VERMONT SUPERIOR COURT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 590-10-18 Wncv

Paige Ibey, Plaintiff v. GEICO Indemnity Company, Defendant	

Opinion and Order on GEICO's Motion for Summary Judgment

This is a very unusual insurance coverage dispute. Plaintiff Paige Ibey claims that after an evening out socializing and consuming alcoholic beverages that she gave her car keys to a complete stranger to drive her home. That stranger drove her *towards* home, but crashed along the way. Ms. Ibey was later found injured in the road nearby, and the stranger was never seen again and has never been identified.

Ms. Ibey's insurer, Defendant GEICO Indemnity Company, investigated and determined that Ms. Ibey, in reality, was the operator of the vehicle at the time of the crash—*i.e.,* there is no stranger. GEICO denied liability coverage for Ms. Ibey's loss, concluding that she was the at-fault operator of her own car. Ms. Ibey then filed this suit, claiming that she was a passenger, that the driver remains unidentifiable, and that she is covered by the policy's uninsured motorists (UM) coverage.

Currently before the Court is GEICO's motion for summary judgment. GEICO filed for the motion asserting that the UM language of the policy cannot properly be interpreted to apply in these circumstances. Ms. Ibey has opposed the motion.

Before analyzing the present motion, it is appropriate to address some contextual matters regarding the potential claims at issue and the scope of that motion. The Court notes that the unresolved factual dispute as to whether Ms. Ibey was the operator of or passenger in her own car when it crashed gives rise to four possible coverage scenarios under the policy relevant to this case, depending on whether she was the driver or passenger and on whether one is analyzing the Section I liability part of the policy or the Section IV UM part. As noted, GEICO takes the position that (1) Ms. Ibey was the driver and was at fault, and thus there is no coverage for her loss under the liability part. Ms. Ibey expressly concedes that if she is found to have been the operator of the vehicle, then she was at fault, and there is no coverage. *See* Ms. Ibey's Memorandum in Opposition at 10 (filed Jan. 14, 2020) ("The Plaintiff recognizes that if a jury determines that she was the driver of the car in which she as injured, as Geico has asserted, there is no coverage."). She alleges instead that (2) she was the passenger, and, as such, there is coverage under the UM part, a proposition with which GEICO disagrees. Neither GEICO nor Ms. Ibey presumably would argue that (3) there could be coverage under the UM part of the policy if Ms. Ibey were the driver.

Both GEICO and Ms. Ibey have touched on, but not explained with any clarity, their positions on a final scenario (4): whether Ms. Ibey could have coverage under the liability part of the policy if she is found to have been the passenger in her own car with an unidentifiable driver. The unidentifiable driver presumably would be a covered permissive driver under the liability part. *See* Policy, Section I, Persons Insured, Who Is Covered ¶ 2, treating as an insured "any other person using the auto with your permission." Without further analysis or explanation, however, Ms. Ibey asserts that there could not be liability coverage "because she could not identify the driver of the vehicle." Ms. Ibey's Supplemental Facts at 2 (filed Mar. 13, 2020). As far as the record goes, GEICO itself has never expressly taken that position or any other position with any clarity. It has ambiguously asserted in briefing, though, that: "Plaintiff had both liability insurance and UM/UIM insurance available to cover the same accident under the same policy. Plaintiff's inability to actually recover under her liability insurance under the circumstances is irrelevant." GEICO's Reply at 6 (filed Feb. 10, 2020). No explication of the purported "inability" to recover under the liability part ensues.

The *actual* availability or unavailability of liability coverage for Ms. Ibey's loss, if she is determined to have been a passenger in her own vehicle with an unidentifiable driver, is at least *potentially* relevant to the proper application of 23 V.S.A. § 941 in the event that UM coverage, as provided in the policy itself, does not independently apply in these circumstances (addressed below). The Court takes no

position on that issue at this time.[1] The Court simply points out the possible incongruence of the parties' positions on this issue as it may bear in subsequent proceedings on the analysis of Section 941.

For now, GEICO has raised a single coverage issue in its summary judgment motion: the proper interpretation of the policy's UM terms. GEICO interprets those terms not to apply to Ms. Ibey in the event she is determined to have been a passenger in her own car. Ms. Ibey interprets them to provide coverage. She also argues that GEICO has waived any right to rely on the policy's UM provisions by not raising any such defense before this litigation commenced. The Court makes the following determinations as to those issues.

[1] The interpretation of the requirements of § 941 and the interpretation of the policy's UM terms are separate matters. While the Vermont Supreme Court occasionally has concluded that a policy does not provide the full extent of coverage required by § 941, it has not then contorted the otherwise plain language of the policy to produce the coverage required by § 941. Instead, it has recognized that the statutory requirement supersedes the deficient policy language. *See, e.g., Monteith v. Jefferson Ins. Co. of New York*, 159 Vt. 378, 383 (1992) ("In sum, the clause in the Peerless policy denying UM coverage for accidents occurring while the insured is occupying a vehicle owned by him but not insured by the company is inconsistent with Vermont law and is unenforceable."). While case law under § 941 is incidentally mentioned in the parties' briefing, the proper application of § 941 is not directly raised or addressed by GEICO's motion, and the parties have not briefed it sufficiently to support any decision as a matter of law at this time. Thus, to the extent that Ms. Ibey argues that GEICO's interpretation of the "uninsured auto" provision of her UM coverage conflicts with the purport of § 941, the Court declines to address that matter. The proper application of § 941 to this case is not squarely and sufficiently presented in the parties' papers. Further, as noted in text, it is at least possible that the application of § 941 may be affected by whether direct liability coverage exists if it were established that a stranger was driving the car.

I. Summary Judgment Standard

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(1), shows that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial).

The Court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers*, Inc., 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts, affidavits, or other evidence to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991). Speculation as to possible facts is insufficient. *Palmer v. Furlan*, 2019 VT 42, ¶ 10.

In this case, the parties dispute whether Ms. Ibey was the driver or passenger, but that dispute is not material to GEICO's motion, which addresses the passenger scenario. Otherwise, the basic facts material to the motion are undisputed.

I. *The UM Policy Language*

GEICO argues that the policy's UM coverage extends to an "uninsured auto," not an "insured auto," and Ms. Ibey's car was an insured auto under the policy at

the time of the accident. Ms. Ibey argues instead that UM coverage applies under the "hit-and-run auto" provision of her UM coverage. "In the absence of ambiguity in the agreement, a statutory violation, or inherently unfair or misleading language," the Court gives effect to the plain meaning of the policy. *Sanders v. St. Paul Mercury Ins. Co.*, 148 Vt. 496, 507 (1987).

GEICO's argument is persuasive. UM coverage applies as follows:

> Under the [UM] Coverage we will pay damages for ***bodily injury*** or property damage caused by accident which the insured is legally entitled to recover from the owner or operator of:
>
> (a) an ***uninsured auto***;
> (b) an ***underinsured auto***; or
> (c) a ***hit-and-run auto***;
>
> arising out of the ownership, maintenance or use of that auto.

Policy, Section IV, Losses We Pay. By definition, the term "uninsured auto" does not include an "insured auto." Policy, Section IV, Definitions § 6. By definition, an "insured auto" includes an auto "described in the declarations and covered by the bodily injury liability and property damage liability coverage of this policy." *Id.* § 3. Ms. Ibey's car is described in the declarations with the relevant coverages. It therefore is an insured auto and the policy's UM coverage does not apply under the uninsured auto provision.

Ms. Ibey argues, instead, that the hit-and-run auto provision applies insofar as it is intended to apply in cases of unidentified drivers, and this is such a case. The policy defines a "hit-and-run auto' as follows:

> ***Hit-and-run auto*** is a motor vehicle causing:

> (a) ***bodily injury*** to an ***insured***; or
> (b) property damage;
>
> through physical contact or no physical contact with the ***hit-and-run auto*** or with other property of the ***insured*** and whose operator or owner cannot be identified.
>
> . . .
>
> The ***insured*** or someone on his behalf must:
>
> . . .
>
> (iii) make available for inspection, at our request, the auto ***occupied*** by the ***insured*** at the time of the accident.

Policy, Vermont Amendment, Section IV, Definitions § 1. This definition clearly contemplates that the driver of a hit-and-run auto "cannot be identified."

There is no reasonable way to read the definition to apply in all cases of unidentified drivers, however. The operative term is *hit-and-run* auto, clearly implying that the at-fault auto fled the scene resulting in an unidentifiable driver/tortfeasor. The definition further requires the insured who was in an auto at the time of the accident to make that auto available for inspection, clearly implying that the hit-and-run auto would be some *other* auto—the one that fled the scene. In short, the plain language of the definition simply cannot support Ms. Ibey's argument that it applies to the driver of Ms. Ibey's vehicle simply because she is unable to identify that driver. Her own case is not a hit-and-run auto under the policy.

The plain language of the policy's UM part does not extend coverage to the circumstances of this case.

II. Waiver

Ms. Ibey argues that, by not denying coverage pre-suit on the basis asserted by her now—UM coverage—GEICO has waived that position under the "mend-the-hold" doctrine. There is no dispute that Ms. Ibey reported her claim, contending that she was an injured passenger, and GEICO investigated and determined that she instead was the at-fault driver. GEICO corresponded with Ms. Ibey and her attorney pre-suit clearly denying coverage under the liability part of the policy on that basis. There was no mention by either side of the UM part of the policy until, shortly before filing this action, Ms. Ibey's attorney sent a letter purporting to notify GEICO that she *may* seek coverage under the UM part of the policy. Ms. Ibey then filed suit noting UM coverage in the complaint, and GEICO responded, among other ways, by sending Ms. Ibey forms to substantiate her UM claim. *See* Letter from GEICO to Attorney Pollock (Nov. 5, 2018).

The phrase—"mend the hold"—"is a nineteenth-century wrestling term, meaning to get a better grip (hold) on your opponent." *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 362 (7th Cir. 1990); *see Ohio & M.R. Co. v. McCarthy*, 96 U.S. 258, 267–68 (1877) ("Where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold."). It is viewed "as a corollary of the duty of good faith." *Harbor Ins. Co.*, 922 F.2d at 363. "A party who hokes up a phony defense to the performance of his contractual duties and then

when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith." *Id.*

> The doctrine in Vermont has been described generally as follows:
>
> > Considerations of public policy require that he [the insurer] shall deal with his individual customer with entire frankness. He may refuse to pay and say nothing as to the basis of his refusal. In that case, all defenses to an action on the policy are available to him. He may refuse to pay on a particular ground reserving the right to defend on other grounds, with the same result. But, when he deliberately puts his refusal to pay on a specified ground, and says no more, he should not be allowed to "mend his hold" by asserting other defenses after the insured has taken him at his word and is attempting to enforce his liability.

Cummings v. Connecticut General Life Ins. Co., 102 Vt. 351, 361–62 (1930) (later noting at 362 that on the facts presented "[i]t is not suggested that [the insurer] acted in ignorance of the facts"). "[T]he insurer cannot be held to have waived a defense to a claim of which it was ignorant." *Segalla v. U.S. Fire Ins. Co.*, 135 Vt. 185, 189–90 (1977). This is so because a waiver, even an implied waiver, is a "voluntary relinquishment of a known right." *Id.* at 189; *see also Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co.*, 2004 VT 124, ¶ 18, 177 Vt. 421, 428 ("[W]e will not find a waiver based on the denial of coverage letter when it is clear that the manner in which plaintiffs tendered their claim obscured the availability of these and other defenses."); 1 William J. Schermer and Irvin E. Schermer, *Auto. Liability Ins.* 4th § 13:7 ("[W]aiver is applicable to prevent insurer reliance on a subsequent ground for claim denial only where the insurer's conduct reflects an intention to relinquish the right to any such other ground for claim denial.").

"Intent lies at the very basis of the doctrine." *Mears v. Farmers Co-op. Fire Ins. Co.*, 112 Vt. 519, 523 (1942).

The Court is not convinced that the mend-the-hold doctrine properly applies to bar GEICO from contesting UM coverage in this case. While Ms. Ibey may succeed in proving that she was a passenger at the time of the accident, there is no suggestion that GEICO failed to undertake a reasonable investigation of her claim or promptly provide notice to her of its subsequent determination. It found that she was the driver of the vehicle, and it denied liability coverage on that basis. It has never wavered from that position.

It is not clear to the Court how taking that position, pre-litigation, in those circumstances, reasonably would have implied that GEICO was forfeiting any policy defenses *related to UM coverage* if, instead Ms. Ibey were found to be a passenger. UM coverage did not appear to be on anyone's radar screen until Ms. Ibey's counsel first notified GEICO that she "may" be claiming it long after GEICO's original denial and shortly before she filed suit. In response, GEICO offered her forms to make such a claim.

Neither party has brought any Vermont case to the Court's attention, and the Court has found none, in which an insurer was required to root out hypothetical coverage claims and scenarios pre-suit in order to avoid an unintended waiver later regarding an unasserted claim of coverage. The mend-the-hold doctrine simply does not require insurers proactively to disclaim coverage under facially inapplicable

coverage provisions merely because a claimant might later, regardless of the facts or policy terms, make a claim for such coverage.

This is not a case in which GEICO was presented a clear set of facts and chose to deny coverage based on one arguably applicable exclusion but not another, even though both should have been reasonably understood to be at issue. Moreover, GEICO's argument with regard to UM coverage is not predicated on any exclusion at all. Rather, Ms. Ibey is attempting to create coverage that does not exist in the policy based on GEICO's failure to foresee earlier that she would press that claim. *See Sperling v. Allstate Indem. Co.*, 2007 VT 126, ¶ 25, 182 Vt. 521, 531 ("[T]he waiver doctrine . . . cannot extend coverage beyond the original terms of the insurance agreement."); *Laurendeau v. Metropolitan Life Ins. Co.*, 116 Vt. 183, 189 (1950) ("Our decisions have established that a waiver cannot operate to eliminate an exception from insurance coverage. A waiver may avoid a forfeiture but may not extend the insurance beyond the terms of the policy."); 14 Steven Plitt et al., *Couch on Ins.* § 198:57 ("Concluding that an insurer is prevented from raising the defense that the coverage terms do not apply to the loss or claim at issue results in 'creating coverage' by waiver or estoppel. Generally, where there is no coverage under the insurance policy, waiver and estoppel may not operate to create coverage." (footnote omitted)).

The record of this case is clear that GEICO has not waived any disclaimer of UM coverage by remaining silent when it should have said something.

Conclusion

For the foregoing reasons, GEICO's motion for summary judgment is granted as regards possible UIM coverage under the direct language of the policy

Dated this __ day of July 2020 at Montpelier, Vermont.

_____
Timothy B. Tomasi
Superior Court Judge