2012 IL App (1st) 111119-U

Nos. 1-11-1119, 1-11-1120, 1-11-1121, 1-11-1122, 1-11-1123 (consolidated)

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

SIXTH DIVISION
June 8, 2012

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARY WOWCZUK, Special Administrator of the Estate of Olga Kosar, Deceased; NORMA REIMERS, Special Administrator of the Estate of Welda Metzger, Deceased; RONALD JONES, Special Administrator of the Estate of Henry Jones, Deceased; PATRICK BRUNI, as Administrator of the Estate of Florence Bruni, Deceased; and LAURA JOHANSEN,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	08 CH 34529
v.	)	
ACE AMERICAN INSURANCE COMPANY and SUNRISE SENIOR LIVING, INC.,	)	The Honorable Richard J. Billik, Jr.,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 *HELD*: The automobile insurance policy provided the mandatory minimum underinsured motorist coverage required by statute.

¶ 2 Plaintiffs, Mary Wowczuk, Special Administrator of the Estate of Olga Kosar, deceased, Norma Reimers, Special Administrator of the Estate of Welda Metzger, deceased, Ronald Jones, Special Administrator of the Estate of Henry Jones, deceased, Patrick Bruni, as Administrator of the Estate of Florence Bruni, deceased, and Laura Johansen, appeal the trial court's order denying their motion for summary judgment and granting the motion for summary judgment of defendants, Ace American Insurance Company (Ace) and Sunrise Senior Living, Inc. (Sunrise). Plaintiffs contend the trial court erred in finding Ace's insurance policy did not provide underinsured motorist (UIM) coverage in an amount equal to the liability coverage. Plaintiffs additionally contend the trial court erred in refusing to strike an affidavit submitted by defendants where the affiant did not have personal knowledge to support the facts provided therein. Based on the following, we affirm the trial court's order granting summary judgment in favor of defendants.

¶ 3 FACTS

¶ 4 On April 30, 2006, Kosar, Metzger, Henry Jones, and Florence Bruni were passengers on a Sunrise bus driven by Johansen, a Sunrise employee. The bus was struck head on by Eric Granstrom. Kosar, Metzger, and Florence Bruni sustained life-ending injuries. Henry Jones and Johansen were injured and Henry Jones later died. Granstrom was insured by Founders Insurance Company (Founders).

¶ 5 The Founders' automobile policy provided liability limits of $20,000 for bodily injury to any one person caused by one accident, and $40,000 for bodily injury to two or more persons caused by one accident ($20/$40). In a letter dated October 10, 2006, Founders offered to tender

$40,000 to "all claimants who have or may have been injured" as a result of the accident. On June 13, 2008, Ace, the nationwide insurance provider for Sunrise, permitted plaintiffs to accept the Founder's settlement. Plaintiffs then filed claims with Ace for UIM coverage. Ace responded to the UIM claim by informing plaintiffs that the policy it issued to Sunrise had the statutory mandatory minimum UIM coverage limit of $20/$40.

¶ 6 Prior to obtaining the subject Ace policy, Sunrise learned that some jurisdictions allowed the insured to reject uninsured motorist (UM)/UIM coverage, while other jurisdictions required UM/UIM coverage in an amount equal to the policy's bodily injury liability limits. The latter jurisdictions, however, allowed insureds to elect UM/UIM coverage equal to that jurisdiction's statutory mandatory minimum for UM/UIM limits. On May 27, 2005, Marsh, Inc. (Marsh), Sunrise's insurance broker, sent a letter to Ace detailing Sunrise's coverage submissions. In relation to UIM coverage, the letter stated that Sunrise chose to "reject except where rejection is not permitted." Ace issued two binders of insurance, on August 11, 2005, and a revised binder on August 31, 2005, to Sunrise. Each binder of insurance reflected that UM/UIM coverage was to be the "Minimum Financial Responsibility Limits for autos subject to a compulsory UM law." The binders further provided that:

> "Laws in many states require us to provide Uninsured Motorist (UM) Coverage and Underinsured Motorist (UIM) Coverage (where applicable) at limits equal to the policy Liability Limit. The insured has the option to select lower limits, or, in some states, to reject such coverage entirely.

> The proposal provides the applicable State Financial Responsibility Limits (minimum UM/UIM limits or coverage rejected as applicable) for all owned autos. If the insured desires to purchase higher limits, we will provide a quote to increase the UM/UIM limits to be equal to the policy Liability Limits.
>
> We will send the insured the required selection forms based on the UM/UIM limits and coverage the insured selects; if the insured does not sign and return these forms to us within 15 days of the effective date, the Policy will be endorsed to provide full UM/UIM limits for an additional premium to be determined."

¶ 7 The Ace policy insured Sunrise for, *inter alia*, vehicles it owned and operated nationwide from September 1, 2005, to September 1, 2006. The declarations page reported a bodily injury liability limit of $2 million. Under coverages for UM and UIM, the declarations of the policy listed that the limits were "statutory" and the premiums were "included" in the premium for the $2 million bodily injury coverage. Attached to the policy were 124 endorsements. Relevant to this appeal, numbers 46 and 47, provided UIM and UM, respectively, coverage in Illinois.

¶ 8 Endorsement number 46 addressed UIM coverage, such that:

> "A. Coverage
>
> We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an 'underinsured motor vehicle.' The damages must result from 'bodily injury' sustained by the 'insured' caused by an 'accident.' The owner's or driver's liability for these damages must

result from the ownership, maintenance or use of the 'underinsured motor vehicle.'

* * *

D. Limit of Insurance

Regardless of the number of covered 'autos,' 'insureds,' premiums paid, claims made or vehicles involved in the 'accident,' the most we will pay for all damages resulting from any one 'accident' is the Limit of Insurance for the Underinsured Motorists Coverage shown in this endorsement."

The endorsement advised that "[i]nformation required to complete this Schedule, if not shown above [*i.e.*, by the 'Limit of Insurance'] will be shown in the Declarations." Nothing was shown in the schedule.

Endorsement 47 addressed UM coverage, such that:

"A. Coverage

We will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or driver of an 'uninsured motor vehicle.' The damages must result from 'bodily injury' sustained by the 'insured' caused by an 'accident.' The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the 'uninsured motor vehicle.'

* * *

D. Limit of Insurance

Regardless of the number of covered 'autos,' 'insureds,' premiums paid, claims made or vehicles involved in the 'accident,' the most we will pay for all

damages resulting from any one 'accident' is the Limit of Insurance for the Uninsured Motorists Coverage shown in the Schedule or Declarations.

We will apply the limit shown in the declarations to first provide the separate limits required by the Illinois Safety Responsibility Law as follows:

a. $20,000 for 'bodily injury' to any one person caused by any one 'accident,' and

b. $40,000 for 'bodily injury' to two or more persons caused by any one 'accident.' "

The endorsement advised that "[i]nformation required to complete this Schedule, if not shown above [*i.e.*, by the "Limit of Insurance"] will be shown in the Declarations." Nothing was shown in the schedule.

¶ 9 In a letter dated December 13, 2005, a Marsh representative provided Ace with signed UM/UIM rejection forms for 43 states plus the District of Columbia. Ace inadvertently failed to provide Sunrise with UM/UIM election forms for seven states, including Illinois. With respect to the 44 UM/UIM election forms that Ace did send to Sunrise, Sunrise rejected UM/UIM coverage in all jurisdictions that allowed for complete rejection and opted for the statutory mandatory minimum for UM/UIM coverage for all jurisdictions that did not allow for complete rejection.

¶ 10 On September 17, 2008, plaintiffs filed a motion for declaratory judgment seeking a declaration that Ace insured plaintiffs and that the limit provided for UIM coverage was $2 million, the same amount as the liability coverage. The parties filed cross-motions for summary judgment. Defendant submitted an affidavit of Ellen Gilmore with their cross-motions for

summary judgment. The affidavit averred that Gilmore had knowledge regarding the discussions between Sunrise, Marsh, and Ace regarding the UIM policy limits. Specifically, the affidavit provided that:

> "With respect to the placement of the ACE Policy, Sunrise instructed Marsh of Sunrise's election to reject UM/UIM coverage in jurisdictions where such rejection is permitted. Sunrise also instructed Marsh of its election to opt for the statutory mandatory minimum allowed for UM/UIM coverage in jurisdictions that do not allow for a complete rejection of such coverages. Sunrise rejected the purchase of UM/UIM limits equal to the ACE Policy's liability limits."

On February 15, 2011, the trial court held a hearing on the cross-motions for summary judgment. On March 16, 2011, the trial court issued a written opinion granting summary judgment in favor of defendants and against plaintiffs. This appeal followed.

¶ 11 DECISION

¶ 12 Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). "Construction of the terms of an insurance policy and whether the policy comports with statutory requirements are questions of law properly decided on a motion for summary judgment." *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 399, 930 N.E.2d 943 (2010). We review an appeal from a motion for summary judgment *de novo*. *Id*. at 399-400.

¶ 13 I. Coverage Limit

¶ 14 We first consider whether the language of the auto insurance policy indicates coverage equal to the bodily injury liability or equal to the statutory minimum allowed by section 7-203 of the Illinois Vehicle Code (625 ILCS 5/7-203 (West 2006)), namely, $20/$40. Plaintiffs contend that the subject insurance policy does not expressly provide UM/UIM limits less than the policy's bodily injury liability limits and, therefore, we need not consider whether Sunrise rejected the offer for additional UIM coverage because the policy itself makes clear that the UIM coverage was for the policy's bodily injury liability limit of $2 million. Defendants respond that the policy's declarations page stated a "statutory" UM/UIM coverage election and the UM/UIM statute provides that the UM/UIM limits be equal to the liability limits only if not specifically rejected by the insured. Defendants maintain that Sunrise rejected the additional coverage, thus "statutory" on the policy's declarations page indicated the statutory minimum. Defendants additionally argue that, because the subject policy had UM coverage of $20/$40, which is the statutory minimum, and section 143a-2 of the Illinois Insurance Code (215 ILCS 5/143a-2 (West 2006)) requires UM and UIM coverage to be equal, the policy clearly demonstrated that Sunrise rejected the additional UIM coverage. Defendants further argue that Sunrise's rejection of additional UIM coverage is demonstrated by the fact that Sunrise did not pay an increased premium and Sunrise either rejected UIM coverage entirely or elected the mandatory minimum coverage in all other jurisdictions.

¶ 15 When interpreting an insurance contract, our goal is to ascertain and give effect to the intention of the parties as expressed in the agreement. *Schultz*, 237 Ill. 2d at 400. When the

terms of the agreement are clear and unambiguous, the language must be enforced as written unless doing so would violate public policy. *Id*. A court must construe the policy as a whole and consider the type of insurance purchased, the nature of risks involved, and the overall purpose of the contract. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 456, 930 N.E.2d 1011 (2010).

¶ 16 Illinois law requires liability insurance for motor vehicles. 625 ILCS 5/7-601(a) (West 2006). Illinois law further requires that auto insurance policies include UM/UIM coverage. 215 ILCS 5/143a (West 2006). If the policy at issue includes liability coverage in excess of the minimum amount required by section 7-203 of the Illinois Vehicle Code (625 ILCS 5/7-203 (West 2006)) (requiring $20/$40 coverage), the UM provision must provide the same increased coverage *unless* "specifically rejected by the insured" "by making a written request for limits of uninsured motorist coverage which are less than bodily injury liability limits or a written rejection of limits in excess of those required by law." 215 ILCS 5/143a-2(1), (2) (West 2006). Moreover, UIM coverage must be "equal to the amount of uninsured motorist coverage provided in that policy where such uninsured motorist coverage exceeds the limits set forth in Section 7-203 of the Illinois Vehicle Code." 215 ILCS 5/143a-2(4) (West 2006). Therefore, "[u]nder Illinois law, liability, UM and UIM provision are thus inextricably linked." *Schultz*, 237 Ill. 2d at 404.

¶ 17 The supreme court has stated that "[t]he legislature avoided the absurdity of a situation where a policyholder would receive fewer benefits in the fortuitous event of being injured by an underinsured rather than an uninsured motorist." *Sulser v. Country Mutual Insurance Co.*, 147 Ill. 2d 548, 557, 591 N.E.2d 427 (1992). The supreme court has further provided that "the

legislative considerations behind the underinsured-motorist statute are the same as those underlying the uninsured-motorist statute. Both statutes ensure that an injured policyholder will be compensated for her damages up to the limits of coverage she has paid for, regardless of the coverage carried by the at-fault driver. [Citations.] This common purpose is underscored by the underinsured-motorist statute's requirement that coverage limits under that provision must equal the insured's uninsured-motorist coverage limit." *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 66, 949 N.E.2d 639 (2011); see *DeGrand v. Motors Insurance Corp.*, 146 Ill. 2d 521, 533, 588 N.E.2d 1074 (1992).

¶ 18 In this case, the declarations page of the subject policy listed UM and UIM coverage as "statutory." The UIM endorsement for Illinois referenced the declarations, noting that the limit of insurance was shown therein. Therefore, the express language of the insurance policy provided that Sunrise elected "statutory" UIM coverage. As described, the Illinois statute addressing UIM coverage required that it be equal to UM coverage (215 ILCS 5/143a-2(4) (West 2006)) and UM coverage had to equal that elected for bodily injury liability coverage "unless specifically rejected" "by making a written request for limits of the uninsured motorist coverage which are less than bodily injury liability limits or a written rejection of limits in excess of those required by law" (215 ILCS 5/143a-2(1), (2) (West 2006)). Ace was required to provide Sunrise with "a brief description of the coverage and advise them of their right to reject the coverage in excess of the limits set forth in Section 2-703 of the Illinois Vehicle Code." 215 ILCS 5/143a-2(1) (West 2006). Accordingly, the applicable statute provided Sunrise with the ability to obtain UM/UIM coverage equal to its liability coverage, namely, $2 million, *or to specifically reject* the

additional coverage in excess of that required by section 2-703 of the Illinois Vehicle Code, namely, $20/$40.

¶ 19 Although the UIM endorsement did not provide an express limit of insurance, the UM endorsement stated that Ace would "apply the limit shown in the declaration first to provide the separate limits required by the Illinois Safety Responsibility Law as follows: (a) $20,000 for 'bodily injury' to any one person cause[d] by any one 'accident,' and (b) $40,000 for 'bodily injury' to two or more persons caused by one 'accident.' " As stated, the declarations provided for "statutory" limits. The "statutory" limits expressed in the UM endorsement were for the mandatory minimum of $20/$40. Therefore, where the UM and UIM limits must be equal (*Phoenix Insurance Co.*, 242 Ill. 2d at 66), the language of the Sunrise policy provided for the mandatory minimum coverage required by section 2-703 of the Illinois Vehicle Code. Moreover, when considering the policy as a whole (*Wilson*, 237 Ill. 2d at 456) in light of the fact that it served as a nationwide policy and there not being any dispute that Sunrise rejected UM/UIM coverage entirely where permitted and rejected additional coverage where total rejection was not permitted in at least 44 jurisdictions, it is clear that the "statutory" limit selection in the declarations demonstrated Sunrise's intent to reject additional UM/UIM coverage in Illinois.

¶ 20 Our conclusion is based on the language of the policy at issue. Plaintiffs have not cited any statutory language or case law demonstrating that UIM limits below the liability limits must be indicated in any specified manner within the policy. Plaintiffs citation to *Lee v. John Deere Insurance Co.*, 208 Ill. 2d 38, 802 N.E.2d 774 (2003), and *Wood v. National Liability & Fire Insurance Co.*, 324 Ill. App. 3d 583, 755 N.E.2d 1044 (2001), to argue that the policy required "a

clear and specific delineation of UIM limits in amounts less than liability policy limits" is misplaced. The issue in both *Lee* and *Wood* was whether a rejection of additional coverage could be accepted after the policy was issued. *Lee*, 208 Ill. 2d at 50; *Wood*, 324 Ill. App. 3d at 586-87. Applying the 1992 version of the statute, the *Lee* and *Wood* courts held that the policies at issue improperly provided UM/UIM coverage unequal to the bodily injury limits because the insureds election forms indicating their rejection of additional coverage were signed after the policies were issued. *Id*. The statute was since amended in 2004 to address that very issue, such that there is no longer a requirement that a rejection of coverage occur prior to the issuance of the policy or that an applicant sign a written rejection of coverage. Pub. Act 93-762, §5, eff. July 16, 2004. *Lee* and *Wood* are inapplicable to the case before us.

¶ 21 II. Gilmore Affidavit

¶ 22 Plaintiffs additionally contend the trial court erred in failing to strike the affidavit defendants submitted in support of their cross-motions for summary judgment where the affidavit lacked sufficient foundation.

¶ 23 Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) governs the sufficiency of an affidavit submitted in support of a motion for summary judgment. Pursuant to Rule 191(a), an affidavit in support of or in opposition to a motion for summary judgment must be made on the personal knowledge of the affiant and must not consist of conclusions, but facts admissible as evidence, and must affirmatively show that the affiant could competently testify to those facts. The decision whether to strike a Rule 191(a) affidavit is within the sound discretion of the trial court. *American Insurance Co. v. China Ocean Shipping Co.*, 402 Ill. App. 3d 513, 524, 932

N.E.2d 8 (2010).

¶ 24 Because our conclusion is based on the language of the policy and does not rely on the contents of the affidavit or Gilmore's deposition testimony, we need not determine whether the trial court abused its discretion in refusing to strike the affidavit.

¶ 25 CONCLUSION

¶ 26 We affirm the judgment of the trial court granting defendants' motion for summary judgment where the policy at issue provided the minimum mandatory UIM coverage required by the Illinois statute.

¶ 27 Affirmed.