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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2013-000912

Omni Insurance Company, ... Appellant,

v.

Christopher Wright, ... Respondent.

FINAL BRIEF OF RESPONDENT

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II.

Does Mr. Barron's failure to ensure that his daughter Jennifer was listed on the policy as a named insured allow Omni to deny UIM coverage to respondent Wright?

COUNTERSTATEMENT OF THE CASE

Since the appellant begins its Statement of the Case by saying in the first sentence that it is entitled to win, the respondent is compelled to counterstate the case.

This action for a declaratory judgment was filed by Omni Insurance Company, the appellant herein, against Christopher Wright, the respondent herein, by summons and complaint filed June 15, 2011. Omni sought a declaration "that the Policy provisions [in question] limit the ability of Defendant [Wright] to bring a UIM claim where he has already brought a liability claim against the same Policy for the same damages arising from the same Accident . . . ." Omni further alleged that if its named insured, Anthony Barron, had included his daughter Jennifer as a named insured, Omni would have charged Mr. Barron a higher premium.

Respondent Wright answered with a general denial and counterclaimed seeking a declaration "that the defendant [Wright] is entitled to underinsured motorist coverage under [Omni's] policy of insurance . . . ."

Following a change of venue from Richland to Cherokee County, respondent's motion for judgment on the pleadings came on for hearing before the Honorable J. Mark Hayes, II, Presiding Judge of the Seventh Judicial Circuit, at the June 11, 2012 term of Court of Common Pleas for Cherokee County.

By order dated October 25, 2012, Judge Hayes granted judgment on the pleadings to the respondent, finding that Wright was an insured under the UIM provisions of the policy and that none of the three policy provisions relied upon by Omni defeated coverage. In its hearing memorandum, Omni characterized as "alternate sustaining grounds" for lack of UIM coverage its allegations relating to the policyholder's daughter. Although no such relief was sought in the prayer, Judge Hayes construed Omni's complaint to attempt to state a cause of action to void the policy. Judge Hayes found that the policyholder would be a necessary party to such an action. His Honor therefore dismissed the complaint without prejudice to Omni's right to seek cancellation in a fresh action, if so minded.

Omni moved on November 16, 2012 to alter or amend the Order of October 25, 2012. In response, Judge Hayes issued an amended order dated November 28, 2012, filed November 30, 2012, superseding the order of October 25, 2012. The amended order is identical to the original order with two exceptions. First, the amended order removed one of the findings regarding the wording of Part C2 of the Omni policy. Second, the amended order withdrew the holding of the original order dismissing Omni's complaint without prejudice to its right to file a fresh action for cancellation. His Honor found that an allegation that Omni would have charged a higher premium had it known of daughter Jennifer was no basis upon which to deny UIM coverage to respondent Wright.

Omni moved on December 18, 2012 to alter or amend the Order of November 28, 2012. Judge Hayes denied the motion by order dated March 19, 2013 and filed on March 21, 2013. Omni appealed.

STATEMENT OF FACTS

Respondent made a single claim against Omni and its insureds as shown by the Covenant Not to Execute [R. 173], not a liability claim followed by a subsequent UIM claim as Omni says in its brief. Respondent's single claim exceeded the total limits of liability and UIM coverages under the policy, *i.e.*, $50,000.00. In a covenant not to execute, Omni recited that "[Wright] alleges to have sustained substantial damages arising out of the above accident and [Wright] alleges that these damages will exceed the amount of liability insurance coverage and underinsured motorist coverage available to the Insured through the policy . . . ." [Covenant Not to Execute, p. 1, R.173.] In exchange for a covenant not to execute against its insureds, Omni tendered its liability limit of $25,000.00 and promised to pay its UIM limit if Wright were found entitled to UIM coverage. The covenant recited the fact that Omni agreed with Wright to file this declaratory judgment action "to determine the rights of the parties under the subject policy . . . ." [Covenant, p. 1, R. 173.]

Omni's second motion to reconsider, filed in response to the order of November 28, 2012 disposing of Omni's first motion to reconsider, did not differ materially from the first

such motion. [*Compare* Motion to Reconsider dated November 13, 2012, R. 95, *with* Motion to Reconsider dated December 18, 2012, R. 103.]

ARGUMENT

I.

None of the three policy provisions relied upon by Omni preclude underinsured motorist coverage to a third-party insured.

The circuit court's amended order of November 28, 2012 identifies the three policy provisions relied upon by Omni for denying UIM coverage to respondent Wright and explains why none of the three apply here.

Omni argues at length that since UIM coverage is voluntary, the carrier may limit such coverage as it wishes. This is true but irrelevant. Here, Omni has chosen not to reduce but to ***enhance*** its insurance product by extending UIM coverage to third-party passengers in the insured vehicle. [Policy, PART C2 – UNDERINSURED MOTORIST COVERAGE, INSURING AGREEMENT ¶ A(2), p. 14, R. 161.] Hence, Christopher Wright is an insured person under the UIM coverage. This much is not disputed. Rather, Omni's contention is that a liability claimant cannot also claim UIM protection, despite the fact that he is an insured under the UIM provisions. It would have taken a single sentence in this policy for Omni to provide that UIM benefits are not available to a liability claimant. Omni did not insert that sentence, nor do any of the three provisions relied upon by Omni have that effect.

The order of the circuit court thoroughly analyzes the three policy provisions relied upon by Omni and rejects the contention that any of the three preclude UIM coverage to an insured who also claims liability coverage. Respondent does not wish to burden the Court by repeating this analysis in detail, but rather invites the Court's attention to the amended order of November 28, 2012.

In two respects, however, the respondent does wish to supplement the circuit court's

rationale.

First, the court rejected Omni's claim that the "sum" referred-to in the UIM coverage, Part C2, page 15, of the policy [R. 161] is a single number, not the sum of two numbers. This provision limits UIM coverage as follows:

> LIMIT OF LIABILITY
> A. If bodily injury is sustained in an accident by any insured while occupying your covered auto . . . :
> 1. Our maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in that accident is the sum of the limits of liability shown in the Declarations for each person for Bodily Injury Liability Underinsured Motorists Coverage. [*sic*]

Part C2, page 15, R. 161. Capitalized terms in the policy are defined terms, as is always the practice in writing complicated contracts such as insurance policies. There is no such thing in this policy as a "Bodily Injury Liability Underinsured Motorists Coverage". Omni could not explain what it meant by the phrase "Bodily Injury Liability Underinsured Motorists Coverage" since that phrase appears nowhere in the policy, much less as a defined term. The circuit court reasoned that the provision only made sense if the word "and" were omitted from the phrase by typographical error. The intended meaning must have been "Bodily Injury Liability [and] Underinsured Motorists Coverage". The provision would then mean that Omni's limit for all damages "is the sum of the limits of liability shown in the Declarations for each person for Bodily Injury Liability [and] Underinsured Motorists Coverage." Instead, Omni argued that "sum" means a single "amount". If the word "sum" were intended to mean a single "amount," no competent insurance draftsman — and Omni's is certainly that — would word this provision to say that the limit of liability for all damages "is the [single amount] of the limits of liability shown in the Declarations for each person for Bodily Injury Liability Underinsured Motorists Coverage." The word "amount" would contradict the prepositional object to which "amount" refers: ***limits***. No insurance policy would use the plural word "limits" to refer to the **limit** of a single coverage. The draftsman would simply say that the limit of liability for all damages "is the limit of liability

shown . . . ," etc. The word "sum" means — and can only mean — the amount resulting from the addition of two numbers. This is so because this provision states that the ***limit*** — singular — of total coverage is the sum of the ***limits*** — plural. If the word "sum" meant a singular amount, not the combination of two addends, then the prepositional object of the word "sum" could only be the singular, "limit," not the plural, "limits". This is not a grammarian's analysis. This is common sense.[1]

Even if this provision were thought to be uncertain, there is no doubt as to how that ambiguity would be resolved. It would be resolved in favor of the insured, Mr. Wright. Among the scores of cases so holding are *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 167 S.E.2d 420, 423 (1969); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455, 459 (2004); and *Poston v. National Fidelity Life Ins. Co.*, 303 S.C. 182, 187, 399 S.E.2d 770, 772 (1990).[2]

The second point upon which the respondent wishes to expand upon the circuit court's analysis is Omni's contention that UIM payments to Wright would "duplicate" payments already made under the liability coverage of Part A of the policy. Each of the five parts of Omni's policy — a separate part for each type of coverage — contains some variation of the boilerplate provision that payments made under this Part shall not duplicate payments "for the same elements of loss" made under another Part. For example, if Omni

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[1] The typographical error discerned by the circuit court in Part C2, the UIM coverage, is not the only one. Line 11 of the INSURING AGREEMENT on page 14, R. 161, reads: "**Insured** as used in this Part means". By typo the letter "**B.**" is omitted. The line was intended to read: "**B. Insured** as used in this Part means". *See* the corresponding provisions of Part A on page 3 [R. 155], Part B on page 6 [R. 167], and Part C1 on page 8 [R. 158]. Omitting the letter-number of the paragraph then misnumbers the subparagraphs which follow.

[2] Even if this principle of insurance law did not apply, the result would be the same. Ambiguity is resolved by discerning the intent of the parties from their agreement as a whole, not from an isolated phrase. *State Accid. Fund v. South Carolina Second Injury Fund,* 388 S.C. 67, 75, 693 S.E.2d 441, 445 (Ct. App. 2010). The word "limit" appears in this policy approximately 120 times. The plural — "limits" — appears approximately 20 times. Each use of the singular refers appropriately to a single limit, and each use of the plural refers appropriately to more than one limit.

has paid medical expenses under Part B — Medical Payments Coverage — then a liability claim or a UM claim or a UIM claim which includes a demand for the same medical expenses is not allowed because it would duplicate a payment already made.

Omni's argument depends entirely upon its contention that it paid Wright the limit of its liability coverage, whereupon he submitted an identical claim under the policy's UIM provisions. This is not what happened. Omni's own Covenant Not to Execute recites what happened. Omni stipulated with Wright in its Covenant Not to Execute that his damages claim exceeded the total of liability and UIM coverage under this minimum-limits policy. [R. 173, fourth paragraph.] Payment of $50,000 will not extinguish his damages claim, as Omni agreed in the Covenant. A dollar paid under the UIM Part will not "duplicate" any dollar paid under the liability Part.[3]

This is a case of simple contract interpretation. The dozens of cases cited by Omni upholding a carrier's right to reduce and diminish UIM coverage are irrelevant. Omni chose here to expand its insurance offering, not to reduce it. Wright is an insured under the UIM part of the policy. Nothing anywhere in the policy provides that UIM coverage is withdrawn from a UIM insured who also makes a liability claim under the policy.

II.

Omni's "alternate sustaining ground" of fraud by its named insured provides no basis to deny UIM coverage to Wright.

Omni alleged that its policyholder, Mr. Barron, did not cause his daughter Jennifer to be listed as a named insured under the policy. [Amended complaint, ¶¶ 7, 10, 11, 42, 43; R. 40, 44.] The complaint contained no allegation that Omni had asked the policyholder anything about resident relatives or anything else, and no allegation that the policyholder was required to list his daughter as a named insured when the policy was

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[3] This "duplicate payments" provision is the only one of the three relied upon by Omni which deals with UIM coverage. The other two deal exclusively with liability coverage, as the circuit court pointed out.

applied for and issued.[4] Omni did not allege that the policyholder's failure to do whatever it was that Omni contends he should have done was fraudulent. Omni did not allege that the policy or any coverage thereunder was void for fraud, or that it would not have issued the policy had it known — only that it would have charged a greater premium had Jennifer been made a named insured. Omni made no reference to these allegations in its demand for relief. [Amended complaint, p. 6, R. 44.] In its memorandum opposing Wright's motion for judgment on the pleadings, Omni stated:

> As noted *supra,* this is not a circumstance where Omni is seeking to deny coverage to the very people who paid the premiums and obtained the Policy. Nor is this an instance where Omni is seeking to avoid coverage entirely, as Omni has already paid its Policy limits. This is simply an instance where Omni seeks to uphold the Policy as it is written, which limits Defendant's ability to assert duplicate claims against a Policy that is not his own for damages arising from the same incident.

[Memorandum at last page, R. 94.]

Construing the complaint liberally, the circuit court found that it would be possible to read the complaint as alleging that the policy was void for fraud, even though this was not relief to which the pleader supposed itself entitled. *Cf. Mr. G v. Mrs. G,* 320 S.C. 305, 311, 465 S.E.2d 101, 105 (Ct. App. 1995) ("[A] decision to grant a Rule 12(b)(6) motion to dismiss cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case, even though different from that on which the plaintiff may have supposed himself entitled to recover."). The circuit court therefore dismissed the complaint without prejudice insofar as it could be

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[4] Omni contends in its brief that Mr. Barron should have listed Jennifer as a **driver** of the insured vehicle, but Omni's complaint alleges only that he failed to make her a **named insured**. [Amended cpt., ¶¶ 7, 10, 11 & 42.] "Driver" is an undefined term in this policy. It appears only on the declarations page, where it has no contractual significance. The term is a mere "d*escriptio personae,* that is, a term descriptive of the person rather than the relationship in which he signs the agreement." *Klutts Resort Realty Corp. v. Down'Round Devel. Corp.,* 268 S.C. 80, 87, 232 S.E.2d 20, 24 (1977). If Omni intended to allege that Mr. Barron had misrepresented something about Jennifer on his insurance application, and that Omni intended to cancel any coverage as a result, it surely would have alleged as much and would have attached a copy of the application instead of the dec page.

read to allege a ground for cancellation. The court found that the policyholder, Mr. Barron, would be a necessary party to any action to cancel his policy.

In its first motion to reconsider, Omni claimed that the UIM coverage — not the entire policy but the UIM coverage — was void by reason of policyholder fraud. [R. 99–100.] Omni made it clear that it had no intention to file a fresh action seeking cancellation of the UIM coverage and denied that its policyholder was a necessary party to Omni's claim that he had defrauded it and that a portion of his policy was void.[5] [R. 99.] The circuit court thereupon issued the amended order of November 28, 2012, withdrawing the opportunity to file a fresh action including Mr. Barron as a party, and found that the allegations of the amended complaint concerning the failure to include Jennifer as a named insured provided no basis to cancel the UIM coverage. [R. 22–32.]

The circuit court's holding is correct for several reasons. First, Omni fails to allege any factual basis for a *duty* on the part of Mr. Barron, its policyholder, to cause his daughter Jennifer to be included along with him as a named insured. Second, Omni does not allege that it would not have issued the policy, had Jennifer been included as a named insured. On the contrary, it alleges merely that it would have charged a greater premium. The only possible relief available to Omni on these allegations would be entitlement to recover from its policyholder the difference between the premium which it says it would have charged, had it known of Jennifer, and the premium which it did charge in ignorance of her. Third, Omni fails to allege that Mr. Barron's failure to do whatever it is that he is supposed to have done was fraudulent.

> It has long been the law of this state that in order to void a policy of insurance on the ground that fraudulent representations were made in the procuring of such policy, the burden of proof rests upon the insurer to show, by clear and convincing evidence, not only that the statements complained of were untrue, but in addition thereto that their falsity was known to the applicant, that they were material to the risk, were relied on by the insurer,

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[5] This position is consistent with Omni's failure in its amended complaint to demand an order cancelling UIM coverage. Omni offered its allegations regarding daughter Jennifer as what it called "alternate sustaining grounds" [Memorandum, p. 25, R. 91] — a device unknown to the trial practice.

> and that they were made with intent to deceive and defraud the company. *Smiley v. Woodmen of the World,* 249 S.C. 461, 154 S.E.2d 834 (1967); *Hood v. Security Ins. Co. of New Haven,* 247 S.C. 71, 145 S.E.2d 526 (1965); *Small v. Coastal States Life Ins. Co.,* 241 S.C. 344, 128 S.E.2d 175 (1962); *Metropolitan Life Ins. Co. v. Bates,* 213 S.C. 269, 49 S.E.2d 201(1948).

Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002). Omni's amended complaint fails to allege any of these elements of fraud. Fourth, Omni stated that it had no intent to deny UIM coverage to its policyholder, Mr. Barron.[6] Omni sought only to deny such coverage to respondent Wright. Presumably, if Mr. Barron had sought to avail himself of UIM coverage during the life of the policy, he would have gotten it. Omni contended that Mr. Barron's failure to make Jennifer a named insured deprives Mr. Wright, but not Mr. Barron, of UIM coverage. This makes no sense.[7]

For all these reasons the fact that Jennifer is not listed on this policy as a named insured is immaterial to the question of UIM coverage in favor of Mr. Wright.

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[6] For example: ". . . the Barron family has UIM coverage in the amount they opted to purchase . . . ." [Appellant's Brief at 4.]

[7] But Omni told the circuit court at one point in contradictory fashion: "Omni's intent is to void voluntary UIM due to fraud by the failure of the named insured to identify [Jennifer] as a driver . . . ." [Second Motion to Reconsider, p. 4, R. 107.]

CONCLUSION

Omni extended UIM coverage to passengers in the insured vehicle, and did not disclaim UIM coverage to a passenger also asserting a liability claim.

Omni failed to allege anything which would allow it to cancel the UIM coverage.

For these reasons, the respondent asks the Court to affirm.

Respectfully submitted,

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December 30, 2013.

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CERTIFICATE OF COUNSEL

I certify that respondent's final brief complies with Rule 211(b), SCACR.

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January 8, 2014.