

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

The Hon. Paul M. Burch, Circuit Court Judge

Case No. 14-CP-26-6382

Appellate Case No. 2015-001827

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MAR 07 2016

SC Court of Appeals

Erie Insurance Exchange.....Respondent

v.

Government Employees Insurance Company, Mark Allison Scoggin and Angela Bennett Hill, Defendants,

Of which Government Employees Insurance Company is.....Appellant

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Petitioner, GEICO, adopts and incorporates by reference the Statement of Case and Facts presented in its opening brief.¹

ARGUMENT

I. ERIE'S ARGUMENT THAT THE TWO GEICO POLICIES ARE "IDENTICAL" THUS WARRANTING IDENTICAL COVERAGE DETERMINATIONS UNDER BOTH IS ERRONEOUS.

In its brief Erie Insurance Exchange ("Erie") repeatedly posits, erroneously, that the GEICO policy purchased by Mildred Scoggin (Policy No. 0929-32-50-09) covering her Ford Taurus carrying bodily liability limits of \$50,000.00/\$1000,000.00 and the GEICO policy purchased by Mark Scoggin (Policy No. 4085-57-17-45) covering his 2005 Chevrolet Colorado carrying liability limits of \$25,000.00/\$50,000.00 are "identical." (See Brief of Respondent pp. 9-15.) Based upon this false premise, Erie proposes, incorrectly, that GEICO's determination that the accident involving Mildred Scoggin's owned vehicle is covered under Mildred Scoggin's liability policy should be binding on GEICO as to coverage under Mark Scoggin's liability policy. (See *id.*) This argument fundamentally ignores what actually constitutes an insurance policy and how policies are to be interpreted.

An automobile insurance policy is "a policy or contract for bodily injury or property damage liability insurance issued or delivered in this State covering liability arising from the ownership, maintenance, or use of any motor vehicle, insuring as the named insured *one individual* or husband and wife who are residents of the same

¹Similarly, GEICO adopts and incorporates by reference all arguments raised in its opening brief. In the interests of brevity, GEICO presents the arguments in this reply brief as a limited reply to certain, discrete issues presented in Erie's brief.

household, and under which the insured vehicle designated in the policy is either...a motor vehicle...or...any other four wheeled vehicle... ." S.C. Code Ann. § 38-77-30(10.5) (*emphasis added*). In other words, by statute an automobile insurance policy is one which insures a named insured and a designated motor vehicle. It "is a contract *between the insured and the insurance company*," which is to be "construed according to the law of contracts." Williams v. Gov't Emps. Ins. Co., 409 S.C. 586, 762 S.E.2d 705, 709 (2014) (*emphasis added*). The insuring contract between the insurer and the insured comprises the application, the policy, and the declarations page. *Id.*, 762 S.E.2d at 711.²

Simply because both policies contain the same definitions, exclusions, etc., does not render the policies identical. Under Mildred Scoggin's policy, she is the named insured and her Ford Taurus – the vehicle Mark Scoggin was operating at the time of the accident – is the designated insured vehicle. (See Stipulation of Facts Ex. A; Ex. E p. 3 (definitions of "insured," "owned auto," and "you").) On the other hand, under Mark Scoggin's policy, he is the named insured and his Chevrolet Colorado truck is the insured vehicle. (See Stipulation of Facts Ex. B; Ex. E p. 3 (definitions of "insured," "owned auto," and "you").) The two GEICO policies at issue cover different insureds and different designated vehicles, constitute completely separate insuring contracts, and are thus different policies as a matter of fact and of law. It does not follow, therefore, that GEICO should be compelled to reach the same coverage determinations under both policies.

²Section V, paragraph 12 of both policies provides: "By accepting this policy, you agree that...(c) this policy, along with the application and declaration sheet, embodies all agreements relating to this insurance." (Stipulation of Facts Ex. E ("Declarations").) See Williams, 762 S.E.2d at 711 (considering identical provision and holding that "by its terms, the policy, along with the application and the Declarations, constitute the entire agreement between the [insureds] and GEICO").

In the coverage agreement (“Losses We Will Pay For You Under Section 1”), GEICO agrees to provide liability coverage for “damages which an insured becomes legally obligated to pay because of...bodily injury...arising out of the ownership, maintenance or use of the owned auto or non-owned auto.” (Stipulation of Facts Ex. E p. 4.) An owned auto is, in pertinent part, “a vehicle described in this policy for which a premium charge is shown for these coverages... .” (*Id. (emphasis added)*.) By its very terms, therefore, any determination as to whether coverage for a particular claim exists must begin with reference to the particular policy being analyzed.

Here, it is undisputed that Mark Scoggin was operating his mother’s Ford Taurus at the time of the accident. Because that Ford Taurus was, in fact, described in Mildred Scoggin’s policy (i.e., listed on the declarations page) for which a premium was charged, the vehicle was an “owned auto” under the express terms of Mildred Scoggin’s policy. GEICO, therefore, appropriately determined that coverage existed under her policy, and accordingly tendered the policy limits to the injured claimant in exchange for a covenant not to execute. (*Id.* ¶¶ 10, 16.)

According to Erie, GEICO should be compelled to reach the same conclusion with regard to Mark Scoggin’s policy. This is factually and logically nonsensical. Erie – itself an insurance carrier – cannot be seriously suggesting that Mildred Scoggin’s Ford Taurus should be deemed an “owned auto” under Mark Scoggin’s policy simply because it was an “owned auto” under Mildred Scoggin’s policy. Mildred Scoggin’s Ford Taurus was not a vehicle described in Mark Scoggin’s policy for which a premium was charged; therefore, it is not, and cannot be, an “owned auto” as to Mark Scoggin’s policy – which is the policy at issue and upon which the coverage determination must be made. *See* S.C.

Code Ann. § 38-77-30(10.5) (“policy” requires that “the insured vehicle designated in the policy” be a motor vehicle (*emphasis added*)). The only “owned vehicle” under Mark Scoggin’s policy was a Chevrolet Colorado which was not involved in the accident.

In addition to agreeing to coverage for an “owned auto,” the coverage agreement provides that coverage will be afforded for “damages which an insured becomes legally obligated to pay because of...bodily injury...arising out of the ownership, maintenance or use of the...non-owned auto.” “Non-owned auto” is defined as “a private passenger...auto...not owned by or furnished for the regular use of either you or your relatives, except a temporary substitute auto.” (Stipulation of Facts Ex. E1 p. 1.) Here, it is undisputed that the Ford Taurus was owned by Mildred Scoggin, Mark Scoggin’s mother. Since the vehicle was owned by Mark Scoggin’s relative, it cannot be a “non-owned auto” under the plain, unambiguous language of Mark Scoggin’s policy – which, again, is the policy at issue.³ See Schulmeyer v. State Farm Fire & Cas., 353 S.C. 491, 579 S.E.2d 132, 134 (2003) (clear and unambiguous policy “language alone determines the contract’s force and effect”); Beaufort County Sch. Dist. v. United Nat’l Ins. Co., 392 S.C. 506, 709 S.E.2d 85, 90 (Ct. App. 2011) (parties intentions are “determined by the contract language”); B.L.G. Enterprises, Inc. v. First Fin. Ins. Co., 334 S.C. 529, 514 S.E.2d 327, 330 (1999) (policy is to “be construed according to the terms the parties have

³There is no argument or evidence that Mark Scoggin was driving the Ford Taurus as a “temporary substitute auto” because his “owned auto” was “withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.” (See Stipulation of Facts Ex. E (definition of “temporary substitute auto”); see also Deposition of Mark Allison Scoggin p. 11, ll. 15-25 (testifying that he was using the vehicle because it was equipped with a dog seat to transport his mother’s dog).)

used"). It is utterly irrelevant that GEICO reached a different conclusion with regard a different policy.⁴

GEICO, therefore, appropriately determined that the Ford Taurus being operated by Mark Scoggin at the time of the accident was neither an "owned auto" nor a "non-owned auto" under Mark Scoggin's policy, and properly denied coverage.

II. WHETHER THE FORD TAURUS WAS AVAILABLE FOR MARK SCOGGIN'S "REGULAR USE" IS IRRELEVANT.

Erie argues, erroneously, that "[o]ne of the key's [*sic*] to GEICO's denial is whether the Mildred Scoggin vehicle was furnished for Mark's regular use." (Brief of Respondent p. 13.) It goes on to argue that it was not so furnished for his regular use. (*Id.*, pp. 13-14.) Erie's argument on this point is, ultimately, irrelevant.

While it is certainly reasonable to infer from Mark Scoggin's deposition testimony that he took his mother's car because "[s]he had a dog seat set up in her car for her little dog and I had to take the dog every time you went out or he'd pitch a fit" and that "I always took the dog with me on my short trips" that he made regular, as opposed to sporadic, use of the vehicle, it is irrelevant ultimately. Under the plain, express terms of his policy with GEICO, a "non-owned auto" is "a private passenger, farm, or utility auto or trailer not owned by *or* furnished for the regular use of either you or your relatives, other than a temporary substitute auto." (*Emphasis added.*) Thus, if the vehicle

⁴Exhibits E and E1 to the Stipulation of Facts are the body of GEICO's automobile insurance policies setting forth the coverage agreements, definitions, exclusions, etc., common to all South Carolina family automobile insurance policies. Erie argues that since these policies contain the same definitions, exclusions, etc., they must be, and are, identical to one another, named insured and designated insured vehicles notwithstanding. Carried to its logical conclusion, Erie's position is that any vehicle insured by GEICO in South Carolina is covered by every other policy written by GEICO in South Carolina since all of those policies are "identical." (One supposes that this would hold true for all insurers, including Erie, and their common policy provisions.)

is one which is owned by Mark Scoggin or his relative, OR which is furnished for the regular use of Mark Scoggin or his relative, it does not qualify as a “non-owned auto.” Either condition is sufficient – both are not required. *See Brewer v. Brewer*, 242 S.C. 9, 129 S.E.2d 736, 738 (1963) (use of “or” indicates “a disjunctive particle that marks an alternative,” and “imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both”). Here, it is undisputed that the Ford Taurus Mark Scoggin was operating at the time of the accident was owned by his mother, a relative. The vehicle is, therefore, not a “non-owned vehicle” under Mark Scoggin’s policy, regardless of its availability for his regular use.

III. THE “OTHER INSURANCE” CLAUSE OF THE POLICY IS INAPPLICABLE AND DOES NOT CREATE AN AMBIGUITY.

Erie maintains that since the “Other Insurance” clause of the policy refers to “a vehicle you do not own” as opposed to a “non-owned auto,” it creates an ambiguity which must be resolved in favor of coverage. (Brief of Respondent pp. 12-13, 15-18.) Erie’s argument, like the circuit court’s order, both misinterprets the effect and purpose of “other insurance” clauses generally, and ignores the complete, plain language of the specific “other insurance” clause at issue.

“Other insurance” clauses such as the one at issue “are intended to apportion an insured loss between or among insurers *where two or more policies offer coverage of the same risk and same interest* for the benefit of the same insured for the same period.” South Carolina Ins. Co. v. Fidelity and Guar. Ins. Underwriters, Inc., 327 S.C. 207, 489 S.E.2d 200, 202 (1996).⁵ They set the priority of coverages between and among

⁵Erie refers to the “other insurance” clause at issue as an “excess coverage” clause. While this particular “other insurance” clause does indeed contain an “excess clause,” it does not provide for “excess coverage.” The “excess clause” at issue is merely

applicable policies which afford coverage for the same loss. *See id.*; Bardsley v. Gov't Emps. Ins. Co., 405 S.C. 68, 747 S.E.2d 436, 443 (2013); Horace Mann Ins. Co. v. General Star Nat. Ins. Co., 514 F.3d 327, 330 (4th Cir. 2008) (where “multiple insurance policies may cover a given loss,” other insurance clauses attempt to define responsibilities). “Other insurance” clauses do not, however, create coverage where none exists as their applicability presupposes the applicability of coverage by “two or more policies.” *See South Carolina Ins. Co., supra*, 489 S.E.2d at 202 (clauses “are intended to apportion an insured loss between or among insurers where two or more policies offer coverage of the same risk”). Here, since, for the reasons discussed above and in GEICO’s opening brief, the loss is not one covered under Mark Scoggin’s policy, the “other insurance” clause is inapplicable as there are not two policies which provide coverage for the same loss.

Moreover, Erie’s argument that an isolated phrase – “a vehicle you do not own” -- in an inapplicable provision creates an ambiguity is unavailing and should be rejected. “An insurance contract is read as a whole document so that ‘one may not, by pointing out a single sentence or clause, create an ambiguity.’” Beaufort County Sch. Dist., supra, 709 S.E.2d at 90 (*quoting Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 225 S.E.2d 344, 348 (1976)). “The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract.” Schulmeyer, supra, 579 S.E.2d at 134. The “other insurance” clause of Mark Scoggin’s policy

“the most common kind of ‘other insurance’ clause, [which] provides that a policy will cover only amounts exceeding the policy limits of other insurance covering the same risk to the same property.” *Id.*, 489 S.E.2d at 204. It is in no way a promise of excess liability coverage.

provides, in its entirety: “If the insured has other insurance against a loss covered by Section I of this policy, we will not owe more than our pro rata share of the total coverage available. Any insurance we provide for losses arising out of the ownership, maintenance or use of a vehicle you do not own shall be excess over any other valid and collectible insurance.” (Stipulation of Facts Ex. E p. 5 (*emphasis added*.) By its plain, unambiguous language, this clause presents an unmistakable conditional statement: if there coverage for a loss under this policy and another policy, then the coverage under this policy is excess. Here, there is no coverage under Mark Scoggin’s policy, therefore the condition precedent fails and the “other insurance” clause is inapplicable.⁶ Erie’s arguments should, therefore, be rejected.

IV. ERIE’S ARGUMENTS FOR AN AWARD OF ATTORNEY’S FEES ARE UNAVAILING.

Erie’s justifications for an award of attorney’s fees are factually erroneous and legally insupportable, and should be rejected.

First, Erie’s statement that GEICO has “continued to fail and refuse to defend its insured” is contrary to the stipulated facts. (Brief of Respondent p. 22.) The parties

⁶Erie also lists other supposed ambiguities in the policy, most notably that the policy coverage agreement and definitions conflict with the declarations page because the declarations page affords policy limits of \$25,000.00/\$50,000.00 without reference to “owned auto,” “non-owned auto,” or other policy definitions and limitations. (See Brief of Respondent pp. 15-18.) Similar arguments were rejected by the Supreme Court in Williams, *supra*, which held that parts of an insurance contract, including the declarations page, cannot be read in isolation but must be considered as a whole. See 762 S.E.2d at 710-11. Again, Erie – as an insurance carrier – is most certainly not suggesting that where a policy declarations page provides for policy limits in a stated amount, all other provisions of the policy which may otherwise limit, define, or exclude coverage are of no effect. If this argument is accepted, the insuring agreement will hereafter be limited to a declarations page, rather than the declaration page, policy, and application as has been repeatedly held by the courts of this State. See *id.*

expressly stipulated that “GEICO has defended Hill’s lawsuit under the Mildred Scoggin policy... .”⁷ (Stipulation of Facts ¶ 10.)

Second, Erie’s argument that it is fulfilling GEICO’s duty to defend Mark Scoggin is equally factually erroneous and legally unsupported. Not only has GEICO defended Mark Scoggin under his mother’s policy, but in appearing in the underlying tort action, Erie, as UIM carrier, is representing its own interests, not those of Mark Scoggin (who, by virtue of the covenant not to execute has no further personal, financial interest). *See* S.C. Code Ann. § 38-77-160 (UIM carrier may assume “defense of action for its own benefit”); *see also* Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46, 48 (1995) (“Although the UIM carrier ‘steps into the shoes’ of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist”). In fact, contrary to Erie’s claim that it is providing Mark Scoggin with a defense, its attorney does not represent Mark Scoggin but instead represents Erie. *See* Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204, 209 (Ct. App. 2003) (“the attorney for the UIM carrier represents the carrier and not the named defendant”). There is no statute, rule, contractual provision, or equitable reason⁸ why GEICO should be ordered to pay Erie’s attorney’s fees for having

⁷Moreover, by virtue of GEICO’s payment of the policy limits under Mildred Scoggin policy, Hill executed a covenant not to execute in Mark Scoggin’s favor fully protecting him from personal liability. (*See* Stipulation of Facts ¶¶ 10, 16.)

⁸Erie contends that its claims in this case are in the nature of equitable indemnity. There is no such claim expressly, or even implicitly, pled. (*See* Complaint.) Nor do the parties – GEICO as purported liability carrier and Erie as UIM carrier -- stand in such special relation to one another so as to support a claim for equitable indemnification, even were such a claim pled. McCoy v. Greenwave Enters., Inc., 408 S.C. 355, 759 S.E.2d 136, 138 (2014) (plaintiff must establish existence of special relationship between parties to support claim for equitable indemnification).

an attorney represent its own interests in a tort action in which it was properly included as a purported UIM carrier.⁹

Third, even if there was indeed an attorney-client relationship established between the UIM counsel and Mark Scoggin – contrary to the holding of Crawford and related authorities – the circuit court’s order does not award Erie its fees in connection with defending him; rather, the circuit court awarded Erie its costs and fees “pertaining to the DJ [declaratory judgment] action only,” not for any costs and fees expended in the underlying action.¹⁰ (Order filed May 7, 2015 p. 12.)

Finally, Erie argues that the circuit court’s fee award is proper under S.C. Code Ann. § 38-59-40. (Brief of Respondent p. 23.) Notwithstanding the fact that the circuit court’s Order does not even mention, much premise the award upon, section 38-59-40, even a cursory review of that statute reveals that it is wholly inapplicable. It provides, in pertinent part:

In the event of a claim, loss, or damage which is covered by a policy of insurance or a contract of a nonprofit hospital service plan or a medical service corporation and the *refusal of the insurer, plan, or corporation to pay the claim within ninety days after a demand has been made by the holder of the policy or contract* and a finding on suit of the contract made by the trial judge that the refusal was without reasonable cause or in bad faith, the insurer, plan, or corporation *is liable to pay the holder, in addition to any sum or any amount otherwise recoverable, all reasonable attorneys' fees for the prosecution of the case against the insurer, plan, or corporation.*

S.C. Code Ann. § 38-59-40(1) (*emphasis added*). To begin with, there is no evidence in the record that there has been a refusal by GEICO to pay any claim within 90 days after

⁹Even if GEICO is obligated to provide coverage under the Mark Scoggin policy, Erie would still be Hill’s UIM carrier subject to claim under to section 38-77-160.

¹⁰This also belies Erie’s argument that the circuit court’s award of fees is in the nature of equitable indemnification damages. *See McCoy*, 759 S.E.2d at 138 (fees may be awardable for “resisting the claim indemnified against”).

demand "by the holder of the policy." More importantly, even if there had been such a refusal after demand, the statute allows for an award of attorney's fees to "the holder" only. Erie is not the policy holder -- Mark Scoggin is. Erie is, therefore, not entitled to any award of fees under section 38-59-40, and its attempted reliance on that statute is misplaced.

Erie is not entitled to an award of attorney's fees, and the circuit court's Order should be reversed.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Appellant's opening brief, the circuit court's order granting Erie Insurance Exchange declaratory relief and attorney's fees should be reversed in its entirety.



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Of which Government Employees Insurance Company is.....Appellant

PROOF OF SERVICE

I, the undersigned, of the law office of King, Love & Hupfer, LLC, as attorneys for Appellant, do hereby certify that I have served the INITIAL REPLY BRIEF OF APPELLANT this March 3, 2016, by depositing the same in a U.S. Postal Box in envelopes, sufficient postage prepaid, properly addressed to the following:

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SC Court of Appeals

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RE: Erie Insurance Exchange v. GEICO
Appellate Case No. 2015-001827
Claim No. 0384961770101086
Our File 00041.01747

Dear Ms. Kitchings:

Enclosed are the original and one copy of the following:

1. Initial Reply Brief of Appellant; and
2. Certificate of Service.

Please file the original in your records, and return a file-stamped copy to us in the enclosed envelope. By copy of this letter, we are hereby serving all counsel of record with a copy of the same. Thank you for your assistance.

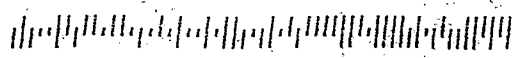
Sincerely,



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Enclosures

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SC Court of Appeals

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