[Cite as *Feazel v. Mills,* 2011-Ohio-5589.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

RAYE ANN FEAZEL, et al.,	:	
Plaintiffs-Appellees,	:	CASE NO. CA2011-02-022
	:	O P I N I O N
- vs -		10/31/2011
	:	
BONNIE F. MILLS, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV07-03-1222

Katzman, Logan, Halper & Siegel, Philip A. Logan, 9000 Plainfield Road, Cincinnati, Ohio 45236, for plaintiffs-appellees

Gallagher, Gams, Pryor, Tallan & Littrell, L.L.P., James R. Gallagher, 471 East Broad Street, 19th Floor, Columbus, Ohio 43214-3872, for defendants-appellants

HUTZEL, J.

{¶1} Defendant-appellant, State Farm Mutual Automobile Insurance Company, appeals a decision of the Butler County Court of Common Pleas granting a motion for summary judgment in favor of plaintiffs-appellees, Raye Ann Feazel, Terry Feazel, and the Estate of Benjamin Feazel, deceased.

{¶2} On April 3, 2005, Benjamin Feazel was operating a Suzuki motorcycle when he was struck and killed by Bonnie Mills' vehicle after she failed to observe a stop sign. The parties to the resulting cause of action stipulated that the damages suffered as a result of that accident totaled at least $200,000. Mills settled with appellees for $100,000, which was the "each person" limit of coverage available under her policy, and was dismissed from the case.

{¶3} At the time of the accident, State Farm had issued nine insurance policies to appellees and their family business, all of which provided for uninsured and underinsured motorists (UIM) coverage. Three of these policies were personal policies issued to Terry and Raye Ann Feazel (Exhibits A1-A3), while the remaining six were issued to T.R. Technological Services, Inc. (Exhibits A4-A9). Each of these policies had UIM limits of $100,000/$300,000. Policy A(1) specifically covered the motorcycle that was involved in the accident.

{¶4} Appellees filed a cause of action for declaratory judgment and sought payment under the UIM coverage of those nine policies. State Farm asserted that: only policy A(1) applied; the $100,000 settlement with Mills equaled the limit of the UIM coverage; and that appellees were therefore not entitled to any UIM coverage for the accident.

{¶5} The parties subsequently filed competing motions for summary judgment. On September 18, 2008, the trial court granted summary judgment in favor of appellees. The court found that while five of the six corporate policies provided no coverage because the vehicles were owned by the business, policy A(8) qualified for coverage due to a notation indicating that the vehicle insured by that policy was owned by Terry Feazel. Additionally, the trial court found that an "other owned vehicle" exclusion contained within

policy A(8) did not apply because the claim was for appellees' mental anguish rather than Benjamin Feazel's bodily injury.

{¶6} The trial court also found that although all three personal policies were applicable, they contained valid anti-stacking language that limited recovery to a single judgment for $100,000. In so holding, the trial court refused to enforce the "other owned vehicle" exclusions asserted by State Farm for policies A(2) and A(3). The court held, however, that because appellees were attempting to recover under both a corporate policy, A(8), and a personal policy, A(1), the anti-stacking provisions of those policies would not apply.

{¶7} State Farm filed a motion to reconsider on November 13, 2008. On January 20, 2009, the trial court issued its decision refusing to change its previous decision to grant summary judgment in favor of appellees. State Farm subsequently appealed the trial court's decision on February 23, 2009. This court sua sponte ruled that the September 18, 2008 decision was a final appealable order and dismissed State Farm's appeals because they were not timely filed within 30 days of that decision. The Ohio Supreme Court then issued an order finding that no final appealable order had yet been filed. Thereinafter, this court remanded the case to the trial court on November 6, 2009. See *Feazel v. Mills* (Nov. 6, 2009), Butler App. Nos. CA2009-02-063 and CA2009-03-091. The trial court issued another decision largely restating its prior decision and also finding that appellees were entitled to prejudgment interest.

{¶8} State Farm now appeals the trial court's decision to grant summary judgment, raising four assignments of error for our review. On appeal, a trial court's decision granting summary judgment is reviewed de novo, which means we review the judgment of the trial court independently and without deference to its determination.

Morris v. Dobbins Nursing Home, Clermont App. No. CA2010-12-102, 2011-Ohio-3014, ¶14.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED IN RULING THAT UIM COVERAGE WAS AVAILABLE UNDER THE CORPORATE POLICY IDENTIFIED AS 'A(8)' ISSUED TO T.R. TECHNOLOGICAL SERVICES, INC. BENJAMIN FEAZEL DID NOT QUALIFY AS AN INSURED UNDER THAT POLICY."

{¶11} Appellant first argues that because Benjamin Feazel did not qualify as an insured under policy A(8), appellees were not entitled to coverage under that policy. In turn, appellees argue that Benjamin's father, Terry Feazel, was insured under policy A(8), and therefore he was entitled to recovery for wrongful death.

{¶12} Appellees acknowledge that the trial court did not find that policy A(8) provided coverage to Benjamin Feazel, but argue that the court correctly found that Terry Feazel was insured under that policy.

{¶13} Parties to an insurance contract are free to define who is an insured person under the policy. *Holliman v. Allstate Ins. Co.* (1999), 86 Ohio St.3d 414, 416-17. Policy A(8) clearly and unambiguously defines who is an insured for purposes of uninsured motor vehicle coverage. "Insured" under this section of the policy is defined in endorsement 6030W as meaning:

{¶14} "[A]ny person while occupying a vehicle covered under the liability coverage. Such vehicle has to be used by a person who is insured under the liability coverage. * * * [A]ny person entitled to recover damages because of bodily injury to an insured * * *."

{¶15} Endorsement 6935A of the policy further states that in order for coverage to apply, "[t]he bodily injury must be sustained by an insured * * *."

{¶16} It is stipulated that Terry Feazel was not occupying a vehicle that was

covered under the liability coverage of policy A(8). Furthermore, the bodily injury suffered in the present case was not suffered by the insured, but rather by his son, Benjamin Feazel. Appellees admit that Benjamin Feazel was not an insured under policy A(8). Therefore, there was no bodily injury suffered by an insured. As such, appellees meet neither of the contractual definitions of an insured under the uninsured motor vehicle section of policy A(8).

{¶17} Appellees argue that despite not suffering bodily harm, they are entitled to recovery for wrongful death under policy A(8). The clear and unambiguous language of the policy, however, limits recovery to those occupying the vehicle and those entitled to damages because of bodily injury to an insured. Again, appellees meet neither of those definitions in this factual situation and therefore cannot recover for wrongful death under policy A(8). Therefore, while Terry Feazel is a named insured under policy A(8), the language of that policy does not provide coverage to appellees for Benjamin Feazel's death as the result of an accident under these particular facts.

{¶18} Accordingly, appellant's first assignment of error is sustained.

{¶19} Assignment of Error No. 2:

{¶20} "THE TRIAL COURT ERRED IN REFUSING TO ENFORCE THE 'OTHER OWNED VEHICLE' EXCLUSIONS CONTAINED IN EACH OF THE POLICIES AT ISSUE. THE EXCLUSION PRECLUDES UIM COVERAGE UNDER ALL OF THE POLICIES EXCEPT POLICY A(1) WHICH INSURED THE VEHICLE INVOLVED IN THE ACCIDENT."

{¶21} Having already found in Assignment of Error No. 1 that policy A(8) does not cover Terry Feazel for this accident, it is not necessary to determine whether the "other owned vehicle" exclusion applies. However, even if we were to have found that Terry Feazel was provided coverage for a wrongful death claim, the "other owned vehicle"

exclusion would preclude his recovery. The exclusion provides that:

{¶22} "THERE IS NO COVERAGE:

{¶23} "* * *

{¶24} "2. FOR DAMAGES ARISING OUT OF AND DUE TO BODILY INJURY TO AN INSURED:

{¶25} "a. WHILE OPERATING OR OCCUPYING A MOTOR VEHICLE OWNED BY, LEASED TO, FURNISHED TO, OR AVAILABLE FOR THE REGULAR USE OF YOU, YOUR SPOUSE OR ANY RELATIVE IF THAT MOTOR VEHICLE IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY."

{¶26} R.C. 3937.18 provides that an insurer may restrict UIM coverage by including terms like those in policy A(8) that exclude coverage for losses sustained while the insured is occupying an "other owned auto." Specifically, R.C. 3937.18(I)(1) states:

{¶27} "(I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorists coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

{¶28} "(1) 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, or 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 motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided."

{¶29} It is the contention of appellees that the "other owned vehicle" exclusion

contained in policy A(8) bars recovery for bodily injury, but does not exclude coverage for a wrongful death claim. Thus, while appellees admit that Benjamin Feazel would have been barred from recovery, they argue that his parents would not. We find this argument lacks merit.

{¶30} "An insurance policy is a contract whose interpretation is a matter of law. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. Contract terms are to be given their plain and ordinary meaning. *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-168. If provisions are susceptible of more than one interpretation, they 'will be construed strictly against the insurer and liberally in favor of the insured.' *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, syllabus. Additionally, 'an exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded.' (Emphasis sic.) *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665." *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, ¶6.

{¶31} The Ohio Supreme Court had the opportunity to determine whether a contractual exclusion of claims arising out of bodily injury was permitted in *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, ¶24-27. In that case, the Court held that an "other owned vehicle" exclusion could properly limit a policy's coverage to preclude a claim for wrongful death. Id.

{¶32} The language of the "other owned vehicle" exclusion under policy A(8) clearly and unambiguously states that there is no coverage for damages *arising out of* bodily injury while an insured is occupying a vehicle not listed in that policy. Therefore, in order for this court to find that the "other owned vehicle" exclusion does not apply to a wrongful death or mental anguish claim under policy A(8), we would be required to find that the claim did not arise out of Benjamin Feazel's bodily injury. While we are cognizant

that a wrongful death claim is independent from a claim for bodily injury, the uninsured motor vehicle section of policy A(8) specifically bars recovery for damages arising out of bodily injury, which would include any derivative claim such as wrongful death or mental anguish.

{¶33} Accordingly, appellant's second assignment of error is sustained.

{¶34} Assignment of Error No. 3:

{¶35} "THE TRIAL COURT ERRED IN RULING THAT THE FEAZELS MAY 'STACK' POLICY A(8) WITH ONE OF THE POLICIES IDENTIFIED AS A(1)-A(3). EVEN IF POLICY A(8) APPLIED, PURSUANT TO THE ANTI-STACKING CLAUSES SET FORTH IN THE POLICIES, THEY ARE LIMITED TO COVERAGE UNDER A SINGLE POLICY."

{¶36} In light of our holding that corporate policy A(8) does not provide coverage for this accident under the first and second assignments of error, appellant's third assignment of error is moot.

{¶37} Assignment of Error No. 4:

{¶38} "GIVEN THE STIPULATION THAT THE TORTFEASOR PAID $100,000 TO THE FEAZEL ESTATE, THE TRIAL COURT ERRED IN FAILING TO SET OFF THAT AMOUNT FROM THE $100,000 LIMIT OF UIM COVERAGE. APPLYING SUCH SETOFF, NO UIM COVERAGE IS AVAILABLE."

{¶39} Appellant argues that it is entitled to set off the $100,000 that has already been paid to appellees collectively by the tortfeasor. In turn, appellees argue that they are entitled to individually recover up to the per person limit of any applicable policies, reduced by any setoff he or she actually receives.

{¶40} In *Mejia v. Heimsch* (June 25, 2001), Butler App. No. CA2000-12-242, this court held that an insurance policy may, by its language, limit all claims to the policy's

single per-person limit. Policy A(1) in the present case limits the amount of UIM coverage available for all damages arising out of and due to bodily injury to one person to $100,000. Thus, in this case, appellees collectively are limited to the $100,000 per person limit under State Farm policy A(1) as the maximum payable under UIM coverage.

{¶41} It has been stipulated by the parties that the tortfeasor, Mills, has settled with appellees for $100,000. Therefore, because appellees have collectively received $100,000 from the tortfeasor, they are not entitled to UIM benefits under policy A(1).

{¶42} Accordingly, appellant's fourth assignment of error is sustained.

{¶43} The trial court's judgment is reversed and judgment is hereby entered on behalf of appellant.

POWELL, P.J., and PIPER, J., concur.