COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2013-SC-000732-D
COURT OF APPEALS NO. 2009-CA-001961

ALLSTATE INSURANCE COMPANY — APPELLANT

vs.

APPEAL FROM THE JEFFERSON CIRCUIT COURT
HONORABLE IRVING MAZE
CIVIL ACTION NO. 09-CI-00399

CRAIG T. SMITH — APPELLEE

*** *** *** ***

REPLY OF APPELLANT ALLSTATE INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Reply Brief was on the 8th day of December, 2014 mailed to the below, as required by CR 76.12(6):

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Comes Appellant Allstate Insurance Company ("Allstate"), by counsel, and for its Reply to the Brief of Appellee, Craig T. Smith ("Response") states the following.

Construing the plain meaning of KRS 304.39-320, this Court has consistently made clear that UIM coverage is a purely optional coverage, and there is no obligation for an insurer to provide this coverage unless it has been specifically requested and a premium paid for it by the insured. Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 248 (Ky. 1992); Flowers v. Wells, 602 S.W.2d 179 180 (Ky.App. 1980); and McKenzie at 7.

Appellee Smith has acknowledged that, despite looking over his various policy versions issued to him every six months for over 30 years prior to the subject motor vehicle accident, he never, not one time, ever requested that UIM coverage be provided.[1] Now, he is having buyers remorse having been involved in a motor vehicle accident in which he claims that the tortfeasor's liability limits were not sufficient to make him whole. He has made every argument conceivable in an attempt to secure this coverage that he never requested nor ever paid for.

The touchtone of Mr. Smith's claim herein is that Allstate never told him that UIM coverage was optional nor that he did not have it. Response at 1. There are only two issues presented to this Court for review–the applicability of KRS 304.20-040(13) to the Allstate Policy and whether Allstate Policy form X4093-1 provided the notice required by this statute.[2] Appellee Smith's arguments in both of these areas constitute nothing less than an attempt to reword the

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[1] This exact issue was dealt with in the McKenzie case on page 5 involving a nearly identical Allstate policy in which the policy declarations made it quite clear that UIM coverage was not provided.

[2] As noted in Allstate's Brief at 7 and in the Motion to Strike A Portion of Appellee's Brief filed herewith, Appellee Smith lost on three other related issues that he raised before the Court of Appeals, but he failed to preserve those issues for this Court's review by not filing a Cross-Motion for Discretionary Review. Thus, the only issue before this Court is the applicability and construction of KRS 304.20-040(13).

statute from what it plainly states.

A. KRS 304.20-040(13) DOES NOT APPLY TO THE ALLSTATE POLICY BECAUSE IT IS NOT RETRO-ACTIVE.

KRS 304.20-040(13) plainly and clearly states that the notice required to be given must be given only on one (1) occasion–on "first notice of renewal." As stated in Allstate's Brief, insurance policies have only one first renewal: that occurs when the original policy period ends, and the policy renews for a new incremental coverage period for the first time. There is no question or dispute that, for the Allstate Policy which dates back to the 1970s, its first renewal occurred long before the enactment of the foregoing statute in 1990.

Appellee Smith argues that this construction would turn the statute "on its head." Response at 6. So, he argues that the statutory notice should have been given at the first renewal after the 1990 enactment of this statute. The problem with that argument, of course, is that it is not consistent with the plain meaning of this statute. In other words, the statute does not contain a provision to "un-grandfather" those policies that were in existence when it was enacted and had already reached their first renewals before then. Indeed, as noted in Allstate's Brief, there is a specific statute that allows the General Assembly to make a statute retroactive, KRS 446.080(3), but it was not applied to KRS 304.20-040(13).

Mr. Smith also argues that the application of this statute's plain meaning would "penalize" him, since his policy was already in effect at the time of the statute's 1990 enactment. Response at 6. He contrasts his perceived plight with a "new customer [who] would be entitled to notice at the same time of first renewal policy." Id. He claims that this situation is "unreasonable." Id. Yet, that is exactly what happened in the Mullins case itself, which Mr.

Smith cites, in which this Court indicated that the foregoing statute did not apply to the insurance policy at issue because the subject motor vehicle accident occurred before the enactment of the statute–regardless of the fact that the plaintiff/insured's suit postdated it. Mullins at 249.

Finally, Appellee Smith argues that Allstate's position would not be in line with the general public policy of the Motor Vehicle Reparations Act, KRS Chapter 304.39 ("MVRA") to ensure that motor vehicle accident victims are "fully compensated." The problem with this argument is that not only is UIM coverage optional per its statute that is part of the MVRA, but a different public policy is expressly set forth in the specific language of the statute actually at issue, KRS 304.20-040(13), that was not retroactive and clearly indicates that the notice in question need only be given at "first renewal."

Thus, the General Assembly's intended purpose for this statute is quite plain and clear on its face, and the statute, therefore, simply does not apply to Appellee Smith's three-decade old Allstate Policy.

B. THE ALLSTATE POLICY'S FORM X4093-1 PROVIDES THE EXACT NOTICE REQUIRED BY KRS 304.20-040(13).

Appellee Smith also ignores the plain language of this statute in his attempt to argue that the Allstate Policy's form X4093-1 does not provide the required statutory notice. He would like this statute to require that insurance companies provide notice to their insureds, first, that UIM coverage is optional coverage and, second, a notice when their policies do not include this coverage. Response at 9. But that is simply not what the statute provides.

A critically important word that Mr. Smith ignores and that is present in this statute is that notice be given that "added" UM, UIM, and PIP coverages are available. There is no

requirement at all from the plain meaning of this statute that an insured be informed that UIM coverage is optional coverage nor that his policy completely lacked this coverage.

It is in this context that the McKenzie Opinion is particularly on point. Contrary to Appellee Smith's attempt to distinguish it, the Court of Appeals addressed this statute and the fact that an identical Allstate Policy's form X4093-1 provided the required notice, when that issue was raised by the appellant/plaintiff in that case. McKenzie at 7-8. Furthermore, Mr. Smith's attempt to assert that the Court of Appeals in McKenzie never addressed the "interplay" between the statute and Mullins is beside the point, as even he acknowledges that the McKenzie Court did cite and, thus obviously consider, Mullins. Response at 10. His attempts to distinguish McKenzie are without merit.

Finally, Appellee Smith argues that, "to interpret this statute as Allstate argues would eliminate the need for an insurer to ever advise of the availability of UIM coverage." Response at 11. Yet, that is precisely the point of Mullins itself and several other cases along with KRS 304.39-320 that all uniformly provide that UIM coverage is strictly optional coverage that need not be provided unless it is expressly requested by an insured. It is not nor was it ever Allstate's obligation to advise Mr. Smith of the availability of UIM coverage. That was his responsibility.

Nonetheless, as the Court of Appeals noted in McKenzie, the notice exactly tracking KRS 304.39-040(13)'s language provided in form X4093-1 does, in substance, advise a policy holder "of the availability of UIM coverage." McKenzie at 8.

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Wherefore, for the reasons set forth herein, in its original Brief and at any other opportunity to be heard, Appellant Allstate Insurance Company respectfully requests that the

Court of Appeals' decisions regarding KRS 304.39-040(13) be reversed and that the Jefferson Circuit Court's Summary Judgment in its favor on all issues be affirmed in its entirety.

Respectfully Submitted,

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