

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

AMBER R. HESS,

Plaintiff,

v.

CASE NO.: 19-C-210
Judge Cindy S. Scott

PROGRESSIVE MAX INSURANCE
COMPANY,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on the 17th day of August 2020, on Plaintiff's Motion for Summary Judgment, filed July 1, 2020, and Defendant's Motion for Summary Judgment, filed July 1, 2020. Plaintiff, Amber Hess appeared not in person, but by counsel Chad C. Groome. Progressive Max Insurance Company ("Progressive") appeared by counsel Susan R. Snowden. The parties seek a determination as to whether the Plaintiff meets the definition of an "insured person" under the underinsured motorist section of Defendant's policy.

The Court heard arguments of counsel and took the motions under advisement. The Court has studied the motions, responses, exhibits, and the memoranda of law submitted by the parties; considered the arguments of counsel; and reviewed pertinent legal authorities. As a result of these deliberations, the Court finds as follows:

FACTS and PROCEDURAL HISTORY

On July 20, 2017, Plaintiff Amber Hess was a guest passenger in a motor vehicle operated by her friend Susan Bindernagel. The motor vehicle was owned by Enterprise LLC. At the time, Ms. Bindernagel was insured by a West Virginia policy of motor vehicle insurance issued by Progressive and which contained underinsured motorists coverage.

While Ms. Bindernagel was operating the rental vehicle, it was rear-ended by a vehicle owned and operated by tortfeasor, Dana D. Miller. The liability of the tortfeasor for the collision was reasonably clear. As a direct and proximate result of the tortfeasor's negligence, Plaintiff suffered bodily injuries requiring medical treatment and sustained damages.

At the time of the collision, Dana D. Miller was insured by a policy of motor vehicle liability insurance issued by USAA, with available limits of Twenty-Five Thousand Dollars (\$25,000.00) per person / Fifty Thousand Dollars (\$50,000.00) per accident. The total amount of the limits, \$50,000.00, was split three ways – between Ms. Bindernagel, Plaintiff, and another passenger (Christine Brehm). As a result of the policy-limits settlement, Plaintiff was not made whole. Therefore, the tortfeasor was operating an underinsured motor vehicle.

Ms. Bindernagel and Plaintiff contacted Progressive and advised it of the policy limits settlement offer, requested consent to settle, requested a waiver of subrogation, and advised Progressive of their intent to proceed against the subject underinsured motorists coverage. Progressive provided consent to settle and a waiver of subrogation with respect to Ms. Bindernagel's claim. However, Progressive's position is that Plaintiff is not an "insured person" under the policy; and, thus, there is alleged to be no underinsured motorists coverage for her benefit.

This declaratory judgment action involves underinsurance coverage for a guest passenger of a rental vehicle who was injured as the result of the negligence of the driver of another vehicle. Both parties have filed motions for summary judgment on the insurance coverage issue.

The subject Policy contains the following insuring agreement for underinsured motorist bodily injury coverage:

PART III UNINSURED/UNDERINSURED MOTORIST COVERAGE

INSURING AGREEMENT - UNDERINSURED MOTORIST COVERAGE

If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of:

1. **an underinsured motor vehicle because of bodily injury:**
 - a. **sustained by an insured person;**
 - b. **caused by an accident; and**
 - c. **arising out of the ownership, maintenance or use of an underinsured motor vehicle; . . .**

ADDITIONAL DEFINITIONS

When used in this Part III:

1. **"Insured person" means:**
 - A. **you, a relative, or a rated resident;**
 - B. **any person while operating a covered auto with the permission of you, a relative, or a rated resident;**
 - C. **any person occupying, but not operating, a covered auto; and**
 - D. **any person who is entitled to recover damages covered by this Part III because of bodily injury sustained by a person described in a., b. or c.**

GENERAL DEFINITIONS

1. **"Additional auto" means an auto you become the owner of during the policy period that does not permanently replace an auto shown on the declarations page if;**
 - a. **we insure all other autos you own;**
 - b. **the additional auto is not covered by any other insurance policy; or**
 - c. **you notify us within 30 days of becoming the owner of the additional auto; and**
 - d. **you pay any additional premium due.**

An additional auto will have the broadest coverage we provide for any auto shown on the declarations page. If you ask us to insure an additional auto more than 30 days after you become the owner, any coverage we provide will begin at the time you request coverage.

5. **“Covered auto” means:**

- A. any auto or trailer shown on the declarations page for the coverages applicable to that auto or trailer;
- B. any additional auto;
- C. any replacement auto; or
- D. a trailer owned by you.

11. **“Replacement auto” means an auto that permanently replaces an auto shown on the declarations page. A replacement auto will have the same coverage as the auto it replaces if the replacement auto is not covered by any other insurance policy. However, if the auto being replaced had coverage under Part IV—Damage To A Vehicle, such coverage will apply to the replacement auto only during the first 30 days after you become the owner unless you notify us within that 30-day period that you want us to extend coverage beyond the initial 30 days. If the auto being replaced did not have coverage under Part IV—Damage To A Vehicle, such coverage may be added, but the replacement auto will have no coverage under Part IV until you notify us of the replacement auto and ask us to add the coverage.**

The Policy’s declarations page lists one automobile: a 2011 Subaru Legacy 4 Door Sedan.

DISCUSSION

Pursuant to West Virginia Code Section 55-13-1, *et seq.*, the Court “shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. . . . [S]uch declarations shall have the force and effect of a final judgment or decree.” W. Va. Code § 55-13-1. The purpose of a declaratory judgment is to avoid the expense and delay of litigation and opt instead for an advance determination of legal questions that is then given legal effect. See Carvey v. West Virginia State Bd. of Educ., 206 W.Va. 720, 527 S.E.2d 831 (1999).

“An insurer may not issue any policy of bodily injury or property damage liability insurance which excludes coverage to the owner or operator of a motor vehicle on account of bodily injury or property damage to any guest or invitee who is a passenger in such motor

vehicle.” W.Va. Code § 33-6-29(a).

“Every policy or contract of liability insurance which insures a motor vehicle licensed in this state with collision, comprehensive, property or bodily injury coverage shall extend these coverages to cover the insured individual while operating a motor vehicle which he or she is permitted to use by a person, firm or corporation that owns the vehicle and is engaged in the business of selling, repairing, leasing or servicing motor vehicle.” W. Va. Code § 33-6-29(b).

“[T]he term ‘named insured’ means the person named as such in the declarations of the policy or contract and shall also include such person's spouse if a resident of the same household and the term ‘insured’ means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person, except a bailee for hire, who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies. W.Va. Code § 33-6-31(c).

“Provisions in an insurance policy which conflict with the requirements of a general insurance statute either by adding to or taking from its requirements are void and ineffective”. Syl. Pt. 2, Johnson v. Continental Cas. Co., 157 W.Va. 572 (1973).

“Insurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes.” Syl. Pt. 3, Deel v. Sweeney, 181 W.Va. 460, 383 S.E. 2d 92 (1989).

“The underinsured motorist statute is remedial and it should be liberally construed. The preeminent public policy of this state in uninsured and underinsured motorist cases is that the injured person be fully compensated for his or her damages not compensated by a negligent

tortfeasor, up to the limits of the uninsured or underinsured motorist coverage.” Adkins v. Meador, 201 W.Va. 148, 153 (1997).

“W.Va.Code, 33-6-31(c) requires insurance companies to provide uninsured motorist coverage, and make available underinsured motorist coverage, for any person, except a bailee for hire, who uses the insured vehicle with the express or implied consent of the named insured. The term ‘uses’ in W.Va.Code, 33-6-31(c) is less restrictive than the term ‘occupying’. ‘Use’ of an insured vehicle implies employing the vehicle for some purpose or object of the user.” Syl. Pt. 3, Adkins v. Meador, 201 W. Va. 148 (1997).

The issue before this Court is whether the Enterprise rental car involved in the accident is a “covered auto” under the underinsured motorist section of Ms. Bindernagel’s Progressive policy and whether Plaintiff meets the definition of an “insured person” under the underinsured motorist section of Ms. Bindernagel’s Progressive policy.

Progressive insists that Plaintiff is not an “insured person” under the policy. Progressive argues that Plaintiff does not meet the definition of an insured person because the Enterprise rental car involved in the accident is not a “covered auto” under the Policy. Specifically, Progressive contends that Plaintiff is not one of the specific persons covered for using any auto since the Enterprise rental car is not a “covered auto” under the Policy. Progressive also argues that Plaintiff does not meet the definition of an “insured” contained in West Virginia Code Section 33-6-31(c).

Plaintiff contends that she is an insured under Ms. Bindernagel’s Progressive underinsured motorist policy. Plaintiff argues that West Virginia Code Section 33-6-31 intended to extend underinsured coverage to guest passengers in every policy applicable to a motor vehicle, regardless of how the insurer defined the scope of an underinsured insured within

its own policies.

Plaintiff urges the Court to read West Virginia Code Sections 33-6-31 and 33-6-29 together. Plaintiff argues that since Ms. Bindernagel's policy is rendered applicable to the rental car by virtue of statute, West Virginia Code Section 33-6-31(c) renders the underinsured coverage applicable to Plaintiff as a guest passenger.

Plaintiff maintains that West Virginia statutes require a guest passenger in a rental vehicle to be afforded underinsured motorist coverage under a policy of insurance that provides coverage to the rental vehicle in which she is a lawful guest passenger. The Court agrees.

Plaintiff was a guest passenger in a rental motor vehicle operated by a named insured of Progressive; therefore, Progressive's policy applied to the subject rental vehicle. As a result, West Virginia statutory requirements supersede policy language which otherwise defines a covered auto or excludes coverage to persons such as the Plaintiff.

Furthermore, the Court believes that excluding Plaintiff from recovering under the Progressive policy as a guest passenger of the rental car driven by a Progressive insured thwarts the spirit, purpose, and intent of the uninsured and underinsured motorists statutes by preventing Plaintiff from recovering damages arising from the negligence of Dana Miller, an underinsured motorist.

ORDER

ACCORDINGLY, based on the foregoing, the Court DECLARES that based on the facts in this case, the applicable policy language, and West Virginia case law, underinsured motorists coverage under the subject Progressive policy applies to the injury and damage claims of Plaintiff, Amber R. Hess.

Therefore, it is ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED. It is further ORDERED that Progressive Max Insurance Company's Motion for Summary Judgment is DENIED.

The Court designates this Order as being a final order as to this issue under W.Va. R. Civ. Proc 54(b) and is now appealable immediately.

The Court directs the Clerk of the Circuit Court of Monongalia County to distribute certified copies of this order to the parties and/or counsel of record.

Enter September 18, 2020
C. Scott
Cindy S. Scott, Chief Judge
17th Judicial Circuit, Division II.

ENTERED: Sept 18, 2020
DOCKET LINE 26 Jean Friend, Clerk

Jean Friend