

Martino

COPY

FILED
HURON COUNTY
COMMON PLEAS COURT

IN THE COURT OF COMMON PLEAS OF HURON COUNTY, OHIO

02 JAN 11 PM 1:52

KATHLEEN L. WALCHER
CLERK OF COURTS

TAYLOR MILLIGAN, a minor, et al.,)

Case No. CVC 2000-036

Plaintiffs,)

JUDGE EARL R. MCGIMPSEY

vs.)

ADAM S. CASTLE, a minor, et al.,)

**DECISION AND
JUDGMENT ENTRY**

Defendants.)

~~RECEIVED~~ 01-11-2002
TEL 394 PG 980

DECISION

This matter is before the Court on cross-motions for summary judgment by Plaintiff and Defendant Liberty Mutual Insurance Company.

Plaintiffs have brought suit for injuries received by Plaintiff's minor daughter, Taylor Milligan, when on August 2, 1999, she was run over by a car driven by Defendant Adam Castle as she lay sleeping in Defendant Dickerson's back yard. Defendant Liberty Mutual insures Mr. Milligan's employer, MTD Products, Inc. The Milligans are making an underinsured motorist claim under the authority of *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.* (1999), 85 Ohio St. 3d 660.

Liberty Mutual issued Policy No. AS2-181-053937-039 to MTD Products, Inc, for the policy period from April 1, 1999, to August 1, 2000. The commercial policy contains a Business Auto Coverage Form (CA 00 01 07 97), which contains endorsements for Uninsured Motorist Coverage (CA 21 17 12 93), Drive Other Car Coverage - Broadened Coverage for Named Individuals (CA 99 10 07 97) and Ohio Changes (CA 01 05 12 98).

The Uninsured Motorist Coverage has a limit of \$25,000.00 as determined by the Declarations [GPO 3095 (1-87) and GPO 3112 R1 ed. (10-93)]. The Uninsured Motorist Coverage Endorsement modifies the Business Auto Coverage Form. Michael Cullen, the Assistant Treasurer of MTD Products, Inc., executed Form BS 691 R5 on March 30, 1999, requesting Bodily Injury Uninsured Motorist Coverage with limits lower than those provided in the policy's Body Injury Limit and specifically in the amount of the "Financial Responsibility Limits." The uninsured motorist coverage limit under the Drive Other Car Coverage Endorsement is also \$25,000.00 by virtue of the schedule attached thereto.

394
781

The Drive Other Car - Broadened Coverage for Named Individuals Endorsement modifies the Business Auto Coverage Form by insuring the individuals and their family members named in the attached schedule (executive officers and sales people who are regularly furnished company vehicles) when driving automobiles that the company does not own, hire or borrow except automobiles owned by such individuals or used by such individuals while working in a business of selling, servicing, repairing or parking autos. This endorsement provides additional coverage to a select group of employees when they are operating vehicles that are not owned, hired or borrowed by the company. All other employees are only covered under the Business Auto Coverage Form generally which provides coverage for "damages * * * caused by an 'accident' and resulting from ownership, maintenance or use of a covered 'auto'"

Without the Drive Other Car Endorsement the policy at issue appears to be the same policy interpreted by the court in *Scott-Pontzer v. Liberty Mutual Fire Insurance Co., supra*. Liberty Mutual argues that the Drive Other Car Endorsement distinguishes this policy from the policy in *Scott-Pontzer* in that the specification of executives and sales people in its attached schedule clarifies the ambiguity upon which the Ohio Supreme Court based its rationale for extending UIM coverage. This Court cannot agree.

The endorsement does not substitute any definitions in the Business Auto Coverage Form or substitute coverages, but instead adds coverage for non-owned, non-hired and non-borrowed vehicles when operated by executives, sales people and their families. For example, under Section II, Liability Coverage, of the Business Auto Coverage Form the definition of an insured includes anyone while using with the company's permission a covered auto the company owns hires or borrows. This includes all employees, so long as the auto is not owned by the employee or a member of his family. Thus, for executives and sales people who are assigned regular use of a company car, they are covered when using their assigned car under the general provisions of the Business Auto Coverage Form. Similarly, an employee who is using a company car, even though he is not regularly assigned to such use, is also covered while driving the company car. What the Drive Other Car Endorsement does is just what its title says: it broadens coverage for named individuals when they are using other cars, i.e., cars not owned, hired or borrowed by the company and which they or members of their families do not personally own. Thus, the naming of that select group of individuals for that specialized coverage in no way clarifies the ambiguity the supreme court perceived in the general language of the Business Auto Coverage Form of Liberty Mutual's policy. This Court must therefore defer to the analysis of the supreme court in *Scott-Pontzer* and find that the Liberty Mutual policy here at issue provides underinsured motorist coverage to Mr. Milligan. To the extent that Mr. Milligan suffered damages as a result to the injuries to his daughter, he has UIM coverage under Liberty Mutual's business auto policy issued to MTD Products, Inc.

394
758

The next issue that must be addressed is the limit of the UIM coverage. Liberty Mutual argues that H.B. 261 controls and under that version of R.C. 3937.18 (C), which was in effect at the inception of the policy and at the time of the accident at issue herein, where there is a written signed selection of coverage limits for UIM different than liability limits a presumption arises that an offer of coverage was made by the insurer consistent with the statutory requirement that limits be offered in the same amounts for UIM coverage as are available for liability coverage.

Liberty Mutual argues that the holding in *Linko v. Indemnity Company of North America* (2000), 90 Ohio St.3d 445, wherein the supreme court held that a valid UIM rejection must contain a brief description of UIM coverage, a premium quote for UIM coverage and an express statement of UIM coverage limits, is not applicable to this case because *Linko* was interpreting an earlier version of R.C. 3937.18. H.B. 261, which became law on September 3, 1997, was the legislative response to *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St. 3d 565, wherein the syllabus had held that "[t]here can be no rejection pursuant to R.C. 3937.18 (C) absent a written offer of uninsured motorist coverage from the insurance provider." *Kinko* was a refinement of the holding in *Gyori*, spelling out what the requisite elements of such an offer are. Since *Gyori* was, in effect, overruled by the legislature, the requirements of *Linko* as to the contents of such an offer also succumb to the statutory presumption of H.B. 261. This Court agrees with this analysis. The statutory presumption of an offer of UIM coverage has not been overcome and the execution of Form BS 691 R5 on March 30, 1999, by the company's assistant treasurer requesting Bodily Injury Uninsured Motorist Coverage with limits lower than those provided in the policy's Body Injury Limit and specifically in the amount of the "Financial Responsibility Limits" was effective to reduce the UIM coverage limit.

Plaintiffs argue, however, that even if this analysis were correct, the selection of "Financial Responsibility Limits" is ambiguous and therefore fails, leaving the court to impose a limit by implication of law in the same amount as the liability limit of \$2,000,000.00. Plaintiff argues that there are a number of different limits of insurance imposed by statute or administrative regulation which makes the term "Financial Responsibility Limits" ambiguous. The Court finds no ambiguity of the kind claimed by Plaintiffs.

The definition of "an uninsured motorist" in R.C. 3937.18 (B) does not include "the owner or operator of a motor vehicle that is self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered." [Emphasis supplied.]

Thus, the term "financial responsibility law" has a specific meaning in the context of R.C. 3937.18. In Ohio it refers to the Financial Responsibility Act, R.C. 4509.01 *et seq.* Under the Act R.C. 4509.51 provides:

Every owner's policy of liability insurance:

(A) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby granted;

(B) Shall insure the person named therein and any other person, as insured, using any such motor vehicles with the express or implied permission of the insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such vehicles within the United States or the Dominion of Canada, subject to **limits** exclusive of interest and costs, with respect to each such motor vehicle, as follows:

(1) Twelve thousand five hundred dollars because of bodily injury to or death of one person in any one accident;

(2) Twenty-five thousand dollars because of bodily injury to or death of two or more persons in any one accident;

(3) Seven thousand five hundred dollars because of injury to property of others in any one accident. [Emphasis supplied.]

The term "limits" therefore has a specific meaning in the context of the Financial Responsibility Act. Since the policy at issue is an automobile insurance policy and the coverage under which benefits are sought is the uninsured motorist coverage, it is only reasonable to read the term "Financial Responsibility Limits" in the context of the Financial Responsibility Act. In such context the term is not ambiguous.

There is, however, an ambiguity in the Liberty Mutual policy at issue. While the Ohio financial responsibility limits are \$12,500.00 per person and \$25,000.00 per accident, the policy declarations [GPO 3095 (1-87) and GPO 3112 R1 Ed. (10-93)] for uninsured motorist coverage in Ohio are in the amount of \$25,000.00, a single limit, rather than the split limit authorized by the statute. Similarly, in the Drive Other Car Coverage Endorsement the attached schedule lists the UIM limit as \$25,000.00. The declarations are therefore inconsistent with the Form BS 691 R5, which selected UIM coverage in the amount of the "Financial Responsibility Limits." Such an ambiguity must be construed liberally in favor of the policy holder and strictly against the insurer. *King v. Nationwide Insurance Co.* (1988), 35 Ohio St. 3d 208 (syllabus). So construed the policy provides an uninsured motorist coverage limit of \$25,000.00.

394
784

Finally, Liberty Mutual seeks to offset against its uninsured motorist coverage any recovery made by Plaintiffs from the Dickerson's homeowner policy. The issue is most likely moot in that it is agreed that the tortfeasor, Adam Castle, has an automobile liability insurance policy limit of \$50,000.00. It is difficult to imagine circumstances in which Castle would not be found liable and the Dickersons would be found liable. Neither party has cited any law to the court dispositive of this issue.

A number of courts have found automobile liability coverage and therefore imputed as a matter of law uninsured motorist coverage under homeowner's policies where the policies insured recreational vehicles as opposed to motor vehicles. See, e.g., *Chuff v. Holland* (September 30, 1999), Licking App. No. 99CA57, unreported, 1999 Ohio App. LEXIS 4742; *State Automobile Mutual Insurance Co. v. Lopez* (September 23, 1999), Franklin app. No. 99AP-15, unreported, 1999 Ohio App. LEXIS 4408; *German v. Wray* (September 3, 1999), Richland App. No. 99 CA 17, unreported, 1999 Ohio App. LEXIS 4273. Cf. *Selander v. Erie Insurance Group* (1999), 85 Ohio St.3d 541 (general business liability policy). Coverage was found even in situations where the underlying accident involved automobiles as opposed to recreational vehicles. Thus, a homeowner's policy may be treated as a general automobile liability policy and it would logically follow that proceeds paid from that policy under the liability coverage arising out of the automobile insurance should be set-off against uninsured motorist coverage. The Plaintiffs, however, do not seek to recover under the Dickersons' homeowners policy based on automobile liability coverage, but rather under the general liability coverage and, since the Dickerson's homeowner's policy is not in evidence, this Court cannot make a determination that depends on construing it.

The Court must therefore look to the rationale of the set-off requirement in R.C. 3937.18 (A)(2):

* * * the underinsured motorist coverage shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any insured under the policy, where the limits of coverage available for payment to the insured **under all bodily injury liability bonds and insurance policies covering persons liable to the insured** are less than the limits for the underinsured motorist coverage. Underinsured motorist coverage in this state is not and shall not be excess coverage to **other applicable liability coverages**, and shall only provide the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment **under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.** [Emphasis supplied.]

394
785

The statute makes clear that the Court is to consider "all applicable bodily injury bonds and insurance policies." Nothing in the legislative language restricts that consideration to only automobile liability bonds and insurance policies. Thus, if the Plaintiff Jack Milligan recovers under the Dickersons' homeowners policy, such amounts as are recovered thereunder must be set-off against the Liberty Mutual underinsurance coverage.

JUDGMENT ENTRY

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment and Defendant Liberty Mutual Insurance Co.'s Motion for Summary Judgment are granted in part and denied in part as follows:

1. Plaintiff Jack Milligan is an insured under the Liberty Mutual Insurance Co. policy issued to MTD Products, Inc. and is entitled to underinsured motorist coverage thereunder.
2. Liberty Mutual Insurance Co.'s policy issued to MTD Products, Inc. provides underinsured motorist coverage with a single limit of \$25,000.00 per person or per accident.
3. Liberty Mutual is entitled to a set-off of any proceeds recovered by Plaintiff Jack Milligan under the Dickersons' homeowners policy.


EARL R. MCGIMPSEY, JUDGE

Copies to:

James J. Martin, Esq.
D. Kim Murray, Esq.
James L. Glowacki, Esq. and
James J. Imbrigiotta, Esq. and
William H. Kotar, Esq.
Darrel A. Bilancini, Esq.
Therese P. Joyce Esq.