[Cite as *Fleming v. Wallace*, 2002-Ohio-6003.]

STATE OF OHIO, BELMONT COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

MURRAY J. FLEMING, EXECUTOR OF THE ESTATE OF WILMA E. FLEMING, DECEASED AND PERSONAL REPRESENTATIVE OF THE NEXT OF KIN OF WILMA E. FLEMING, DECEASED, PLAINTIFF-APPELLANT/ APPELLEE, VS. VIRGINIA WALLACE, DEFENDANT, STATE FARM MUTUAL AUTOMOBILE INSURANCE, DEFENDANT-APPELLEE, AND STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, DEFENDANT-APPELLANT.	)	CASE NO. 01-BA-64 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court Case No. 98-CV-325
JUDGMENT:	Affirmed
JUDGES:	
Hon. Gene Donofrio Hon. Joseph J. Vukovich Hon. Mary DeGenaro	

Dated: October 29, 2002

[Cite as *Fleming v. Wallace*, 2002-Ohio-6003.]

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DONOFRIO, J.

{¶1} Plaintiff-appellant/appellee, Murray J. Fleming, Executor of the Estate of Wilma E. Fleming and Personal Representative of the Next of Kin of Wilma E. Fleming, appeals from the decision of the Belmont County Court of Common Pleas granting summary judgment in favor of defendant-appellee, State Farm Mutual Automobile Insurance Company, and denying his motion for summary judgment. Additionally, defendant-appellant/appellee, State Automobile Mutual Insurance Company, appeals from the same decision granting summary judgment in favor of plaintiff-appellant/appellee and denying its motion for summary judgment.

{¶2} On December 7, 1997, Wilma E. Fleming (Wilma) died as a result of injuries she sustained in an automobile accident on September 11, 1997 while she was a passenger of Virginia Wallace (Virginia). At the time of the accident, State Farm Mutual Automobile Insurance Company (State Farm) insured Virginia for any damages up to $100,000 per person and $300,000 per accident. State Automobile Mutual Insurance Company (State Auto) insured Wilma for up to $200,000 resulting from bodily injury, including death, in UM/UIM coverage. After Wilma's death, her brother, Murray J. Fleming, was appointed the executor of her estate and as personal

representative of Wilma's next of kin, which include Murray, a sister, four nephews and one niece.[1]

{¶3} State Farm and State Auto each paid $100,000 to the Executor with an understanding that if the court found that the Executor was not entitled to further benefits, this amount would be final. On November 13, 1998, the Executor, both on behalf of Wilma's estate and on behalf of her next of kin, filed an action against Virginia, State Farm, and State Auto for damages resulting from Wilma's survival and wrongful death. The Executor subsequently dismissed Virginia from the lawsuit. In August of 2000, all remaining parties filed competing motions for summary judgment. On November 26, 2001, the trial court entered its judgment on the summary judgment motions. The court granted summary judgment in favor of State Farm against the Executor. The court also granted summary judgment in favor of the Executor against State Auto for $100,000. The court overruled State Auto's motion for summary judgment.

{¶4} State Auto filed a timely notice of appeal on December 12, 2001. The Executor filed a timely notice of appeal on December 19, 2001.

{¶5} The Ohio Supreme Court set out the standard for considering motions for summary judgment in *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The court stated:

{¶6} "[W]e hold that a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential

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[1] When referring to Murray J. Fleming in his personal capacity, we use the name "Murray." When

element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* [emphasis sic.] of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." Id. at 293.

{¶7} Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming* (1994), 68 Ohio St.3d 509, 511. A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598, 603.

{¶8} When reviewing a summary judgment case, appellate courts are to apply a de novo standard of review. *Cole v. American Indus. and Resources Corp.* (1998), 128 Ohio App.3d 546, 552.

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referring to Murray J. Fleming in his fiduciary capacity, we use the term "the Executor."

{¶9} The Executor raises two related assignments of error, which we will address together. They state:

{¶10} "THE TRIAL COURT ERRED BY SUSTAINING THE MOTION FOR SUMMARY JUDGMENT OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY."

{¶11} "THE TRIAL COURT ERRED BY OVERRULING THE MOTION FOR SUMMARY JUDGMENT BY MURRAY J. FLEMING, EXECUTOR OF THE ESTATE OF WILMA E. FLEMING AND PERSONAL REPRESENTATIVE OF THE NEXT OF KIN OF WILMA E. FLEMING, AGAINST STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY."

{¶12} The Executor makes two arguments in support of his claim that the trial court should not have awarded summary judgment in State Farm's favor, but instead, should have awarded summary judgment in his favor. The Executor's first argument states: "The trial court erred when it granted summary judgment to State Farm against the Executor, because State Farm's Policy is unclear."

{¶13} The Executor explains that it represents Wilma's estate for the survivorship claim arising from Wilma's bodily injuries from the date of the accident until her death and that he represents himself and Wilma's other next of kin in their wrongful death claims. It is undisputed that State Farm paid the Executor $100,000. The Executor applied this sum to the estate's survivorship claim. (Murray affidavit). State Farm contends that when it paid the Executor the $100,000 on Virginia's account, it satisfied its obligation, which was confined to $100,000 "each person" as per its policy. The Executor alleges that each of the next of kin that he represents are

able to assert claims against Virginia for coverage under the State Farm policy up to the "each person" limit of $100,000, until the $300,000 "per accident" limit is used up. Accordingly, the Executor argues that it can still collect $200,000 from State Farm.

{¶14} State Farm's policy provides:

{¶15} "The amount of coverage is shown on the declarations page under 'Limits of Liability -U- Each Person, Each Accident.' Under 'Each Person' is the amount of coverage for all damages, including damages for care and loss of services, arising out of and due to *bodily injury* to one *person*. Under 'Each Accident' is the total amount of coverage, subject to the amount shown under 'Each Person', for all such damages arising out of and due to *bodily injury* to two or more *persons* in the same accident." (Emphasis sic.) (Murray affidavit, Exhibit B, p. 13g).

{¶16} The Executor argues that the "each person" limit covers a single person's damages up to $100,000. State Farm argues that the "each person" limit covers bodily injuries, not persons; therefore, for the single bodily injury to Wilma, it paid its $100,000 limit. The Executor claims that the policy is ambiguous because it begs the question: Was the policy intended to read, "$100,000 is the amount of coverage for all damages to Wilma Fleming as well as *to others* arising out of and due to bodily injury to Wilma Fleming" or "$100,000 is the amount of coverage for all damages which Wilma Fleming can claim for *her* bodily injury?" (Executor's brief, p. 9). Additionally, the Executor points out that after Wilma's accident, State Farm clarified its policy. State Farm amended its policy to include the sentence, "'*Bodily injury* to one *person*' includes all injury and damages to others arising out of and resulting from this *bodily injury*." (Emphasis sic.) (Murray affidavit, Exhibit H, p. 8).

{¶17} When construing the terms of an insurance contract, courts must give the words their plain and ordinary meaning. *Weiker v. Motorists Mut. Ins. Co*. (1998), 82 Ohio St.3d 182, 185. Only when the contract is ambiguous and susceptible to more than one meaning must we construe the language in favor of the insured. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353.

{¶18} The Fourth Appellate District has upheld the same policy language as being unambiguous and effectively limiting claims for "each person." *Francis v. McClandish* (Apr. 19, 1999), 4th Dist. No. 98CA21, (children's loss of consortium claim limited by the "each person" language). Furthermore, when we examine the language ourselves, we reach the same conclusion. The sentence the Executor takes issue with is: "Under 'Each Person' is the amount of coverage for all damages, including damages for care and loss of services, arising out of and due to *bodily injury* to one *person*." (Emphasis sic.) These words, when read as a sentence, do not have more than one meaning. The key is the phrase "including damages for care and loss of services." The injured person would not assert damages for loss of services. A spouse, child, or family member would bring such a claim. Thus, the language must apply to limit the claim to $100,00 for the bodily injury to one person no matter how many claimants seek benefits due to the one person's bodily injury.

{¶19} Additionally, as the trial court stated:

{¶20} "[I]t is clear and unambiguous to this Court that the term for 'for all damages' is all inclusive when referring to any damages arising out of and due to bodily injury to one person under the policy. The intent of said term to be all inclusive

is further clarified by the language immediately provided under each heading 'Each Accident,' which language limits the total amount of coverage, subject to the amount shown under 'Each Person' for all such damages . . . 'to two or more persons in the same accident.'" (Nov. 26, 2001, Judgment Entry, p. 8).

{¶21} Thus, the trial court did not err in granting summary judgment in State Farm's favor on this matter. Accordingly, the Executor's first argument is without merit.

{¶22} The Executor's second argument states: "The trial court erred in finding Ohio Revised Code Section 3937.44, as enacted by S.B. 20, constitutional."

{¶23} The Executor argues R.C. 3937.44 is unconstitutional asserting it violates Article I, Section 19a and the Right to Remedy Clause. The Executor argues reading Article I, Section 19a as not applying to insurance policies but only applying to amounts received by the tortfeasor is unreasonably restrictive. The Executor analogizes R.C. 3937.44's limitation to that of a worker's compensation fund that would cap wrongful death recovery and points out that during the Article I, Section 19a debate the legislators anticipated that Article I, Section 19a might apply to contract damages independent of jury verdicts. Therefore, the Executor argues, the term "damages" has a broader use in Article I, Section 19a than merely wrongful death statutory caps and jury verdicts. The Executor next argues the phrase "recoverable by civil action" as used in Article I, Section 19a, refers to insurance policy benefits as well as jury verdicts. He further claims that funneling wrongful death claims into a single per person limit is an unconstitutional limit upon damages. Additionally, the Executor argues that R.C. 3937.44 violates Article I, Section 16 of the Ohio Constitution, other

wise known as the "Right to Remedy" Clause. He claims that R.C. 3937.44 denies Wilma's next of kin of a meaningful remedy.

{¶24} R.C. 3937.44 provides:

{¶25} "Any liability policy of insurance including, but not limited to, automobile liability or motor vehicle liability insurance that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such 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."

{¶26} Article I, Section 19a of the Ohio Constitution states, "[t]he amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law." The Executor argues that this section prohibits any limitations by R.C. 3937.44 on the amount of wrongful death damages.

{¶27} All legislative enactments enjoy a presumption of constitutionality. *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, *Benevolent Assn. v. Parma* (1980), 61 Ohio St.2d 375, 377. Furthermore, courts must apply all presumptions and pertinent rules of construction to uphold, if at all possible, a statute alleged to be unconstitutional. *State v. Sinito* (1975), 43 Ohio St.2d 98, 101.

{¶28} As State Farm correctly notes, this court previously upheld the constitutionality of R.C. 3937.18 et. seq. in *Rulong v. Allstate Ins. Co.* (Feb. 25, 2000), 7th Dist. No. 97-JE-61. In *Rulong*, the appellant argued that the statute was unconstitutional because it violated the Right to Remedy Clause. We stated:

{¶29} "[S]ince *Beagle* [*v. Walden* (1997), 78 Ohio St.3d 59] left R.C. § 3937.18(A)(2) intact, this statute, as amended, enjoys a 'strong presumption of constitutionality.' The Ohio Supreme Court has itself issued decisions based on its own presumption that S.B. 20 was constitutional, although without specifically addressing this issue. Logic dictates that this presumption is further heightened by virtue of the fact that the state's highest court had the opportunity and yet declined to declare it constitutionally infirm under the same principle presented by Appellant in this case. Moreover, this Court has rendered decisions pertaining to the applicability of S.B. 20 and have held it to be constitutional." (Internal citations omitted.)

{¶30} Based on the above reasoning, we overruled the appellant's argument that R.C. 3937.18 et. seq. was unconstitutional. Based on our decision in *Rulong*, the Executor's argument that R.C. 3937.44 violates the Right to Remedy Clause is without merit.

{¶31} The Executor's argument that R.C. 3937.44 violates Article I, Section 19a of the Ohio Constitution is also without merit. First, the Ohio Supreme Court was recently faced with the opportunity to rule on the constitutionality of R.C. 3937.44 in *Nitchman v. Nationwide Mut. Fire Ins. Co.* (2001), 146 Ohio App.3d 315. The court opted not to do so, determining the appeal was improvidently allowed. *Nitchman v. Nationwide Mut. Fire Ins. Co.* (2002), 94 Ohio St.3d 1248. The court then denied

reconsideration of the issue. *Nitchman v. Nationwide Mut. Fire Ins. Co.* (2002), 95 Ohio St.3d 1441. Had the court contemplated that R.C. 3937.44 might be unconstitutional, it most likely would have granted reconsideration so that it could determine the statute's constitutionality.

{¶32} Furthermore, as the trial court reasons in its judgment entry, "[w]hile [the Executor] may be limited in the amount of damages he may recover from [State Auto and State Farm] in this case, due to the contractual terms of the insurance policies between each Defendant and their respective insureds, he is not limited in the amount of damages he may otherwise recover from the tortfeasor." (Nov. 26, 2001 Judgment Entry, p. 4-5). The trial court was correct in its analysis. Article I, Section 19a of the Ohio Constitution prohibits the limitation of damages by law recoverable in a wrongful death action. R.C. 3937.44 does not limit the amount of damages the Executor can recover in the wrongful death action. R.C. 3937.44 in no way limits the amount of damages the Executor could have sought and recovered from Virginia, the tortfeasor. The Executor chose to dismiss Virginia from the lawsuit. The limitation placed on the Executor's potential recovery from State Farm was by contract, not by law. Art. I, Section 19a does not prohibit parties from contracting to limit damages recoverable under an insurance policy.

{¶33} Thus, the Executor's second argument is without merit. Accordingly, the Executor's first and second assignments of error are without merit. Thus, the trial court properly granted summary judgment in State Farm's favor.

{¶34} Next, we turn to State Autos' appeal. State Auto raises six assignments of error. State Auto's first two assignments of error are related; hence, we will address them together. They provide:

{¶35} "THE TRIAL COURT ERRED BY SUSTAINING THE MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF MURRAY J. FLEMING, EXECUTOR OF THE ESTATE OF WILMA E. FLEMING, DECEASED AND PERSONAL REPRESENTATIVE OF THE NEXT OF KIN OF WILMA E. FLEMING, DECEASED."

{¶36} "THE TRIAL COURT ERRED BY OVERRULING THE MOTION FOR SUMMARY JUDGMENT BY STATE AUTOMOBILE MUTUAL INSURANCE COMPANY AGAINST PLAINTIFF MURRAY J. FLEMING, EXECUTOR OF THE ESTATE OF WILMA E. FLEMING, DECEASED AND PERSONAL REPRESENTATIVE OF THE NEXT OF KIN OF WILMA E. FLEMING, DECEASED."

{¶37} State Auto argues that not only did the trial court err in granting summary judgment in favor of the Executor, but also that it erred in denying summary judgment in its favor. State Auto's remaining four assignments of error are arguments in support of its first two assignments of error. Therefore, we will proceed to discuss the remaining assignments of error as support for State Auto's first two assignments of error.

{¶38} State Auto's third assignment of error states:

{¶39} "THE COURT BELOW ERRED IN NOT FINDING THAT PLAINTIFF MURRAY J. FLEMING, EXECUTOR OF THE ESTATE OF WILMA E. FLEMING, DECEASED AND PERSONAL REPRESENTATIVE OF THE NEXT OF KIN OF WILMA E. FLEMING, DECEASED, IS LIMITED TO A SINGLE CLAIM FOR A SINGLE

BODILY INJURY PURSUANT TO OHIO LAW AND STATE AUTOMOBILE MUTUAL INSURANCE COMPANY'S INSURANCE POLICY."

{¶40} State Auto argues that under its policy, it only pays for "bodily injury" sustained by "an insured" and "caused by an accident." State Auto contends that since Wilma's next of kin did not sustain a "bodily injury," their claims are derivative of Wilma's "bodily injury" and are not recoverable under the policy.

{¶41} The pertinent policy language is as follows:

{¶42} "A. We will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of bodily injury:

{¶43} "1. Sustained by an 'insured'; and

{¶44} "2. Caused by and accident." (State Auto Policy, AU0482 (03/95).

{¶45} State Auto also argues that the trial court failed to consider the case of *Littrell v. Wigglesworth* (2001), 91 Ohio St.3d 425. In *Littrell*, the Ohio Supreme Court held that the plaintiffs were not entitled to recover UIM benefits because they had already been compensated in an amount greater than their UIM limits.

{¶46} In response, the Executor argues that Wilma and her next of kin are all "insureds" under State Auto's policy, each with their own claim. Citing, *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271. The Executor asserts that although R.C. 3937.18(H) permits consolidation of insureds' claims, the insurer must include language in its policy that clearly and unambiguously consolidates such claims. The Executor alleges that State Auto's policy fails to meet this requirement.

{¶47} The policy defines "bodily injury" as "bodily harm, sickness or disease including death that results." (State Auto policy, p.1, Definitions). The Executor points out that an insurer cannot limit UM/UIM coverage in such a way that an insured must suffer bodily injury to recover. Citing, *Wallace v. Balint* (2001), 94 Ohio St.3d 182, syllabus. The Executor argues that the policy obligates State Auto to pay for damages that an insured can recover because of bodily injury to an insured. Finally, the Executor points to the policy definition of "insured." The policy states:

{¶48} "'Insured' as used in this endorsement [UM/UIM coverage] means:

{¶49} "1. You or any 'family member.'

{¶50} "2. * * *

{¶51} "3. Any person for damages that person is entitled to recover because of 'bodily injury' to which this coverage applies sustained by a person described in 1. * * * above." (State Auto Policy, p.1 of 2, Endorsement Uninsured Motorists Coverage-Ohio).

{¶52} The Executor argues that Wilma's next of kin are "insureds" since they are entitled to recover because of Wilma's "bodily injury."

{¶53} We agree with the Executor's argument. Per the terms of the policy, Wilma is an "insured." Additionally, her next of kin are "insureds" because they are people who are "entitled to recover because of 'bodily injury' to which this coverage applies sustained by a person described in 1. * * * above." Section 1 above, which the provision refers to, is "You or any 'family member.'" "You" refers to Murray because he is the named insured on the policy. "[A]ny 'family member'" refers to Wilma. The policy defines "family member" as "a person related to you by blood * * * who is a

resident of your household." (State Auto policy, Definitions Section, p.1 of 10). Wilma was Murray's sister and resided in Murray's household for her entire life. (Murray's affidavit). Thus, Wilma was a "family member."

{¶54} Based on the foregoing, Wilma's next of kin are "insureds" who are entitled to recover for her "bodily injury." Thus, State Auto's third assignment of error is without merit

{¶55} State Auto's fourth assignment of error states:

{¶56} "THE COURT BELOW ERRED IN NOT OFFSETTING THE $100,000 PAYMENT BY STATE FARM INSURANCE COMPANY FROM THE $200,000 SINGLE LIMIT POLICY OF APPELLANT STATE AUTOMOBILE MUTUAL INSURANCE COMPANY."

{¶57} State Auto asserts that the trial court should have offset State Farm's $100,000 payment from its $200,000 single limit policy. It argues that if Virginia had been uninsured the most that the Executor could have recovered would be $200,000. State Auto argues that since the Executor has already recovered $200,000 ($100,00 from State Farm and $100,000 from State Auto), State Auto's setoff provisions apply. State Auto argues that where the insurance policy provides a setoff and where the insured does not receive less compensation than if she had been injured by an uninsured motorist, then the setoff provisions apply.

{¶58} The Ohio Supreme Court addressed the issue of setoffs in *Clark*, 91 Ohio St.3d 271. The court held:

{¶59} "For the purpose of setoff, the 'amounts available for payment' language in R.C. 3937.18(A)(2) means the amounts actually accessible to and recoverable by

an underinsured motorist claimant from all bodily injury liability bonds and insurance policies (including from the tortfeasor's liability carrier)." Id. at syllabus.

{¶60} The court reasoned, "[i]t would be manifestly absurd to interpret the S.B. 20 amendments to R.C. 3937.18(A)(2) as permitting an insurer to offset, against its own insured, those amounts that a tortfeasor's automobile liability insurance carrier has paid to other injured parties." Id. at 279. Additionally, the court noted that a limits-to-limits comparison was only proper in situations where a single claimant is involved. Id. at 278-79.

{¶61} Based on the reasoning of *Clark*, the trial court properly found that State Auto was not entitled to a setoff from the compensation paid by State Farm. This case involves eight insureds total, Wilma's estate, Murray, Wilma's sister, Wilma's four nephews and one niece. If State Auto was permitted to setoff the money paid by State Farm in this situation, certain of its own insureds may not recover anything. Thus, State Auto's fourth assignment of error is without merit.

{¶62} State Auto's fifth assignment of error states:

{¶63} "THE COURT BELOW ERRED IN NOT FINDING THAT APPELLANT STATE AUTOMOBILE MUTUAL INSURANCE COMPANY'S POLICY LIMITS WERE LESS THAN THE POLICY LIMITS OF STATE FARM INSURANCE COMPANY; THEREFORE, APPELLANT STATE AUTOMOBILE MUTUAL INSURANCE COMPANY OWED NOTHING TO PLAINTIFF PURSUANT TO OHIO LAW AND APPELLANT STATE AUTOMOBILE MUTUAL INSURANCE COMPANY'S POLICY HEREIN."

{¶64} State Auto argues that the trial court erred in finding that its policy limits were not less than State Farm's policy limits. State Auto argues that if we find that State Farm owes the Executor a total of $300,000, the issue of setoff is not applicable since R.C. 3937.18(A)(2) will not provide for UIM coverage in this situation. State Auto argues that in order to trigger UIM coverage, the liability limits of the tortfeasor must be less than the insured's UIM coverage limits. Thus, State Auto claims that if this court finds that State Farm's policy limit is $300,000, then no UIM coverage exists.

{¶65} Since we have already determined that summary judgment in favor of State Farm was proper, this argument is moot. Accordingly, State Auto's fifth assignment of error is without merit.

{¶66} State Auto's sixth assignment of error states:

{¶67} "THE COURT BELOW ERRED IN FINDING THE LANGUAGE OF THE APPELLANT STATE AUTOMOBILE MUTUAL INSURANCE COMPANY'S INSURANCE POLICY AMBIGUOUS."

{¶68} State Auto argues that its policy language is clear and unambiguous. State Auto's policy language provides, in pertinent part:

{¶69} "LIMIT OF LIABILITY

{¶70} "The following provision applies if the Declarations indicates a single limit:

{¶71} "The Limit of Liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one accident.

{¶72} "* * *

{¶73} "This is the most we will pay regardless of the number of:

{¶74} "1. 'Insureds';

{¶75} "2. Claims made;

{¶76} "3. Vehicles or premiums shown in the Declarations; or

{¶77} "4. Vehicles involved in the accident.

{¶78} "Except with respect to coverage under Section 2. of the definition of 'uninsured motor vehicle,' any amounts otherwise payable for damages under this coverage shall be reduced by all sums paid because of 'bodily injury' by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A of this policy.

{¶79} "With respect to coverage under Section 2. of the definition of 'uninsured motor vehicle,' the limit of liability shall be reduced by all sums paid because of 'bodily injury' by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A of this policy.

{¶80} "Any payment under this coverage will reduce any amount that person is entitled to recover for the same damages under Part A of the policy.

{¶81} "No one will be entitled to receive duplicate payments for the same elements of loss for any amounts paid, because of 'bodily injury,' by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A of this policy." (State Auto Policy, AU0482 [03/95]).

{¶82} State Auto contends that this language clearly limits its maximum amount of UM/UIM exposure in this case to $100,000. It arrives at this conclusion in the following way. Under the State Auto policy, its limit is $200,000 regardless of the number of insureds or claims made, reduced by any amounts paid because of bodily

injury by or on behalf of people or organizations who may be legally responsible. Thus, its reasoning continues that since State Farm paid the Executor $100,000 for "a person legally responsible" for the single "bodily injury" to Wilma, this reduces State Auto's liability to $100,000. State Auto has already paid the Executor $100,000. Accordingly, State Auto argues that the trial court erred in entering judgment against it for another $100,000.

{¶83} As stated previously, when construing the terms of an insurance contract, we must give the words their plain and ordinary meaning. *Weiker*, 82 Ohio St.3d at 185. Only when the contract is ambiguous and susceptible to more than one meaning must we construe the language in favor of the insured. *Foster Wheeler*, 78 Ohio St.3d 353.

{¶84} State Auto's language is ambiguous. The trial court, in determining that the above language is ambiguous, set out a detailed explanation regarding this issue. It states:

{¶85} "* * * The policy calls for a limits reduction 'for any amounts otherwise payable as damages **under this coverage**.' State Auto's policy provides coverage for Wilma Flemming, Murray Flemming and the other Next of Kin. The 'Limit of Liability' clause does not say whether the term 'this coverage' refers to a reduction of the coverage for 'all insureds' or 'each insured.'

{¶86} "It is unequivocally clear that the term 'Uninsured Motorist Coverage' applies to any insured who is legally entitled to recover. However, the second phrase '**under this coverage**', as it appears under the heading 'Limit of Liability' is ambiguous in that the phrase 'this coverage' may likewise apply to each and every

insured who is legally entitled to recover from the tortfeasor. Therefore, if more than one insured (multiple claimants) are entitled to recover against the tortfeasor based upon each insured's particular, individual claim, then and in that event, though State Auto may properly limit its liability for the accident to $200,000.00, with provision for reduction by any amount recovered from tortfeasor, that same limitation does not necessarily prohibit an uninsured or underinsured claimant (insured) from seeking his or her respective recovery up to the policy limits." (Emphasis sic.) (Nov. 26, 2001 Judgment Entry, p. 12).

{¶87} The trial court further goes on to explain that State Auto failed to properly provide for the bundling of claims. It notes that although State Auto attempted to do so by limiting its liability to $200,000 per accident, this does not permit State Auto to escape from paying $200,000 to insureds who would otherwise receive no compensation from the tortfeasor and would be unable to collect UM/UIM benefits. (Nov. 26, 2001 Judgment Entry, p. 12-13).

{¶88} The trial court's analysis is correct, as State Auto's policy language is ambiguous. Therefore, State Auto's sixth assignment of error is without merit.

{¶89} Since State Auto's third through sixth assignments of error lack merit, its first and second assignments of error are likewise without merit. The trial court did not err in entering summary judgment in favor of the Executor and entering judgment against State Auto for $100,000.

{¶90} For the reasons stated above, the decision of the trial court is hereby affirmed.

Judgment affirmed.

Vukovich, J., concurs.
DeGenaro, J., concurs.