

COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA1611
Boulder County District Court No. 06CV323
Honorable D.D. Mallard, Judge

James Maxwell, Janet Maxwell, and Leon Hill, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

United Services Automobile Association and USAA Casualty Insurance Company,

Defendants-Appellees.

JUDGMENT VACATED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by: JUDGE WEBB
Hawthorne and Rovira*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: December 4, 2008

Evans & McFarland, L.L.C., M. Gabriel McFarland, Luke McFarland, Golden, Colorado; Hill & Robins, P.C., Robert F. Hill, John H. Evans, Nathan P. Flynn, Denver, Colorado; McFarland Law Offices, Thomas D. McFarland, Golden, Colorado, for Plaintiffs-Appellants

Ayd Johnson Lewis, P.C., Patricia M. Ayd, James D. Johnson, Denver, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2008.

Plaintiffs, James Maxwell, Janet Maxwell, and Leon Hill, individually and on behalf of all others similarly situated, appeal the trial court's summary judgment in favor of defendants United States Automobile Ass'n and USAA Casualty Ins. Co. (USAA) on all of their claims. We vacate the judgment and remand the case for further proceedings consistent with this opinion.

Plaintiffs purchased motor vehicle insurance, including liability and uninsured motorist/underinsured motorist (UM/UIM) coverage, from USAA. Only the UM/UIM coverage is at issue here.

The declaration page of the USAA policy at issue states that it "provides ONLY those coverages for which a premium is shown below," and UM/UIM premiums are shown on a per vehicle basis. The policy excludes UM/UIM coverage for "bodily injury sustained by any person while using or occupying: any motor vehicle . . . owned by you or a relative, other than a covered vehicle" (OBNI exclusion).

In addition, the policy insured two classes of insureds -- Class 1 included the named insured and any other person related to the named insured by blood, marriage, or adoption, including a ward or foster child, who is a resident of the named insured's household, or

temporarily living elsewhere; Class 2 included any other person occupying a covered vehicle with the consent of the named insured or a pedestrian if the accident involves the covered auto. *See Radil v. Nat'l Union Fire Ins. Co.*, ___ P.3d ___, ___ (Colo. App. No. 07CA1534, Oct. 16, 2008).

Under the USAA multiple vehicle/single policy, an insured could accept or reject UM/UIM coverage only for all vehicles insured under the policy. Acceptance provided Class 2 insureds with coverage for those vehicles. In contrast, an insurer that issued per vehicle/multiple policies provided Class 2 insureds with coverage only on the insured vehicle, although as a matter of law UM/UIM coverage for Class 1 insureds extended to all of the vehicles owned by the named insured.

This litigation was originally filed in 2003 as a class action with twenty-seven plaintiffs against twenty-five insurance companies. The action was subsequently severed in 2006.

Plaintiffs asserted claims for: fraudulent concealment; negligent misrepresentation by omission; unjust enrichment; bad faith violation of the Colorado Consumer Protection Act; and declaratory judgment. The relief sought included compensatory

damages together with punitive damages, treble damages, and attorney fees permitted by law, depending on the claim.

Plaintiffs argue that USAA had a duty to advise its insureds of the implications of *DeHerrera v. Sentry Insurance, Co.*, 30 P.3d 167 (Colo. 2001), and *Jaimes v. State Farm Mut. Auto. Insurance Co.*, 53 P.3d 743 (Colo. App. 2002), regarding the purchase of the UM/UIM coverage. USAA counters, and the trial court agreed, that because of its lawful, single policy/multiple vehicle underwriting practice, plaintiffs did not have an option to purchase UM/UIM coverage from USAA on only one vehicle; thus, there was no decision for them to make, nothing for USAA to disclose concerning its practices and, for the same reason, they could not have been misled by the wrongly included OBNI exclusion.

We are persuaded by *Wagner v. Travelers Property Casualty Co.*, ___ P.3d ___ (Colo. App. No. 07CA2112, Nov. 13, 2008), in which the division found the inclusion of the OBNI exclusion after *DeHerrera* and *Jaimes* potentially misleading and a genuine issue of material fact whether an insured could reasonably have misunderstood that Travelers was selling UM/UIM coverage on a per vehicle basis, rather than on a per policy basis. For that

reason, we conclude the order granting summary judgment here must be vacated.

Here, as in *Travelers*, the trial court rested its conclusion that insurers like USAA, who underwrite multiple vehicles under a single policy, have no duty to advise their insureds of the implications of *DeHerrera* and *Jaimés* on its interpretation of section 10-4-609(4), C.R.S. 2008. While we also conclude that section 10-4-609(4) does not require such disclosure, we agree with the division in *Travelers* that USAA's duties are not limited to this statute.

The trial court further concluded that "USAA's bundled insurance policy includes coverage for class two insureds in the additional vehicles who would not have coverage if the insured purchased UM/UIM coverage for only one vehicle." But for the reasons set forth in *Travelers*, we discern a disputed factual issue whether the declaration page in the USAA policy could be misleading absent disclosure that the premiums shown for UM/UIM coverage on additional vehicles provided at most only this benefit, but were not necessary to obtain UM/UIM coverage for Class 1 insureds as to all vehicles.

We are not persuaded otherwise by the assertion in USAA's supplemental brief, submitted in response to *Travelers*, that as a matter of law it could not "issue a single policy providing liability coverage for multiple vehicles and UM/UIM coverage for only selected vehicles." As the court's order recognizes, "a policyholder may own a vehicle that they [sic] do not include on a [USAA] policy." Therefore, as explained in *Travelers*, if USAA created a misimpression concerning the benefit of obtaining UM/UIM coverage on additional vehicles -- an issue we do not decide -- then plaintiffs' decision-making whether to insure only one vehicle through USAA and obtain coverage on their other vehicles from a multiple policy/multiple vehicle insurer could have been affected. *See Travelers*, ___ P.3d at ___. Thus, USAA's further assertion "[t]he display of a separate premium for each coverage on each vehicle does not suggest that the insured had the right to reject UM/UIM coverage on a per vehicle basis" is beside the point. Further, plaintiffs' continued purchase of coverage on all of their vehicles from USAA does not resolve the disputed factual issue of why they did so, especially after suit had been filed and they may have been acting on advice of counsel.

Therefore, the summary judgment is vacated and the case is remanded for further proceedings consistent with the views expressed in this opinion.

JUDGE HAWTHORNE and JUSTICE ROVIRA concur.