

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MICHAEL W. CLINE

Plaintiff-Appellee

vs.

BUCKEYE UNION INSURANCE COMPANY, ET AL.

Defendants-Appellants

: JUDGES:
: Hon. Sheila G. Farmer, P.J.
: Hon. Julie A. Edwards, J.
: Hon. John F. Boggins, J.
:

: Case No. CT2003-0007
:

: OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. CC 2002-0047

JUDGMENT: Affirmed in part, reversed in part and
remanded

DATE OF JUDGMENT ENTRY: October 7, 2003

APPEARANCES:

For Plaintiff-Appellee

For Buckeye Union Insurance Company

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Farmer, J.

{¶1} On September 4, 1994, appellee, Michael Cline, was a passenger in a vehicle being driven by one Rex Haas. Mr. Haas failed to negotiate a curve in the roadway and struck a guardrail and a tree. As a result of the accident, appellee sustained injuries.

{¶2} At the time of the accident, appellee was employed by Shelly & Sands, Inc., insured under a business auto policy and a commercial general liability policy issued by Buckeye Union Insurance Company and an umbrella policy issued by Crum & Forster Insurance Company.

{¶3} On January 15, 2002, appellee filed a complaint against Buckeye Union and Crum & Forster, seeking underinsured motorists benefits. An amended complaint was filed on January 16, 2002.

{¶4} All parties filed motions for summary judgment. By judgment entry filed December 30, 2002, the trial court granted appellee's motion, finding appellee was entitled to underinsured motorists benefits under the policies.

{¶5} Buckeye Union and Crum & Forster filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶6} "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANTS' JOINT MOTION FOR SUMMARY JUDGMENT WHEN IT FOUND THAT APPELLEE IS ENTITLED TO UNINSURED/UNDERINSURED MOTORIST COVERAGE."

{¶7} Buckeye Union and Crum & Forster claim the trial court erred in finding coverage to appellee under the business auto and umbrella policies.

{¶8} At the outset, we note appellee concedes the trial court erred in finding coverage under the Buckeye Union commercial general liability policy. Appellee's Brief at 8. Appellee is not entitled to coverage under said policy. See, *Szekeres v. State Farm Fire and Cas. Co.*, Licking App. No. 02CA00004, 2002-Ohio-5989, at ¶31-45; *Dalton v. The Travelers Insurance Co.* (December 23, 2002), Stark App. Nos. 2001CA00380, 2001CA00393, 2001CA00407 & 2001CA00409, at 9-11. The trial court's decision granting coverage under this policy is reversed.

{¶9} Summary judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶10} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (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 nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶11} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

BUSINESS AUTO POLICY

{¶12} The business auto policy issued by Buckeye Union contained express uninsured/underinsured motorists coverage. The trial court found appellee was entitled to said coverage pursuant to *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*, 85 Ohio St.3d 660, 1999-Ohio-292.

{¶13} Section B of the Ohio Uninsured Motorists Coverage, CA 21 33 04 91, attached to Plaintiff's Motion for Summary Judgment as Exhibit A, defines an "insured" as follows:

{¶14} "1. You.

{¶15} "2. If you are an individual, any 'family member.'

{¶16} "3. Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.'***

{¶17} "4. Anyone for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured.'"

{¶18} The policy states "the words 'you' and 'your' refer to the Named Insured shown in the Declarations." See, Business Auto Coverage Form, CA 00 01 12 90, attached to Plaintiff's Motion for Summary Judgment as Exhibit A. The named insured listed is "Shelly & Sands, Inc." See, Named Insured, attached to Plaintiff's Motion for Summary Judgment as Exhibit A. This definition of an "insured" is similar to the

definition in *Scott-Pontzer*. However, the policy contains an endorsement titled “Drive Other Car Coverage - Broadened Coverage for Named Individuals” adding individuals as named insureds, namely “James F. Graham, James Poe, William D. Hamm, Richard H. McClland and Larry E. Young.” See, Endorsement No. CA 99 10 12 90, attached to Plaintiff’s Motion for Summary Judgment as Exhibit A. Appellants argue the inclusion of specifically named individuals precludes the application of *Scott-Pontzer*.

{¶19} Section C of the endorsement adds the following to “Who Is An Insured” under uninsured/underinsured motorists coverage:

{¶20} “Any individual named in the Schedule and his or her ‘family members’ are ‘insured’ while ‘occupying’ or while a pedestrian when being struck by any ‘auto’ you don’t own except:

{¶21} “Any ‘auto’ owned by that individual or by any ‘family member.’”

{¶22} According to this definition, underinsured motorists coverage is broadened to include appellee and any resident family members except for when occupying any vehicle they own. It is undisputed the vehicle involved in the accident was owned by “Rex A. Haas.” See, Ohio Traffic Crash Report, attached to Joint Motion for Summary Judgment as Exhibit 2. Because the vehicle was not owned by appellee or any resident family member, the exclusion in the endorsement does not apply and appellee is an insured under the policy. See, *Griffith v. Buckeye Union Ins. Co.*, Stark App. No. 2001CA00410, 2003-Ohio-3799, at ¶23-28; *Fish v. The Republic-Franklin Ins. Co.*, Stark App. No. 2003CA00044, 2003-Ohio-4277, at ¶68-72.

{¶23} Because appellee is an insured under the uninsured/underinsured motorists coverage, appellee is bound by the terms and conditions of the policy. See,

Szekeres, supra, at ¶17-21. Buckeye Union argues appellee failed to comply with the notice, consent, and subrogation provisions contained within the policy. Buckeye Union further argues because appellee settled with the tortfeasor, the "legally entitled to recover" provision in the policy bars recovery.

{¶24} Section A(1) of the Ohio Uninsured Motorists Coverage states the following:

{¶25} "We will pay all sums the 'insured' is *legally entitled to recover* as compensatory damages from the owner or driver of an 'uninsured motor vehicle' because of 'bodily injury' caused by an 'accident.' The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the 'uninsured motor vehicle.'" (Emphasis added.)

{¶26} In *Pilo v. Liberty Mutual Fire Ins. Co.*, Ashland App. No. 02-COA-038, 2003-Ohio-662, ¶30, this court reviewed a similar provision and found it did not apply to underinsured motorists claims as the claimant could still prove all the elements of his/her claim against the tortfeasor. See also, *Fish v. Ohio Cas. Ins. Co.* Stark App. No. 2003CA00041, 2003-Ohio-4276, at ¶41-44.

{¶27} As for notice, Section IV(2)(a) of the Business Auto Coverage Form states, "In the event of 'accident,' claim, 'suit' or 'loss,' you must give us or our authorized representative prompt notice of the 'accident' or 'loss.'" Section E(2) of the Ohio Uninsured Motorists Coverage adds the following:

{¶28} "A person seeking Uninsured Motorists Coverage must also promptly notify us in writing of a tentative settlement between the 'insured' and the insurer of the vehicle described in paragraph F.3.b. of the definition of 'uninsured motor vehicle' and

allow us 30 days to advance payment to that insured in an amount equal to the tentative settlement to preserve our rights against the insurer, owner or operator of such vehicle described in paragraph F.3.b. of the definition of 'uninsured motor vehicle.'"

{¶29} Buckeye Union argues the six year delay in giving notice precludes coverage. In support, Buckeye Union cites *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, wherein the Supreme Court of Ohio held the following at paragraph one of the syllabus:

{¶30} "When an insurer's denial of underinsured motorist coverage is premised on the insured's breach of a prompt-notice provision in a policy of insurance, the insurer is relieved of the obligation to provide coverage if it is prejudiced by the insured's unreasonable delay in giving notice. An insured's unreasonable delay in giving notice is presumed prejudicial to the insurer absent evidence to the contrary."

{¶31} Buckeye Union argues the issue of prompt notice/prejudice was fully developed at the summary judgment stage and appellee failed to rebut same at that time. However, we note attached to appellee's response to Buckeye Union's motion for summary judgment are two affidavits, one by appellant, Plaintiff's Exhibit K, and the other by Beth Rice, the tortfeasor's wife at the time of the accident, Plaintiff's Exhibit N. These affidavits aver the tortfeasor was killed in the accident and left no estate. The trial court's judgment entry in this case does not specifically address the issues of notice, subrogation and prejudice. Therefore, we remand this case to the trial court for determination of these issues.

{¶32} Appellee argues he is entitled to a jury trial on the issue of prejudice. We disagree. There is no factual issue to resolve in determining prejudice. Prejudice as defined in *Ferrando* is a determination for the trial court.

{¶33} Buckeye Union argues the trial court erred in not permitting setoff from the \$200,000 appellee received from the tortfeasor (\$100,000) and his own personal policy (\$100,000). Former R.C. 3937.18(A)(2), now subsection (C), provides, "The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured."

{¶34} Section D(3) of the Ohio Uninsured Motorists Coverage states the following:

{¶35} "With respect to damages resulting from an 'accident' with a vehicle described in paragraph b. of the definition of 'uninsured motor vehicle,' [which is an underinsured motor vehicle] the limit of liability shall be reduced by all sums paid by or for anyone who is legally responsible, including all sums paid under the policy's LIABILITY COVERAGE."

{¶36} Based upon these sections, we find Buckeye Union is entitled to a \$200,000 setoff.

UMBRELLA POLICY

{¶37} The umbrella policy issued by Crum & Forster includes the business auto policy issued by Buckeye Union. See, Schedule A – Schedule of Underlying Insurance, attached to Plaintiff's Motion for Summary Judgment as Exhibit C. Crum & Forster argue although its policy is an umbrella to the Buckeye Union policy, its limits are only

one million pursuant to the "Uninsured Motorist Insurance Underinsured Motorist Insurance Limitation" endorsement of the policy which states "this policy is limited to the coverage provided to the 'Insured' in the 'Underlying Insurance'," as opposed to the twenty million limit on the face of the umbrella policy. Appellee argues this arbitrary and unilateral reduction is in violation of the law established in *Linko v. Indemnity Ins. Co. of N. Am.*, 90 Ohio St.3d 445, 2000-Ohio-92, 447-448, wherein the Supreme Court of Ohio held, "To satisfy the offer requirement of R.C. 3937.18, the insurer must inform the insured of the availability of UM/UIM coverage, set forth the premium for UM/UIM coverage, include a brief description of the coverage, and expressly state the UM/UIM coverage limits in its offer."

{¶38} As the policy purports to give uninsured/underinsured motorists coverage, it is subject to the case law of *Linko*. There is no proof of any statutory information to the insured and any rejection of lower than the face value coverage of the umbrella policy.

{¶39} Upon review, we find the one million dollar limitation to be unenforceable. Because the umbrella policy is by definition an excess policy, it is liable only after the amounts under the Buckeye Union policy have been exhausted.

{¶40} The sole assignment of error is granted as to coverage under the Buckeye Union commercial general liability policy, denied as to coverage under the Buckeye Union business auto policy and the Crum & Forster umbrella policy, granted as to the issue of setoff and remanded for a determination on notice, subrogation and prejudice pursuant to *Ferrando*.

{¶41} The judgment of the Court of Common Pleas of Muskingum County, Ohio is hereby affirmed in part, reversed in part and remanded.

By Farmer, P.J.

and Boggins, J. concur.

Edwards, J. concurs in part and dissents in part.

EDWARDS, J., CONCURRING, IN PART, DISSENTING, IN PART

{¶42} I concur with the majority's conclusion that appellee is an insured under the business auto policy issued by Buckeye Union, but for a different reason.

{¶43} The majority, in its Opinion, holds that pursuant to the definition of an insured contained in Section C of the "Drive Other Car Coverage - - Broadened Coverage for Named Individuals" endorsement, "underinsured motorists coverage is broadened to include appellee and any resident family member except for when occupying any vehicle they own."

{¶44} Section C specifically states as follows:

{¶45} "C. CHANGES IN AUTO MEDICAL PAYMENTS AND UNINSURED AND UNDERINSURED MOTORISTS COVERAGES

{¶46} "The following is added to WHO IS AN INSURED:

{¶47} "Any individual named in the Schedule and his or her 'family members' are 'insured' while 'occupying' or while a pedestrian when being struck by any 'auto' you don't own except:

{¶48} "Any 'auto' owned by that individual or by any 'family member.'" (Emphasis added.)

{¶49} However, appellee Michael Cline is not named in the “Schedule” referred to in Section C. For such reason, I disagree with the majority’s assertion that “underinsured motorists coverage is broadened to include appellee and any resident family members except for when occupying any vehicle they own.”

{¶50} However, I concur with the majority’s conclusion that appellee is an insured for UIM purposes under the Buckeye Union business auto policy. The “Drive Other Car Coverage – Broadened Coverage for Named Individuals” endorsement adds to the definition of who is an insured for UIM purposes. Thus “you” remains as an insured under the UM/UIM endorsement and, pursuant to *Scott-Pontzer*, includes the corporations’ employees. As noted by this Court in *Dalton v. Lumbermans Mut. Ins. Co.*, Stark App. No. 2002CA00198, 2003-Ohio-2897, “[i]t is axiomatic by adding a broadened coverage to the definition of ‘who is an insured’ for UIM purposes the Drive Other Car Coverage - - Broadened Coverage for Named Individuals endorsement does not serve to reduce or restrict ‘Who Is an Insured’ under the UIM endorsement in the policy itself. Because that endorsement contains the same ambiguity found in *Scott-Pontzer*, appellee is insured thereunder.” See also *Moore v. Hartford Fire Ins.*, Delaware App. No. 02CAE-10-048, 2003-Ohio-2037.

{¶51} Based on the foregoing, I concur with the majority that appellee is an insured under the Buckeye Union business auto policy.

{¶52} However, while the majority finds that appellee Buckeye Union is entitled to a \$200,000 set off, I disagree. As the majority notes in its Opinion, appellee received \$100,000 from the tortfeasor and another \$100,000.00 from his own personal policy, for a total of \$200,000. Former R. C. 3937.18(A)(2), now subsection (C), provides, in part,

that “[t]he policy limits of underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds...” (Emphasis added.) Of the \$200,000 received by appellee, \$100,000 was received from appellee’s own UM/UIM coverage – not from any liability coverage. For such reason, I would find that Buckeye Union is only entitled to a \$100,000 set off, representing the amount received from the tortfeasor.

Judge Julie A. Edwards