2012 IL App (2d) 110774-U
No. 2-11-0774
Order filed May 31, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JENNIFER E. SANTOS, as Administrator of the Estates of Michael Greco and Clara Katherine Greco, Deceased, Plaintiff-Appellant, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant-Appellee.	)	Appeal from the Circuit Court of Kane County. No. 10-MR-512 Honorable Thomas E. Mueller, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

Held: The trial court correctly determined that defendant's underinsured motorist and setoff policy provisions were not ambiguous. The setoff provision in defendant's policy was not contrary to any public policy. The trial court correctly determined the limits of the subject automobile insurance policy issued by defendant. We affirmed the judgment of the trial court.

¶ 1 Plaintiff, Jennifer Santos, as administrator of the Estates of Michael Greco and Clara Katherine Greco, deceased, seeks review of the trial court's order granting summary judgment in favor of defendant, United Services Automobile Association, on plaintiff's complaint for declaratory

judgment. Plaintiff argues that the trial court incorrectly determined the limits of an automobile insurance policy issued by defendant. Plaintiff also argues that defendant's policy is ambiguous and should be construed against defendant. We affirm the trial court's grant of summary judgment in favor of defendant.

¶ 2 The pleadings, depositions, admissions, affidavits, and agreed statement of facts reflect the following. On August 16, 2009, Michael and Clara Katherine Greco were injured in a three-car motor vehicle collision in Shelbyville, Indiana. Motorist Leon Posey, Jr. was traveling eastbound and had pulled his vehicle over to the shoulder. As he attempted to re-enter the eastbound lane, Posey pulled in front of motorist Kathleen Kim. Kim lost control of her vehicle, crossed the median, and collided head-on with the Greco vehicle in the westbound lane. The Grecos were transported to a hospital, where Michael Greco died on August 27, 2009, and Clara Katherine Greco died on August 28, 2009.

¶ 3 Kim was insured by Allstate Insurance Company (Allstate) with motor vehicle liability policy limits of $100,000 per person/$300,000 per occurrence. Allstate tendered its liability policy limits of $100,000 for the claim of Michael Greco and $100,000 for the claim of Clara Katherine Greco in exchange for a full release of Kim. Defendant consented to this settlement.

¶ 4 Posey was insured by State Farm Insurance Company (State Farm) with motor vehicle liability policy limits of $250,000 per person/$500,000 per occurrence. In exchange for a full release of Posey, State Farm tendered its liability policy limits of $500,000 in the following distribution: $200,000 for the claim of Michael Greco; $200,000 for the claim of Clara Katherine Greco; and $100,000 for the claim of Kim. Defendant consented to this settlement.

¶ 5 Plaintiff filed a claim for underinsured motorist benefits under the automobile insurance policy the Grecos carried with defendant. Defendant's split-limits policy with the Grecos carried underinsured motor vehicle limits of $300,000 per person and $500,000 per accident. On January 27, 2010, defendant offered $200,000 for the claim of Michael Greco and $200,000 for the claim of Clara Katherine Greco. Defendant paid plaintiff $400,000 based upon its interpretation of the policy.

¶ 6 On October 22, 2010, plaintiff filed suit against defendant seeking a judicial determination that each estate was entitled to underinsured motor vehicle coverage and that the limits of this coverage were $300,000 per person and $500,000 per accident. Plaintiff sought the full policy limits of $500,000 for the combined claims of Michael Greco and Clara Katherine Greco. On December 27, 2010, defendant filed its answer and affirmative defenses. For its affirmative defenses, defendant alleged that (1) plaintiff's claims failed, were barred, or otherwise limited to the extent that any amounts sought were in excess of the "Limit of Liability" provisions in the policy, and (2) plaintiff's claims failed, were barred, or otherwise limited to the extent that any amounts received from the alleged tortfeasor(s) policy or policies of insurance were to be set off from the limits of liability for underinsured motorist coverage.

¶ 7 On June 1, 2011, defendant filed a motion for summary judgment. On the same day, plaintiff filed a motion for summary judgment. The parties fully briefed the issue. On June 30, 2011, the trial court conducted a hearing. Following arguments of the parties, the trial court granted defendant's motion for summary judgment and denied plaintiff's motion for summary judgment. Plaintiff filed a timely notice of appeal.

¶ 8 Plaintiff contends that the trial court erred when it granted defendant's motion for summary judgment. Plaintiff argues that defendant is responsible to pay $300,000 to each claim, resulting in

a total exposure of $600,000. Plaintiff further argues that defendant's maximum limit of liability would then apply to reduce the combined total payment to $500,000. Because defendant tendered only $400,000, plaintiff asserts she is still owed $100,000 for the combined claims. Alternatively, plaintiff argues that the liability and set-off provisions of defendant's policy are ambiguous and should be construed against defendant.

¶ 9 The construction of an insurance policy and a determination of the rights and obligations arising under the policy are questions of law for the court, and summary judgment is an appropriate proceeding for resolving these questions. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). "When, as in this case, parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law." *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755 (2005). A trial court will enter summary judgment if the pleadings, depositions, admissions, and affidavits show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291 (2000). We review *de novo* an order granting or denying summary judgment. See *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

¶ 10 The relevant provision in the policy is as follows:

"**LIMIT OF LIABILITY**

A. For **BI** [bodily injury] sustained by any one person in any one accident, **our** maximum limit of liability for all resulting damages, including, but not limited to, all direct, derivative or consequential damages recoverable by any persons, is the limit

of liability shown in the Declarations under any one vehicle for UM Coverage or for UIM [underinsured motorist] Coverage for "each person", whichever is applicable. Subject to this limit for "each person", the limit of liability shown in the Declarations for "each accident" for UM Coverage or for UIM Coverage is **our** maximum limit of liability for all damages for **BI** resulting from any one accident. These limits are the most **we** will pay regardless of the number of:

1. **Covered persons;**
2. Claims made;
3. Vehicles or premiums shown in the Declarations;
4. Premiums paid; or
5. Vehicles involved in the accident."

The policy also contains a set-off provision:

"C. Underinsured Motorists Coverage

1. Unless there is a **tentative settlement** and **we** give the **covered person** consent to settle, the limit of liability for "each person" and for "each accident" for UIM Coverage shall be reduced by all sums paid because of the **BI** by or on behalf of the owner or operator of the **underinsured motor vehicle.**
2. If there is a **tentative settlement** and **we** give the **covered person** consent to settle, the limit of liability for "each person" and for "each accident" for UIM Coverage shall be reduced by the limit of liability for **BI** liability coverage applicable to the owner or operator of the **underinsured motor vehicle**."

¶ 11 The Insurance Code defines an underinsured motor vehicle as follows:

> "*** [T]he term 'underinsured motor vehicle' means a motor vehicle whose ownership, maintenance or use has resulted in bodily injury or death of the insured, as defined in the policy, and for which the sum of the limits of liability under all bodily injury liability insurance policies or under bonds or other security required to be maintained under Illinois law applicable to the driver or to the person or organization legally responsible for such vehicle and applicable to the vehicle, is less than the limits for underinsured coverage provided the insured as defined in the policy at the time of the accident. The limits of liability for an insurer providing underinsured motorist coverage shall be the limits of such coverage, less those amounts actually recovered under the applicable bodily injury insurance policies, bonds or other security maintained on the underinsured motor vehicle." 215 ILCS 5/143a-2(4) (West 2010).

The legislative purpose behind underinsured motorist coverage is to " 'place the insured in the same position he would have occupied if the tortfeasor had carried adequate insurance.' " *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 57 (2011) (quoting *Sulser v. Country Mutual Insurance Co.*, 147 Ill. 2d 548, 555 (1992)).

¶ 12 We first address plaintiff's argument that the above policy provisions are ambiguous. Plaintiff argues that the limiting and set-off provisions fail to clearly and unambiguously state that the "per accident" limit applies to all accidents involving two or more "covered persons" and further fails to clearly and unambiguously state that the comingled aggregate settlement of two "covered persons" from an underinsured motor vehicle will be deducted from defendant's "per accident" limit. We note that plaintiff cites no authority in support of her ambiguity argument.

¶ 13 A court's primary objective in construing the language of an insurance policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). If the policy terms are clear and unambiguous, they must be given their plain and ordinary meaning; but if the terms are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. *Wilson*, 237 Ill. 2d at 455-56. Provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer. A court must construe the policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. *Wilson*, 237 Ill. 2d at 456.

¶ 14 Defendant's policy is a "split-limits" policy. "A policy with split limits of liability provides one level of coverage per person and a separate level of coverage per accident." *West American Insurance Co. v. Reibel*, 762 F. Supp. 808, 812 (N.D. Ill. 1991). In the present case, the declarations indicate that defendant's obligation for bodily injury coverage is limited to $300,000 per person and $500,000 per accident. The undisputed facts demonstrate that this policy was written with split limits of liability; the Grecos purchased this policy; therefore, no ambiguity exists concerning the dual levels of coverage. Because this is a split-limits policy, the limit-of-liability provision necessarily takes into account and provides for the dual levels of coverage. We find no ambiguity.

¶ 15 With respect to the set-off provision, our supreme court stated that such a provision must be "clear, definite and specific." *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 393-94 (2005) (citing *National Union Fire Insurance Co. v. Glenview Park District*, 158 Ill. 2d 116, 123 (1994)). In this case, we find no ambiguity. The set-off provision in defendant's policy explicitly provides that "the limit of liability for 'each person' and for 'each accident' for UIM

Coverage shall be reduced by the limit of liability for **BI** liability coverage applicable to the owner or operator of the **underinsured motor vehicle**." This provision is straightforward; any payout made pursuant to the policy's underinsured motorist coverage results in a corresponding reduction in liability coverage. The language is clear and unambiguous. Plaintiff does not develop the ambiguity argument in any meaningful manner. Therefore, the terms of the policy will be enforced as written. See *West American Insurance Co.*, 762 F. Supp. at 811.

¶ 16 Turning to the substantive issue with the above principles in mind, the plain language of section C of defendant's policy reflects that the limit of coverage to plaintiff under the policy shall be reduced by all sums paid because of bodily injury by or on behalf of Kim and Posey. Plaintiff is entitled to claim benefits in an amount equaling the limit of the underinsured motorist coverage, and defendant has the right to claim a set off for benefits received from the underinsureds' carriers. In other words, the limit of defendant's policy is $500,000 per claim, or $1,000,000 for the combined claims of Michael Greco and Clara Katherine Greco. The $500,000 limit-of-liability per claim is set off by the $100,000 per claim Allstate paid for Kim's liability and the $200,000 per claim State Farm paid for Posey's liability. Accordingly, plaintiff is entitled to receive $200,000 for each claim, that is, $500,000 less the $300,000 set off, or a combined total of $400,000. Under this scenario, the Grecos were afforded the full value of the coverage purchased, and defendant is obligated to pay benefits only up to the split limit of the coverage selected by the Grecos, less those amounts actually recovered from Kim's and Posey's liability insurer. See *Sulser*, 147 Ill. 2d at 556-57.

¶ 17 Contrary to plaintiff's interpretation, the foregoing method is consistent with our supreme court's rationale in *Sulser*, 147 Ill. 2d 548. In *Sulser*, the plaintiff's husband was killed in a motor vehicle accident involving an underinsured motorist. *Id.* at 551. The defendant insurance company

sought to reduce the plaintiff's underinsured motorist coverage by workers' compensations benefits plaintiff received on behalf of the husband. *Id.* at 553. The supreme court construed the legislative intent for providing underinsured motorist coverage was "to place the insured in the same position he would have occupied if injured by a motorist who carried liability insurance in the same amount as his [underinsured motorists coverage]." *Id.* at 558. The *Sulser* court further construed the public policy embodied in the underinsured motorist provision was "designed to offer insurance to 'fill the gap' between the claim and the torfeasor's insurance" and "not intended to allow the insured to recover amounts from the insurer over and above the coverage provided by the underinsured motorist policy." *Id.* at 556. The *Sulser* court concluded that an automobile insurance policy provision allowing a setoff of workers' compensation benefits from underinsured motorist coverage was not contrary as to public policy and concluded that the insurance company was entitled to the setoff. *Id.* at 559.

¶ 18 In so ruling, we reject plaintiff's methodology of resolving defendant's liability. A policy provision does not become ambiguous just because the parties disagree about its meaning. *Burcham v. West Bend Mutual Insurance Co.*, 2011 IL App (2d) 101035, ¶ 25 (citing *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). Instead, it is ambiguous if the language is susceptible to more than one reasonable interpretation. *Id.* Under plaintiff's methodology with respect to the Allstate policy issued to Kim,

> "Kim carried "per person" liability policy limits of $100,000. Therefore, [plaintiff] maintain that their estates are each entitled to $200,000, representing the estate's 'each person' UIM limit, less the amount actually recovered under the applicable bodily injury coverage maintained on the Kim (UIM) vehicle."

Under plaintiff's methodology with respect to the State Farm policy issued to Posey, plaintiff maintains that "the estates of Mr. and Mrs. Greco each receiving $100,000, representing the 'each person' UIM limit, less the amount actually recovered under the applicable bodily injury insurance maintained on the Posey (IUM) vehicle." "Accordingly, the Grecos would be entitled to a total recovery of $600,000 from [defendant]." That is, "[t]he estates *** seek only to enforce the terms of their policy and be placed in the same position each would have been in had the tortfeasors carried $300,000 'each person' policies."

¶ 19 Plaintiff's methodology, or interpretation, is not reasonable. Under plaintiff's methodology, it appears that plaintiff is seeking to recover the $300,000 "each person" amount from every tortfeasor's insurance carrier (Allstate and State Farm), and defendant should be liable for the shortfall. Under plaintiff's methodology, Allstate was short $200,000 per person ($400,000 combined) and State Farm was short $100,000 per person ($200,000 combined). Extrapolating plaintiff's methodology would result in absurdity. For example, had there been five underinsured tortfeasors, whose insurance carriers had each paid $100,000 "each person" amounts to each claim of Michael Greco and Clara Katherine Greco, then plaintiff would be requesting defendant to cover the $200,000 "per person" shortfall from each of the five policies, or $1 million for the claim of Michael Greco and $1 million for the claim of Clara Katherine Greco ($2 million combined). Under the plain language of defendant's policy, it matters not what other insurance carrier's or carriers' "per person" or "per accident" limits are or the shortfalls, but rather the "sums paid" *** "by or on behalf of" the tortfeasors. In this case, the total sums paid by Allstate and State Farm on behalf of Kim and Posey were $300,000 for the claim of Michael Greco and $300,000 for the claim of Clara Katherine Greco. Under the plain language of defendant's policy, therefore, defendant was liable for $200,000

for the claim of Michael Greco and $200,000 for the claim of Clara Katherine Greco (or $400,000 combined) to "fill the gap" between each claim and the sums paid by Allstate and State Farm. See *Sulser*, 147 Ill. 2d at 556. In doing so, plaintiff would be precluded from attempting to recover amounts from defendant over and above the coverage provided by defendant's underinsured motorist policy provision. See *id.* at 556.

¶ 20 In its brief, defendant relies on *Erie Insurance Exchange v. Triana*, 398 Ill. App. 3d 365 (2010), in support of its position, and in her brief, plaintiff argues that defendant's reliance on *Erie* is misplaced. In *Erie*, plaintiffs Christine Wagner (driver) and Christine Triana (passenger) were involved in a two-car accident with William Weinen. Weinen's insurer, State Farm, paid $100,000 to Wagner and $100,000 to Triana for their bodily injury claims. *Id.* at 366. Thereafter, Wagner and Triana submitted claims to Erie, Wagner's insurer. The Erie policy provided underinsured motorist coverage limits of $300,000 per person and $300,000 per accident, subject to its limitations and reductions provisions. *Id.* Erie's policy provided that the $200,000 paid by State Farm to both Wagner and Triana must be set off in the aggregate against the $300,000 per-accident limit, leaving only $100,000 in underinsured motorist benefits remaining to both the Wagners and Triana. *Id.* at 367. The trial court agreed, and the appellate court affirmed. *Id.* at 369-70.

¶ 21 We have reviewed *Erie*, and although it concerns split limits of liability and a set-off provision, it is not dispositive to our analysis. The set-off provision in *Erie* reflected that its limits of liability would be reduced by the amounts paid by "to anyone we protect." *Id.* at 370. In *Erie*, the definitions and underinsured motorist coverage in Erie's policy reflected that it protected "anyone [who] occup[ies] any owned auto it insures." *Id.* The appellate court found that the $300,000 per-accident limit would be applied to Wagner and Triana and that the $300,000 would be reduced by

the $200,000 already paid by State Farm on behalf of Weinen. *Id.* Conversely, in the present case, defendant's limits of liability were not so broad, and plaintiff was able to submit separate claims on behalf of both Michael Greco and Clara Katherine Greco. We therefore consider *Erie* only to the extent that our *de novo* review, as in *Erie*, encompasses the specific facts of the case, the specific policy provisions, the statutory definition of underinsured motor vehicle, the legislative purpose underlying underinsured motorist coverage, and the application of the per-accident provision, not the per-person provision, to a situation involving multiple claims.

¶ 22 Our interpretation here is consistent with the supreme court's policy regarding underinsured motorist coverage. "The purpose of underinsured coverage is to put the insured in the same position he or she would have occupied had the at-fault vehicle carried liability coverage in the same amount as selected by the insured in his or her underinsured motor vehicle policy." *State Farm Mutual Automobile Insurance Co. v. Villicana*, 181 Ill. 2d 436, 446 (1998)). Had Kim or Posey carried adequate or better insurance coverage than defendant provided to the Grecos, defendant's underinsured motorist coverage would not have been triggered. See *Katz v. State Farm Mutual Automobile Insurance Co.*, 2012 IL App (1st) 110931, ¶ 30 (noting that, under section 143a-2(4) of the Insurance Code, a tortfeasor cannot be considered an underinsured motorist when the tortfeasor's primary liability limit is greater than the limit of coverage provided to the injured party under the party's underinsured motor vehicle policy provision). Neither party claims that the setoff provision in defendant's policy is contrary to any public policy. The reduction did not prevent plaintiff from receiving the difference between the underinsured drivers' insurance amounts and the amount of underinsured motorist coverage provided in the policy. See *Sulser*, 147 Ill. 2d at 556. Accordingly, we hold that the trial court properly granted summary judgment in favor of defendant.

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 24 Affirmed.