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IN THE COMMON PLEAS COURT OF RICHLAND COUNTY, OHIO

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| Tammy K. Moran, | : | Case No. 01-279 D |
| Plaintiffs, | : | |
| v. | : | JUDGMENT ENTRY ON |
| Cincinnati Insurance Company, | : | SUMMARY JUDGMENT |
| Defendants. | : | MOTIONS |

This underinsured motorists coverage declaratory judgment action is brought before the court by the following motions: (1) defendant Cincinnati Insurance Company's 1-11-02 motion for summary judgment, (2) plaintiff Tammy Moran's 1-28-02 cross-motion for partial summary judgment, and (3) Cincinnati Insurance Company's 2-8-02 motion to stay these proceedings because of other cases pending in the Ohio Supreme Court.

Factual Discussion

The facts necessary to resolution of these motions are not in dispute. On March 25, 1999, plaintiff Tammy Moran (then known as Tammy Gordon) was involved in a car wreck. Timothy Hahn negligently ran a stop sign and his car collided with a car driven by Ms. Moran. Ms. Moran suffered a severe ankle fracture. Her medical expenses to date exceed \$17,800. She has reportedly now developed post-traumatic arthritis and requires a surgical fusion of her ankle joint.

Mr. Hahn's insurer offered and paid his policy limits of \$100,000. Ms. Moran's employer was Rable Machine, Inc. It had a business automobile policy with \$1,000,000 coverage and an umbrella policy with \$4,000,000 additional coverage. Ms. Moran seeks

underinsured motorist coverage under her employer's policies pursuant to the Ohio Supreme Court's creation of such a right in the *Scott-Pontzer*¹ case.

At the time of the collision Ms. Moran was driving a car that belonged to her live-in boyfriend, Michael Moran. Cincinnati Insurance contends (1) that Rable Machine's auto policy excluded coverage for any collision involving an insured occupying a car not owned by Rable Machine, and (2) that underinsured coverage under the umbrella policy was expressly rejected by Rable Machine. It consequently contends it is entitled to summary judgment on plaintiff's complaint. Plaintiff contends to the contrary that she has underinsured coverage under both of Rable's policies.

Legal Discussion

1. Motion to stay proceedings.

Cincinnati Insurance asks the court to wait to decide the summary judgment motions until the Ohio Supreme Court decides questions certified to it by the U.S. District Court. These questions relate to the effectiveness of a rejection of underinsured motorist coverage like that argued by Cincinnati Insurance in this case.

The court declines to delay its rulings here. First, there is some dispute from plaintiff whether the issues are the same. Second, these issues have nothing to do with the \$1,000,000 business auto policy. Third, any errors this court might make may be corrected on appeal.

2. The Business Auto Policy

Cincinnati Insurance concedes that Rable Machine had a policy of insurance,

¹ (1999) 85 Ohio St. 3d 660.

including commercial auto insurance, in effect on the date of Ms. Moran's wreck. It also apparently concedes that she is an insured under this policy because of the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*²

But Cincinnati Insurance contends that underinsured coverage of Ms. Moran's injuries is barred by the following exclusion at page 2 of its underinsured motorists coverage (emphasis added):

C. Exclusions

This insurance does not apply to:

. . .

5. "Bodily injury" sustained by an "insured" while the "insured" is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a **named insured**, a spouse of a resident relative of a **named insured**, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided.

Defendant Cincinnati Insurance contends plaintiff is a "named insured" within the meaning of this exclusion. Rable Machine Inc. is the only named insured identified in the policy. But defendant argues *Scott-Pontzer*'s reading of policy language defining "insureds" to include the employees of an insured business corporation means they're also included in "named insureds."

Section B of Rable Machine's underinsured motorist coverage defines an

² (1999), 85 Ohio St 3d 660.

“insured” identically to the policy considered in the *Scott-Pontzer*³ case:

B. Who is an Insured

1. You.
2. If you an individual, any family member.

• • •

The Supreme Court found “you” in this definition of insured to be ambiguous because underinsured coverage is for the protection of persons, not vehicles. Because a corporation is not a physical person, the court concluded⁴ that the term “you” must be read to include the corporation’s employees:

[I]t would be reasonable to conclude that “you” while referring to [the insured corporation], also includes [the insured corporation’s] employees, since a corporation can act only by and through real live persons.

While this policy definition of “insured” – interpreted by *Scott-Pontzer* – includes Ms. Moran as an insured under Rable’s policy, it does not include her as a “named insured.” If the policy’s C.5. exclusion from underinsured coverage used the phrase available for “the regular use of an insured” rather than the “regular use of a named insured,” this court would agree with Cincinnati Insurance’s argument. By the use of the “named insured” language, however, the exclusion only reaches unlisted vehicles owned or regularly used by Rable Machine, Inc., itself. Plaintiff has coverage.

3. The Umbrella’s Policy Rejection of Underinsured Coverage

Cincinnati Insurance furnished a rejection of underinsured coverage under Rable Machine’s umbrella policy. That rejection is not authenticated under oath in a way that would make it cognizable under Civ. R. 56 (C). There consequently may be a factual

³ 85 Ohio St. 3d at 663.

dispute to resolve concerning its authenticity. Assuming, for sake of argument, that defendant will be able to authenticate the document, the court will discuss the rejection as if it is authentic.

Rable's umbrella policy relevant to plaintiff's claims was issued for the three year period of 7-28-98 to 7-28-01. Prior to 7-28-98, on 10-11-95 or 10-13-95, Rable rejected uninsured motorist coverage in the umbrella policy in a signed written rejection.

It is the statutory law in effect at the time the policy is issued which governs interpretation of the contract documents.⁵ At the time Rable's policy was issued on 7-28-98, Ohio law authorized written rejections of underinsured coverage. R.C. 3937.18(C) provided in relevant part:

... A named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's written, signed selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be effective of the date signed, shall create a presumption of an offer of coverages consistent with division (A) of this section and shall be binding on all other named insureds, or applicants...

Unless a named insured or applicant requests such coverages in writing, such coverages need not be provided in or made supplemental to a policy renewal or replacement policy where a named insured or applicant has rejected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer...

Assuming Rable Machine's rejection of coverage is authentic, it is the named insured's written, signed rejection of underinsured coverage and its election in 1995 not to buy and pay for such coverage. When that umbrella policy was reissued in 1998, the second paragraph of R.C. 3937.18(C), quoted above, meant Cincinnati Insurance

⁴ 85 Ohio St. 3d at 664.

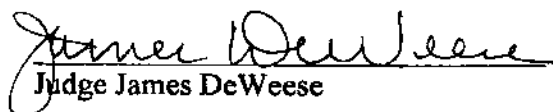
⁵ Ross v. Farmers Insurance Group of Cos. (1998), 82 Ohio St 3d 281; Wolfe v. Wolfe (2000), 88 Ohio St 3d 246, 250.

legitimately did not need to offer or provide such coverage in the policy renewal. The plaintiff consequently has no uninsured coverage under Rable's umbrella policy.

Judgment Entry

It is therefore ordered:

1. The defendant's 2-8-02 motion to stay the proceedings is overruled.
2. Partial summary judgment is entered that:
 - a. Plaintiff has underinsured motorists coverage under the \$1,000,000 business auto insurance coverage issued by defendant Cincinnati Insurance Company to Rable Machine, Inc.
 - b. Unless plaintiff challenges the authenticity of Rable's rejection of underinsured coverage within a week after this entry is filed, in which case there would be a factual issue to resolve, plaintiff has no underinsured motorists coverage under the umbrella policy issued by defendant Cincinnati Insurance Company to Rable Machine, Inc.
3. The 1-11-02 and 1-28-02 cross-motions for summary judgment are otherwise overruled.


Judge James DeWeese

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Judgment Entry was served according to local rules this 12th day of March, 2002, to the following:

Michael Inscore
Dennis Fogarty, 1700 Midland Bldg., 101 Prospect Ave. West, Cleveland, Ohio 44115


Secretary to Judge DeWeese