[Cite as *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 2010-Ohio-5176.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

The Cincinnati Insurance Company	Court of Appeals No. L-10-1095
Appellee	Trial Court No. 09CVF00649
v.	
The Motorists Mutual Insurance Company	**DECISION AND JUDGMENT**
Appellant	Decided: October 22, 2010

* * * * *

April C. Tarvin, for appellee.

Christopher W. Carrigg and Jennifer M. Brill, for appellant.

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PIETRYKOWSKI, J.

{¶ 1} Motorists Mutual Insurance Company ("Motorists") appeals a March 4, 2010 judgment of the Maumee Municipal Court in favor of The Cincinnati Insurance Company ("Cincinnati") and against it in a dispute over priority of automobile liability

insurance coverage. The dispute concerns automobile liability coverage owed to Barbara Webb with respect to a July 21, 2008 motor vehicle collision.

{¶ 2} Webb's personal automobile liability insurance is provided by Cincinnati under a policy in which Webb is the named insured. Cincinnati settled property damage claims against Webb arising from the collision by payment of $1,692.50 and filed suit against Motorists in Maumee Municipal Court. In the suit, Cincinnati asserted a right of contribution on a pro rata basis from Motorists. Motorists provided automobile liability coverage under an automobile policy it issued to the owner of the automobile driven by Webb at the time of the collision.

{¶ 3} The trial court granted Cincinnati's motion for summary judgment on its claim against Motorists and entered judgment in favor of Cincinnati and against Motorists in the amount of $1,410.25. The trial court also denied Motorists' cross-motion for summary judgment. Motorists appeals.

{¶ 4} Motorists asserts one assignment of error on appeal:

{¶ 5} "Appellant's Assignment of Error: The trial court erred in granting appellee's motion for summary judgment and denying appellant's cross-motion for summary judgment."

{¶ 6} The standard of review of judgments granting motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ. R. 56(C) provides:

{¶ 7} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. No evidence or stipulation may be considered except as stated in this rule. * * *"

{¶ 8} Summary judgment is proper where the moving party demonstrates: "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 9} Where a motion for summary judgment is made and supported by appropriate evidence showing the absence of a dispute of material fact, the burden shifts to the opposing party to present evidence showing the existence of a genuine issue of fact for trial: "* * * an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ. R. 56(E).

{¶ 10} The parties agree that the underlying facts are not in dispute. The July 21, 2008 collision was a rear end collision and the liability of Barbara Webb for damages arising from the collision is not disputed. At the time of the collision, Webb was driving Mary Ann Cary's automobile with permission. Although related, Webb did not reside with Cary at the time of the collision.

Cincinnati Automobile Liability Insurance Policy

{¶ 11} Webb is the named insured in an automobile liability insurance policy issued by Cincinnati. The policy provides automobile liability coverage for property damage with policy limits of $100,000 for each accident. The Cincinnati liability policy also includes an other insurance provision:

{¶ 12} "**Other Insurance**

{¶ 13} "If there is other applicable liability insurance 'we' will pay only 'our' share of the loss. 'Our' share is the proportion that 'our' limit of liability bears to the total of all applicable limits. *However, any insurance 'we' provide for a vehicle 'you' do not own or a vehicle operated or used by any person other than 'you' or any 'family member' shall be excess over any other collectible insurance*." (Emphasis by italics added.)

{¶ 14} As Webb was driving a vehicle she did not own, the Cincinnati policy's other insurance provision provides that liability coverage afforded Webb under the policy was to be excess over any other collectible insurance.

Motorists Automobile Liability Insurance Policy

{¶ 15} Mary Ann Cary is the named insured under the Motorists vehicle policy. The 2002 Buick LeSabre operated by Webb at the time of the collision is listed in the policy declarations. It is undisputed that Webb operated the vehicle with permission. The policy provides automobile liability insurance coverage for property damage with coverage limits of $500,000.

{¶ 16} The other insurance provisions of the Motorists automobile liability insurance policy are contained in an amendatory endorsement:

{¶ 17} "**OTHER INSURANCE**

{¶ 18} "If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. Any insurance we provide for a vehicle you do not own, including any vehicle while used as a temporary substitute for **your covered auto**, shall be excess over any other collectible insurance. *Any insurance we provide for use of **your covered auto** by any person other than you and any **family member** will be excess over any other collectible insurance, self-insurance or bond stated to be primary, contributing, excess or contingent.*" Endorsement PP 71 34 (9-07). (Emphasis by italics added.)

{¶ 19} It is undisputed that Webb was operating a covered auto[1] under the policy owned by the named insured in the Motorists policy at the time of the collision and that

[1]The Buick LeSabre was owned by Cary and listed in the declarations.

Webb was not a family member[2] as defined in the policy. Accordingly, Motorists has argued that the applicable other insurance provision makes automobile liability coverage for Webb to be "excess over any other collectible insurance[3] * * * stated to be primary, contributing, excess or contingent."

Competing Other Insurance Clauses

{¶ 20} Cincinnati argues that the applicable other insurance clauses in the two policies are both excess insurance clauses, that the excess clauses are mutually repugnant, and that the case is therefore governed by the Ohio Supreme Court decision in *Buckeye Union Ins. Co. v. State Auto. Mut. Ins. Co.* (1977), 49 Ohio St.2d 213. The syllabus of the decision provides:

{¶ 21} "Where two insurance policies cover the same risk and both provide that their liability with regard to that risk shall be excess insurance over other valid, collectible insurance, the two insurers become liable in proportion to the amount of insurance provided by their respective policies."

{¶ 22} Motorists argues that the *Buckeye Union* decision does not apply because the Cincinnati and Motorists policies do not cover the same risk and because the excess other insurance clauses are not identical. In *Buckeye Union* the two excess clauses were identical, providing that liability for the risk "shall be excess insurance over other valid, collectible insurance." *Buckeye Union*, 49 Ohio St.2d at 214.

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[2]Webb is Cary's niece, but did not reside in the Cary household.

[3]This case does not involve self-insurance or bonds.

{¶ 23} Here both excess clauses provide that the respective policies shall or will be excess over any other collectible insurance. The Motorists policy adds additional wording to read "will be excess over any other collectible insurance, *self-insurance or bond stated to be primary, contributing, excess or contingent.*" (Emphasis added.) As this case does not involve issues relating to coverage afforded under self-insurance or bonds, the difference between the excess clauses is that Motorists' excess clause added the phrase "stated to be primary, contributing, excess or contingent" to describe the other collectible insurance to which it applies.

Risk Covered

{¶ 24} Here the responsible driver (Barbara Webb) is the named insured under the Cincinnati policy and is a "covered person" under the Motorists policy based upon permissive use of a motor vehicle listed in the Motorists policy declarations. Ohio courts have recognized that whether automobile liability coverage is afforded a driver through her own liability insurance policy or through the policy of the vehicle's owner under omnibus coverage afforded permissive users, such insurance covers the same risk—liability of the driver arising from operation of the vehicle. *Progressive Casualty Ins. Co. v. Motorists Ins. Co.* (Mar. 2, 1994), 1st Dist. Nos. C-930040 and C-930047; *Motorists Mut. Ins. Co. v. Progressive Ins. Co.* (Aug. 16, 1993), 5th Dist. No. CA-9252. The rule announced in *Buckeye Union* has been applied to policies providing automobile liability coverage where one insurance policy provides coverage based upon the identity of the

driver and another insurance policy issued by another insurance carrier provides coverage based upon the identity of the vehicle. Id.

Difference in Wording of Excess Clauses

{¶ 25} Both the Cincinnati and Motorists policies provide that insurance under their respective policies is excess over any other collectible insurance. Motorists does not dispute that the Cincinnati excess insurance clause is triggered by the existence of the Motorists policy. Cincinnati admits that the two clauses are mutually repugnant, with the existence of either policy triggering the excess clause of the other.

{¶ 26} Ohio recognizes "that before one policy 'can ride as excess insurance, the other policy must be made to walk as primary insurance.'" *Buckeye Union*, 49 Ohio St.2d at 216, quoting *State Farm Mut. Auto. Ins. Co. v. Home Indemn. Ins. Co.* (1970), 23 Ohio St.2d 45, 47.

{¶ 27} In *Buckeye Union*, the Ohio Supreme Court approved and followed the decision of the Tenth District Court of Appeals in *Continental Cas. Co. v. Buckeye Union Cas. Co.* (1957), 75 Ohio Law Abs. 79 with respect to the analysis to be applied in cases involving conflicting excess other insurance clauses. The court considers each policy separately to determine whether its excess clause applies and whether there exists another policy of primary insurance. *Buckeye Union*, 49 Ohio St.2d at 216, fn. 3; *Continental Cas. Co. v. Buckeye Union Cas. Co.*, 75 Ohio Law Abs. at 91. Where the excess other insurance clauses of both policies apply and no policy providing primary insurance coverage exists, the excess other insurance clauses become inoperable. Id. In such

circumstances coverage is apportioned between the two policies in proportion to the amount of insurance provided by the respective policies. *Buckeye Union*, 49 Ohio St.2d at 218.

{¶ 28} Conducting such a review here, we find that there is no dispute of material fact and that, although differently worded, the Cincinnati and Motorists excess other insurance clauses are mutually repugnant and if permitted, would prevent any primary insurance coverage to Webb under either policy. Accordingly, under *Buckeye Union* both excess insurance clauses are deemed inoperable and liability coverage is apportioned between the insurers in proportion to the amount of insurance provided by their respective policies. The judgment of the trial court is consistent with this analysis.

{¶ 29} Both policies direct that they are excess over other collectible insurance. Both are unambiguous and both apply under the facts. They directly conflict and would, if permitted, prevent any underlying primary coverage. The *Buckeye Union* excess vs. excess rule has provided clear guidance on priority of insurance for over 30 years in such cases. The rule limits disputes between insurers as to coverage and aids in prompt payment of automobile liability insurance claims.

{¶ 30} Given the fact that both clauses are mutually repugnant under the facts presented in this case, we decline to treat the Motorists policy differently due to the difference in wording of its excess clause.

{¶ 31} Accordingly, we conclude that the trial court did not err in granting the Cincinnati motion for summary judgment and in overruling the cross-motion for summary judgment of Motorists. Motorists' sole assignment of error is not well-taken.

{¶ 32} On consideration whereof, the court finds that substantial justice has been done the party complaining. The judgment of the Maumee Municipal Court is affirmed. Appellant is ordered to pay costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE