[Cite as *Cox v. Grubb*, 2011-Ohio-1635.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

LEWIS COX, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2010-09-020
	:	O P I N I O N
- vs -		4/4/2011
	:	
KRISTI L. GRUBB, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CV20080548

Charles H. Bendig, 4937 West Broad Street, Columbus, Ohio 43228, for plaintiffs-appellants, Lewis & Claudia Cox

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RINGLAND, J.

{¶1} Plaintiffs-appellants, Lewis Cox and Claudia Cox, appeal from the decision of the Madison County Court of Common Pleas granting summary judgment to defendant-appellee, Nationwide Mutual Fire Insurance Company, as well as its decision denying their motion for prejudgment interest, in a lawsuit involving a claim for underinsured motorist coverage pursuant to an automobile insurance policy. For the

reasons outlined below, we affirm.

{¶2} On November 4, 2008, the Coxes suffered serious injuries resulting from an automobile accident with Kristi Grubb. At the time of the accident, Grubb was insured by State Farm Insurance Company under a policy that limited its liability to $50,000 per person and $100,000 per occurrence, whereas the Coxes were named insureds under a single policy issued by Nationwide that limited its uninsured/underinsured motorist (UM/UIM) coverage to $300,000 per person and $300,000 per occurrence.

{¶3} On December 8, 2008, the Coxes filed suit against Grubb alleging that she had negligently caused the automobile accident by failing to yield to oncoming traffic. The Coxes also filed suit against Nationwide seeking to recover UIM benefits under their insurance policy. After filing suit, and in anticipation that State Farm would pay upon the liability limits found in Grubb's insurance policy, the Coxes each received a $50,000 advance payment from Nationwide for their respective injuries.

{¶4} On April 28, 2010, after settlement negotiations proved unsuccessful, the parties filed a joint stipulation that stated, in pertinent part, that "[t]he issues as [to] the amount of UIM coverage and the amount of setoff of coverage will be briefed and resolved by the Court."

{¶5} On April 29, 2010, the Coxes filed a "Motion for Declaratory Judgment" requesting the trial court to enter judgment against "Nationwide in the amount of $250,000 plus interest and costs," prejudgment interest, and attorney fees. In their motion, the Coxes argued that it was improper for Nationwide to "reduce its underinsured motorist limit by both the $50,000 it paid on the Lewis Cox claim, and by the $50,000 it paid on the Claudia Cox claim."

{¶6} On May 20, 2010, after the trial court advised the parties "to review the

procedures employed in bringing issues before the court," the Coxes filed a "Notice of Redesignation of Motion for Declaratory Judgment to Motion for Summary Judgment." Accompanying their motion, the Coxes filed a joint stipulation that stated, in pertinent part, that the "collision was the result of the negligence of an underinsured defendant driver," and that "fair and reasonable compensation to Lewis Cox for injuries received as the direct and proximate result of defendant driver's negligence equals or exceeds $300,000."

{¶7} On June 10, 2010, Nationwide, agreeing that the Coxes' motion should be treated as a motion for summary judgment, subsequently filed its own motion for summary judgment arguing that the Coxes had already "received $100,000 from [State Farm]," and therefore, "it gets a set-off for this amount, resulting in $200,000 in underinsured motorist benefits owed to [the Coxes], and a total recovery of $300,000."

{¶8} On August 18, 2010, the trial court issued a "Partial Dismissal Entry," dismissing all claims against Grubb after learning State Farm had "paid her liability limits of $50,000 per person [and] $100,000 per occurrence to Nationwide to repay Nationwide the advance payments to Lewis Cox of $50,000 for his injuries, and to Claudia Cox of $50,000 for her injuries."

{¶9} On August 23, 2010, the trial court issued a decision denying the Coxes' motion for summary judgment and granting summary judgment to Nationwide. In so holding, the trial court determined that because the Coxes had collectively received $100,000 from State Farm pursuant to Grubb's insurance policy, their UIM coverage, which limited liability to $300,000 per occurrence, only entitled them to receive $200,000 in UIM benefits from Nationwide. The trial court's decision also overruled the Coxes' motion for prejudgment interest. On September 7, 2010, the trial court issued a final entry incorporating its August 23, 2010 decision therein.

{¶10} The Coxes now appeal from the trial court's decision, raising three assignments of error for review. For ease of discussion, the Coxes' second and third assignments of error will be addressed together.

{¶11} Assignment of Error No. 1:

{¶12} "THE TRIAL COURT ERRED IN FAILING TO FIND THAT LEWIS COX'S UNDERINSURED MOTORIST COVERAGE WITH NATIONWIDE OF $300,000 PER PERSON, $300,000 PER OCCURRENCE, COULD ONLY BE REDUCED BY THE $50,000 HE RECEIVED FROM THE RESPONSIBLE STATE FARM INSURED DRIVER."

{¶13} In their first assignment of error, the Coxes argue that the trial court erred by granting summary judgment to Nationwide because, according to them, they were "entitled to be paid $250,000 by Nationwide" under their UIM coverage, and not, as the trial court found, only $200,000. In other words, the Coxes argue that although they collectively received $100,000 from State Farm pursuant to Grubb's insurance policy, "the $50,000 paid to Claudia Cox for an unrelated bodily injury cannot be used to offset or reduce the underinsured per person limit of $300,000 payable to Lewis Cox." We disagree.

{¶14} On appeal, a trial court's decision granting summary judgment is reviewed de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. See Civ.R. 56(C); see, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The movant bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of

material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once this burden is met, the nonmovant has a reciprocal burden to set forth specific facts showing a genuine issue for trial. Id.

{¶15} An insurance policy is a contract. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶9. When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 1999-Ohio-162. An insurance contract must be examined as a whole and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. Courts may not alter the clear and unambiguous language of an insurance policy in order to reach a particular result which was not intended by the parties to the contract. See *Gomolka v. State Automobile Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 168.

{¶16} In support of their claim, the Coxes argue that based on the Ohio Supreme Court's decision in *Webb v. McCarty*, 114 Ohio St.3d 292, 2007-Ohio-4162, a case in which the court did not add husband's settlement amount to the amount received by his wife's estate when determining if husband was to recover any UIM benefits, Nationwide was not entitled to offset both $50,000 payments the Coxes received from State Farm pursuant to Grubb's insurance policy. However, while it may be true that the court in *Webb* did not combine husband's settlement amount to that received by his wife's estate, in that case, the parties specifically agreed to the amount paid under the policy. Id. at ¶2 (stating "the parties appear to agree that the amount paid under the policy is $269,836.08"). Furthermore, the issue before the court in *Webb* was not whether husband's settlement amount should be considered in conjunction with the amount received by his wife's estate, but instead, whether "a limits-to-limits comparison controls"

in determining the availability of UIM coverage in situations involving multiple claimants.[1] Id. at ¶3. Therefore, we find the *Webb* decision inapplicable to the case at bar.

{¶17} The Coxes also cite to the First District Court of Appeals' decision in *Kuchmar v. Nationwide Mut. Ins. Co.*, Hamilton App. No. C-060866, 2007-Ohio-6336, a decision which, according to them, "correctly found the *Webb* decision only allows the comparison of what each bodily injury claimant receives from the liability coverage, against the total underinsured motorist available to that bodily injury claimant." However, just as we found the *Webb* decision inapplicable, based on the facts and circumstances of this case, we also find the *Kuchmar* decision inapplicable.

{¶18} After a thorough review of the record, including an extensive examination of the policy in question, we find no error in the trial court's analysis, and therefore, no error in its decision granting summary judgment to Nationwide by finding the Coxes were only entitled to receive $200,000 in UIM benefits. See *Sandford v. State Farm Mut. Auto. Ins. Co.*, Stark App. No. 2004CA00342, 2005-Ohio-3349 (insurance company entitled to set off full $100,000 settlement received where husband and wife each personally received only $50,000); see, also, *Estate of Jackson v. State Farm Ins. Co.*, Stark App. No. 2007CA00205, 2008-Ohio-5802, ¶19.

{¶19} In this case, the policy at issue contains language limiting Nationwide's liability for payment of UIM benefits to $300,000 per occurrence. Specifically, the policy states, in pertinent part:

{¶20} "Our obligation to pay [UIM] – Bodily Injury losses is limited to the amounts * * * per occurrence stated in the policy Declarations. * * * The limit shown * * * for bodily injury for each occurrence is * * * the total limit of our liability for all covered

1. According to *Webb*, "a limits-to-limits comparison," means, "in a case involving multiple claimaints, [UIM] coverage would be compared to the amount paid under an automobile liability policy, not to the limit

damages when two or more persons sustain bodily injury, including death, as a result of one occurrence. * * * This per occurrence policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the Declarations or policy, or vehicles involved in the accident."

{¶21} The policy continues by stating:

{¶22} "The insuring of more than one person or vehicle under this policy does not increase our [UIM] payment limits. In no event will any insured be entitled to more than the highest per person limit applicable under this or any other policy issued by us or a company affiliated with us.

{¶23} "* * *

{¶24} "The limits of this coverage will be reduced by *any amounts available* for payment by or on behalf of any liable parties *for all claims*, including claims for bodily injury, loss of consortium, injury to the relationship, and any and all other claims." (Emphasis added.)

{¶25} Here, because the policy in question contains language limiting Nationwide's liability for payment of UIM benefits to $300,000 per occurrence, and because they had already received $100,000 from State Farm pursuant to Grubb's insurance policy, we find the clear and unambiguous language in the Coxes' policy limited their recovery from Nationwide to $200,000. See, e.g., *Gleason v. Collier*, Erie App. No. E-06-019, 2006-Ohio-6293, ¶29. Furthermore, had Grubb been uninsured, as opposed to merely underinsured, the Coxes would have still only been entitled to collect a total of $300,000 in UM benefits, thereby making any further recovery above their policy limits improper. See R.C. 3937.18(C) (limiting UIM coverage to "an amount of

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of the automobile liability policy."

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"); see, also, *Brown v. Nationwide Mut. Fire Ins. Co.*, 174 Ohio App.3d 694, 2008-Ohio-174, ¶36. Accordingly, because we find no error in the trial court's decision granting summary judgment to Nationwide by awarding the Coxes $200,000 in UIM benefits, the Coxes' first assignment of error is overruled.

{¶26} Assignment of Error No. 2:

{¶27} "THE TRIAL COURT ERRED IN FAILING TO AWARD PREJUDGMENT INTEREST FROM DATE OF ACCRUAL OF THE UNDERINSURED MOTORIST CAUSE OF ACTION."

{¶28} Assignment of Error No. 3:

{¶29} "THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO FOLLOW THE GUIDELINES FOR DETERMINING DATE OF ACCRUAL OF THE UNDERINSURED MOTORIST ACTION FOR PURPOSE OF CALCULATION OF PREJUDGMENT INTEREST."

{¶30} In their second and third assignments of error, the Coxes argue the trial court erred by denying their motion for prejudgment interest. In support of their claim, the Coxes argue that "liability was never disputed" and that prejudgment injury from the "date of injury" was appropriate. We disagree.

{¶31} The right to recover interest is governed by R.C. 1343.03. However, the applicable subsection of R.C. 1343.03., i.e., R.C. 1343.03(A) or (C), is dependent upon whether the cause of action lies in contract or in tort. *Leach Dev., L.L.C. v. Miami Woodworking, Inc.*, Warren App. No. CA2009-11-154, 2010-Ohio-2433, ¶23, citing *Lehrner v. Safeco Ins./Am. States Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795, ¶72.

{¶32} As this court has previously stated, "an action by an insured against his or

her insurance carrier for payment of [UIM] benefits is a cause of action sounding in contract, rather than tort, even though it is tortious conduct that triggers applicable contractual provisions." *Hofle v. General Motors Corp.*, Warren App. No. CA2002-06-062, 2002-Ohio-7152, ¶8, citing *Hance v. Allstate,* Clermont App. No. CA2008-10-094, 2009-Ohio-2809, ¶8; *Landis v. Grange Mutual Ins. Co.,* 82 Ohio St.3d 339, 341, 1998-Ohio-387. This is based on the fact that the underinsured motorist benefit claim arises out of the insurance contract between the parties. *Landis* at 341. R.C. 1343.03(A), therefore, controls in this matter. See *Martin v. Am. Natl. Property & Cas. Co.*, Butler App. No. CA2009-11-282, 2010-Ohio-3370, ¶37; *Hance* at ¶12.

{¶33} Pursuant to R.C. 1343.03(A), "when money becomes due and payable upon any * * * instrument of writing, * * * and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of * * * a contract * * * the creditor is entitled to interest * * *." However, while the statutory language found in R.C. 1343.03(A) is mandatory, "this does not mean that a trial court is divested of all discretion in a R.C. 1343.03(A) claim." *Textiles, Inc. v. Design Wise, Inc.*, Madison App. Nos. CA2009-08-015, CA2009-08-018, 2010-Ohio-1524, ¶50. Instead, "this discretion is confined to a determination of when money becomes 'due and payable.'" *Hance* at ¶17, citing *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 115, 1995-Ohio-13.

{¶34} This court reviews the trial court's determination of when prejudgment interest becomes "due and payable" under an abuse of discretion standard. *Goodrich Corp. v. Commercial Union Ins. Co.*, Summit App. Nos. 23585, 23586, 2008-Ohio-3200, ¶58, citing *Zunshine v. Cott*, Franklin App. No. 06AP-868, 2007-Ohio-1475, ¶26. More than mere error of law or judgment, an abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Textiles* at ¶50, citing

Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219.

{¶35} In this case, although the accident occurred on November 4, 2008, the parties did not agree as to the party responsible for the accident, or to the amount of reasonable compensation for Lewis Cox's injuries, until May 20, 2010. In addition, as evidenced by their April 28, 2010 joint stipulation, "issues as [to] the amount of UIM coverage and the amount of setoff coverage will be briefed and resolved by the court." In turn, contrary to the Coxes' claim, because the record clearly indicates that issues remained regarding the amount "due and payable" until the trial court rendered its final judgment, we find no error in the trial court's decision denying the Coxes' motion for prejudgment interest. See *Hance* at ¶17; *Textiles* at ¶53; *Martin* at ¶40-41. As noted by the Ohio Supreme Court, whether prejudgment interest "should be calculated from the date coverage was demanded or denied, from the date of the accident, * * * or some other time based on when [the insurer] should have paid [the insured] is for the trial court to determine." *Landis* at 342. Therefore, because we find no abuse of discretion in the trial court's decision denying the Coxes' motion for prejudgment interest, appellant's second and third assignments of error are overruled.

{¶36} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.