

COPY ✓

IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO

MARK HEADLEY )

PLAINTIFF )

VS. )

GRANGE GUARDIAN INSURANCE )  
COMPANY, et al. )

DEFENDANTS )

CASE NO. 00 CV 1153  
JUDGE JOHN M. DURKIN

**JUDGMENT ENTRY** OF COURTS  
MAHONING COUNTY, OHIO  
JUN 18 2001  
FILED  
ANTHONY VIVO, CLERK

This cause is before the Court on Plaintiff's Motion for Partial Summary Judgment and on Defendant, AMMICA's, Motion for Summary Judgment.

The parties seek a declaration of rights and obligations under certain policies of insurance issued by Defendant. Plaintiff contends that Defendant is obligated to provide underinsured motorist coverage to him under two policies of insurance issued to his employer, to wit: Commercial Automobile Liability Insurance Policy N o. 3ML 517 897-00 (the Business Automobile Policy) and Commercial Catastrophe (umbrella/excess) Liability Policy No. 3SG 054 528-00.

In regard to the business automobile policy there is but one issue presented by the Defendant's denial of Plaintiff's claim for coverage based on Scott-Pontzer v. Liberty Ins. Co. (1999), 85 O.S. 3d 660. Defendant relies on the "other owned auto" exclusion set forth in the policy.

The business automobile policy (BAP) provided UIM coverage up to \$1 million for vehicles owned by Andover Industries, Plaintiff's employer. The policy provides that - [The] insurance does not apply to: 4) Bodily Injury sustained by: a. You while 'occupying'... a vehicle owned by you that is not a covered auto. Uninsured Motorist Coverage Endorsement Section C.

21505  
1169

AUG 13 2001

The terms of the policy provide that "you" refers to the named insured throughout. See; Business Auto Coverage Form par. 2.

While Plaintiff is an insured under the policy pursuant to the decision in Scott-Pontzer he is not a named insured.

The "other owned auto" exclusion applies where an insured is injured in a vehicle owned by a named insured but not covered by the policy.

As Plaintiff was injured while occupying a vehicle which he owned and which therefore was not owned by a named insured the exclusion relied upon by Defendant has no application to the facts of this case.

Accordingly, Plaintiff is entitled to the declaration sought in regard to coverage under the business auto policy of insurance.

In regard to coverage under the Commercial Catastrophe Liability Policy, it is undisputed that uninsured/underinsured motorist coverage was neither offered nor expressly rejected. Defendant contends that the mandatory offering requirement of R.C. Section 3937.18 does not apply to this policy so as to impute coverage when there is neither offer nor rejection of the coverage. Further, Defendant argues that should coverage be found imputable Plaintiff is nevertheless not entitled to coverage as he is not "insured" thereunder.

Defendant's position that the CCP policy is not subject to the mandatory offering provisions of Section 3937.18 is based on its contention that the policy is not such a policy as is governed by the statute and that as the policy was sold as a "package" with the BAP policy, and since Defendant did offer UIM coverage under the BAP portion of the package, it satisfied its obligation under the statute.

Defendant's argument that the CCP is not an automobile or motor vehicle liability policy subject to the provisions of R.C. Section 3937.18 is unpersuasive. Nothing in the applicable statutes supports Defendant's position that where underinsured motorist coverage is provided by a primary policy it need not be offered in an umbrella sold as part of a package. The statutory provision that UIM be offered in an amount 'equivalent to the liability coverage' and numerous decisions of the Ohio Supreme Court are contrary to Defendant's position.

The imputation of coverage by operation of law pursuant to R.C. Section 3937.18 applies to the CCP.

Defendant contends further that if coverage is imputed, Plaintiff's claim is subject to an "other owned vehicle" exclusion in Coverage A of the CCP and to a definitional "exclusion" relative to Coverage B.

As set forth above, "other owned auto" exclusions are not applicable as Plaintiff was not operating a vehicle of the named insured at the time of his injury.

As to Coverage B of the CCP, it is again argued that Plaintiff is not an insured. This argument contends that Plaintiff is not an insured as no coverage can be found in the BAP and consequently none in the CCP. As it has been determined that coverage does arise under the BAP this argument is unpersuasive.

Defendant further contends that as Plaintiff was not within the scope of his employment or performing duties relating to the conduct of the employer's business at the time of the injury he is not entitled to any UIM coverage under the CCP.

Since the requirement that an employee be acting within the scope of this employment applies only to liability coverage and not to coverage imputed by law, coverage is not precluded

by Plaintiff being outside the scope of his employment.

As Coverage B would appear to come into effect only if the underlying business auto policy was found not to apply and since it is here decided that there is coverage provided by the BAP, it is of no consequence at this time that Coverage B insurance is found available.

It is further asserted by Defendant that the decisions of the Ohio Supreme Court in Scott-Pontzer and other cases violate the contract clause of the U.S. and Ohio constitutions.

Clearly, this Court may not overrule the Supreme Court of Ohio by holding its decisions unconstitutional.

Neither will the Court differentiate - as proposed by Defendant - to craft a different holding here in regard to med pay rather than follow the guidance of the Supreme Court's decisions in Scott-Pontzer.

Finally, there remains for determination here the appropriate application of the provisions for "set off" at R.C. Section 3937.18(A)(2). Because the statute provides for set off or reduction by amounts "available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured" the Court finds that amounts paid Plaintiff pursuant to his own UIM coverage cannot be said to be amounts for which Section 3937.18(A)(2) provides a right of set off.

Accordingly, Plaintiff is found entitled to underinsured motorist coverage from Defendant, AMMIC under both the business auto and the commercial catastrophe liability policies.

The amount of available coverage is \$16 million. (One million pursuant to the business auto policy and 15 million under the umbrella commercial catastrophe policy). The amount by

which R.C. Section 3937.18(A)(2) authorizes Defendant to reduce this coverage is (\$12,500) representing amounts available from persons liable to Plaintiff.

In accordance with the foregoing, Plaintiff's Motion for Partial Summary Judgment is sustained and Defendant, AMMIC's, Motion for Summary Judgment is overruled.

There being no just reason for delay, judgment is hereby entered for the Plaintiff in accordance with the foregoing.



---

JUDGE JOHN M. DURKIN



CLERK: COPY TO ALL COUNSEL  
OR UNREPRESENTED PARTY.