

THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Tawny Eby, Admx, et al.
Plaintiff(s)

CASE NO(S). 408279

vs.

Zurich American Insurance Co., et al.
Defendant(s)

MEMORANDUM OF OPINION
AND ORDER

FRIEDMAN, J:

The Court has before it Defendant Zurich Insurance Co.'s Motion for Summary Judgment (filed 12/19/01), Defendant Parker Hannifin Corporation's motion for summary judgment (filed 3/30/01), as well as the cross-motion of Plaintiff-Administratrix, Tawny Eby, for summary judgment (filed 1/16/01).

Under well settled Ohio law, a moving party is entitled to summary judgment when the Court, construing the evidence in a light most favorable to the nonmoving party, concludes that no genuine issue as to any material fact exists and the moving party is entitled to summary judgment as a matter of law. Grafton v. Ohio Edison Co. (1996), 77 Ohio St. 3d. 102, 105.

Pursuant to Dresher v. Burt (1996), 75 Ohio St.3d 280, a party moving for summary judgment cannot simply allege that the nonmoving party has no set of facts to prove its case; rather, it must point to specific portions of the record for support. Id., at 293. Once this burden is satisfied, the nonmoving party must set forth specific facts showing that there is an issue for trial, and, "if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." Id. See also Whiteleather v. Yosowitz (1983 Cuyahoga Co.), 10 Ohio App.3d 272 (The nonmoving party bears no burden of proof unless the moving party submits evidence that refutes the nonmoving party's claim; once such evidence is before the Court, the nonmoving party has a burden to present rebuttal evidence.) This is not a simple or mechanical task. The United States Supreme Court has established that in order to create a genuine issue of material fact the non-moving party must go beyond simply presenting some evidence, stating:

There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the [non-moving party's] evidence is merely colorable, or it not significantly probative, summary judgment may be granted.

Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242, 249-250.

Facts

The facts of the underlying motor vehicle accident giving rise to the case *sub judice* are not in dispute. On May 24, 1997, Plaintiff's decedent, Michael B. Eby, was a passenger in a one-car accident. The owner and operator of the car, Elton Ketron, lost control of the vehicle and struck a tree and utility pole.

Decedent's father was an employee of Parker Hannifin Corporation ("Parker"). Parker was a named insured on a business automobile insurance policy issued by Zurich: policy number BAP 8416950-00 ("policy 00"). The effective date of the policy period was April 1, 1996 to April 1, 1997. The policy carried liability coverage in single limits in the amount of \$1,000,000.00. Policy 00 was renewed by policy number BAP 8416950-01 ("policy 01") for the effective period of April 1, 1997 through April 1, 1998. The accident occurred during the time policy 01 was in effect.

Parker, as named insured, claims that it properly exercised its option under Ohio Revised Code Section 3937.18(C) and rejected UM/UIM coverage in Ohio. The rejection with regard to policy 00 was not made until April 8, 1996, seven days after the effective date of the policy. Further, the rejection form was not signed or dated; rather, what *was* signed and dated was a "summary form" provided by Parker that was attached to the rejection form. With regard to policy 01, the rejection form was never signed or dated, and the summary form attached to the rejection form and policy was not signed or dated until July 7, 1997, well after the accident in the instant case, and over three months after the effective date of the policy.

Plaintiffs argue that, to the contrary—since the rejection form from policy 00 was never signed or dated—it was invalid and thus could not be applied to the renewal policy (01). Likewise, they contend, the rejection form of policy 01 was invalid, as it was not signed or dated, and the summary form was not signed until July 7, 1997.

What is in dispute is the whether underinsured motorist coverage is available to plaintiffs under the Zurich policy 01, and whether the rejection of UM/UIM coverage by Parker was effective with regard to policy 01.

Analysis of Law

A. Validity of Rejection of UM/UIM Coverage

It is well settled in Ohio that, under the mandatory provisions of R.C. §3937.18, coverage is provided by operation of law *unless the named insured expressly rejects UM/UIM coverage*. *Abate v. Pioneer Cas. Co.* (1970), 22 Ohio St.2d 161, 165. Defendants Parker and Zurich argue that the rejection in the instant

case is valid, pursuant to R.C. § 3937.18 (C). The version of this section in effect at the time of the accident is as follows:

The named insured may only reject or accept both coverages offered under division (A) of this section. The named insured may require the issuance of such coverages for bodily injury or death in accordance with a schedule of optional lesser amounts approved by the superintendent, that shall be no less than the limits set for this section 4509.20 of the Revised Code for bodily injury or death. If the named insured has selected uninsured motorist coverage in connection with a policy previously issued to him by the same insurer, such coverages offered under division (A) of this section need not be provided in excess of the limits of liability previously issued for uninsured motorist coverage, unless the named insured requests in writing higher limits of liability for such coverages.

The Court agrees with Zurich and Parker that an otherwise proper rejection of a UM/UIM coverage offer is effective as to any renewal of the policy even if signed after the effective date. R.C. § 3937.18(C); See, Hillyer v. State Farm Mut. Auto Ins. Co. (1999, Cuyahoga Co.), 13 Ohio App.3d 172, 179.

This determination, however, does not end there. First, this Court must next analyze the rejection of policy 00 in order to determine if it was effective and properly executed, since otherwise it will not be rendered effective by the mere renewal of that policy.

Defendants argue that the decisions of the Ohio Supreme Court in Linko v. Indemnity Ins. Co. (2000), 90 Ohio St.3d 445, and Gyori v. Johnston Coca-Cola Bottling Group, Inc. (1996), 76 Ohio St.3d 565, are not binding upon this Court and controlling over the Zurich policy. This court must disagree. The general rule in Ohio is "... that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law." Peerless Elec. Co. v. Bowers (1955), 164 Ohio St. 209, 210.

Further, the Court notes the very recent decision of the District Court for the Northern District of Ohio (Western Division) in Hindall v. Winterthur International (March 29, 2001), 2001 U.S. Dist. LEXIS 4278. There the court noted that the accident giving rise to that case occurred May of 1999, and R.C. §3937.18(C) was amended by Am. Sub. H.B. No. 261, effective September 3, 1997. In that case the defendant insurance company argued that Gyori and Linko did not apply because they both interpreted the former statute. The court agreed with defendants that:

In Gyori v. Johnston Coca-Cola Bottling Group, 76 Ohio St.3d 565, the Court held that there can be no rejection of uninsured motorist coverage under O.R.C. § 3917.18(C) [sic] absent a written offer of such coverage from the insurance provider. Additionally, the Court held that such a rejection must be in writing and be received by the insurance provider

prior to the commencement of the policy year. (*Id.* in syllabus).¹ This year, the Court broadened its interpretation of the former statute, by finding additional requirements for the content of the written offer, in Linko v. Indem. Ins. Co., 90 Ohio St.3d 445, 739 N.E.2d 338.

* * *

In making these arguments, Plaintiff fails to acknowledge that each of these cases interprets the former statute, and that the amended statute applies to this case. The amended statute, by its terms, supercedes these requirements. Because they interpret the former statute, the requirements of the two cases, and the retroactivity of Linko, are not at issue in this case.

Hindall, 2001 U.S. Dist. LEXIS at *5-6.

Similarly, this Court finds that--inasmuch as this accident occurred May 24, 1997--the former statute applies, and Linko and Gyori are controlling as to the case *sub judice*.

Linko addressed the question of "[w]hether the language of the uninsured/underinsured motorist coverage rejection forms accompanying the subject automobile liability policy satisfies the offer requirements of R.C. 3837.18 [sic, 3937.18]." 90 Ohio St. 3d. 445, at 448. The rejection form in Linko read, in pertinent part:

Ohio Revised Code Section 3937.18 requires us to offer you Uninsured/Underinsured Motorists Insurance coverage in an amount equal or greater to the policy bodily injury liability limit(s) with respect to any motor vehicle registered or principally garaged in the State of Ohio, unless you reject such coverage.

Unless you have previously rejected this coverage, your policy has been issued to include Uninsured/Underinsured Motorists Insurance Coverage at limit(s) equal to the policy bodily injury limit(s).

Linko held that

...Ohio's appellate courts have developed a useful body of law regarding what constitutes a valid offer of UM/UM coverage. We agree with the following required elements for written offers imposed by Ohio appellate courts: a brief description of the coverage, the premium for that coverage, and an express statement of the UM/UM coverage limits.

Linko, 90 Ohio St.3d at 449. (citations omitted).

With respect to the rejection form in Linko, the court found that it did not meet those requirements, and further stated that "Indemnity's alleged offer is complete only in its incompleteness." *Id.* Additionally, the court stated that the "Indemnity rejection form, lacking in that required information,

¹ After the accident giving rise to this suit, the Ohio Supreme Court held that the same requirements exist for reflecting underinsured motorist coverage under the former statute. See, e.g., Linko v. Indem. Ins. Co., 90 Ohio St. 3d,

could not be termed a written offer that would allow an insured to make an express, knowing rejection of the coverage." Id.

The rejection form for policy 00 in the instant case, attached to Defendant Zurich's motion for summary judgment at appendix A-1 is as follows:

Your policy provides "bodily injury" uninsured (including underinsured motorists coverage at your policy "bodily injury" limit. Ohio law allows you to reject this coverage or select a lower limit which is at least equal to the state financial responsibility limit.

* * *

I understand that if I accept uninsured (including underinsured motorist coverage and do not check any of the above optional limits, the policy "bodily injury" limit shall apply to all claims arising out of this coverage.

I understand that my selection applies to all vehicles licensed or principally garaged on Ohio for each subsequent renewal of my policy coverage, including any additional or replacement vehicles which I may add in the future, unless I request different coverage in writing.

This language contains even *less* information than the rejection form under review by the Linko court. There is no mention of a premium, only minimal description of the coverage, not to mention the failure to direct the policyholder to R.C. §3937.18 whatsoever. Thus, this Court finds that the Zurich rejection form lacks the required information to constitute: "a written offer that would allow an insured to make an express, knowing rejection of the coverage." Linko, 90 Ohio St.3d at 449. Thus, this court finds that this rejection is not valid as to policy 01.

B. Is the Policy a "Fronting" Policy Constituting Self-Insurance?

In the alternative to a valid rejection of UM/UIM coverage, defendants argue that the Zurich policy is, in essence, a fronting policy, setting forth a self-insurance program, and thus is not subject to the requirements of R.C. §3937.18, because Parker pays Zurich a 100% deductible for complete coverage under the business auto policy, which includes UM/UIM coverage. In this endorsement, Parker reimburses Zurich for all monies Zurich pays under the policy on behalf of Parker.

In order to qualify as a self-insurance program in Ohio, R.C. §4509.72 requires that the person (which includes a company) hold a certificate of self-insurance. This certificate demonstrates that the person or company has financial responsibility for liabilities. R.C. §4509.72(B).

In Grange Mut. Cas. Co. v. Refiners Transport and Terminal Corp. (1986), 21 Ohio St.3d 47, the Supreme Court of Ohio held that not only do the requirements of 3937.18 not apply to self insurers, they also do not apply to financial responsibility bond principals. Id. at 51.

The Court has reviewed the Business Auto Coverage Deductible Endorsement, attached to Parker's motion to intervene. Even assuming, *arguendo*, that this endorsement was an effective "fronting policy", this court still finds that the Zurich policy is bound by the terms of R.C. §3937.18, no matter what amount Parker agreed to pay to Zurich as a deductible. Plaintiffs correctly point out that the rejection form to policy 01, the renewal policy, clearly contemplates Parker's obligation to comply with R.C. §3937.18. See Exhibit A-3, attached to Defendant Zurich's motion for summary judgment. Plaintiffs also assert that this fronting policy between Parker and Zurich was not effectuated until October 31, 1997, more than five months after the accident in the case *sub judice*. See Plaintiffs' supplemental brief in opposition to Defendants' motions for summary judgment at Exhibit A. There was also no evidence before this Court with respect to this motion that suggests that the purported fronting policy between Parker and Zurich was made effective before the date of the accident.

Ohio courts are split as to whether a fronting policy constitutes, for all intents and purposes, self-insurance, while permitting the policyholder to avoid the mandates of R. C. §3937.18. In this case Parker specifically seeks to avoid the requirement of filing a certificate of self-insurance with the State of Ohio, while yet enjoying one of the benefits of a certified self-insurer: that is, being exempt from Ohio law regarding UM/UIM coverage. In essence, Parker obtained insurance from Zurich, but now want to be declared by this Court to be self-insured.

Accordingly, this Court finds that Parker is not self-insured in the "practical sense"; therefore, Defendants are bound by the requirements of § 3937.18, the uninsured/underinsured motorist coverage statute.

C. Decedent's Residency

Plaintiffs' claims are premised on the Scott-Pontzer v. Liberty Mutual (1999), 85 Ohio St.3d 660, line of cases. The Scott-Pontzer ruling is directly based upon the Ohio Supreme Court's reading of policy language which contained the definition of "Who is an insured." The court found the term "you" to be ambiguous in a corporate setting. This ambiguity has created a situation wherein many corporate policies have been determined by the Scott-Pontzer decision to include employees of the corporation. The definition was further broadened to include family members of the employee. Ezawa v. Yasuda Fire & Marine Ins. Co. (1999), 86 Ohio St.3d 557. "Family member" is defined by the Zurich policy in the instant case as:

'Family member' means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.

It is with this definition that Defendants argue that Plaintiffs' decedent, Michael B. Eby, was not a member of his father's household such that the Zurich Policy would apply to him. This assertion is supported by deposition testimony, as well as official records listing decedent's address with his mother.

At the time of the accident, Michael B. Eby's mother and father were divorced. His mother resided at 626 McGuire Drive in Camden, Ohio. His father lived with the decedent's paternal grandparents at 801 South Maple Street in Eaton, Ohio.

Plaintiffs argue, however, that Michael B. Eby had dual residency status between his mother and father, and point as well to deposition testimony that indicates that he lived with his father and paternal grandparents as well.

Given that this crucial determination hinges on issues of fact and not of law, this Court will not rule on decedent's residency status, as this is a proper determination for the jury to make. Accordingly, both the Defendants' and the Plaintiffs' motions for summary judgment are overruled and this case will proceed to trial, as there are genuine issues of material fact.

IT IS SO ORDERED.



Judge Stuart A. Friedman

Dated: November 30, 2001

SERVICE

Copies of the foregoing Memorandum of Opinion and Order were sent via U.S. mail to all counsel of record this date: November 30, 2001.



Judge Stuart A. Friedman