT

THE PROSPECTIVE SUBROGATION RIGHT OF THE INSURER CANNOT TAKE PRIORITY OVER THE CONTRACTUAL RIGHT OF THE INSURED TO COVERAGE FOR COLLISION DAMAGE WHERE THE INSURER HAS MADE NO PAYMENT.

A. The Coverage Provision

Insurance is a contractual agreement between the insured and the insurer (the insurance company) that for payment of a premium the insurance company will indemnify the insurer for an insured against loss pursuant to the terms of the contract. Wheeler v. Hartford Acc. & Indem. Co., 560 S.W.2d 816 (Ky. 1970). The contract of insurance is a contract of adhesion and the insurance company is held strictly accountable for the terms of the insurance contract it prepared. Wolford v. Wolford, 662 S.W.2d 835, 838 (Ky. 1984); Wine v. Globe American Cas. Co., 917 S.W.2d 558, 564 (Ky. 1996).

The collision coverage provision in the Nationwide policy reads as follows:

We will pay for loss to your auto caused by collision or upset. We will pay for the loss less your deductible.

The meaning of this provision is clear. Nationwide becomes responsible at the time of the loss to pay for the loss to an insured's vehicle caused by collision or upset, less the insured deductible. There is no language in the policy which specifies the time in which the insured must make a claim under his insurance coverage.

B. The Subrogation Provision

Nationwide's policy does contain a subrogation provision, which reads as follows:

1. **We** have the right of subrogation under the:

a) PHYSICAL DAMAGE;

Coverages in this policy. This means that after paying a loss to **you** or others under this policy, **we** will have the **insured's** right to sue for or otherwise recover such loss from anyone else who may be liable. Also, **we** may require reimbursement from the **insured** out of any settlement or judgment that duplicates **our** payments. These provisions will be applied in accordance with state law. **Any insured** will sign such papers, and do whatever else is necessary, to transfer these rights to **us**, and will do nothing to prejudice them.

It is generally accepted that the insurance company's subrogation rights do not arise unless and until payment is made to its insured under the policy. Wine v. Globe American Cas. Co., supra. Nationwide itself acknowledges in its subrogation provision that it does not acquire the insured's right to sue until after it has paid the insured's covered loss. Nationwide's subrogation rights under its policy are derivative and the company acquires only such rights as its insured may have otherwise had to pursue recovery of the loss from a wrongdoer once it has made payment to its insured. Com. Dept. of Transp. v. All Points Constr. Co., 566 S.W.2d 171 (Ky. App. 1977). But, what happens if, as in this case, the insured chooses not to pursue a tort action against the wrongdoer, but rather chooses to pursue a claim under the contractual provisions of her insurance policy?

In this case, both the trial court and the Court of Appeals, relying upon Remedial System of Loaning v. New Hampshire Fire Ins. Co., 13 S.W.2d 1005 (Ky. 1929), held that Gilbert had a duty under the policy to avoid prejudice to the subrogation rights of Nationwide and that by failing to file suit against the tortfeasor within the two year statute of limitations provided for under KRS 413.125,

breached that contractual duty and therefore could not recover under a contractual claim against Nationwide for property damage. In Remedial, the insured made a decision to bring a tort claim against the tort-feasor. A settlement was reached with the tort-feasor and the insured gave the tort-feasor a complete release. The insured then attempted to proceed with a contractual claim under his insurance policy for some of the same elements of damage for which he had already given the tort-feasor a release. In Remedial @ p. 1006, the court held that when the insured gave the release to the tort-feasor, he extinguished the insurer's right of subrogation as against the tort-feasor, thereby relieving the insurance company of its obligations under the insurance contract. Indeed, *Couch on Insurance, Third*, speaks to the insured's impairment of insurer's subrogation rights. §224:72-224:75. *Couch* states: "The burden of preserving an insurer's subrogation rights is shared by an insurer and by an insured by way of the policy requirements". *Couch* @ p.224-94. *Couch*, in its discussion of the insured's impairment of the insurer's subrogation rights, speaks to what happens if the insured releases a claim before the loss and what happens if an insured releases after the loss. It does not speak to what happens to the insured's subrogation rights if the insured does not pursue a tort claim at all or if the insured does not pursue a tort claim within the statute of limitations applying to tort claims.

When an insured motorist carrying collision coverage under his automobile liability policy is involved in an accident, he has two choices as to how to proceed: (a) he can proceed with a tort claim against the wrongdoer; or

(b) he can proceed with a contractual claim under the collision coverage of his insurance policy. If he chooses to proceed with a tort claim against the wrongdoer, he must either settle that claim or, under Kentucky law, KRS 413.125, file within two years a lawsuit against the wrongdoer. If he chooses to file a lawsuit, he will likely incur attorney fees, costs and expenses. He will additionally subject himself to an uncertain outcome.

If he chooses to proceed with a contract claim under the collision coverage of his own insurance policy, he must, under the holdings of the trial court and the Court of Appeals, not only present that claim within two years of the date of loss, but he must also settle that claim within two years of the date of loss to insure that his insurance company's right of subrogation is protected.¹

Effectively, the trial court and the Court of Appeals have done what the court in Webb v. Kentucky Farm Bureau Insurance Company, 577 S.W.2d 17 (Ky. App. 1978), and the Court in Elkins v. Kentucky Farm Bureau Ins. Co., 844 S.W.2d 423 (Ky. App. 1993), said the insurance company itself could not do----it shortened the time in which the insured has to proceed with a contract claim under his policy for less than two years. Either the insured settles his claim within two years to give his insurance company time to pursue its subrogation rights under the contract or he forfeits his right to payment under the policy. Nowhere, however, in the Nationwide insurance policy does it say that its insured's have to make an election to proceed with a tort claim against the

American Premier Inc. Co. v. McBride, 159 S.W.3d 342, 346 (Ky. App. 2004) (noted that the insurer's subrogation accrues when the underlying negligent act occurred).

wrongdoers or a contract claim under his own insurance policy within two years or risk being denied coverage.

It has long been the law in Kentucky that limitations or restrictions on coverage must be set out in the contract in clear and unambiguous terms. Simon v. Continental Ins. Co., 724 S.W.2d 210, 212 (Ky. 1986). The insured, under his insurance policy, has a reasonable expectation of being paid under the policy for a covered loss. Under KRS 413.090(2), the insured would therefore have 15 years to proceed to bring an action on the policy. The trial court and the Court of Appeals have applied a two year statute of limitations. The Nationwide policy is silent as to when the property damage claim must be brought.

Kentucky courts have held that where the insurance company's rights are inimical to the rights of the insured, the insured's right under the insurance contract outweighs the insurance company's contractual rights. In Puckett v. Liberty Mutual Insurance Co., 477 S.W.2d 811 (Ky. 1971), the court held unenforceable an insurance policy provision requiring its insured to join the tort-feasor in an uninsured motorist action, while recognizing that by doing so the insurance company's right of subrogation might well be destroyed. In Coots v. Allstate Ins. Co., 853 S.W.2d 895 (Ky. 1993), the court recognized that the subrogation right of the insurance company is not absolute and held that when the subrogation right of the insurance company is inimical to the rights of the insured to recover under the policy, the right of the insured had priority so that the insured might realize the benefits of the coverage the insured had bought and paid for. Here, the insurer's rights under the contract are inimical to the


subrogation rights of Nationwide. Under Elkins, supra, the insurance company cannot, by the written terms of its contract, unduly or unreasonably restrict the insured's right to coverage by shortening the two year statute of limitations to file a lawsuit against the wrongdoer. To allow Nationwide to escape its contractual obligation by invoking the subrogation provision when Nationwide has not yet made a payment unduly and unreasonably restricts Gilbert's right to coverage.

CONCLUSION

Collision coverage is first part coverage. The statute of limitations governing insurance contracts is 15 years. By failing to clearly and concisely advise its insureds that a claim under the collision coverage of the Nationwide policy must be filed before the two year property damage statute of limitations runs, Nationwide has effectively limited the ability of its insureds to recover under the collision coverage of the policy, contrary to law and public policy. It is submitted that Debra Gilbert is entitled to the collision coverage she bought and paid for.

Respectfully Submitted.

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