

Rege

FILED

IN THE COURT OF COMMON PLEAS, FAIRFIELD COUNTY, OHIO

Kenneth L. Rienschild,

2001 DEC 28 AM 8:34

Plaintiff,

RON BALSER
CLERK OF COURTS
FAIRFIELD CO., OHIO

Case No. 00 CV 724

v.

JUDGE LUSE

Nationwide Mutual Insurance Co., et al.,

Defendants.

MEMORANDUM OF DECISION

I. NATURE OF THE PROCEEDINGS

This matter comes before the Court upon Motions for Summary Judgment filed by Defendant Nationwide Mutual Insurance Co., (hereafter referred to as "Nationwide"), Defendant Motorists Mutual Insurance Company (hereafter referred to as "Motorists") and Plaintiffs Kenneth L. Rienschild and Katie Rienschild pursuant to Civ. R. 56. Each party has moved for summary judgment requesting that the Court determine, as a matter of law, the UM coverage provided to Plaintiff by two different insurance policies, a policy issued by Nationwide, referred to as policy number 91 34 BA 829072 0001, and a policy issued by Motorists, referred to as policy number 33.164499.

The Plaintiffs assert that both policies provide UM coverage, by operation of law, and there are no applicable exceptions or conditions that prevent recover.

Motorists claims: 1) that by virtue of Plaintiffs settlement with and release of the at-fault party, Plaintiff has prejudiced Motorists' subrogation rights against the at-fault party, thereby forfeiting his right to recover UM benefits; 2) because Plaintiffs are no longer legally entitled to

recover from the at-fault party, they are not entitled to recover uninsured motorists benefits from Motorists; 3) even if Plaintiffs are entitled to UM coverage, the Motorist policy only provides excess coverage and the UM coverage provided by Nationwide is primary.

Nationwide submits that: 1) The Plaintiff's failure to provide notice of his intention to present a claim under his "Business Automobile Policy," the policy at issue, within a reasonable time prejudiced Nationwide, as a matter of law, and relieves Nationwide of any obligation to provide UM coverage; 2) if UM coverage is provided, then both the Motorist and Nationwide policies provide primary coverage and the amount of coverage should be the highest amount allowed under the highest single policy limit, and each company should pay their share based on a pro-rata calculation.

II. FACTS

All the parties agree that the material facts are not in dispute. This is an action for personal injuries and a declaratory judgment that arises out of an auto accident that occurred in Fairfield County on May 24, 1997. According to the Complaint, Plaintiff Kenneth Rienschild was operating a motorcycle on County Road 11. While the details are not 100 % clear from the Complaint, Plaintiff alleges that the accident was caused by the negligence of Theodore Johnston and that the Plaintiff sustained serious injuries as a result. Rienschild was the owner as well as an employee of Rienschild's Finer Meats, Inc., an Ohio corporation.

Johnston had liability insurance at the time of the accident in the amount of \$50,000. In exchange for a payment to Rienschild of those limits, Rienschild executed a full release in favor of Johnston on July 17, 1997.

Because the tortfeasor's liability limits were apparently not sufficient to compensate

Rienschield and other family members for their injuries and damages, Plaintiffs now seek Uninsured/Underinsured Motorist benefits from Motorists and Nationwide.

Policy No. 22.164499-40 issued by Motorists Mutual Insurance Company to Rienschield Finer Meats, Inc., on its face, provides coverages for such things as fire, theft and general liability. Although the parties agree that the policy was not intended to serve as the company's primary automobile coverage, the Motorists policy does include coverage for liability arising out of the use of "hired" and "non-owned" autos. It does not contain expressed UM coverage, however, Motorists failed to secure a signed rejection of UM coverage at the time the policy was issued.

Because the Motorists policy does provide coverage for the insured's liability arising out of the use of certain highway motor vehicles, Motorists concedes that it is a "motor vehicle liability policy" under Ohio Law, as it existed at the time of issuance. For that reason, and because no written offer of UM coverage was made, the Motorists policy contains UM coverage by operation of law. Selander v. Erie Ins. Group (1999), 85 Ohio St.3d 541. The limits of the UM coverage in the Motorists policy, by operation of law, are \$300,000, the same as the auto liability limits of the policy. Linko v. Indemnity Ins. Co. of North America (2000), 90 Ohio St.3d 445.

The Nationwide Policy No. 91 BA 108-526-0001 was also issued to Kenneth Rienschield, dba Rienschield Finer Meats. The Nationwide policy is what is known as a commercial auto policy, and it contains both expressed liability and UM coverage. The liability limits of the Nationwide policy are \$1,000,000 while the stated limits of the UM coverage are only \$25,000. Nationwide did not obtain a valid rejection of the higher limits from Mr.

Rienschield, therefore, the UM limits of the policy are, by operation of law, also \$1,000,000 by virtue of Linko. Id.

III. STANDARD OF REVIEW

Upon a motion for summary judgment, a court must adhere to Ohio Civ. R. 56(C). Civ.

R. 56(C) sets forth the following:

Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. (1977), 50 Ohio St.3d 317, 327.

The United States Supreme Court also noted, “[b]y its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material fact*.” Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (emphasis added). Furthermore, the party seeking summary judgment bears the responsibility of informing the court of the basis for the motion and identifying those portions of the record which

demonstrate the absence of genuine issues of material fact and upon which the moving party is entitled to judgment as a matter of law. Dresher v. Burt (1996), 75 Ohio St.3d 280. Once the moving party satisfies that burden, the party opposing the motion has an affirmative duty to produce evidence on any issue for which that party bears the burden of production at trial. Id.; Celotex Corp. v. Catrett (1986), 477 U.S. 317.

IV. CONCLUSIONS OF LAW

After reading the parties' briefs, reviewing the pertinent law and considering the evidence available to the Court pursuant to Civ. R. 56, the Court finds that granting summary judgment in favor of the Plaintiffs is appropriate.

There has been much debate concerning the rationale used by the Ohio Supreme Court, in Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 St.3d 660 and Selander v. Erie Ins. Group (1999), 85 Ohio St.3d 541, which resulted in a conclusion, by the Supreme Court, that a plaintiff, as an employee of an insured corporation, was also an insured under both the employer's commercial automobile liability policy and the umbrella excess policy issued to the employer. Despite its ability to make the holding in these decisions proactive only, the Ohio Supreme Court failed to do so, which has resulted in the revival of numerous cases that had been previously "closed."

These new demands for coverage are often related to injuries sustained in accidents that occurred years in the past, and the claims against the tortfeasor have been settled or litigated, well before any party thought that policies, like the ones at issue in this matter, could possibly offer coverage. Therefore, these claims create unique issues involving the application of conditions to coverage, such as notice and subrogation requirements. Accordingly, the plaintiff, in the suit

against the employer's insurance company, is faced with defenses to coverage based on the lack of required notice or on the Plaintiff's failure to protect the insurer's subrogation rights. The case before this Court concerns several of these issues, which the Ohio Supreme Court has yet to speak upon.

Plaintiff has provided the Court with a copy of Martin v. Liberty Mutual Insurance Company, Case Number 5:00 CV 1864 (a decision from the United States District Court for the Northern District of Ohio, Eastern Division). In the Martin decision, the Federal Court addressed several of the issues involved in this action, and the Court finds that the Federal Court's rationale in determining that coverage was available to the plaintiff, despite the defendants' alleged defenses, is logical and appropriate, given the Ohio Supreme Court's prior decisions.

As the U.S. District Judge David D. Dowd, Jr. stated in the Martin decision, this Court has also immersed itself in Ohio insurance law in an attempt to resolve the complicated issues presented by this case, which in some instances, required this Court to simply anticipate the Ohio Supreme Court's next decision, due to the fact that these claims will become so prevalent that the Supreme Court will have to address these issues in the near future.

As noted above, all the parties agree that the Ohio Supreme Court has determined that UM insurance coverage is provided by the policies at issue by operation of law, therefore, the Court will now address the Defendant's arguments in support of its position that Plaintiffs are not entitled to coverage benefits.

A. SUBROGATION

First, Defendants assert that Plaintiffs are not entitled to coverage because they failed to protect the Defendants' subrogation rights by settling with the tortfeasor and releasing the

tortfeasor from all claims related to the accident.

As to this issue, the policies differ in that Nationwide had an expressed UM policy, therefore, there may be some applicable exclusion; however, the Motorists policy offers UM coverage by operation of law, therefore, pursuant to Myers v. Safeco Ins. Co. of America, 2000 WL 329800 (Ohio App. 5th Dist. 2000) the exclusions and conditions that apply to the liability portion of the policy do not transfer to the UM claims. In Myers, the Appellate Court established that where UM coverage is implied by law, the contracting party cannot avail itself of any limitations or exclusions found elsewhere in the policy, such as the right of subrogation. Thus, the law simply does not bar the Plaintiff from recovery for failing to protect Motorists' subrogation rights against the tortfeasor.

The Myers decision was reversed by the Ohio Supreme Court. However, the decision to reverse was based upon other grounds and other issues; therefore, this Court feels compelled to follow the Fifth District's opinion on these issues.

The Fifth District's judgment in Myers was reversed by the Ohio Supreme Court, and the decision is not controlling upon this Court. However, the Ohio Supreme Court reversed Myers on different grounds, therefore, it is anticipated that the Fifth District will be consistent with the portion of its opinion that was not commented upon.

The Nationwide Insurance policy, on its face, appears to grant Nationwide a contractual right to subrogation. The Ohio Supreme Court has long recognized an insurer's right of subrogation. Newcomb v. Cincinnati Ins. Co. (1872), 22 Ohio St. 382. The court has also held that a subrogation clause is a valid and enforceable precondition to the duty to provide underinsured motorist coverage. McDonald v. Republic-Franklin Ins. Co. (1989), 45 Ohio St.3d

27.

While this Court does not disagree with the case law of the Ohio Supreme Court, the Court is of the opinion that the facts underlying the case at issue make application of the existing case law to this case unjust. While it is true that Plaintiffs settled with the tortfeasor and released him from all liability, the Plaintiffs did so before the Ohio Supreme Court decided Scott-Pontzer and Selander. Before these holdings were issued in 1999, Plaintiffs, and other similarly situated, could not predict that they would be covered under these types of insurance policies. Accordingly, the Court is not prepared to rely upon the destruction of Nationwide or Motorists' subrogation rights to bar Plaintiffs from recovering.

Also, the Court will note that Nationwide, in its Answer, admitted UM coverage in the amount of \$1,000,000 and failed to allege any affirmative defenses, therefore, pursuant to the Ohio Civil Rules of Procedure, these affirmative defenses, lack of notice/waiver/consent or impairment of subrogation issues, are waived.

B. NOTICE

The Defendants submit that the Plaintiffs' claims should be barred because the Plaintiff failed to provide adequate notice.

The Court finds, just as the destruction of the Defendants' subrogation rights will not prevent recovery, the Plaintiff's failure to notify these insurers will not prevent recovery.

Plaintiffs submit that conditions and exclusions are contractually based, and, as such, they are enforceable to the extent that they do not contravene public policy or the statutory laws of this State. State Farm Auto. Ins. Co. v. Alexander (1992), 62 Ohio St.3d 397, 401.

As noted above, in the Motorists policy there is no expressed UM coverage, therefore, the

Court in Meyers, relying upon the Supreme Court's decision in Scott-Pontzer, dictates that this Court ignore the conditions and exclusions within the auto policy and the umbrella policy. Also, in Hamilton Mutual Insurance Company v. Perry, 1993 WL 49798 (Ohio App. 6 Dist.), the Sixth District Court of Appeals determined that there was no duty to notify the insurer when the claim had not been legally recognized, and in West American Insurance Co. v. Hardin, (1989), 59 Ohio App.3d 71, the Appellate Court found that delay in notice was excusable when no claim was recognized under existing law. For Plaintiffs to have given notice to Motorist before Scott-Pontzer would have been a vain and futile act since the right to coverage and their claims for UM/UIIM benefits had not yet been established by any Ohio court.

As for the Nationwide policy, the Court, as noted above, has determined that Nationwide has waived these defenses; however, the Court probably would have allowed Nationwide to amend its Answer to assert these defenses if the Court believed there was a meritorious defense available.

The reality of the situation is that Nationwide was notified of this accident as the Plaintiff had a different policy issued by Nationwide upon which he made a timely claim following the accident. That claim was for the same accident which is the subject of this action. Nationwide consented to the settlement of the claim against Johnston and was given the right to subrogation, which it never pursued.

Obviously, the Court understands that neither Plaintiff nor Nationwide were concerned with the policy, now at issue, when Plaintiff pursued and Nationwide granted coverage pursuant to another personal auto policy, issued by Nationwide, but that is exactly the point. Neither the Plaintiff nor Nationwide believed that coverage was available pursuant to this policy.

Furthermore, although the Court has attempted to address the Nationwide policy as if it had expressed UM coverage, and as such, the exclusions and conditions could apply, the Court should note that only \$25,000 of UM coverage was expressed in the contract. The remaining \$975,000 of coverage is by operation of law and faces the same consequences as the Motorists policy, no enforcement of exclusions and conditions, including notice.

The bottom line is that Nationwide was aware of the accident and aware that Plaintiff was seeking to receive UM coverage from any policy available, and they failed to provide such coverage pursuant to this policy. The Court and the parties know that had Plaintiff actually requested coverage, before 1999, upon this policy, the action would have been futile and in vain. Nationwide would have denied the claim. The Court finds that Nationwide is estopped from claiming a lack of notice as it was not prejudiced, Nationwide would not have provided coverage benefits before 1999 and it was actually notified of the claim. Therefore, the Court will not allow Plaintiff's claim to be barred due to lack of notice.

While this Court has probably said enough on the subject, the Court would also state that the language of the Nationwide policy, even if enforced pursuant to normal insurance contract standards without the Supreme Court's latest interpretations, does appear to be ambiguous as to the notice requirements. The Court could easily interpret the policy in a manner that would demonstrate that the Plaintiff met the notice requirements of the contract. Where provisions of a contract of insurance are reasonably susceptible to more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured. See, Weiker v. Motorists Mut. Ins. Co. (1998), 82 Ohio St.3d 182.

The Court has reviewed the various notice and consent sections contained in various parts

of the policy, and the Court concludes that the UIM endorsement is unclear as to whether notice is prerequisite to coverage.

C. LEGALLY ENTITLED TO RECOVER

Defendants alleged that Plaintiff is not entitled to UM coverage because the original tortfeasor has been released. According to the Defendants, UM coverage only provides benefits when the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle. Thus, since Plaintiff has already released the tortfeasor, he is not legally entitled to recover anything from the owner or operator of an uninsured motor vehicle; therefore, UM coverage is not available.

Although on its face the argument seems to have merit, the argument fails as a matter of law. O.R.C. §3937.18 defines an insured that is "legally entitled to recover" as an insured that is able to prove the elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured motor vehicle. There is no case or statutory law that suggests that an insured that can prove the above is not eligible because he previously released the tortfeasor. Therefore, the Court finds that Plaintiffs are not barred from recovery as Plaintiff still met the statutory definition of "an insured that is legally entitled to recover."

D. DIVISION OF LIABILITY

Furthermore, the Court finds that the Plaintiff is not entitled to stack the UM policies. Rather, Ohio UM statute and the language of Nationwide's "anti-stacking" clause dictate that the combined maximum amount of UM coverage available to the Plaintiff is the limit of the highest applicable UM policy. Since the highest applicable limit is \$1,000,000, the maximum amount of UM coverage would also be \$1,000,000.

The Court has also determined that the Defendants shall share the damages on a prorated basis. It is well settled that when two or more policies provide the same UM coverage, the damages shall be prorated among the carriers. Buckeye Union Insurance Co. v. State Automobile Mutual Insurance Co. (1977), 49 Ohio St.2d 213.

V. CONCLUSION

For the above stated reasons, the Plaintiff's Motion for partial Summary Judgment is GRANTED. Defendants', Motorist and Nationwide, Motions for Summary Judgment are DENIED. Counsel for the Plaintiff shall prepare a judgment entry accordingly, present it to opposing counsel for approval, and submit it to the Court within ten (10) days.


JUDGE JAMES W. LUSE

XC: ✓ Mark R. Riegel, Attorney for Plaintiff
W. Charles Curley, Attorney for Defendant Motorists Mutual Insurance Company
Timothy D. Johnson, Attorney for Nationwide Mutual Insurance