

THIRD DIVISION
April 20, 2011

No. 1-09-3608

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstance allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

F. LOUIS BEHRENDTS, Individually and as authorized agent of Joanne Behrends, Plaintiff-Appellant,)	APPEAL FROM THE
)	CIRCUIT COURT OF
)	COOK COUNTY
)	
)	
v.)	No. 08 CH 13297
)	
)	
COUNTRY MUTUAL INSURANCE)	
COMPANY, an Illinois Mutual Insurance)	HONORABLE
Company,)	DOROTHY KIRIE KINNAIRD,
Defendant-Appellee.)	JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

ORDER

HELD: The circuit court did not err in granting summary judgment to defendant insurance company on counts I, II and III of the amended complaint. The circuit court did not err in ruling the antistacking clauses contained in the two automobile insurance policies defendant issued to plaintiffs were clear and unambiguous, precluding the stacking of underinsured motorist coverage and medical payments coverage. The umbrella policy defendant issued to plaintiffs does not extend to cover sums plaintiffs reimbursed Medicare under a lien.

In this appeal, we are asked to decide whether plaintiff F. Louis Behrends (Louis), individually and as authorized agent of his wife, Joanne Behrends (Joanne), is entitled to stack the underinsured motorist coverage contained in two automobile policies issued by defendant Country Mutual Insurance Company (Country Mutual). Louis filed an action for declaratory judgment to construe the limits of underinsured motorist coverage contained in the two policies and to determine whether a personal umbrella policy issued by Country Mutual covered funds the Behrends paid to Medicare. The circuit court of Cook County entered summary judgment in favor of Country Mutual (735 ILCS 5/2-1005©) (West 2008)), reasoning that the antistacking clauses contained in the insurance policies were clear and unambiguous, precluding the stacking of underinsured motorist coverage. The circuit court also ruled the umbrella policy did not cover funds reimbursed to Medicare. For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

The record on appeal discloses the following facts. On March 25, 2002, Joanne was struck in Florida by a motor vehicle insured by State Farm Insurance Company, which provided a policy with a liability limit of \$50,000 per person. As a result of the accident, Joanne suffered medical expense liability in excess of \$1 million. With Country Mutual's approval, Louis and Joanne settled their claim against the driver of the motor vehicle for the liability limit of \$50,000.

At the time of the accident, Joanne was insured under three Country Mutual policies. The first policy (Joanne's policy) is an automobile insurance policy issued to Joanne as the named insured (with Louis as an insured) for her 1998 Buick, which provided underinsured motorist

1-09-3608

coverage of \$500,000 per person and \$1 million per occurrence. The first page of Joanne's policy states that "[t]he declarations page of your Auto Insurance Policy shows all your coverages, limits and the company issuing your policy." The first page also states, "Be sure you check your declarations page to see which of the following apply to you," before listing various coverages, exclusions and conditions. The declarations page states in part: "Your policy consists of the policy booklet, applications, declarations pages and any endorsements. Please keep them together." The declarations page also states various coverages and limits of liability, including the underinsured motorist coverage.

Section two of Joanne's policy, as amended by an endorsement, defines the underinsured motorist coverage in relevant part:

"If you have paid for this coverage (see the declarations page), we will pay damages which an insured is legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by an insured and caused by an accident. The owner's or operator's liability for these damages must arise from the ownership, maintenance or use of the uninsured or underinsured motor vehicle.

If you have Underinsured Motorists coverage (see the declarations page), we will pay only after all liability bonds or policies have been exhausted by judgments or payments.

Conditions, Section 2

In addition to the following conditions, all General Policy Conditions listed at the back of this policy also apply to Section 2.

2. **Limits of Liability.** The Uninsured - Underinsured Motorists limits of liability shown on the declarations page apply as follows:

- c. Amounts payable for damages under Uninsured-Underinsured Motorists, Coverage U, will be reduced by the present value of all amounts paid or payable under any workers' compensation, disability benefits or any similar law.

Amounts payable for damages under Underinsured Motorists coverage will be reduced by all sums paid under Medical Payments, Personal Injury Protection or Uninsured Motorists coverage of any personal vehicle policy issued by us. Any payment under Uninsured Motorists coverage of this policy either to or for an insured will reduce any amount that person is entitled to receive under Section 1, Liability or Underinsured Motorists coverage of this policy.

4. **Other Insurance.** If there is other applicable uninsured - underinsured motorists insurance that covers a loss, we will pay our proportionate share of that loss. Our

share is the proportion our limits of liability bear to the total of all applicable limits. However, in the case of motor vehicles you do not own, this policy will be excess and will apply only in the amount our limit of liability exceeds the sum of the applicable limits of liability of all other applicable insurance. We will pay only after all other applicable liability limits have been paid."

The "General Policy Conditions" section of Joanne's policy contains an antistacking provision that provides:

"8. **Other Vehicle Insurance with Us.** If this policy and any other vehicle insurance policy issued to you or a relative by one of our companies apply to the same accident, the maximum limit of our liability under all the policies will not exceed the highest applicable limit of liability under any one policy."

The second policy (Louis's policy) is an automobile insurance policy issued to Louis as the named insured (with Joanne as an insured) for his 1998 Cadillac, which also provided underinsured motorist coverage of \$500,000 per person and \$1 million per occurrence. In addition, Louis's policy contained underinsured motorist coverage provisions and conditions identical to those quoted earlier from Joanne's policy.

The third policy is a personal umbrella policy, which named Joanne and Louis as insureds and provided coverage of \$5 million in excess of the coverage provided by the two automobile policies. The basic coverage provision of the umbrella policy provides as follows:

"We will pay on behalf of an insured for ultimate net loss in excess of the retained limit which an insured is obligated to pay because of personal injury or property damage

1-09-3608

caused by an occurrence happening anywhere in the world during the policy period. We will have no other obligation to pay or perform acts or services unless explicitly provided for under part B. Defense."

"Ultimate net loss," as defined by the umbrella policy:

"means the sum actually paid in cash in the settlement or satisfaction of losses for which an insured is liable either by adjudication or compromise with our written consent, after making proper deduction for all recoveries and salvages collectible."

On April 9, 2008, Louis, individually and as authorized agent of his wife Joanne, filed a complaint seeking a declaratory judgment that the underinsured motorist coverage of Louis' policy applied to the losses suffered by Joanne and that the umbrella policy was required to respond to the liability to Medicare incurred by the Behrends as a result of Joanne's injuries. The complaint was amended on May 6, 2008.

Country Mutual maintained that it was obliged to pay \$440,000 under Joanne's policy, representing the \$500,000 per person limit minus \$10,000 Country Mutual paid under the medical payments section of the policy and the \$50,000 paid by State Farm. Country Mutual and the Behrends entered into a partial settlement under Joanne's policy, allocating \$220,000 for Joanne's medical expenses and \$220,000 for Louis's loss of consortium.

However, Country Mutual denied any coverage under Louis's policy, maintaining that those coverages could not be stacked with the underinsured motorist and medical payments coverages of Joanne's policy. Country Mutual also denied any coverage under the umbrella policy for the Behrends' liability to Medicare in excess of the \$10,000 Country Mutual paid

1-09-3608

under the medical payments section of Joanne's policy, maintaining the umbrella policy provided only "first party" coverage and not coverage for medical expense liability beyond that provided by the automobile insurance.

On May 20, 2009, following pretrial discovery, Country Mutual filed a motion for summary judgment on counts I and II of the amended complaint, which addressed the construction of the automobile insurance policies. On June 8, 2009, Louis filed a cross-motion for summary judgment. On August 26, 2009, following briefing and a hearing, the circuit court entered an order granting Country Mutual summary judgment on counts I and II of the amended complaint. On September 16, 2009, Country Mutual moved for summary judgment on count III of the amended complaint, which concerned the umbrella policy. On November 17, 2009, following briefing and a hearing, the circuit court entered an order granting summary judgment to Country Mutual on count III of the amended complaint. On December 11, 2009, Louis filed a timely notice of appeal to this court.

DISCUSSION

I. The Standard of Review

On appeal, the Behrends argue that the trial court erred in granting summary judgment to Country Mutual. Appellate review of a summary judgment is *de novo*. *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 146 (2003). Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). The interpretation of an insurance policy

and the coverage provided under the policy presents questions of law that are appropriate for resolution through summary judgment. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993).

II. The Underinsured Motorists Coverage

The Behrends contend that the circuit court erred in ruling the antistacking clauses contained in their automobile insurance policies were clear and unambiguous, precluding the stacking of their underinsured motorist coverage. In construing the policy language, our primary objective is "to ascertain and give effect to the intentions of the parties as expressed by the words of the policy." *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). We construe the policy as a whole, giving effect to every provision. *Central Illinois Light*, 213 Ill. 2d at 153. Where the words used in the policy are clear and unambiguous, we afford them their plain, ordinary, and popular meaning. *Central Illinois Light*, 213 Ill. 2d at 153. Ambiguous policy terms that limit an insurer's liability will be liberally construed in favor of coverage. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). Ambiguity exists in an insurance contract if the language is subject to more than one reasonable interpretation, but we will not strain to find an ambiguity where none exists. *Id.*

The Behrends first argue that the declaration pages of their policies render those policies ambiguous because they provide two distinct coverages of \$500,000 per person and \$1 million per occurrence. They note that both the introductory language of their policies and the underinsured motorist coverage for each policy directs the insured's attention to the declarations to determine coverage. A policy listing multiple liability limits in its declarations may, in some

cases, create ambiguity. The rule derives from *dicta* in *Bruder v. Country Mutual Insurance Co.*, 156 Ill. 2d 179 (1993). In that case, Ruth Bruder was injured in an accident with two uninsured drivers. Among several insurance policies that provided coverage was a business auto policy covering two trucks owned by her husband, John Bruder. The Bruders attempted to stack the uninsured motorist coverage applicable to the two trucks. The policy contained a provision that prohibited stacking coverages. *Bruder*, 156 Ill. 2d at 189. However, the Bruders contended that the layout of the declarations page, listing separately the premiums paid for each coverage for each truck, created an ambiguity. The court rejected this argument. It observed that, although the declarations page listed separate premiums for each truck, it showed the limits of liability applicable to both trucks only once. *Bruder*, 156 Ill. 2d at 192. However, the court then commented on the hypothetical situation where the limits were shown more than once:

"It would not be difficult to find an ambiguity created by such a listing of the bodily injury liability limit for each person insured. It could easily be interpreted that an insured should enjoy a total limit of \$200,000 in coverage because a figure of \$100,000 would be shown for each pickup truck. There would be little to suggest in such a listing that the parties intended that coverage was to be limited to that provided for only one of the two pickup trucks. It would be more reasonable to assume that the parties intended that, in return for the two premiums, two \$100,000 coverage amounts were afforded." *Bruder*, 156 Ill. 2d at 192.

1-09-3608

Interpreting what has become known as the *Bruder dicta* has divided this state's appellate court ever since. See *In re Estate of Striplin*, 347 Ill. App. 3d 700, 703 (2004) (and cases cited therein).

However, this appeal, unlike the situation hypothesized in the *Bruder dicta*, does not involve coverages of multiple vehicles set forth in confusing columns in a single declaration, or multiple declarations attached to a single policy. Rather, this case involves two separate declarations pages in two separate policies. A clear and unambiguous antistacking clause can defeat a plaintiff's claim for stacked benefits where the plaintiff has paid separate premiums for uninsured motorist coverage for separate cars in separate policies. In *Grzeszczak v. Illinois Farmers Insurance Co.*, 168 Ill. 2d 216, 229 (1995), the supreme court held that an antistacking provision similar to the one at issue here was unambiguous and did not violate public policy. The clause there provided:

" 'With respect to any accident or occurrence to which this and any other auto policy issued to you by any member company of the Farmers Insurance Group of Companies applies, the total limit of liability under all the policies shall not exceed the highest applicable limit of liability under any one policy.' " *Grzeszczak*, 168 Ill. 2d at 220-21.

The court held that this language unambiguously provided that the insured could not stack underinsured motorist coverages of multiple policies. *Grzeszczak*, 168 Ill. 2d at 229; see also *Bruder*, 156 Ill. 2d at 186 (holding similar provision unambiguous); *Menke v. Country Mutual Insurance Co.*, 78 Ill. 2d 420, 424 (1980) (same).

Similarly, the language of the antistacking provision here is not rendered ambiguous by the declarations pages in each policy. The declarations are not confusing in their layout. Moreover, the declarations explicitly note that each "policy consists of the policy booklet, applications, declarations pages and any endorsements." The declarations do not purport to constitute the final word on coverage. Indeed, such an interpretation would render the bulk of the policy irrelevant, in contravention of the rule that an insurance policy is to be construed as a whole. *Central Illinois Light*, 213 Ill. 2d at 153.

The Behrends also argue that their policies are ambiguous because the conditions of section 2(2)(e) of each policy state that "[a]mounts payable for damages under Underinsured Motorists coverage will be reduced by all sums paid under Medical Payments, Personal Injury Protection or Uninsured Motorists coverage of any personal vehicle policy issued by" Country Mutual, which does not include other uninsured motorists coverage issued by Country Mutual. The Behrends further argue that their policies are ambiguous due to the "other insurance" clause (section 2, condition 4) of their policies, which expressly permits the aggregation of the limits of other underinsured motorists coverage. The Behrends conclude that these specific provisions of their policies control rather than the antistacking provision, which is listed as a general policy condition. See *Skidmore v. Throgmorton*, 323 Ill. App. 3d 417, 425-26 (2001). This argument fails to address the fact that the conditions of Section 2 of each policy state that "[i]n addition to the following conditions, all General Policy Conditions listed at the back of this policy also apply to Section 2." Thus, no conflict exists between the conditions of section 2(2)(e) and the antistacking provision specifically incorporated by reference therein. *Skidmore* addressed a

choice between a general antistacking provision and a specific one. *Skidmore*, 323 Ill. App. 3d at 425-26. In contrast, this case involves an antistacking provision expressly incorporated by reference with the other specific conditions of the uninsured motorists coverage.

The Behrends assert that insureds who purchase separate policies and pay separate premiums do not reasonably contemplate that other provisions of their policies will reduce their coverage to what they would receive under a single policy and premium. The Behrends rely on *Glidden v. Farmers Automobile Insurance Association*, 57 Ill. 2d 330 (1974), in which an "other insurance" clause intended to distribute responsibility among multiple insurers had no meaningful purpose and was therefore ambiguous when applied to coverage issued by one insurer. The Behrends also cite *Squire v. Economy Fire & Casualty Co.*, 69 Ill. 2d 167 (1977), in which the court found a right to stack because the policy did not clearly express that no additional coverage was provided. However, in *Menke*, the Illinois Supreme Court found both *Glidden* and *Squire* distinguishable where the policy contained an unambiguous antistacking clause. *Menke*, 78 Ill. 2d at 424.

Lastly, the Behrends argue that the "other insurance" condition does not only apply to underinsured motorists coverage issued by a different insurer. They argue that this court issued differing rulings on the issue in *American Family Mutual Insurance Co. v. Martin*, 312 Ill. App. 3d 829, 833 (2000), and *McElmeel v. Safeco Insurance Co. of America*, 365 Ill. App. 3d 736, 741-43 (2006). However, the rulings in each case reflect reading the policies involved as a whole and both cases are instructive here. In *Martin*, this court ruled that the "other insurance" clause in the plaintiff's policy did render the policy as a whole ambiguous, because the antistacking

provision clearly covered situations where two or more cars belonging to the same insured are covered by policies issued by plaintiff. In that context, the "other insurance" clause clearly referred only to a situation where a different policy issued by a different company applies. *Martin*, 312 Ill. App. 3d at 833. In *McEmeel*, this court ruled that the ambiguity in the declarations pages and the antistacking clauses that incorporate them were resolved by the unambiguous "other insurance" clause, when the policy was read as a whole. *McElmeel*, 365 Ill. App. 3d at 741. In both *Martin* and *McElmeel*, this court was presented with policies which, when read as a whole, included reconcilable "other insurance" and antistacking clauses. Such is also the case with the policy language here. When the policy language is read as a whole, the declarations do not render the policy ambiguous, and the unambiguous antistacking provision expressly incorporated into the underinsured motorists coverage more specifically controls over the more generally worded "other insurance" clause.

In short, the circuit court did not err in ruling the antistacking clauses contained in the automobile insurance policies were clear and unambiguous, precluding the stacking of underinsured motorist coverage. We note that the Behrends also contend that the circuit court also erred in ruling that the medical payments provisions of their automobile policies could not be stacked. However, the Behrends rely on assertions regarding the declarations and "other insurance" provisions substantially identical to those we have just rejected, citing only *Skidmore* in support of these assertions. Accordingly, we conclude that the Behrends have failed to show the circuit court erred in granting summary judgment to Country Mutual on counts I and II of the amended complaint.

III. The Umbrella Coverage

Furthermore, the Behrends contend that the circuit court erred in granting summary judgment to Country Mutual on count III of the amended complaint, ruling that their umbrella policy did not cover sums the Behrends repaid to Medicare under a lien. In *Hartbarger v. Country Mutual Insurance Co.*, 107 Ill. App. 3d 391, 394-95 (1982), this court addressed, as a matter of first impression, whether an umbrella policy will be construed as including uninsured motorists coverage. In rejecting the plaintiff's claim for uninsured motorists coverage under an umbrella policy, the *Hartbarger* court pointed out the differences between an umbrella policy and an automobile policy, stating that "[i]t is obvious that the present umbrella policy was intended by both parties to protect the insured against excess judgments, and the risks and premiums were calculated accordingly. To require that policy to furnish uninsured motorist coverage would work a substantial revision of that policy." *Hartbarger*, 107 Ill. App. 3d at 396. Similar distinctions between an umbrella policy and an underlying automobile policy were discussed in *Cincinnati Insurance Co. v. Miller*, 190 Ill. App. 3d 240, 247 (1989), wherein this court stated that "the intended purpose of umbrella policy coverage is to protect an insured from judgments in favor of a claimant against the insured in an amount greater than the auto liability policy ***. We construe the word 'liability' in these insurance policies to mean liability for injuries or other losses to persons other than the insured. If an insurance policy contained no express uninsured or underinsured coverage provision, the insured could not recover on his own liability policy." *Cincinnati Insurance Co.*, 190 Ill. App. 3d at 247.

In this case, the Behrends argue that *Hartbarger* is distinguishable because the policy there obligated the insurer "to indemnify the insured for ultimate net loss in excess of the retained limit which the insured shall become legally obligated to pay *** [a]s damages because of personal injury." *Hartbarger*, 107 Ill. App. 3d at 396, 437 N.E.2d at 694. Although the umbrella policy here does not refer to "damages," it does define the ultimate net loss payable as "the sum actually paid in cash in the settlement or satisfaction of losses for which an insured is liable either by adjudication or compromise with our written consent." Thus, the policy language here clearly refers to liability as sums to be paid to persons other than the insured as the result of suit or settlement, as in *Hartbarger* and *Cincinnati Insurance Co.* Moreover, the reimbursement to Medicare only represents sums an injured person recovers from an insurer. See 42 U.S.C. §1395y(b)(2) (2008). Had the Behrends not recovered from Country Mutual, there would have been no liability to Medicare. The Behrends cite no authority for the proposition that sums recovered from an insurer are a "loss" under an umbrella policy. Accordingly, the Behrends have failed to show the circuit court erred in granting summary judgment on count III of the amended complaint.

CONCLUSION

In sum, we conclude that the circuit court did not err in granting summary judgment to Country Mutual on counts I, II and III of the amended complaint. The circuit court also did not err in ruling the antistacking clauses contained in the automobile insurance policies were clear and unambiguous, precluding the stacking of underinsured motorist coverage and medical payments coverage. The umbrella policy does not extend to cover sums the Behrends reimbursed

1-09-3608

Medicare under a lien. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.