

NOTICE

Decision filed 06/15/06. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-04-0575

IN THE  
 APPELLATE COURT OF ILLINOIS  
 FIFTH DISTRICT

COLUMBIA MUTUAL INSURANCE COMPANY, ) Appeal from the  
 ) Circuit Court of  
 Plaintiff, ) Saline County.  
 )

v. )

DR. ROGER HERRIN, Special Administrator of the )  
 Estate of Michael Herrin, Deceased, )  
 KATHERINE DUNCAN, ROSS DUNCAN, JARED )  
 HEAD, ENCOMPASS INSURANCE COMPANY, )  
 HARRISBURG MEDICAL CENTER, BRIAN W. )  
 BRAMLET, and ROBERT BRAMLET, )

Defendants. )

----- ) No. 02-MR-42

DR. ROGER HERRIN, Special Administrator of the )  
 Estate of Michael Herrin, Deceased, )

Counterplaintiff-Appellee and Cross-Appellant, )

v. )

ENCOMPASS INSURANCE COMPANY, )

Counterdefendant-Appellant and Cross-Appellee, )

and )

JARED HEAD, WAYNE HEAD, MARTHA HEAD, )  
 KATHERINE DUNCAN, ROSS DUNCAN, )  
 RUSSELL DUNCAN, MONROE GUARANTY )  
 INSURANCE COMPANY, and CINCINNATI )  
 INSURANCE COMPANY, )

Counterdefendants. )

) Honorable  
 ) Bruce D. Stewart,  
 ) Judge, presiding.

JUSTICE McGLYNN delivered the opinion of the court:

## I. INTRODUCTION

At issue in this appeal is the interpretation of an automobile insurance policy after a fatal automobile accident for which multiple insurance policies apply. In this case, the negligent driver's insurance company tendered its policy limits of \$100,000 to the trial court through interpleader. Since the other driver had underinsured-motorist (UIM) coverage under her own insurance policy issued by Encompass Insurance Company (Encompass) and \$100,000 was not enough to cover the injuries incurred in this accident, Encompass was brought in as a defendant. The Encompass insurance policy provided \$300,000 in UIM coverage on three automobiles. A counterclaim for a declaratory judgment was also filed against Encompass by the estate of the decedent passenger to determine how much UIM coverage was available. After the parties filed motions for a summary judgment, the trial court entered an order finding that the Encompass insurance policy at issue provides \$900,000 in UIM coverage to the four injured parties. The trial court also found that Encompass is entitled to a total setoff in the amount of \$100,000, or a setoff of the actual amount each claimant receives from the negligent driver's insurance company. In essence, the trial court found that the UIM coverage amounts for three separate vehicles listed in the Encompass insurance policy stack but that the setoff provided by the negligent driver's insurance contribution does not.

Encompass now files an interlocutory appeal pursuant to Illinois Supreme Court Rule 304(a) (155 Ill. 2d R. 304(a)), arguing that since the UIM coverage of \$300,000 stacks for each of the three vehicles covered by the policy to provide \$900,000 in UIM coverage for the four injured parties, then the setoff for the negligent driver's insurance contribution should also stack. A review of this question necessitates a review of how the insurance contract is interpreted as a whole. Thus, we are compelled to first review the original finding by the trial court that the Encompass policy provides \$900,000 in UIM coverage. After a thorough

review of the insurance policy and the applicable law, we find that the proper interpretation of the policy prohibits the stacking of UIM coverages and also prohibits the stacking of the setoffs. However, as discussed further below, since Encompass's second motion to amend its answer was denied and that motion is not before this court, we decline to address the question of whether Encompass may be bound by its admission that the coverages *do* stack and that \$900,000 in UIM coverage is available.

## II. BACKGROUND

On June 14, 2001, Brian Bramlet failed to stop his truck at an intersection in Saline County and collided with a car driven by Katherine Duncan. Duncan was injured, as were her son Ross Duncan and his friend Jared Head, who were passengers in Duncan's vehicle. Tragically, a third passenger, Michael Herrin, was killed. Thereafter, Bramlet's insurer, Columbia Mutual Insurance Company, filed a complaint for interpleader and deposited Bramlet's liability insurance limit of \$100,000 with the trial court for its determination of the distribution among Herrin's estate and the other injured parties. In turn, Herrin's estate filed a counterclaim against Duncan's insurance company, Encompass, alleging that Duncan's insurance policy provides UIM coverage in the amount of \$1.2 million, or \$300,000 stacked for each of the three motor vehicles and one all-terrain vehicle (ATV) included in Duncan's policy issued by Encompass. Encompass then filed an answer admitting that the UIM coverages applied, admitting that the coverages stacked, and admitting that the total coverage provided was \$1.2 million. Thereafter, the trial court granted Encompass's motion to amend its answer so that it could deny that \$300,000 of the admitted \$1.2 million in UIM coverage applied because it related to an insured ATV and so that it could admit that only \$900,000 in UIM coverage applied, or \$300,000 for each of the three insured automobiles.

After Herrin's estate filed a motion for a summary judgment with regard to its counterclaim against Encompass, the trial court entered an order finding that Encompass's

policy provides \$900,000 in UIM coverage and that Encompass is entitled to a setoff against the \$900,000 UIM coverage in the total amount of \$100,000 (Bramlet's liability insurance limit). The trial court did not state whether it found that \$900,000 in UIM coverage was available because in its answer Encompass had admitted that the UIM coverages stacked or whether the trial court interpreted the insurance contract under the law to provide stacked coverage. Regardless, after the trial court's order on this issue was entered, Encompass filed a second motion to amend its answer to deny that the UIM coverage stacked, in light of the Illinois Supreme Court's opinion in *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 823 N.E.2d 561 (2005). Encompass argued that the supreme court's opinion in *Hobbs* led Encompass to believe that the Fifth District may rule that in some circumstances antistacking provisions may be enforceable. The trial court denied Encompass's second motion but did not state the basis for the denial.

After the trial court denied Encompass's second motion to amend its answer, Encompass filed this interlocutory appeal, but only with regard to the trial court's determination that the setoffs did not stack and that Encompass was entitled only to a \$100,000 setoff. Encompass did not appeal the trial court's order that denied its second motion to amend its answer to deny that the UIM coverages stacked. Therefore, that question is not before us on appeal.

To properly address the setoff issue, we must interpret the construction or legal effect of the insurance contract as a matter of law. See *Bruder v. Country Mutual Insurance Co.*, 156 Ill. 2d 179, 185, 620 N.E.2d 355, 358 (1993). This interpretation necessitates the need to review whether the UIM coverages stack. Since these issues are strictly questions of law, we review the policy *de novo*. See *Bruder*, 156 Ill. 2d at 185, 620 N.E.2d at 358.

### III. UIM COVERAGE

The Encompass insurance policy lists three vehicles on the declarations page and

limits the liabilities for UIM coverage to \$300,000 per accident for each vehicle. The UIM-coverage-limitation provision also provides the following antistacking provision:

"LIMIT OF LIABILITY

1. The limit of liability shown in the Coverage Summary for this coverage is our maximum limit of liability for all damages, resulting from any one motor vehicle accident.

This is the most we will pay regardless of the number of:

- a. Covered persons;
- b. Claims or suits made;
- c. Vehicles involved in an accident *or shown in the Coverage Summary*;
- d. Persons who sustain injury or damage;
- e. *Vehicles insured by this or any other policy issued by us or others; or*
- f. *Premiums paid for this coverage.*" (Emphasis added.)

Antistacking provisions in insurance policies are enforceable when the language employed is clear and unambiguous. *Grzeszczak v. Illinois Farmers Insurance Co.*, 168 Ill. 2d 216, 221, 659 N.E.2d 952, 956 (1995). If an antistacking clause is unambiguous and does not violate public policy, it must be enforced according to its terms. *Grzeszczak*, 168 Ill. 2d at 223-24, 659 N.E.2d at 956. "The touchstone in determining whether ambiguity exists regarding an insurance policy \*\*\* is whether the relevant portion is subject to more than one reasonable interpretation [citations], not whether creative possibilities can be suggested." *Bruder*, 156 Ill. 2d at 193, 620 N.E.2d at 362. "Reasonableness is the key." *Bruder*, 156 Ill. 2d at 193, 620 N.E.2d at 362.

In *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 823 N.E.2d 561 (2005), the Illinois Supreme Court set out the broad rules to apply when analyzing and interpreting an insurance policy, stating:

"If the policy language is unambiguous, the policy will be applied as written, unless it contravenes public policy. [Citation.] Whether an ambiguity exists turns on whether the policy language is subject to more than one reasonable interpretation. Although 'creative possibilities' may be suggested, only reasonable interpretations will be considered. [Citation.] Thus, we will not strain to find an ambiguity where none exists. [Citation.] Although policy terms that limit an insurer's liability will be liberally construed in favor of coverage, this rule of construction only comes into play when the policy is ambiguous." *Hobbs*, 214 Ill. 2d at 17, 823 N.E.2d at 564.

In most cases where Illinois courts have found that antistacking provisions were unenforceable and that coverages stacked, they did so when the liability limit was listed separately on the declarations page for each covered vehicle. In doing so, these courts found that the declarations page could be interpreted differently than the policy language itself, which prohibited stacking. The finding that the coverages stacked, however, was not the result of an analysis of the policy language. Rather, it was a result of a judicially created rule to find strictly against the insurer whenever an ambiguity existed regarding the proper interpretation of the declarations page and the policy language itself.

When interpreting an insurance contract, we are to examine the declarations page or binder along with the printed terms of the insurance policy itself. *Hobbs*, 214 Ill. 2d at 23, 823 N.E.2d at 567. Undoubtedly, questions left unanswered by one portion of the contract may be answered quite clearly by another portion of the contract. *Hobbs*, 214 Ill. 2d at 23, 823 N.E.2d at 568. This does not make the document as a whole or in part ambiguous.

In Illinois, the policy and its declarations page or schedule-of-coverage page should detail the nature and amounts of coverage in order to protect consumers from unwittingly accepting insurance in amounts or under terms contrary to those for which he or she bargained. Therefore, as we undertake to interpret an automobile insurance policy in

conjunction with its declarations page, we must consider the statutory and common law rules that require an insurer to include certain data in policies and declarations pages or schedules of coverage.

Under Illinois law, those who operate a motor vehicle must maintain liability insurance and carry proof of insurance while driving. 625 ILCS 5/7-601 (West 2004); 50 Ill. Adm. Code §8010.20 (2000). In order to allow a driver to comply easily with the law, insurers are required to issue to an insured driver an insurance card that details the driver's insurance coverage. 50 Ill. Adm. Code §8010.20(a) (2000). However, a driver may also comply by carrying a policy declarations page, a certificate of insurance, or an insurance binder. 50 Ill. Adm. Code §8010.30(a)(1), (a)(2), (a)(3) (2000). In order for these items to qualify as evidence of insurance, they must contain the following:

- "1) company name;
- 2) policy number—not required on a binder or premium receipt;
- 3) effective date;
- 4) expiration date or number of days from the effective date;
- 5) name of insured(s);
- 6) vehicle year;
- 7) vehicle make;
- 8) either all or the last six characters of the vehicle identification number (VIN);
- 9) date of premium payment—required only on a receipt; and
- 10) signature of an authorized representative." 50 Ill. Adm. Code §8010.30(b) (2000).

Insurers are also required to offer UIM coverage in an amount equal to the amount of liability insurance the insured purchased. 215 ILCS 5/143a-2(4) (West 2004). However, the

insured may choose to purchase less uninsured-motorist coverage and UIM coverage than what is offered. 215 ILCS 5/143a-2(2), (4) (West 2004); see *Lee v. John Deere Insurance Co.*, 208 Ill. 2d 38, 44-45, 802 N.E.2d 774, 777-78 (2003). If so, the insured must elect the lower amount *in writing*. 215 ILCS 5/143a-2(2), (4) (West 2004); see *Lee*, 208 Ill. 2d at 44-45, 802 N.E.2d at 777-78. Because the limits for liability coverage and UIM coverage can be different amounts for different vehicles and insurers must provide a written declaration of the coverage purchased, it is understandable, if not mandated, under the Illinois law cited above, that the insurer list the amount of liability coverage and UIM coverage for each vehicle separately, as Encompass did in this case.

Such a format does not mean, however, that the limits of coverage stack. In this case, the antistacking language contained within the policy itself is quite clear. The insurer's declarations page, with its columns identifying who is insured, the make, model, and vehicle identification number of each vehicle covered, and the amounts of coverage for each vehicle, does not negate this antistacking language. The declarations page merely portrays the insurers' effort to create a document that complies with the statutory and regulatory schemes governing vehicle insurance policies in Illinois. After reviewing the declarations page and the policy language together, we fail to find that the declarations page in this case is ambiguous or misleading about the coverage provided, given the antistacking language in the policy itself.

Much has been made of certain *dicta* found in *Bruder v. Country Mutual Insurance Co.*, 156 Ill. 2d 179, 192-93, 620 N.E.2d 355, 362 (1993), which one could consider instructive on the situation the insurance policy presents here. In *Bruder*, the Illinois Supreme Court found that the antistacking clause at issue was unambiguous, but the court stated that "[i]t would not be difficult to find an ambiguity" created by a declarations page which listed the limit of liability separately for each vehicle insured. *Bruder*, 156 Ill. 2d at

192, 620 N.E.2d at 362. Indeed, some courts have read this language to mandate a finding of ambiguity when the declarations page lists the limit of liability for each vehicle. Having considered this *dicta*, we find that the supreme court did not intend to create a *per se* rule that any listing of multiple limits of liability creates an ambiguity.

The same assessment was made in *In re Estate of Striplin*, 347 Ill. App. 3d 700, 703, 807 N.E.2d 1255, 1259 (2004). As we discussed above, the *In re Estate of Striplin* court found that "by focusing solely on the layout of the declarations page, it ignores the command that all portions of an insurance policy must be construed together." *In re Estate of Striplin*, 347 Ill. App. 3d at 704, 807 N.E.2d at 1259. The *In re Estate of Striplin* court also noted, as we did above, that "[a]ny provision of a lengthy document is bound to be ambiguous in the sense that it creates questions that can be answered only with reference to other portions of the document." *In re Estate of Striplin*, 347 Ill. App. 3d at 706, 807 N.E.2d at 1260. "That is why all provisions of an insurance policy must be construed together." *In re Estate of Striplin*, 347 Ill. App. 3d at 706, 807 N.E.2d at 1261. After construing the insurance policy as a whole, the *In re Estate of Striplin* court found, as we do here, that "[t]he entries in the columns on the declaration page in this policy do nothing more than indicate the amount of coverage provided for each vehicle and the amount of the total premium allotted to that coverage." *In re Estate of Striplin*, 347 Ill. App. 3d at 705, 807 N.E.2d at 1260 (quoting *Pekin Insurance Co. v. Estate of Ritter*, 322 Ill. App. 3d 1004, 1005, 750 N.E.2d 1285, 1286 (2001)). When read in conjunction with the policy language, the declarations page creates no question or confusion with respect to stacking—the coverages on the three different vehicles insured in this case do not stack. We decline to address the issue of whether Encompass may be bound by its admission that the coverages *do* stack and that \$900,000 in UIM coverage is

available, since that issue is not before us in this interlocutory appeal.<sup>1</sup>

#### IV. SETOFFS

We now turn to whether the \$100,000 setoff allowed to account for Bramlet's insurer's contribution of its liability limit stacks to provide a total setoff of \$300,000 per claim. We must remember, however, that Encompass based this argument on the premise that if it is bound to its admission of stacking, it should enjoy the benefit of stacking the setoffs afforded each vehicle covered. Since we have found that under Illinois law the limits do not stack under the terms of the unambiguous policy language as a whole, we find there is no stacking of the setoffs either. Because the policy includes clear antistacking language regarding coverages, one cannot infer that it intended to allow for the stacking of setoffs.

Since the policy at issue was effective during the years 2000 and 2001, the Illinois Supreme Court's opinion in *Cummins v. Country Mutual Insurance Co.*, 178 Ill. 2d 474, 687 N.E.2d 1021 (1997), controls. In *Cummins*, the supreme court held that to the extent that the amount of liability insurance *actually recovered* is less than the amount of UIM coverage, the liable driver is considered underinsured and the injured party is entitled to UIM benefits. *Cummins*, 178 Ill. 2d at 486, 687 N.E.2d at 1027. Therefore, we affirm the decision of the trial court in this case regarding the issue of setoffs. Encompass, as the UIM insurance carrier, is entitled to a setoff in the amount actually received by each claimant from Bramlet's

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<sup>1</sup>If the trial court has occasion to further reconsider this issue, however, we remind the trial court of the Illinois Supreme Court's recent opinion in *People ex rel. Department of Public Health v. Wiley*, 218 Ill. 2d 207, 843 N.E.2d 259 (2006).

insurance company. However, this setoff is not to exceed the total amount of liability coverage tendered by Bramlet's insurance company, which was \$100,000.

#### V. THE HERRIN ESTATE'S CROSS-APPEAL

The Herrin estate has also filed a cross-appeal in this case. In this cross-appeal, the Herrin estate claims that the trial court erred in granting Encompass leave to amend its answer to deny that the applicable insurance policy provided UIM coverage for four vehicles (three automobiles and the ATV) and to clarify that it only provided UIM coverage for three automobiles. We disagree.

The decision of whether to allow an amendment to a pleading lies within the sound discretion of the trial court, and its ruling on the matter will not be disturbed on review absent an abuse of discretion. *Killion v. Meeks*, 333 Ill. App. 3d 1188, 1195, 777 N.E.2d 1007, 1013 (2002); *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill. App. 3d 628, 633, 819 N.E.2d 353, 358 (2004). An abuse of discretion is found when no reasonable person could take the position adopted by the trial court. *American Federation of State, County & Municipal Employees v. Schwartz*, 343 Ill. App. 3d 553, 559, 797 N.E.2d 1087, 1091 (2003).

When deciding whether to grant a motion for leave to amend, the trial court must consider the following factors: (1) whether the proposed amendment would cure the defective pleading, (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment, (3) whether the proposed amendment is timely, and (4) whether previous opportunities to amend the pleading could be identified. *Killion v. Meeks*, 333 Ill. App. 3d 1188, 1195, 777 N.E.2d 1007, 1013 (2002).

In the instant case, allowing Encompass to amend its answer cured the defective pleading. It is doubtful that the other parties sustained prejudice or surprise by the amendment. The mistake in admitting that there was UIM coverage for four vehicles was a mistake that was clearly recognizable by all the parties—the declarations page clearly states

that UIM coverage is provided for the three automobiles owned by the Duncans and not for the four-wheel ATV that was insured for liability, medical expenses, comprehensive, and collision coverages under the policy but not for UIM coverage. Moreover, since Encompass moved to amend its answer as soon as it first noticed its mistake—which was within the first three months after filing its original answer, we find that the motion to amend was filed within a reasonable time and at Encompass's first opportunity.

Therefore, based on the record in this case, we cannot say that the circuit court abused its discretion in granting Encompass's motion to amend. Accordingly, we affirm the decision of the trial court to allow Encompass to amend its original answer. Thus, we deny the relief requested in the Herrin estate's cross-appeal.

## VI. CONCLUSION

For the foregoing reasons, we affirm the trial court's order with regard to the parties' motions for a summary judgment as it relates to the specific finding that the setoffs do not stack. We also affirm the trial court's order granting Encompass's first motion to amend its complaint. Since this is an interlocutory appeal pursuant to Supreme Court Rule 304(a) and the orders at issue do not resolve all the issues regarding all the parties, we remand this case to the trial court for further proceedings consistent with this opinion.

Affirmed; cause remanded.

HOPKINS and DONOVAN, JJ., concur.



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