[Cite as *Safe Auto Ins. Co. v. Semenov*, 2009-Ohio-2334.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

SAFE AUTO INSURANCE COMPANY,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-10-123
	:	O P I N I O N
- vs -		5/18/2009
	:	
ANTHONY A. SEMENOV, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 06 CV 66788

David A. Goldstein Co. L.P.A., Seth K. Kleinman, 326 South High Street, Suite 500, Columbus, Ohio 43215, for plaintiff-appellee

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BRESSLER, P.J.

{¶1} Defendant-appellant, Robert McGregor, appeals the decision of the Warren County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Safe Auto Insurance Company.[1]

{¶2} On April 26, 2006, Safe Auto issued an automobile insurance policy to Anthony Semenov. The insurance policy provided, among other things, coverage, "other than

physical damage coverage, for a period of thirty (30) days after you become the owner" to "any additional vehicle," when certain conditions are met. Two months later, on June 28, 2006, Semenov and Robert McGregor, his passenger, were involved in an automobile accident with Michael Taggart. At the time of the accident, Semenov was driving a 1999 Mercury Sable sedan that he purchased on May 31, 2006, just 29 days prior. It is undisputed that the insurance policy was in effect at the time the accident occurred.

{¶3} Safe Auto moved for summary judgment claiming it was not obligated to provide coverage to Semenov or McGregor based on any claims that may have arisen out of the June 28, 2006 accident. The trial court granted summary judgment in favor of Safe Auto. McGregor now appeals the trial court's decision, raising one assignment of error.

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN GRANTING [SAFE AUTO'S] MOTION FOR SUMMARY JUDGMENT."

{¶5} This court conducts a de novo review of a trial court's decision on summary judgment. *Harold v. Nationwide Mut. Ins. Co.*, Warren App. No. CA2007-01-013, 2008-Ohio-347, ¶11, citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. In applying the de novo standard, we review the trial court's decision independently and without deference to the trial court's determination. *White v. DePuy* (1998), 129 Ohio App.3d 472, 478.

{¶6} A court may grant summary judgment only when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence submitted that reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Welco Indus., Inc. v. Applied Cos.,* 67 Ohio St.3d 344, 346, 1993-Ohio-191. The party who moves for summary judgment has the burden of demonstrating that there is no genuine issue of material fact regarding the

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

essential elements of the claim of the nonmoving party. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-93, 1996-Ohio-107.

{¶7} A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Carter v. Noble*, Fayette App. Nos. CA2008-05-013, CA2008-05-016, CA2008-05-017, 2009-Ohio-1090, ¶12, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505. To determine what constitutes a genuine issue, the court must decide whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. *Lexie v. Ohio Edison Co.* (2000), 140 Ohio App.3d 578, 582.

{¶8} In his sole assignment of error, McGregor, the passenger in the vehicle driven by Semenov, argues the trial court erred in granting Safe Auto's motion for summary judgment. Specifically, McGregor claims Safe Auto "did provide insurance covering the 1999 Mercury Sable at the time of the car crash * * * under the clear and unambiguous language of the contract," and therefore, he was entitled to recover for his injuries as an "insured person." In response, Safe Auto claims the disputed insurance policy did not provide insurance covering the 1999 Mercury Sable because the policy was unambiguous in that it provided "Named Operator – Non-Owned Vehicle Coverage," which would have only insured Semenov, and his passengers, for operating vehicles that he did not own.

{¶9} The trial court, in its decision granting summary judgment in favor of Safe Auto, found Semenov, the driver, "could not include the 1999 Mercury Sable in the declarations page of his policy since he did not won [sic] it at the time he purchased the liability policy from [Safe Auto]," and that "Semanov purchased the 1999 Mercury Sable more than thirty days after his coverage began with Safe Auto." Based on these findings, the trial court determined that Semenov and McGregor were precluded "from receiving coverage from an accident including the 1999 Mercury Sable under [Semenov's] policy with Safe Auto." However,

although both of these factual assertions are correct, they were, for obvious reasons,[2] not originally argued by either party, and were otherwise immaterial to the issues raised; namely, whether the disputed insurance policy was ambiguous or unambiguous, and furthermore, whether the disputed insurance policy provided coverage for any claims that may have arisen out of the June 28, 2006 accident.

{¶10} After reviewing the record, it is clear that the trial court did not address the parties' original arguments, which included the ambiguity of the disputed insurance policy, and the implications of such a finding could have on Safe Auto's underlying obligations. It is well-settled that a trial court "may not sua sponte grant summary judgment premised on issues not raised by the parties." *Ranallo v. First Energy Corp.*, Lake App. No. 2005-L-187, 2006-Ohio-6105, ¶26, quoting *Eller v. Continental Invest. Partnership,* 151 Ohio App.3d 729, 2003-Ohio-894, at ¶16. As a result, although we are aware that this court conducts a de novo review of a trial court's decision on summary judgment, we find that the trial court's summary judgment order, which was undoubtedly based on a misreading of the insurance policy, was premised on issues not originally raised by the parties. See *Ranallo* at ¶26-27.

{¶11} In addition, the trial court's misreading of the disputed insurance policy, and its

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2. **{¶a}** Safe Auto, in its brief, concedes that the trial court "erred insomuch as it based its decision on a misreading of the thirty day grace period found within the policy." The 30-day grace period, found on page three of the policy, states that a "covered vehicle" includes, besides any vehicle shown on the declarations page:

{¶b} "any additional vehicle on the date you become the owner if:

{¶c} "b. you acquire the vehicle during the policy period shown on the declarations page;

{¶d} "c. we insure all vehicles owned by you; and

{¶e} "d. no other insurance policy coverage for the vehicle.

{¶f} "We will provide coverage, other than physical damage coverage, for a period of thirty (30) days after you become the owner [of any additional vehicle]. We will not provide coverage after this thirty (30) day period, unless within this period you ask us to insure the [additional] vehicle; * * *."

{¶g} It is undisputed that the accident occurred on June 28, 2006, and that Semenov purchased the 1999 Mercury Sable, the vehicle involved in the accident, on May 31, 2006, just 29 days prior, thus falling within the 30-day grace period.

subsequent decision granting Safe Auto's motion for summary judgment, left many of the issues initially raised before the trial court, and then to this court on appeal, unresolved. These issues include, but are not limited to, whether the disputed insurance policy is ambiguous or unambiguous, whether it provides coverage to Semanov and/or McGregor, or whether it is simply a "Named Operator – Non-Owned Vehicle Coverage" policy, not to mention whether McGregor was, in fact, an "insured person" entitled to coverage.[3] We find these issues material as their resolution would certainly affect the outcome of the suit under the applicable substantive law, and that, under these circumstances, it would be unfair to the parties for this court to rule on these issues for the first time on appeal. See, e.g., *Link v. Matthews*, Allen App. No. 1-08-61, 2009-Ohio-1920 (finding priority of lien holders, although unresolved, was not a material issue preventing summary judgment).

{¶12} In light of the foregoing, and after reviewing the record, we reverse the trial court's decision granting summary judgment in favor of Safe Auto. It is apparent that the trial court failed to address the parties' original arguments, and then proffered a decision premised on issues not raised by the parties, thus leaving many material issues unresolved, which included, most notably, a determination of the ambiguity of the disputed insurance policy. Therefore, without expressing an opinion in regard to any alleged ambiguity of the disputed insurance policy, and without making a determination on whether McGregor was, in fact, an "insured person" entitled to coverage, we sustain McGregor's sole assignment of error and remand the cause to the trial court for proceedings consistent with this opinion.[4]

{¶13} Judgment reversed and remanded.

POWELL and YOUNG, JJ., concur.

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3. An "insured person," as defined by the disputed insurance policy, includes, among others, "any other person while occupying a *covered vehicle*." (Emphasis added.)

4. Nothing in this opinion should preclude either party from filing a subsequent motion for summary judgment, as we are aware of no rule prohibiting such action. See *Graham v. Allen Cty. Sheriff's Office,* Allen App. No. 1-06-04, 2006-Ohio-4183, ¶9.

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