[Cite as *Stallings v. Safe Auto Ins. Co.*, 2010-Ohio-677.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93446

LESETTA STALLINGS

PLAINTIFF-APPELLANT

vs.

SAFE AUTO INS. CO.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-658845

BEFORE: McMonagle, J., Kilbane, P.J., and Boyle, J.

RELEASED: February 25, 2010
JOURNALIZED:

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Plaintiff-appellant Lesetta Stallings appeals the trial court's judgment granting summary judgment in favor of defendant-appellee Safe Auto Insurance Co. We affirm.

I

{¶ 2} Stallings filed this action seeking a declaration of coverage for her 15-year- old son, Matthew Stallings, under an insurance policy issued to her by Safe Auto. She also alleged that Safe Auto negligently failed to procure adequate insurance. Safe Auto filed a motion for summary judgment on the ground that Matthew was specifically excluded from coverage under the terms of the policy. Stallings opposed the motion, arguing that a genuine issue of material fact existed as to whether Safe Auto knew or should have known that she sought coverage for Matthew and that the company's failure to obtain the insurance was negligent.

II

{¶ 3} The record demonstrates the following facts. Stallings had a policy of automobile insurance with Safe Auto. Under the policy, her household members — Matthew, Leslie McElrath (her father), and LaPortia McElrath (her daughter) — were excluded. Stallings failed to timely make a monthly payment and Safe Auto cancelled the policy.

{¶ 4} Upon receiving notice of the cancellation, Stallings called Safe Auto via Ohio Relay, a service for the hearing impaired.[1] A Safe Auto representative informed Stallings that her policy had been cancelled because of late payment, but the funds the company received from her could be applied toward a new policy. Stallings agreed to have a new policy issued. When questioned by the representative as to whether there would be any changes from the prior policy, Stallings responded, "[n]o, it's still the same except the only info you had before was the title Leslie McElrath, he is not the title owner and I am title owner[.]" Further, when the representative stated that she had Matthew, Leslie, and LaPortia[2] "[a]s excluded from the Policy meaning that they are not covered to be driving your vehicle[,]" Stallings responded, "Leslie is not the title owner of my car, I'm the owner and my daughter has [ ] insurance herself, it's only myself."

{¶ 5} Approximately two weeks after that conversation, Stallings wrote to Safe Auto and requested that Leslie and LaPortia be removed from the policy. The letter further stated "I will let you know of any further change. Please let me know if you get this straightened out." About two weeks after the letter, Stallings called Safe Auto to inform it that her father's name was

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[1]The transcripts from the Ohio Relay system were attached to Safe Auto's summary judgment motion.

[2]The transcript refers to her as "Maportia," but the record is clear that references to "Maportia" mean LaPortia.

spelled incorrectly (Leslie, not Lesley) and that she wanted his name removed from her policy. The Safe Auto representative explained to her that because her father resided in the same household with her, he had to be listed on the policy as either "excluded or as a driver." The representative further explained that her father was "listed under excluded," which meant that "he's not covered to drive [your vehicle], that's why we have him listed as excluded." Stallings responded "ok," and reiterated the correct spelling of her father's name. When asked by the representative if there was anything else he could help her with, Stallings responded, "[n]o, just want to make sure, ok?" and then inquired about when her payment was due.

{¶ 6} The following are listed on the declarations page as "excluded drivers": "Matthew Stallings[,] Lesley [sic] McElrath[,] [and] LaPortia McElrath[.]" The "named driver exclusion" portion of the policy provides: "If you have asked us to exclude any person from coverage under this policy, then we will not provide coverage for any claim arising from an accident or loss involving a vehicle being operated by that excluded person. This includes any claim for damages made against you, a relative, or any other person or organization that is vicariously liable for an accident arising out of the operation of a vehicle by the excluded driver." (Emphasis omitted.)

{¶ 7} Further, the "endorsement excluding specified operator(s)" form provided as follows: "In consideration of the premium charged for the policy to

which this endorsement is attached, it is agreed that the insurance afforded by this policy shall not apply with respect to any claim arising from accidents which occur while the vehicle described in the policy or any other vehicle to which the terms of the policy are extended is being driven or operated, either with or without the permission of the named insured, by: Matthew Stallings[,] Leslie McElrath[,] [and] LaPortia McElrath * * *." The form contained signature lines for Stallings, Matthew, Leslie, and LaPortia. Stallings and Matthew signed, and the lines for Leslie and LaPortia were crossed off.

III

{¶ 8} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Zemcik v. La Pine Truck Sales & Equip.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court enunciated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-70, 696 N.E.2d 201, as follows:

{¶ 9} "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor."

{¶ 10} The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264. Once the moving party satisfies its burden, the nonmoving 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." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197; Civ.R. 56(E). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-59, 604 N.E.2d 138.

{¶ 11} In its motion for summary judgment, Safe Auto argued that the clear and unambiguous language of the policy excluded coverage for Matthew. In opposition, Stallings argued that the following created an issue of fact regarding her intent relative to Matthew: (1) her hearing impairment; (2) her lack of reference to Matthew as an excluded person in conversations with the company's representatives and her letter to the company; and (3) Matthew's signature, and the crossing off of Leslie and LaPortia, on the exclusion form. We disagree.

{¶ 12} "[A]n insurance policy is a contract between the insurer and the insured." *McDaniel v. Rollins*, Allen App. No. 1-04-82, 2005-Ohio-3079, ¶31,

citing *Wilson v. Smith*, Summit App. No. 22193, 2005-Ohio-337, ¶9, and *Leber v. Smith* (1994), 70 Ohio St.3d 548, 553, 639 N.E.2d 1159. The court must interpret the language in the insurance policy under its plain and ordinary meaning. *McDaniel* at ¶32, citing *Wilson* at ¶9. When the contract is clear and unambiguous, the court "may look no further than the four corners of the insurance policy to find the intent of the parties." *McDaniel* at id. An ambiguity exists "only when a provision in a policy is susceptible of more than one reasonable interpretation." *Hacker v. Dickman*, 75 Ohio St.3d 118, 119-120, 1996-Ohio-98, 661 N.E.2d 1005.

{¶ 13} The four corners of the contract here clearly and unambiguously provide that Matthew was an excluded person. He was listed on the declarations page as such, the policy clearly and unambiguously defined an excluded person, and the endorsement excluding specified operators clearly and unambiguously provided that "this policy shall not apply * * * [to] Matthew Stallings * * *." On this record, the trial court properly granted summary judgment in favor of Safe Auto and Stallings's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

MARY J. BOYLE, J., CONCURS

MARY EILEEN KILBANE, P.J., DISSENTS WITH SEPARATE OPINION

MARY EILEEN KILBANE, P.J., DISSENTS:

{¶ 14} I respectfully dissent from the majority's opinion which concluded that summary judgment was appropriate, essentially finding that Safe Auto exercised good faith and reasonable diligence as a matter of law. In light of the documented miscommunciation between the parties, I would find that a genuine issue of material fact still exists as to whether Safe Auto used good faith and reasonable diligence when procuring Stallings's insurance policy.

{¶ 15} Determinations as to whether an insured's policy was negligently procured are generally issues of fact that are properly resolved at trial and not on a motion for summary judgment. *Ruggiero v. Nationwide Ins.*, Cuyahoga App. No. 86431, 2006-Ohio-808, at ¶20, citing *Minor v. Allstate Ins. Co.* (1996), 111 Ohio App.3d 16, 21, 675 N.E.2d 550. In light of the fact that

the parties were unable to communicate with one another, a genuine issue of material fact clearly exists as to whether Safe Auto acted with reasonable diligence in selling Stallings a policy without properly verifying which family members were to be included.

{¶ 16} Additionally, the trial court stated that it granted Safe Auto's motion for summary judgment based in part on the fact that Stallings used an ASL interpreter when contacting Safe Auto. However, that is factually inaccurate. Stallings used the Ohio Relay Service to contact Safe Auto, and there is no evidence that the individuals working at the Ohio Relay Service are ASL interpreters.

{¶ 17} Further, the trial court's entry stated that if Stallings was confused she should have contacted Safe Auto to verify her policy. However, Stallings did make numerous attempts to verify the accuracy of her policy with Safe Auto by making numerous phone calls and sending a letter. Therefore, the trial court's assertion that Stallings did not attempt to correct the problem with Safe Auto is also factually inaccurate.

{¶ 18} On January 19, 2006, during Stallings's first Ohio Relay call, there is obvious confusion between the parties. The following exchange occurred:

> **SAFE AUTO:** **"Ok, I'm going to ask you some Underwriting questions and these are just yes or no answers. The first is, [have] all**

residents of your household ages fourteen years or older been disclosed on this Application? Go ahead."

STALLINGS: "[O]n the Application are you talking about? [sic] My dependents? Go ahead."

SAFE AUTO: "I have Matthew (sic), Leslie, and Maportia [sic]."

STALLINGS: "Could you spell that?"

SAFE AUTO: "M-A-P-O-R-T-I-A. [sic] as excluded from the policy[,] meaning that they are not covered to be driving your vehicle. Go ahead."

STALLINGS: "Leslie is not the title owner of my car. I'm the owner and my daughter has * * * insurance herself, it's only myself. Go ahead."

SAFE AUTO: "Ok. And have all drivers such as children away from home or in College or anyone that may operate your vehicle on a regular or occasional basis been listed on the Application?"

STALLINGS: "Ok, is it on a regular or occasional basis."

SAFE AUTO: "Been listed on the Application?"

STALLINGS: "My daughter is away from home because she is in College. Sometimes she drives, she will always, [sic] she has her own car go ahead."

SAFE AUTO: "Ok and this is your only vehicle? Go ahead."

{¶ 19} The questions asked by the Safe Auto representative in the Ohio Relay transcripts clearly do not comport with Stallings's responses, evidencing the miscommunication. No further mention of Matthew was made, and the Safe Auto representative never poses a follow-up question to determine if he is to be included under the policy. The issue of Matthew's coverage was left unresolved.

{¶ 20} Subsequently, Safe Auto received the "Endorsements Excluding Specified Operators," on which Stallings had crossed out both Leslie and LaPortia's names, evidencing her intent that they be excluded from the policy. Both Stallings and Matthew had signed the form, evidencing Stallings's clear intent that both she and Matthew receive coverage. However, Safe Auto never inquired as to why Stallings completed the form in this manner.

{¶ 21} On February 7, 2006, Stallings again attempted to verify the accuracy of her coverage by mailing the following letter to Safe Auto:

> **"I am writing and to request to remove Lesley (Leslie) McElrath off of my insurance policy. Per se conversation with my daughter LaPortia, she asked me to have her name removed off of my insurance policy, for she has her own car and insurance policy.**
>
> **"Please kindly remove both Lesley (Leslie) and LaPortia McElrath off of my insurance policy. I will let you know of any further change. Please let me know if you get this straightened out. Thank you."**

"* * *

"TTY/TDD dial 711 first I am DEAF!!!)."

{¶ 22} The language of the letter clearly indicates that Stallings was confused regarding her insurance coverage and that she has a disability that may require additional steps to assist and properly insure her by Safe Auto.

{¶ 23} On February 19, 2006, during her second Ohio Relay call to Safe Auto, Stallings requested that Leslie be removed from her policy. This statement by Stallings is evidence of her continued attempts to verify the accuracy of her policy; however, Safe Auto did not take the opportunity to verify the accuracy of the policy.

{¶ 24} Based upon a review of the telephone transcripts and the letter Stallings mailed to Safe Auto, I would find that there remains a genuine issue of material fact as to whether Safe Auto exercised good faith and reasonable diligence in procuring Stallings's insurance policy. A review of the record demonstrates there was a miscommunication between the parties. All doubts must be resolved in favor of the nonmoving party; consequently, I cannot conclude that Safe Auto is entitled to judgment as a matter of law based on these facts. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 25} I would reverse and remand.