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SUPREME COURT

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

DEBRA GILBERT

APPELLANT

VS.

JEFFERSON CIRCUIT COURT
NO. 2002-CI-3761

PRIME INC., et al.

APPELLEES

REPLY BRIEF FOR APPELLANT, DEBRA GILBERT

Respectfully Submitted,

Sitlinger, McGlincy,
Theiler & Karem



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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 28th day of September, 2007.



Charles E. Theiler, II

STATEMENT OF POINTS AND AUTHORITIES

Purpose of the Reply Brief.....1

Argument 2-3

Simon v. Continental Ins. Co,
724 S.W. 2d 210, 212 (Ky. 1986)3

Elkins v. Kentucky Farm Bureau Ins. Co.,
844 S.W.2d 423, 425 (Ky. App. 1993)3

Statement of Relief Sought4

Appendix5

PURPOSE OF THE REPLY BRIEF

The purpose of this Reply Brief is to address what Gilbert believes to be an incomplete and therefore misleading statement of facts and the conclusion of Nationwide that Gilbert has made no argument suggesting that the provision involved in the case at bar is in any way ambiguous or violates public policy.

ARGUMENT

Nationwide mistakenly concludes in its brief that Gilbert has made no argument suggesting that the provision involved in the case at bar is in any way ambiguous or violates public policy. This simply is not so. What Nationwide is attempting to do is to use the restrictive language of the subrogation provision to limit or bar Gilbert's right to the contractual benefits of her collision coverage. The competing rights of Gilbert, the insured, and Nationwide, her insurer under the policy, are brought sharply into conflict by language of the subrogation provision.

Gilbert claims that she has 15 years under KRS 413.090(2) in which to bring an action involving the benefits she is entitled to under her policy of insurance with Nationwide. Nationwide, invoking the subrogation provision of the policy, effectively claims that Gilbert must either resolve her collision claim under the policy within two years of the motor vehicle accident or file a property damage claim against the at fault party.

Nowhere, however, in the subrogation provision can there be found language which clearly and unambiguously supports Nationwide's position. Indeed, Gilbert was not told by Patricia Duvall, Nationwide's adjustor, that there was any time limit under the Nationwide policy in which she had to make her collision claim. (Duvall deposition, p. 33, Appendix 1). The claim was closed by Nationwide without having talked to Gilbert about whether or not she had accepted an offer from the claimant carrier intended to pursue a collisions coverage claim. (Duvall deposition, pp. 31, 32, Appendix 2). Nationwide has no written guidelines, policies or procedures to enable its own adjustors to determine when or under what circumstances a collision

claim is timely filed. (Duvall deposition, p. 37, Appendix 3). According to Carrie Goff, another of Nationwide's adjustors involved in this claim, a collision claim made at 11:59 P.M. on the two year anniversary date of the accident is not timely made because it does not give Nationwide time to investigate the claim. (Goff deposition, p. 76, Appendix 4). The time Nationwide would need to investigate the claim may vary from one year to months to years. (Goff deposition, p. 77, Appendix 4). Nationwide's own adjustors do not know what time limitations are paced on the collision coverage claim under the policy. The law in Kentucky requires 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) (Appendix 5). Clearly the Nationwide policy does not do so.

With respect to Nationwide's contention that Gilbert makes no argument that the subrogation provision violates public policy, Gilbert would point to her argument that the 15 year statute of limitations on a contract action applies where the Nationwide policy by clear and unambiguous language does not provide otherwise. Nationwide's attempt to shorten the statute of limitations using the subrogation provision of its policy is not a reasonable restriction, limitation or exclusion of Gilbert's contractual rights to her collision coverage. It is contrary to public policy. Elkins v. Kentucky Farm Bureau Ins. Co., 844 S.W.2d 423, 425 (Ky. App. 1993)(Appendix 6).

STATEMENT OF RELIEF SOUGHT

Gilbert respectfully submits that she is entitled to the collision coverage she bought and paid for. Gilbert seeks a ruling from this Court holding that Nationwide cannot escape its contractual obligation to pay a collision damage claim by invoking the subrogation provision, a provision which provides no time limitation on Gilbert's right to make that claim

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