[Cite as *Harris v. Allstate* , 2004-Ohio-4955.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

LAURIE B. HARRIS, et al. Appellees v. ALLSTATE INSURANCE COMPANY Appellant	C.A. Nos. 03CA0070 03CA0072 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 01 CV 0554

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

{¶1} Appellant Allstate Insurance Company ("Allstate") appeals from the decision of the Wayne County Court of Common Pleas which granted summary judgment in favor of appellees Laurie and William Harris on the issue of whether Allstate's policy issued to appellees provided uninsured and underinsurance coverage ("UM/UIM") for Laurie Harris. For the foregoing reasons, this Court reverses.

I.

{¶2} The facts of this case are not in dispute. On December 14, 1999, appellee Laurie Harris was a passenger in a vehicle leased by her husband and driven by her daughter Ashley. The Harris' vehicle collided with a 1994 Ford pickup truck driven by Gregory Albert when Ashley pulled out into an intersection in the path of Mr. Albert's car. As a result, appellee Laurie Harris sustained serious injuries.

{¶3} Thereafter, appellees brought suit against Allstate based on their automobile policy with them and against a number of other insurance companies who provided coverage to appellees' employers.[1] All the insurance companies filed motions for summary judgment on the grounds that the policies did not provide UM/UIM coverage for appellee. The trial court granted summary judgment in favor of all the employer insurance companies. The appeals with regard to these policies have been dismissed. With respect to Allstate, the trial court denied its motion for summary judgment and held that appellee was an insured under the policy who was entitled to UM/UIM coverage. Allstate appealed and has assigned two errors.

[1] Appellees also brought suit against Ashley and Mr. Albert. These parties have been dismissed from the suit and are no longer part of this suit.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN FINDING THAT APPELLEES/CROSS-APPELLANTS, WILLIAM AND LAURIE HARRIS, ARE INSUREDS FOR THE PURPOSE OF UNINSURED MOTORIST COVERAGE BECAUSE APPELLEES DO NOT FIT WITHIN THE DEFINITION OF 'INSURED(S)' IN THE ALLSTATE POLICY."

{¶4} In the first assignment of error, appellant argues that the trial court erred in finding that appellee Laurie Harris was an insured under the terms of the Allstate policy.[2]

{¶5} Appellate courts review the grant of summary judgment de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, an appellate court "review[s] the same evidentiary materials that were properly before the trial court at the time it ruled on the summary judgment motion." *Am. Energy Servs. Inc. v. Lekan* (1992), 75 Ohio App.3d 205, 208. Under Civ.R.56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

[2] William also contends that he is an insured under the policy. The same reasoning precluding Laurie as an insured also precludes Williams from being an insured.

{¶6} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Any doubt is to be resolved in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶7} Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Dresher*, 75 Ohio St.3d at 293. Once this burden is satisfied, the nonmoving party bears the burden of offering specific facts to show a genuine issue for trial. Id. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735. Pursuant to Civ.R. 56(C), only certain evidence and stipulations, as set forth in that section, may be considered by the court when rendering summary judgment. Specifically, the court is only to consider "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ.R.56(C).

{¶8} The dispute at issue involves whether appellee Laurie Harris is an insured under the terms of the Allstate policy. The policy lists William and Laurie Harris as insureds in the declaration page. The trial court found this language

dispositive and held that appellee was an insured entitled to UM/UIM coverage.

Allstate, however, contends that the language contained in the liability section of the policy precludes appellee from being considered an 'insured.' The language in the liability section defines an insured as follows:

"Additional Definitions for Part 1

"Insured Person(s) means:

"1. *While operating your insured auto:*

"a. you,

"b. any resident relative,

"c. and any other person operating it with your permission." (Emphasis added.).

{¶9} Allstate contends appellee could not be an insured because she was not operating the vehicle at the time of the collision as required by the terms of the policy.

{¶10} Appellee argues that she is an insured because she is a named insured on the declaration page and that any restriction on the definition of 'insured' in the liability section of policy does not apply because the UM/UIM coverage arose under operation of law.

{¶11} Under Ohio law, if an insurance company does not properly proffer UM/UIM insurance, coverage is imposed as a matter of law. R.C. 3937.18. There is no dispute that the UM/UIM coverage in this case arose by operation of law. Usually, insurance contracts are contracts which must be construed to fulfill the

intent of the parties. *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St.3d 107. However, because UM/UIM coverage is imposed by operation of law, and not by mutual agreement, the interpretation of this type of coverage is different than the usual insurance contract.

{¶12} First, because UM/UIM coverage arises by operation of law, the terms of the invalid UM/UIM coverage contained in the policy do not carry through to the coverage available. *Rohr v. Cincinnati Ins. Co.*, 5th Dist. No. 2001CA00237, 2002-Ohio-1583, certiorari denied, 96 Ohio St.3d 1468, 2002-Ohio-1583. In this case, that means that the court does not look to the terms of the UM/IUM coverage contained in the policy.

{¶13} Second, all preconditions to coverage which apply generally also apply to UM/UIM coverage arising by operation of law. *Blankenship v. Travelers Ins. Co*., 4th Dist. No. 02CA693, 2003-Ohio-2592 at ¶16, citing *Luckenbill v. Midwestern Indemn. Co.* (2001), 143 Ohio App. 501, 506-507. The definition of who is an insured is a precondition of coverage. *Blankenship*, supra. ("Therefore, the starting point for any court's analysis into whether *** the person seeking coverage qualified as an 'insured,' *** under the policy's definition[.]")

{¶14} Last, any contractual restrictions contained in the liability coverage are not transferred to UM/UIM coverage arising by operation of law. See *Demetry v. Kim*, (1991) 72 Ohio App.3d 692; *Wayne v. Pamer*, 9th Dist. No. 02CA0107-M,

2004-Ohio-1424. Neither party disputes the law which applies to UM/UIM coverage implied by operation of law.

{¶15} The parties, however, do dispute whether the language limiting the insured to one who is "operating" a vehicle is a valid precondition to coverage. Appellee contends that the insurance declaration page naming her as the insured is dispositive and the trial court agreed. Appellee argues that the condition that she be operating the vehicle at the time of her accident is an exclusion which cannot be applied to UM/UIM coverage arising by operation of law. Appellant argues that the language limiting the insured to one who is "operating" a vehicle is a valid precondition which excludes appellee from coverage.

{¶16} This Court finds that the language limiting the insured to one who is operating a vehicle is a legitimate precondition to coverage. When UM/UIM coverage arises by operation of law, the Court looks to the liability portion of the policy to determine who is an insured. *Mason v. Royal Ins. Co. of Am.*, 5th Dist. No. 2003CA00029, 2003-Ohio-7047 at ¶15, citing *Jordan v. Travelers Property Casualty Ins. Co.*, 5th Dist. No. 2002Ca0028, 2003-Ohio-1309. The provision at issue is contained in the definitional section of the liability portion of the policy which applies generally to liability insurance. It is a general precondition to coverage and as such also applies to UM/UIM coverage arising by operation of law. This language is not an exclusion which does not apply to limit UM/UIM coverage arising by operation of law.

{¶17} The language limiting the insured to one who is operating a vehicle is unambiguous on its face and must be given its plain meaning. Consequently, the appellee is not an insured under the terms of the liability section of the policy because she was not operating the vehicle at the time of the accident and consequently is not entitled to UM/UIM coverage. For the foregoing reasons, we hereby reverse the trial court.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN FINDING THAT APPELLEES/CROSS-APPELLANTS, WILLIAM AND LAURIE HARRIS, ARE ENTITLED TO UNINSURED MOTORIST COVERAGE UNDER THE SUBJECT ALLSTATE POLICY."

{¶18} The Court's determination on appellant's first assignment of error is dispositive on this matter and therefore, this Court makes no finding on the second assignment of error.

III.

{¶19} The judgment of the Wayne County Court of Common Pleas is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

Exceptions.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BATCHELDER, J.
CONCUR

APPEARANCES:

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