[Cite as *Dickenson v. Pate*, 2011-Ohio-1085.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gregory L. Dickenson,	:	
Plaintiff-Appellee,	:	
v.	:	
Paula M. Pate,	:	
Defendant-Appellant,	:	
		No. 03AP-403
and	:	(C.P.C. No. 01CVC07-6746)
Safe Auto Insurance Company,	:	
		(REGULAR CALENDAR)
Defendant/Third-Party Plaintiff-Appellee,	:	
	:	
v.		
	:	
William L. Pate,		
	:	
Third-Party Defendant-Appellant,	:	
and	:	
Christopher Sekol,	:	
Third-Party Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on March 10, 2011

Boone, Smith & Associates, LLC, and *G. Rand Smith*, for Paula and William Pate.

Mazanec, Raskin, Ryder & Keller Co., L.P.A., and *David K*. *Frank*, for Safe Auto Insurance Company.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Paula M. Pate ("Paula Pate"), and third-party defendant-appellant, William L. Pate ("William Pate"), from a decision and entry of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant/third-party plaintiff-appellee, Safe Auto Insurance Company ("Safe Auto").

{¶2} On July 16, 1999, plaintiff-appellee, Gregory L. Dickenson ("Dickenson"), was injured when a 1978 Ford truck, owned by Paula Pate, rolled backwards in a parking lot and struck Dickenson as he was loading groceries into a vehicle. Paula Pate's truck had been driven to the parking lot by her husband, William Pate. It is undisputed that William Pate did not have a valid driver's license at the time of the incident. Safe Auto had issued a policy of automobile liability insurance to Paula Pate, in effect for the period of May 20, 1999 through November 20, 1999, under which the Ford truck was listed as a covered vehicle.

{¶3} On July 13, 2001, Dickenson filed a complaint against Paula Pate, Safe Auto, Progressive Insurance Company ("Progressive"), Metropolitan Property and Casualty Co. ("Metropolitan Property"), and various John Does. The complaint alleged causes of action against Paula Pate for negligence and negligent entrustment in parking and securing the truck, and Dickenson sought a declaratory judgment against Safe Auto, Progressive and Metropolitan Property. Safe Auto filed an answer, a counterclaim

against Dickenson, and cross-claims against Paula Pate, Progressive, and Metropolitan Property. Safe Auto also filed a third-party complaint against William Pate.

{¶4} On April 19, 2002, Safe Auto filed a motion for summary judgment with respect to its counterclaim, cross-claims, and third-party complaint. Safe Auto argued that an unlicensed driver exclusion contained in the insurance policy operated to exclude the accident from coverage under the Safe Auto policy issued to Paula Pate. On May 7, 2002, Paula Pate and William Pate (collectively "appellants") filed a memorandum contra Safe Auto's motion for summary judgment.

{¶5} By decision and entry filed January 17, 2003, the trial court granted summary judgment in favor of Safe Auto. The trial court concluded that the unlicensed driver exclusion in Paula Pate's policy should be enforced on the basis that: (1) William Pate was the last person to drive the vehicle prior to the accident, (2) William Pate admittedly parked the vehicle in the precise location from which it rolled and struck Dickenson, and (3) William Pate's conduct constituted violations under the provisions of R.C. 4507.02.

{¶6} On February 13, 2003, appellants filed an appeal, but this court issued a journal entry of dismissal for lack of a final appealable order. Appellants then filed a motion with the trial court requesting the court to file an amended entry or to issue a nunc pro tunc entry. On March 11, 2003, the trial court filed a nunc pro tunc decision and entry, expressly finding no just reason for delay, and appellants filed a new notice of appeal. On November 13, 2003, appellants filed a voluntary petition under Chapter 13 of the Bankruptcy Code, and this court issued a stay of the appeal. On June 22, 2006, the

parties agreed to an entry dismissing Progressive and Metropolitan Property from the appeal. In 2010, this court reinstated the appeal.

{¶7} On appeal, appellants set forth the following three assignments of error for this court's review:

> I. THE TRIAL COURT ERRED IN GRANTING SAFE AUTO'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT AS A MATTER OF LAW WILLIAM PATE WAS OPERATING THE VEHICLE AT THE TIME OF THE ACCIDENT AND, THUS, THE UNLICENSED DRIVER EXCLUSION OPERATED TO EXCLUDE THE ACCIDENT FROM COVERAGE UNDER THE POLICY.
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> II. THE TRIAL COURT ERRED IN GRANTING SAFE AUTO'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT SAFE AUTO AS A MATTER OF LAW HAS NO OBLIGATIONS TO PAULA PATE FOR ANY CLAIM ARISING OUT OF THE ACCIDENT.
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> III. THE TRIAL COURT ERRED IN GRANTING SAFE AUTO'S MOTION FOR SUMMARY JUDGMENT BY RELYING UPON AS FACT A CONTESTED GENUINE ISSUE OF MATERIAL FACT IN THE CASE.

{¶8} Appellants' three assignments of error raise various challenges to the trial court's decision to grant summary judgment in favor of Safe Auto; specifically, appellants argue that the trial court erred in: (1) finding William Pate was operating the vehicle at the time of the accident; (2) ruling that Safe Auto had no obligations to Paula Pate; and (3) relying on a contested issue of material fact in granting summary judgment.

{¶9} Our review of a trial court's decision granting summary judgment is de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.,* 95 Ohio St.3d 314, 2002-Ohio-2220, ¶24, citing *Doe v. Shaffer,* 90 Ohio St.3d 388, 390, 2000-Ohio-186. Under Civ.R. 56(C), "summary judgment shall be granted when the filings in the action, including depositions

and affidavits, 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." *Bonacorsi* at ¶24.

{¶10} In *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, the Supreme Court of Ohio discussed a court's role in interpreting insurance contracts as follows:

> [T]his court has consistently held that insurance contracts must be construed in accordance with the same rules as other written contracts. *Universal Underwriters Ins. Co. v. Shuff* (1981), 67 Ohio St.2d 172, 21 O.O.3d 108, 423 N.E.2d 417; *Rhoades v. Equitable Life Assur. Soc. of the United States* (1978), 54 Ohio St.2d 45, 8 O.O.3d 39, 374 N.E.2d 643.
>
> In applying these rules, we have stated that the most critical rule is that which stops this court from rewriting the contract when the intent of the parties is evident, *i.e.*, if the language of the policy's provisions is clear and unambiguous, this court may not "resort to construction of that language." *Karabin v. State Auto. Mut. Ins. Co.* (1984), 10 Ohio St.3d 163, 167, 10 OBR 497, 499, 462 N.E.2d 403, 406. In *Tomlinson v. Skolnik* (1989), 44 Ohio St.3d 11, 12, 540 N.E.2d 716, 717-718, this court expounded upon this rule further:
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> "* * * Thus, in reviewing an insurance policy, words and phrases used therein 'must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the end that a reasonable interpretation of the insurance contract consistent with the apparent object and plain intent of the parties may be determined.' " (Quoting *Gomolka v. State Auto. Mut. Ins. Co*. [1982], 70 Ohio St.2d 166, 167-168, 24 O.O.3d 274, 275-276, 436 N.E.2d 1347, 1348.)

{¶11} Appellants assert, under the first assignment of error, that the primary issue in this case is whether coverage under the Safe Auto policy extended to the accident and Dickenson's injuries. Appellants contend that the question of coverage turns upon the

meaning of an undefined phrase, i.e., "is being operated," as set forth in the General Provisions section of the State Auto policy. That section of the policy states:

> No coverage is afforded under any section of this policy if the covered auto is being operated by a person who is not a qualified, licensed driver, or is without a valid driver license, or whose driver license is expired, revoked or suspended, or is in violation of any condition of their driving privileges, or is without privileges to drive for any reason.

{¶12} Appellants argue that the issue as to whether the exclusion applies necessarily depends upon the determination of what constitutes the "operation" of a motor vehicle; specifically, whether the truck in this case was being operated by William Pate at the time of the accident. Appellants contend that the plain and ordinary meaning of the word "operated" in the context of motor vehicles requires an element of physical control over the vehicle. Appellants assert that the exclusion is unenforceable where the facts indicate the alleged operator is outside the vehicle and lacks the capacity to exert control over the vehicle (i.e., a capacity to drive it) at the time of the accident.

{¶13} Both sides focus upon William Pate's actions in parking the vehicle that day. According to appellants, William Pate exited the truck, and the truck was "legally parked with the engine turned off, and was car-lengths away when the accident occurred." Appellants' Brief at 5. As such, appellants contend, William Pate lacked any capacity of control over the vehicle.

{¶14} In contrast, Safe Auto argues that the accident arose when William Pate "improperly parked" the truck, "which then rolled backwards and over Mr. Dickenson while he loaded groceries into a vehicle." (Safe Auto Brief at 5.) Safe Auto further contends

that the truck rolled away "immediately" after William Pate departed from it. (Safe Auto Brief at 9.)

{¶15} Appellants rely in part upon two cases from other jurisdictions, *Marshall v. Safeguard Mut. Fire Ins. Co.* (1963), 202 Pa.Super. 161, and *Oregon Mut. Ins. Co. v. Fonzo* (1970), 2 Wash.App. 304. In *Marshall,* the court affirmed a common pleas court decision in which that court construed the words "is being operated" to mean "actual physical control of the automobile" by the driver. *Marshall v. Safeguard Mut. Fire Ins. Co.* (1963), 32 Pa.D.&C.2d 24, 32. In *Fonzo,* the court interpreted an exclusionary clause in an automobile liability policy which precluded coverage with reference to any claim arising from accidents occurring while the automobile "is being operated by an excluded person." *Fonzo* at 309. In considering that language, the court held that such clause "does not bar recovery unless the excluded person was in personal physical management of the automobile at the time of the accident." Id.

{¶16} Safe Auto also relies in part upon a case from another jurisdiction, *Cacchione v. Wieczorek* (1996), 674 A.2d 773. In *Cacchione,* the court held that "parking is unquestionably an act normally related to the operation of a vehicle [and that] [t]he movement of the vehicle ceases, and the operation of the vehicle terminates, at the moment the vehicle is *properly parked*." Id. at 776. (Emphasis added.)

{¶17} In cases involving the construction of insurance exclusionary clauses, the word "operate" has been "interpreted to include activities on the part of the driver which are usual and customary to the operation of a motor vehicle." *Heritage Ins. Co. of Am. v. Phelan* (1974), 17 Ill.App.3d 443, 446-47. In this respect, courts have held that "[a] person need not be inside a vehicle to operate the vehicle." *Melchert v. Melchert*

(Minn.App.1994), 519 N.W.2d 223, 226, citing *Vesely v. Prestige Cas. Co.* (1972), 4 Ill.App.3d 726, 728.

{¶18} In *Vesely,* the insured vehicle was involved in a collision when the driver stopped the car, left the motor running, and went into a store. The trial court granted summary judgment in favor of the plaintiffs, including the driver, in plaintiffs' action seeking a declaration that the automobile policy issued by the defendants-insurers covered the decedent and the driver. The defendants-insurers appealed, contending that the policy contained a clause excluding coverage when the car was being operated by the driver because of the driver's accident record. The appellate court reversed the judgment of the trial court, holding that "[t]he word 'operate' is not limited to a state of motion produced by the mechanism of the car," and therefore "[l]eaving an automobile when its engine is running, while the driver goes into a store – obviously, with the intent of making a quick purchase – is in substance a continued operation of the car by the driver." Id. at 728.

{¶19} In *Republic Ins. Co. v. Haverlah* (Tex.1978), 565 S.W.2d 587, the court held that an insured pilot "operated" an airplane when the plane moved during the insured's attempt at maintenance in setting blocks under its wheels. In holding that the term "operated by" was not limited to the movement of a vehicle, the court cited by analogy automobile cases in which "absences from the driver's seat did not preclude a finding that the insured was operating the automobile." Id. at 589. Further, the court observed, "[t]he term 'operating' does not contemplate a constant and unceasing motion, but includes such stops as the driver ordinarily makes in the course of operating a car, and moments of rest are as much the operating of a car as moments of progress." Id.

{¶20} In the present case, the trial court, while noting a lack of civil cases in Ohio dealing with what constitutes "operation" of a motor vehicle, found that "the concept of 'operating' a motor vehicle is considerably broader than mere driving." In support, the trial court, by analogy, relied in part upon Ohio statutory criminal provisions that prohibit an individual from operating a vehicle without a valid license (R.C. 4507.02(A)(1)), and which prohibit permitting an unlicensed driver to operate a motor vehicle (R.C. 4507.02(A)(2)). The trial court concluded that, because William Pate was the last person to drive the vehicle prior to the accident, "and he admittedly parked the vehicle in the precise spot from which it rolled and eventually struck Plaintiff, and he did all of the above in violation of R.C. 4507.02, * * * the unlicensed driver exclusion in Mrs. Pate's policy should be enforced."

{¶21} As noted above, both sides focus upon William Pate's actions in parking the vehicle. According to appellants, the vehicle was "legally parked" when the accident occurred; in contrast, Safe Auto's argument that the trial court did not err in granting summary judgment is premised primarily upon its contention that William Pate "improperly parked" the vehicle at the time of the accident, and that the truck "immediately" rolled into Dickenson after William Pate departed the vehicle.

{¶22} The sole evidence as to the manner in which the vehicle was parked is contained in the affidavit of William Pate, which is lacking in any detail. According to William Pate's affidavit, he "parked and exited" the vehicle, and the truck then "moved by its own volition towards Dickenson," thereby causing the accident. (William Pate Affidavit, ¶5.) William Pate's affidavit further contains the conclusory statement that he was "not

driving or operating the vehicle at the time and immediately preceding the time" of the accident. (William Pate Affidavit, ¶6.)

{¶23} Paula Pate, who provided the only deposition testimony of record, stated that the Ford truck had a manual transmission. Paula Pate testified in her deposition that, on the date of the incident, she drove to the accident scene immediately after receiving a phone call from her husband informing her of the accident. When asked whether she had any understanding as to how the accident occurred, she responded: "Not really, no." (Paula Pate Depo. at 23.)

{¶24} The fact that William Pate was the last person to drive the vehicle, or that he may have been in violation of R.C 4507.02, is not, in our view, dispositive of whether the exclusionary clause applies to the facts of this case. Nor, however, do we adopt appellants' narrow construction that the exclusion is unenforceable merely because the alleged operator was not physically inside the vehicle at the time of the incident.

{¶25} Accepting the proposition set forth in *Cacchione* at 776, that "parking is unquestionably an act normally related to the operation of a vehicle," and further accepting William Pate's affidavit testimony that he "parked and exited" the vehicle prior to the accident, the record in this case contains insufficient evidence to determine whether or not William Pate "properly" parked/secured the vehicle such that the operation of the vehicle terminated at the time Dickenson was injured. In viewing the evidence in a light most favorable to the non-moving party, we conclude that genuine issues of material fact exist as to whether the actions of William Pate were sufficient to trigger application of the exclusionary language ("is being operated") of the policy, thereby precluding the grant of summary judgment in favor of Safe Auto.

{¶26} Accordingly, we sustain appellants' first assignment of error, and remand this matter to the trial court for further proceedings.

{¶27} Under the second assignment of error, appellants contend that the trial court erred in granting Safe Auto's motion for summary judgment on the basis that Safe Auto, as a matter of law, had no obligation to Paula Pate for any claim arising out of the accident. Appellants' argument is premised in part upon their contention that the unlicensed driver exclusion is unenforceable. However, in light of our finding that genuine issues of material fact exist with respect to whether the exclusionary clause applies to the facts of this case, this assignment of error is rendered moot.

{¶28} Under the third assignment of error, appellants argue that the trial court erred in granting Safe Auto's motion for summary judgment by relying on a contested issue of material fact. Specifically, appellants assert that the trial court erred in adopting and relying upon the declarations page advanced by Safe Auto. Appellants maintain that the declarations page, which lists William Pate as an excluded driver, was not in effect on the date of the accident.

{¶29} While the trial court's decision references the fact that a "copy of the Declarations Page of the policy" was attached to an affidavit, there is no language in the court's decision suggesting that summary judgment was granted on the basis of whether or not William Pate was listed as an "excluded driver" under the declarations page. Accordingly, appellants cannot show error based upon the trial court's reference to a declarations page. Appellants' third assignment of error is not well-taken, and is overruled.

{¶30} Based upon the foregoing, appellants' first assignment of error is sustained, appellants' second assignment of error is rendered moot, and appellants' third assignment of error is overruled. The judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings in accordance with law, consistent with this decision.

Judgment reversed and cause remanded.

BRYANT, P.J., and TYACK, J., concur.

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