[Cite as *Dye v. Grose*, 2015-Ohio-1001.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TIMOTHY DYE, ET AL.

Plaintiffs-Appellees

-vs-

ROBERT C. GROSE

Defendant-Appellee

And

NATIONWIDE INSURANCE COMPANY OF AMERICA

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 14CA58

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of Common Pleas, Case No. 2012CV01124

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: March 12, 2015

APPEARANCES:

For Appellant

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Gwin, J.

{¶1} Appellant appeals the January 3, 2014 judgment entry of the Richland County Court of Common Pleas granting summary judgment in favor of appellees.

Facts & Procedural History

{¶2} On September 24, 2010, appellee Timothy Dye was riding his bicycle on West Fourth Street in Richland County. Appellee was hit and injured by a Chevrolet S-10 pickup truck driven by Robert Grose ("Grose"). Prior to the collision, appellee had purchased an auto insurance policy from appellant Nationwide Insurance Company of America ("Nationwide"). The policy included medical payments coverage up to a limit of $5,000. In the "Coverage Extensions" provision of appellee's insurance policy, it states that it provides coverage for medically necessary services, regardless of who was at fault, for treatment of accidental bodily injury suffered by insureds, "as pedestrians if hit by any motor vehicle or trailer."

{¶3} On September 20, 2012, appellees Timothy and Bonnie Dye filed a complaint against Grose and Nationwide seeking tort damages and a declaration that appellee Timothy Dye is entitled to medical payment coverage under his own policy of insurance with Nationwide. Appellees also asserted a bad faith claim and uninsured/underinsured motorist's claim against Nationwide. The uninsured/underinsured claim was voluntarily dismissed by appellees on September 20, 2013.

{¶4} On October 25, 2013, Nationwide filed a motion for partial summary judgment on appellees' claim for a judicial determination that Timothy Dye was entitled to medical payments benefits under the provisions of his insurance policy with

Nationwide. On December 9, 2013, appellees' filed their own motion for partial summary judgment on their judicial determination claim.

{¶5} The trial court issued a judgment entry on January 3, 2014 and granted appellees' motion for partial summary judgment, finding that Timothy Dye is entitled to medical payments within his Nationwide policy limits as a "pedestrian" for his injuries in the bicycle-car collision on September 24, 2010. The trial court also denied Nationwide's motion for partial summary judgment on the same issue. On June 13, 2014, appellees dismissed their claims against Grose. On June 30, 2014, the trial court issued a judgment entry that dismissed appellees' bad faith claim against Nationwide and stayed the January 3, 2014 judgment pending appeal.

{¶6} Nationwide appeals the January 3, 2014 judgment entry of the Richland County Court of Common Pleas and assigns the following as error:

{¶7} "I. THE TRIAL COURT ERRED IN DENYING APPELLANT NATIONWIDE'S OCTOBER 25, 2013 MOTION OF PARTIAL SUMMARY JUDGMENT AND IN GRANTING PLAINTIFFS/APPELLEES' DECEMBER 9, 2013 MOTION FOR PARTIAL SUMMARY JUDGMENT."

{¶8} Appellees argue that the word "pedestrian" is ambiguous and the word must be liberally construed in their favor. Appellees cite to the Sixth District Court of Appeals case *Schroeder v. Auto-Owners Insurance Company* in support of their argument. 6th Dist. Lucas No. L031349, 2004-Ohio-5667. In *Schroeder*, the appellees argued the word "pedestrian" had a customary meaning in the auto industry which encompassed anyone not occupying a motor vehicle and submitted numerous policy forms from other states, including those issued by the appellants in the case, which

utilized the definition of pedestrian as anyone not occupying a motor vehicle. *Id.* The appellants in *Schroeder* contended the word should be given its common ordinary meaning of "going on foot * * * of, relating to, or designed for walking." *Id.* The Sixth District found the word "pedestrian" to be ambiguous based upon the term "pedestrian" as defined in Black's Law Dictionary and found appellees had submitted ample evidence of custom or usage of the term "pedestrian" in the auto insurance industry that utilized the appellees' definition of the term. *Id.* The Sixth District also found that the appellants' own representative admitted that the term "pedestrian" encompassed a bicycle rider. *Id.*

{¶9} Nationwide argues there is no ambiguity in the term "pedestrian" in this instance, that *Schroeder* is distinguishable from the case at hand, and that the intent of the parties is frustrated with regards to the insurance policy due to the trial court's decision.

{¶10} We first find that there is a legitimate question as to whether the term "pedestrian" is ambiguous when given its ordinary meaning as found in Ohio's motor vehicle laws and recognized by the Ohio Supreme Court.

{¶11} The construction of a written contract is a matter of law and subject to review de novo. *Latina v. Woodpath Development Co.*, 57 Ohio St.3d 212, 567 N.E.2d 262 (1991). Our goal when construing the policy is to ascertain the intent of the parties. *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority*, 78 Ohio St.3d 353, 678 N.E.2d 519 (1997). We examine the insurance contract as a whole and presume the intent of the parties is reflected in the language used in the policy. *Id.* We look to the plain and ordinary meaning of the language used in the policy

unless another meaning is clearly apparent from the contents of the policy. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 141, 374 N.E.2d 146 (1978). Policies in which the language is selected by the insurer and are doubtful or ambiguous in their meaning are construed most favorably to the insured. *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, 948 N.E.2d 931.

{¶12} In this case, the term "pedestrian" is not defined in the policy. However, just because the policy does not define a term does not mean the policy is ambiguous. *Chicago Title Ins. Co. v. Huntington Nat'l Bank,* 87 Ohio St.3d 270, 1999-Ohio-62, 719 N.E.2d 955. Unlike in the *Schroeder* case, the term "pedestrian" is not in bold face in the policy, so there is no indication that the policy ascribed a specific, unusual meaning to the term due to bold face type.

{¶13} In addition, R.C. 4511.01, in effect at the time the policy was issued to Timothy Dye in April of 2010, contains specific definitions of the terms "vehicles," "motor vehicles," "bicycle," and "pedestrian." The definition of "motor vehicle" excludes vehicles propelled by muscular power but "vehicle" includes a bicycle, which is defined, in part, as a "two-wheeled device propelled solely by human power." The term "pedestrian" is specifically defined as "any natural person afoot." R.C. 4511.01(A), (B), (G), (X). See also R.C. 4501.01 and R.C. 4509.01 (containing similar definitions of the terms "vehicles" and "bicycles"). Also, the Ohio Supreme Court has held that, for purposes of determining tort liability, a person riding a bicycle is not, as a matter of law, a "pedestrian," and that a person riding a bicycle changes from the operator of a "vehicle" to a "pedestrian" when he or she gets off the bicycle to push and walk along side of the bicycle. *Jones v. Santel*, 164 Ohio St. 93, 128 N.E.2d 36 (1955).

{¶14} Second, even if the term "pedestrian" is ambiguous, this ambiguity does not resolve the analysis in this case. This case is distinguishable from *Schroeder v. Auto Owners Ins. Co.*, 6th Dist. Lucas No. L-03-1349, 2004-Ohio-5667. In *Schroeder*, once the Sixth District determined the term "pedestrian" was ambiguous, they found the appellees presented ample evidence in support of their motion for summary judgment of customary usage of the word "pedestrian" in the insurance industry in the form of numerous policy forms from other states and from the appellant in the case which utilized the definition appellees advanced. Additionally, in *Schroeder,* the insurance company's own representative admitted the term "pedestrian" encompassed a bicycle rider. In this case, appellees provided no Civil Rule 56 evidence in support of their motion for summary judgment that the term "pedestrian" is customarily used in other insurance policies issued by Nationwide, or others, to include "any person not travelling in a motor vehicle," which is the definition appellees advance. Further, there is no admission from a Nationwide representative that the term "pedestrian" encompasses a bicycle rider under the policy. Accordingly, appellees failed to present any evidence that there is a meaning of the word "pedestrian" in the auto industry that is different from that of the customary meaning of "going on foot" advanced by Nationwide.

{¶15} Further, the court in *Schroeder* found ambiguity based upon the term "pedestrian" as defined in a previous edition of Black's Law Dictionary which provides that "while pedestrians' are ordinarily understood to be persons traveling on foot, they may be on roller skates, ice skates, stilts or crutches." The *Schroeder* court then looks to an expanded definition of the term "pedestrian" that is not found in Black's Law

Dictionary, but is instead found in a 1929 case in which a New Jersey court found a plaintiff who was on roller skates to be a pedestrian because,

> while it is true that a pedestrian is ordinarily understood to be one who travels on foot, nevertheless, the mere circumstances, that he or she has attached to his or her feet roller skates, or ice skates, or walk on stilts, or uses crutches, or is without feet and propels himself or herself along, by means of a chair, or by some other mechanical device, does not clothe him or her, in a broad and general sense, with any other character than that of a pedestrian.

Eichinger v. Krouse, 105 N.J.L. 402, 144 A. 638 (1929). We find such authority unpersuasive.

{¶16} Even if the definition contained in Black's Law Dictionary is utilized to find the term "pedestrian" ambiguous, the facts of each case and the specific activity at issue must be analyzed with regards to this definition. In this case, we deal only with the specific facts or activity of appellee being struck while riding a bicycle on a public road. This case does not involve someone on roller skates, ice skates, someone walking on slits, someone using crutches or someone in a wheelchair, and we decline to issue an advisory opinion as to how each of these various activities or differing circumstances would be analyzed. The activity in this case of riding a bicycle on a public road is not analogous to those listed in the Black's Law Dictionary and, in analyzing the activity at issue in this case pursuant to that definition, appellee is not a "pedestrian."

{¶17} Based on the foregoing, the trial court erred in granting appellees' partial motion for summary judgment and in denying appellant's partial motion for summary judgment. Appellant's assignment of error is sustained. The January 3, 2014 judgment entry of the Richland County Court of Common Pleas is reversed and remanded for further proceedings in accordance with this opinion.

By Gwin, P.J., and

Wise, J., concur;

Hoffman, J., dissents

Hoffman, P.J., dissenting

{¶18} I respectfully dissent from the majority opinion.

{¶19} As noted by the majority, the Nationwide policy language at issue does not provide a definition for the term “pedestrian.” Does it mean only someone "going on foot" or anyone not within a motor vehicle? I would find the term ambiguous as used in this automobile insurance contract. Because I find the term ambiguous, it must be liberally construed in favor of the insured. Accordingly, I would find the trial court did not err in granting partial summary judgment in favor of Appellees, and Appellee Timothy Dye is entitled to medical payment coverage under the terms of his policy of insurance with Appellant Nationwide.

{¶20} I find the majority's reliance on *Jones v. Santel* (1955), 164 Ohio St.93 problematic. The majority finds the case stands for the proposition "…for the purposes of determining tort liability, a person riding a bicycle is not, as a matter of law, a 'pedestrian,' and that a person riding a bicycle changes from the operator of a 'vehicle' to a 'pedestrian' when he or she gets off the bicycle to push and walk along side of the bicycle." (Majority at ¶13). While I agree the *Jones* case arose in a tort context, I am not persuaded its purpose was to determine "tort liability."

{¶21} A closer look at *Jones* is warranted.

{¶22} *Jones* involved an action by a fifteen year-old boy for injuries he sustained when struck by an oncoming automobile while walking and pushing a bicycle uphill along the left side of a highway. The defendant asserted the plaintiff was the operator of a regulated vehicle; therefore, negligent per se for not operating his bicycle on the right side of the roadway in accordance with the Uniform Traffic Act.

{¶23} The Ohio Supreme Court specifically identified the issue presented as, "Our question is whether one pushing a bicycle as he walks along a public road is a pedestrian or an operator of a regulated vehicle and as such subject to the Uniform Traffic Act," Id. at 94 (emphasis added). In concluding the plaintiff was a pedestrian within the scope of the Uniform Traffic Act, the Supreme Court analyzed the definitions of "vehicle," "pedestrian," "operated," and "operator" as defined within the Act.

{¶24} What is noteworthy in *Jones* is what the Supreme Court did not answer…what is the meaning of "pedestrian" outside of the Uniform Traffic Act? Or more importantly, as relevant to the case sub judice, what is the meaning of "pedestrian" in a motor vehicle insurance policy? The issue here is not one of "tort liability," but rather contractual insurance coverage.

{¶25} In a similar vein, I further disagree with the majority's reliance on the definition of "pedestrian" found in R.C. 4511.01. As set forth in the clear and express language of that statute, the definitions therein apply only "(a)s used in this Chapter and in chapter 4513," specifically, Traffic Law. I find the definitions are not applicable to insurance contracts and have no bearing on determining the common understanding of the term "pedestrian" as used in an automobile insurance policy.

{¶26} I disagree with the majority's restrictive interpretation of the definition of "pedestrian" as defined in Black's Law Dictionary and utilized by the court in *Eichinger v. Krouse*, 105 N.J.L. 402, 144 A. 638 (1929). While I concede this case does not involve someone on roller skates, ice skates, someone walking on stilts, someone using crutches or someone in a wheelchair, I find such hypothetical situations useful in determining what the scope of the term "pedestrian" should mean in an automobile

insurance context. I do not read the list of situations set forth in Black's or *Eichinger* to be necessarily exclusive. Rather, the examples seem to generally cover situations where a person's feet are not in actual contact with the ground, yet the person is still considered a pedestrian. In this general sense, the same could be said of a person riding a bicycle.

{¶27} Using Nationwide's definition of "pedestrian" as someone "going on foot", a person struck while traveling in a wheelchair would not be considered covered under the insurance policy - a scenario which counsel for Nationwide conceded during oral argument coverage would exist.

{¶28} I also disagree with the majority's total rejection of the *Schroeder v. Auto Owner's Insurance Co.*, 6th Dist. Lucas No. L-03-1349, 2004-Ohio-5667, decision. While I recognize and concede the difference in the evidentiary development between that case and the case sub judice, I find the rationale expressed in *Schroeder* regarding the etymology of the term "pedestrian" persuasive.[1] Using Nationwide's definition, a person pushing a baby in a stroller would be covered if struck by a car while the baby would not.[2]

{¶29} I would affirm the decision of the trial court.

HON. WILLIAM B. HOFFMAN

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[1] The majority also distinguishes *Schroeder* on the basis the term "pedestrian" is not in boldface in the instant policy as it was in Schroeder. I find this fact irrelevant as the Schroeder court specifically states they "are not certain" the boldface, by itself, makes the term susceptible to more than one interpretation. Id, at ¶29.

[2] Would an insured struck by a car while sitting on a roadside bench whose feet were not in contact with the ground be considered covered?