Auto Liability Case Law Update

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UM COVERAGE DISPUTE: "REDUCED-BY" VS. "ADD-ON" BENEFITS
***Frey v. Jesperson*, 336 Ga.App. 488 (2023)**
Dillard, P.J.; Mercier and Markle, JJ., concur

On January 23, 2023, the Court of Appeals of Georgia affirmed a trial court's ruling that decedent William Frey knowingly and voluntarily purchased an insurance policy with "reduced-by" uninsured motorist ("UM") benefits despite arguments that he was not given a meaningful opportunity to select "add-on" UM coverage and that his untimely return of the UM selection form resulted in his policy providing the "broadest UM coverage available."

This case arises from a wrongful death and personal injury action brought by decedent William Frey's wife, Irish Frey, against Michael Jesperson after a motor vehicle accident involving William and Jesperson resulted in William's death. At the time of the accident, William was covered by two UM policies issued by Progressive Insurance Company that each provided $25,000 in "add-on" UM coverage. William was covered by a third UM policy issued by Liberty Mutual which provided $100,000 in "reduced-by" UM benefits.

It is undisputed that the Liberty Mutual policy was secondary in priority to the Progressive policies. Prior to trial, Jesperson tendered his liability policy limits of $50,000; Progressive tendered a total of $50,000 of "add-on" UM benefits; and Liberty Mutual tendered $50,000 under its "reduced-by" policy.

Thereafter, a dispute arose regarding the amount of UM benefits available under the Liberty Mutual policy.

Liberty Mutual filed a motion for summary judgment arguing that William affirmatively selected "reduced-by" UM coverage when executing his policy, and thus, Liberty Mutual was entitled to a setoff of the $50,000 liability limits. Irish Frey opposed the motion arguing that the language in Liberty Mutual's UM selection form and its accompanying cover letter was "coercive" and "discouraged" William from selecting add-on coverage. Further, Irish argued that William did not knowingly and voluntarily select reduced-by coverage and that by returning the UM selection form after Liberty Mutual's stated due date, William's policy provided the broadest UM coverage available (which she alleged was $250,000). The trial court granted Liberty Mutual's motion for summary judgment and Irish Frey appealed.

William first secured an automobile insurance policy with Liberty Mutual in August of 2004 and renewed the policy each year until his death in 2017. In July of 2009, he modified the policy by executing a UM selection form that gave him the option to select reduced-by, add-on, or no UM coverage. William chose reduced-by UM coverage in the amount of $100,000 per person for bodily injuries then signed, dated, and returned the form to Liberty Mutual.

In 2013, Liberty Mutual sent William an updated UM selection form ("2013 Form") and accompanying cover letter. The 2013 Form also explained the differences between reduced-by and add-on UM coverage including the effect on policy premiums with each type of coverage. The accompanying cover letter explained that Liberty Mutual had pre-selected the limit that was already being afforded on the policy at that time (reduced-by UM coverage with a $100,000 per person policy limit) and that if William wanted to maintain that current coverage, he was to sign, date, and return the form by Feb-

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ruary 27, 2013. The cover letter noted that the only markings allowed on the 2013 Form were William's signature and date and that if he wanted to select different coverage than was pre-selected, he needed to call Liberty Mutual using the provided telephone number. Finally, the cover letter provided another explanation of the differences between reduced-by and add-on coverage along with a hypothetical to illustrate the same. It was undisputed that William signed, dated, and returned the 2013 Form on March 6, 2013 (a week or so after the stated deadline).

On appeal, Irish Frey argued that by limiting what William could write on the 2013 Form, Liberty Mutual discouraged him from selecting add-on coverage and coerced him into maintaining the pre-selected reduced-by coverage. Irish also asserted that by placing the "burden" on William to call Liberty Mutual if he wanted to change the pre-selected coverage, the insurer was not acting pursuant to the intent of Georgia's UM statute, O.C.G.A. §33-7-11. However, Irish cited to no legal authority or specific language in the UM statute prohibiting an insurance company from so "burdening" an insured.

The Court disagreed and found that because the language of the 2013 Form and cover letter unambiguously explained the difference in reduced-by and add-on coverage and provided detailed instructions on how to make a selection between the two, Irish could not show that William was coerced into selecting reduced-by coverage. Moreover, by signing, dating, and returning the 2013 Form, William represented that he understood Liberty Mutual's explanation of coverage. The parties to a contract are presumed to have read their provisions and to have understood the contents. Thus, the Court held that William's selection of reduced-by UM coverage was knowing and voluntary under the unambiguous language of the 2013 Form and its cover letter.

Finally, Irish Frey argued that the policy should provide the "broadest UM coverage available" because Liberty Mutual received William's signed 2013 Form after its due date. The Court found this argument to be a "nonstarter" and reiterated prior holdings that an insured may modify the terms of his or her policy at any time by notifying the insurer of the requested change. Thus, even though William executed and returned the 2013 Form after the deadline, his selection of reduced-by coverage was a modification of the policy and was nevertheless effective once made.

Jones v. Georgia Farm Bureau Mutual Insurance Company
367 Ga. App. 35 (2023)
Dillard, P.J.; Mercier and Markle, JJ., concur

On March 1, 2023, the Court of Appeals of Georgia affirmed the trial court's grant of partial summary judgment to Georgia Farm Bureau Mutual Insurance Company as to the amount of uninsured motorist ("UM") coverage provided for in an insurance policy GFB issued to Ernie Jones in two appeals filed by beneficiaries William Jones and Madison Jones which were consolidated.[1] These cases provide guidance as to the applicable UM policy limits in cases where the insured affirmatively chose UM limits less than the liability limits without specifying the amount of the UM limits, and the amount of the UM limits was included separately on the declarations page.

On January 12, 2015, Jones met with GFB agency manager Russ Godwin. During the meeting, Jones made modifications to his policy and signed his name to a form stating, "I affirmatively choose Uninsured Motorist Limits in amount of less than the Limit of Liability for Bodily Injury and Property Damage Coverage." The signature page did not provide him with an option to select the *specific* amount of UM coverage desired, but it stated that it "contain[ed]" a declarations page which included the amount of coverage. The declarations page showed that Jones had liability limits of $1,000,000 per person and UM limits of $25,000 per person. Thereafter, periodic notices were sent by GFB to Jones confirming these limits.

On April 18, 2016, Jones was killed in a car accident while covered by his GFB policy. During litigation following the accident, the Court granted GFB's motion for partial summary judgment, finding that Jones affirmatively chose UM limits of $25,000 when he modified his policy in 2015. These consolidated appeals follow.

In Case No. A22A1685, William argued, in part, that the trial court erred in granting partial summary judgment to GFB because (1) Jones did not affirmatively choose UM limits lower than the liability limits and, thus, the UM limits are set at an amount equal to the liability limits pursuant to O.C.G.A. § 33-7-11; and (2) the signature page and the declarations page do not establish that Jones selected UM limits of $25,000.[2] O.C.G.A. § 33-7-11 requires insurers to provide UM coverage unless the insured rejects UM coverage in writing. Following a statutory amendment in 2001, insurers were required to provide either the mandatory minimum UM coverage of $25,000 per person or optional coverage in an amount equal to the liability limits if the liability limits exceed $25,000 per person. While an insured may affirmatively choose UM coverage in an amount less than the liability limits, the amount of UM coverage defaults to the liability limits in the absence of an affirmative choice of a lesser amount. Further, unlike an insured's rejection of UM coverage, an insured's choice of UM coverage

in amount less than the liability limits need not be in writing. Even still, the insurer has the burden of proving that the insured made an affirmative choice of lesser coverage.

First, while Jones was not statutorily required to make an affirmative choice of UM coverage in amount less than the liability limits in writing, the record conclusively establishes that he did so by signing his name under a statement that is not only unambiguous but also tracks the language of O.C.G.A. § 33-7-11. Further, the Court declined to impose a requirement that an insured *simultaneously* make an affirmative choice of UM coverage in amount less than the liability limits and a choice of the specific amount of UM coverage, reasoning that the General Assembly did not include language imposing such a requirement in the UM statute and it is not the role of the Court to rewrite the statute to include such a requirement. As such, even though the specific amount of UM coverage was not included on the signature page, Jones properly exercised his option to affirmatively choose UM coverage in amount less than the liability limits.

Second, while a declarations page showing a UM limit less than the liability limit, standing alone, is insufficient evidence of an affirmative choice of UM coverage in amount less than the liability limits,[3] GFB satisfied its burden of proving that Jones affirmatively chose UM limits of $25,000 per person with the *combined* evidence that Jones signed his name under a statement affirmatively choosing UM coverage in amount less than the liability limits, the signature page expressly stated that the policy contained a declarations page detailing the amount of coverage, and the declarations page indicated that he chose UM limits of $25,000 per person. In short, the Court charged Jones with "awareness of the insurance coverage [he] solicited, and with checking the policy to see that proper coverage had been obtained."

In Case No. A22A1696, in addition to the arguments outlined above, Madison argued that public policy concerns weigh against the trial court's grant of partial summary judgment to GFB. Because the appellants relied on *Jones v. Ga. Farm Bureau Mut. Ins. Co.*, 248 Ga. App. 394 (2001), which applied the pre-2001 version of the UM statue and did not involve the issues presented in their appeal, the Court held that this claim of error was not supported by relevant legal authority. ◆

Morgan McGee and Brooke Ray practice with Waldon Adelman Castilla Hiestand & Prout in Atlanta. Ms. McGhee focuses her practice in the areas of insurance defense, insurance coverage, and civil litigation. She authored the Frey case law update. Ray concentrates on automobile negligence, insurance defense, and civil litigation. She authored the Jones update.

Endnotes

1. In accordance with the Court's reference to the parties throughout its opinion, we will refer to William Jones and Madison Jones by their first names or as the "appellants" collectively, Georgia Farm Bureau Mutual Insurance Company as "GFB", and Ernie Jones as "Jones."
2. William also argued that the testimony of the insurance agent who met with Jones in 2015 was not credible and GFB's routine destruction of documentary evidence required denial of its motion for summary judgment. However, the Court did not consider the credibility argument because the trial court expressly noted that the insurance agent's credibility was irrelevant to its ruling and is, therefore, outside the scope of the Court's review. Further, the Court did not consider the spoliation argument because litigation was not pending or even contemplated in 2015 when the alleged destruction of evidence occurred.
3. *McGraw v. IDS Property & Casualty Insurance Company*, 323 Ga. App. 408 (2013); *Government Employees Insurance Company v. Morgan,* 341 Ga. App. 396 (2017).

Amicus

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the statute. In its amicus brief, GDLA asks the Court to clarify when a mutual agreement between the parties has occurred, adding, "We respectfully request this Court provide that a standard of candor and reasonableness must be used to determine whether the offer complies with the statute and whether the acceptance conforms to the requirements of the offer."

GDLA joined the petitioners in requesting the grant of a writ of certiorari. The Supreme Court is asked to impose some reasonable standards and a duty of good faith on increasingly complex pre-suit policy limits offers. It is argued that pre-suit settlement offers on low limits policies are actually a calculated effort to engineer a response from the insurer that the plaintiff can assert is not a mirror image of the terms of the offer, so not settlement contract is formed. Two other amici briefs were filed. The respondent/plaintiff also requested that the Supreme Court accept the case to, inter alia, "address the insurance industry's constant requests to re-write the law of contract formation."

GDLA thanks the authors for their time in drafting both briefs. We also appreciate the continued efforts of our hard-working Amicus Committee co-chaired by Elissa Haynes of Freeman Mathis & Gary in Atlanta and Philip Thompson of Ellis Painter in Savanna, alongside Vice-chair Patrick Silloway of Balch & Bingham in Atlanta. These and prior briefs can be found in the members only area under Amicus Policy & Briefs. ◆