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

ALLSTATE INSURANCE COMPANY — APPELLANT

vs.

APPEAL FROM THE JEFFERSON CIRCUIT COURT
HONORABLE IRVING MAZE
CIVIL ACTION NO. 09-CI-00399

CRAIG T. SMITH — APPELLEE

*** *** *** ***

BRIEF OF APPELLANT ALLSTATE INSURANCE COMPANY

*** *** *** ***

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Brief was on the 24th day of September, 2014 mailed to the below, as required by CR 76.12(6):

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INTRODUCTION

This case presents the issue of whether a motor vehicle insurance policy, in which the first renewal occurred prior to the enactment of KRS 304.20-040(13), was required to provide the notice required by this statute that "added . . . underinsured motorist coverage" was available for purchase. An additional second issue is whether a form provided with the Appellee's policy indicating that "addeditional . . . underinsured motorist coverage" was available for purchase provides the sufficient statutory notice–that being an issue over which two Court of Appeals panels have now reached opposite results.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Allstate Insurance Company has no objection to oral argument.

STATEMENT APPOINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellee here, Appellant below, and Plaintiff Craig T. Smith ("Smith") filed this case in the Jefferson Circuit Court in 2009 against Appellant here, Appellee below, and Defendant Allstate Insurance Company ("Allstate") asserting claims against it for breach of contract and declaration of rights as well as for punitive damages and bad faith regarding his assertion that he was entitled to underinsured motorist ("UIM") coverage. Record at 1-55. All of these claims rest on his assertion that UIM coverage was or should have been provided in the applicable Allstate Insurance Company Auto Insurance Policy ("Allstate Policy"), which is found in the Record at 181-228.

In response to Mr. Smith's claims, Allstate filed a Counterclaim asserting its own declaration of rights action. Record at 57-61. Thereafter, the extra-contractual bad faith and punitive damages claims were bifurcated and held in abeyance. Record at 149. Allstate took the deposition of Appellee Smith on June 9, 2009. See transcript of Deposition of Craig T. Smith of 6-9-2009 ("Smith Depo") in the Record.

Shortly thereafter, Mr. Smith moved for Summary Judgment seeking an adjudication on his declaration of rights and breach of contract claims. Record at 150-253. Allstate responded by filing its own Motion for Summary Judgment seeking adjudication of all underlying issues and, in the event that those issues were resolved in its favor, a resolution of the bifurcated extra-contractual claims as well. Record at 285-300.

In an Opinion and Order entered on October 8, 2009 (attached as *Exhibit 1*), the Jefferson Circuit Court overruled Appellee Smith's Motion for Summary Judgment and sustained Allstate's Motion for Summary Judgment, in its entirety. Record at 349-50. Since Allstate

prevailed on its Motion for Summary Judgment below, the following facts are provided in the most favorable light to Appellee Smith.

Factual Background

This case arises out of a March 16, 2006 motor vehicle accident in which Appellee Smith was involved and for which he asserts that the other driver was solely at fault. Smith Depo at 14 and Record at 1-55. The other driver's liability insurance carrier, Safe Auto Insurance Company, paid its $25,000 in bodily injury liability limits to Mr. Smith, but Mr. Smith has asserted that this sum was insufficient to compensate him for his injuries from this accident. Smith Depo at 68-69 and Record at 1-55.

Thus, Appellee Smith asserted the subject claim for UIM benefits to Allstate that Allstate denied based upon the fact that the Allstate Policy does not provide UIM coverage. This coverage is not listed on the Allstate Policy's declarations page, see Record at 186-89, nor did Mr. Smith pay a premium for this coverage. Affidavit of Diane Sisson in Record at 309-10. As the Allstate Policy's general terms make clear, "**a coverage applies only when a premium for it is shown on the declarations page**" (emphasis added). Record at 199 and relevant pages of Allstate Policy attached as *Exhibit 2*.

At of the time of his 2009 deposition, Appellee Smith had been an insured under the Allstate Policy for over thirty (30) years: thus, through numerous six-month renewals, this policy dates back to at least 1979. Smith Depo at 4-5 & 73. It is undisputed that he never requested that UIM coverage be provided under his policy. Smith's Response to Interrogatory 2 in Record at 311-13. Mr. Smith acknowledged receiving and reviewing each of the six-month renewals of his policy over the ensuing years–including the particular version of the policy that was in effect

at the time of the foregoing motor vehicle accident–and against which his demand for UIM benefits was asserted. Smith Depo at 37-40 & 44-47.

In accordance with the provisions of KRS 304.20-020, the Allstate Policy did provide uninsured ("UM") coverage in the Allstate Policy. However, since Mr. Smith never requested the purely optional UIM coverage, this coverage was not provided by the Allstate Policy.

Court of Appeals Decisions

After Jefferson Circuit Court (now Court of Appeals) Judge Irv Maze rendered the Opinion and Order sustaining Allstate's Motion for Summary Judgment and overruling Mr. Smith's own such Motion, Mr. Smith filed the instant appeal with the Kentucky Court of Appeals through a Notice of Appeal filed on October 19, 2009.

The Court of Appeals rendered its Opinion Reversing and Remanding on September 10, 2010 (attached as *Exhibit 3*). The Court carefully addressed each of the grounds raised by Appellant below and Appellee here Smith on his appeal. Mr. Smith made four arguments why the Circuit Court should be reversed. The Court of Appeals panel rejected the first three.

It rejected Mr. Smith's first argument that the Allstate Policy unambiguously provided UIM coverage, and the Court expressly found that this policy, in fact, did not provide such coverage. Opinion Reversing and Remanding at 2-4. Similarly, the Court rejected Mr. Smith's second claim that the Allstate Policy was ambiguous as to whether it provided UIM coverage, and it expressly found that this policy was not ambiguous at all. Id. at 5-6.

Mr. Smith's third basis for reversal contained his final two arguments relating to whether Allstate had a duty to advise him that UIM coverage was available. The first argument asserted that Allstate owed him a Common Law duty to advise him of the availability of this coverage due

to his long "course of dealing" and other interactions with the Allstate adjusters–per the law set forth by this Court's case of Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 248 (Ky. 1992). The Court of Appeals rejected this argument–finding that his thirty-two year history with Allstate agents did not rise to the level warranting such a duty. Id. at 6-9.

It was on the second argument that the Court of Appeals found merit. Id. at 9-12. Mr. Smith argued that KRS 304.20-040(13) imposed upon Allstate a statutory duty to advise him of the availability of UIM coverage. Id. The Court of Appeals rejected Allstate's argument that this statutory notice provision did not apply to the Allstate Policy, as the original version of this policy long predated the statute's enactment in 1990. It then stated that "Allstate has made no argument that it ever gave Smith notice that UIM coverage could be purchased for an additional premium," and it, thus, found that there was a genuine issue of material fact as to whether Allstate "breached its duty as imposed by KRS 304.20-040(13) to notify Smith that his policy did not include UIM coverage, but that such coverage could be purchased for an additional premium." Id. at 12.

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In fact, Allstate did provide the appropriate statutory notice through Form X4093-1 that was included in the Allstate Policy and in its predecessor versions. See *Exhibit 2* and Record at 192. This Court of Appeals panel apparently overlooked the existence of Form X4093-1 even though it was referenced in Allstate's Response Brief to the Court of Appeals at page 19. Given this failure, Allstate filed a Petition for Rehearing with the Court of Appeals on September 23, 2010 addressing this issue.

The Court of Appeals rendered a divided Order Denying Petition for Rehearing on

September 27, 2013 (copy attached as *Exhibit 4*). Significantly, the Court of Appeals' Chief Judge Acree dissented from this Opinion stating that he believed that form X4093-1 "did, in fact, satisfy the requirements" of KRS 304.20-040(13).

Waiver of Review by Appellee Smith of Arguments

Allstate then filed its timely Motion for Discretionary Review to this Court on October 21, 2013. Review was granted through an Order Granting Discretionary Review entered on August 13, 2014.

Notably, Plaintiff, Appellant below, and now Appellee herein Craig Smith failed to file a Cross-Motion for Discretionary Review, pursuant to CR 76.21, to preserve the three issues decided in Allstate's favor by the Court of Appeals for review by this Court. As this Court has stated, when a Motion for Discretionary Review is granted, it is incumbent upon the prevailing party in the Court of Appeals to file a timely Cross-Motion for Summary Judgment to preserve his right to argue issues that he lost in, or were not decided by, the Court of Appeals. Perry v. Williamson, 824 S.W.2d 869, 871 (Ky. 1992).

Consequently, Appellee Smith has waived his right to argue any of these issues, and the sole issues for to this Court to review relate to the applicability and coverage of KRS 304.20-040(13).

ARGUMENT

The Court of Appeals ruled correctly in its rejection of three of the four issues raised by Appellant below Smith in his appeal. It, however, erred in its conclusions regarding the fourth issue–regarding the applicability and coverage of KRS 304.20-040(13). It ignored the statute's plain meaning that its notification was only required to be given one time–on "first renewal." Furthermore, Chief Judge Acree's minority position finding that Allstate Policy Form X4093-1 satisfied the statute is in line with another unpublished Court of Appeals Opinion, authored by this Court's now-Chief Justice, McKenzie v. Allstate Insurance Company, et al., No. 2005-CA-001893-MR (copy attached as *Exhibit 5*)–that likewise found that this same form provided the notice required by this statute.

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 motorists, underinsured motorists, and personal injury protection coverages may be purchased by the insured [emphasis added].

The Court of Appeals below concluded that this statute "imposes upon insurers [the obligation] to advise an insured of the availability of UIM coverage." Rejecting Allstate's argument that this statute is inapplicable to the Allstate Policy, as its "first renewal" long predated the statute's enactment, the Court of Appeals agreed with Appellee Smith's argument that such an outcome would "turn the purpose of the statute 'on its head.'" There are two issues raised by the Court of Appeals' construction: (1) when does the notice required by the statute have to be given, and (2) what particular notice must be given?

In order to evaluate these issues, Kentucky's statutory construction law needs to be considered. Well-settled law provides that statutes are to be construed to "effectuate the plain meaning and unambiguous intent expressed by the law" and that the "literal" meaning of statutory terms is to be used, unless that would lead to "an absurd or wholly unreasonable conclusion." Com. v. Sears, 206 S.W.3d 309, 311 (Ky. 2006) and Cosby v. Com., 147 S.W.3d 56, 59 (Ky. 2004). The duty in statutory construction is to "give effect" to the intent of the legislature, and, to determine same, the statute must be viewed "as a whole." Bowling v. Lexington-Fayette Urban Co. Govt., 172 S.W.3d 333, 341 (Ky. 2005). That determination must, however, be made from the words employed and not from speculation about what the General Assembly may have intended but failed to include. Peterson v. Shake, 120 S.W.3d 707, 709 (Ky. 2003). Moreover, it is not appropriate to construe statutory terms so that they "become ineffectual or meaningless." Lewis v. Jackson Energy Co-Op Corp., 189 S.W.3d 87, 91 (Ky. 2005).

A. THE ALLSTATE POLICY IS NOT SUBJECT TO KRS 304.20-040(13)'S NOTICE REQUIREMENT BECAUSE ITS "FIRST RENEWAL" PREDATED THE STATUTE'S ENACTMENT IN 1990.

Turning to the first issue, the plain meaning of KRS 304.20-040(13) clearly and unambiguously indicates that its required notice must be given *only* on one occasion–at the "first renewal" of an insurance policy. The notice that must be given on that occasion is merely that "added" amounts of three different kinds of coverage, including UIM coverage, "may be purchased."

It is Allstate's position that the only proper reading of this language requires that, when the maximum limits for coverage have not been purchased, then this notice need be given only at

the "first renewal" of an insurance policy. Ignoring this language, the Court of Appeals below concluded that it must be given on other occasions as well–seemingly suggesting that it must be given with *every* renewal. Such a construction is clearly inconsistent with the statute's plain meaning.

Kentucky's Courts long ago recognized that each insurance policy is a separate contract that continues, as amended at each "renewal," until cancelled. MFA Mut. Ins. Co. v. Black, 441 S.W.2d 134, 135-36 (Ky. 1969) and Marcum v. Rice, 987 S.W.2d 789, 791 (Ky. 1999). Each renewal version of a policy itself constitutes sufficient notice of policy changes, even when those changes take away coverage that was previously provided. Marcum at 791-92. "Where the language of an insurance contract unambiguously explains the terms and conditions, no separate formal notification is required to effectuate a policy provision." Id.

Another long-standing rule of statutory construction is that prior judicial decisions on a subject are presumed to be known by the General Assembly when it enacts new legislation on the same subject. Rose v. Turner, 191 S.W.2d 397, 398 (Ky. 1945). Applying this rule in the present context, the General Assembly is presumed to have known about the foregoing construction of this Court when it enacted KRS 304.20-040(13) in 1990.

When this context is considered, the General Assembly's use of the terms "first renewal" would make no sense if it intended that the required notice be given at *every* renewal, as the Court of Appeals below seems to have concluded. The only reasonable reading of the General Assembly's language in this statute is that the term "policy" is intended to refer to a single contract of insurance from its inception, through all renewals, containing the same policy number. It is only in this context that the General Assembly's use of the word "first," in

reference to an insurance policy "renewal," makes sense. Thus, a "first renewal" of a policy is the first time that the policy re-issues after the term of coverage ends on the originally issued policy version.

This construction is confirmed by various sections of Kentucky's Insurance Code. For casualty insurance policies, this code requires that an insurer must, before the end of "the policy," mail or deliver the named insured a notice of a "renewal premium." KRS 304.20-035. The term "renewal" is defined as:

> The issuance and delivery by an insurer at the end of a policy period or term of a policy superceding a policy previously issued and delivered by the same insurer, or the issuance and delivery of a certificate of notice extending the term of an existing policy beyond its policy period or term.

KRS 304.20-310(1). The code then imposes limitations on an insurer from refusing to "renew a property or casualty insurance policy." KRS 304.20-320(3)(a).

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KRS 446.080(3) provides that "no statute shall be construed to be retroactive, unless expressly so declared." The 1990 creation of KRS 304.20-040(13) does not so provide. Thus, the clear legislative intent is that the notice required by this statute would not apply to policies of insurance that were already in effect and had reached their first renewals prior to its enactment.

Failing to consider KRS 446.080(3), the Court of Appeals incorrectly indicated that a different result was warranted from this Court's decision in Mullins. In Mullins, this Court was presented with a plaintiff's claim that he should have been advised that UIM coverage was available both as a matter of Common Law and as required by, as it was then denoted, KRS 304.20-040(12). Mullins at 246-47 & 249-50. As in the case at bar, he did not first raise this

issue until *after* he sustained serious injuries in motor vehicle accident. Id. at 246-47.

In rejecting the existence of a Common Law duty to advise, this Court explained that such a duty "would alter the expressed public policy of the Commonwealth established by the General Assembly on the dates the policy was issued and when injury occurred" (emphasis added). Id. at 249. Thus, the Court could have chosen one or both of these dates to justify its holding that the statute was inapplicable to the plaintiff's policy. This Court's choice to rely upon the latter date, by noting that the plaintiff's cause of action had not yet accrued when the statute was enacted in 1990, does not at all preclude a reliance on the former date, when the policy was "issued" prior to the statute's enactment. Id.

In the case of Appellee Smith's policy with Allstate, it is undisputed that its first renewal occurred long before KRS 304.20-040(13) was enacted in 1990–since the Allstate Policy dates back to the late 1970s and renews at six-month intervals. Thus, the notice required by this statute was not required to be given to Mr. Smith–since the enactment of this statutory provision was not retroactive.

For these reasons, this Court should confirm that the notice required to be given by KRS 304.20-040(13) does not apply to policies in which their first renewals predate its enactment. Such a confirmation would nullify the Court of Appeals' sole basis for reversing Judge Maze's grant of Summary Judgment.

B. ALLSTATE POLICY FORM X4093-1 PROVIDED THE NOTICE REQUIRED BY KRS 304.20-040(13) TO APPELLEE SMITH.

Regardless of whether KRS 304.20-040(13) applies to the Allstate Policy, the Allstate Policy contains Form X4093-1 that provides the exact notice required by this statute. Thus, for

The notice specifically provides the exact notice required by KRS 304.20-040(13) in that it advises insureds that "added" UM coverage, UIM coverage and PIP coverage may be purchased. The notice given is exactly what the plain wording of KRS 304.20-040(13) requires be given.

By concluding that the Allstate Policy Form X4093-1 does not provide the statutory notice, the majority of the Court of Appeals panels that looked at this issue were not only simply wrong, when the plain language of the form and statute are compared, but their decision conflicts with another decision from the Court of Appeals–the unpublished McKenzie Opinion written by now Kentucky Supreme Court Chief Justice, John Minton. Writing for a unanimous Court of Appeals panel, then-Judge Minton rejected an Allstate insured's claim in that case that it had failed to provide the notice required by KRS 304.20-040(13), by stating that:

> Kentucky law does not recognize any affirmative duty on the part of the insurance agent to inform a policyholder of UIM coverage [*citing* Mullins at 248]. Rather, it is the responsibility of the policyholder to **request** UIM coverage. [The Appellant] . . . cites no authority requiring an agent to put the policyholder on notice of UIM availability.
>
> In spite of this, Allstate did give . . . [the policyholder] notice of the availability of UIM coverage when it sent his renewal information every six months. Form X4093-1 in the [Allstate] policy renewal put the policyholder on notice by informing him of the opportunity to purchase higher limits for UM, UIM and PIP coverage [emphasis added].

McKenzie, Opinion Affirming of July 28, 2006, page 8 (*Exhibit 5*).[1]

Similarly, in the case at bar, Appellant Smith acknowledged receiving and reviewing the subject Allstate Policy version as well as its prior renewals every six months, including Form X4093-1. Smith Depo at 31-41. Specifically:

> Q: And then if you turn over to the next page, there is

[1]This 2005 unpublished opinion is cited pursuant to CR 76.28(4)(c), in part, as no published opinion specifically addresses whether Allstate Form X4093-1 provides the notice required by KRS 304.20-040(13).

something described as important notice.

A: Yes, sir.

Q: I'm assuming you would have read that when you got the policy; is that right?

A: Yes.

Q: It says you may purchase higher limits for UM, UIM and PIP. Do you see that?

A: Yes, sir
[emphasis added].

Smith Depo at 40-41 & Exhibit A to deposition.

Thus, Appellant Smith was notified, through Form X4093-1, that "additional uninsured motorist, underinsured motorists, or personal injury protection coverage" were available for purchase in exact compliance with the mandate of KRS 304.20-040(13) that was provided to him with the issuance of the renewal of his Allstate Policy that was in effect at the time of the subject accident. Thus, this fact as well warrants the reversal of the adverse portion of the Kentucky Court of Appeals Opinion below.

C. ALLSTATE IS ENTITLED TO THE DISMISSAL OF THE EXTRA-CONTRACTUAL CLAIMS AGAINST IT.

Since the Allstate Policy did not nor does it, for the reasons set forth, have to provide UIM coverage, the extra-contractual claims were properly dismissed by the Jefferson Circuit Court, as they are all derivative.

It is well-settled law that bad faith claims, such as the ones alleged below, are not viable "where a contractual obligation for coverage is lacking." National Ins. Co. v. Shaffer, 155 S.W.3d 738, 741-42 (Ky.App. 2004). Thus, absent a "contractual obligation to pay, . . . there is

simply no bad faith cause of action, either at common law or by statute." Davidson v. American Freightways, Inc., 25 S.W.3d 94, 100 (Ky. 2000).

Similarly, punitive damages claims are also derivative and cannot exist absent legal liability on the underlying claim out of which the basis for such claims arise. Williams v. Wilson, 972 S.W.2d 260, 263 & 268 (Ky. 1998) (abolition of underlying claim is the "ultimate limitation of damages") and Horton v. Union Light, Heat & Power, 690 S.W.2d 382, 388 (Ky. 1985) (punitive damages require the existence of "aggravating circumstances" to the underlying claim).

Since the Allstate Policy does not provide UIM coverage, the sole underlying foundation for Plaintiff Smith's punitive damages and bad faith claims does not exist, and these claims were properly dismissed by the Jefferson Circuit Court.

CONCLUSION

A published opinion is needed from this Court to, once and for all, confirm the applicability of the plain meaning of KRS 304.20-040(13) and to confirm that this statute is not retroactive. In so doing, this Court has the opportunity to eliminate the direct conflict between two unpublished Court of Appeals Opinions.

The plain and unambiguous meaning of this statute requires that its notice be given only once–at the "first renewal" of an insurance policy. The subject Allstate Policy has been in existence, by Mr. Smith's own admission, for over thirty (30) years and has been renewed at six-month intervals throughout that time. So, its first renewal occurred more than a decade before the 1990 effective date of the applicable statute. Consequently, Allstate had no obligation to provide the statutory notice to Appellee Smith. The Court of Appeals' opinion to the contrary

should, therefore, be reversed.

It should also be reversed because Allstate, nonetheless, did provide that notice with the subject renewal version of the Allstate Policy, as well as in previous versions, through Form X4093-1. Tracking the exact language of the statute, this form notified Mr. Smith that "additional" UIM coverage as well as the other specified coverages was available for purchase. The Court of Appeals previously concluded, in the McKenzie case, that the foregoing Allstate form completely satisfied this statute's notice provision.

With the reversal of these two adverse decisions and with the remaining issues in the Court of Appeals' Opinion below having been decided in Allstate's favor, the Jefferson Circuit Court's grant of a Summary Judgment in Allstate's favor in the underlying UIM claims will stated affirmed. That being the case, such action will also affirm the Jefferson Circuit Court's decision to dismiss all of the extra-contractual claims, including the bad faith and the punitive damages claims, asserted against Allstate as well, as they are derivative.

Wherefore, for the reasons set forth herein and any future opportunities to be heard, Appellant & Defendant below respectfully requests that this Court reverse the Court of Appeals' decisions on Craig Smith's two statutory grounds for relief under KRS 304.20-040(13) and affirm the remainder of the Court of Appeals' opinions that were all rendered in Allstate's favor below.

Respectfully submitted,

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