

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

Tracy K. Thom

Court of Appeals No. E-10-069

Appellee

Trial Court No. 2008-CV-0806

v.

Perkins Township, et al.

Defendants

DECISION AND JUDGMENT

[Western Reserve Mutual
Casualty Company—Appellant]

Decided: April 6, 2012

* * * * *

James L. Murray and William H. Bartle, for appellee.

D. John Travis, Gary L. Nicholson and David L. Jarrett,
for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This appeal concerns uninsured/underinsured motorist ("UM/UIM") insurance coverage for personal injury claims arising out of a motor vehicle collision that

occurred on October 3, 2007. Appellant is Western Reserve Mutual Casualty Company ("Western Reserve"). Its policyholder, Tracy Thom, is appellee.

{¶ 2} Western Reserve appeals a judgment, journalized on November 5, 2010, of the Erie County Court of Common Pleas on cross-motions for summary judgment filed by Western Reserve and Tracy Thom concerning whether UM/UIM coverage exists under an insurance policy issued to Thom by Western Reserve for injuries sustained by Thom as a result of an October 3, 2007 automobile accident.

{¶ 3} The trial court granted the motion for summary judgment of Thom and denied the motion of Western Reserve. The court held that UM/UIM coverage existed under the automobile insurance policy issued by Western Reserve to Thom with coverage limits of \$100,000 for claims against Perkins Township and James Greenham, a township police officer, arising out of the incident.

October 3, 2007 Collision

{¶ 4} It is undisputed that on October 3, 2007, James Greenham, a police officer on duty with the Perkins Township Police Department, drove to 2820 North Bayview Lane in Perkins Township, Ohio in a township police cruiser. As Greenham drove into the driveway at the residence, Tracy Thom pulled her vehicle ahead and stopped close to the garage. Greenham saw Thom exit her vehicle and go to the rear of it to gather belongings from the trunk.

{¶ 5} Greenham pulled the police cruiser into the driveway and stopped. He exited the cruiser without turning the vehicle off. Afterwards, the police cruiser, on its

own, went forward, striking and pinning Tracy Thom between the rear of her vehicle and the front of the police cruiser. Officer Greenham testified by deposition that the collision was caused by his failure to place the police cruiser in park before exiting it.

{¶ 6} Both Greenham and Perkins Township have claimed that they are immune from liability to Tracy Thom for personal injuries suffered by her in the collision, pursuant to Ohio's Political Subdivision Tort Liability Act, R.C. Chapter 2744.

The Litigation

{¶ 7} Thom filed suit against Greenham and Perkins Township for personal injuries in the Erie County Court of Common Pleas on August 26, 2008, and filed an amended complaint on January 7, 2010, adding Western Reserve as a defendant. Under the amended complaint, Thom asserted UM/UIM claims against Western Reserve under an automobile insurance policy issued by Western Reserve to Thom due to injuries caused by the accident.

{¶ 8} This appeal is of the trial court's judgment of November 5, 2010, ruling on cross-motions for summary judgment by both Western Reserve and Tracy Thom on the issue of UM/UIM insurance coverage for Thom's personal injury claim arising from the collision. In the judgment, the trial court denied the motion for summary judgment filed by Western Reserve that argued that UM/UIM coverage was lacking under the policy. The court granted the motion for summary judgment of Thom and held that the Western Reserve insurance policy provided UM/UIM coverage to Thom for personal injury

claims arising from the accident and based upon the negligence of Police Officer Greenham. Western Reserve asserts one assignment of error on appeal:

I. Assignment of Error.

The trial court erred in denying Defendant-Appellant Western Reserve Mutual Casualty Company's motion for summary judgment and granting Plaintiff-Appellee Tracy Thom's motion for partial summary judgment. (Trial Court's November 2, 2010 Opinion and Judgment Entry.)

{¶ 9} Western Reserve argues that there are two alternate, independent grounds demonstrating that the trial court erred in declaring that UM/UIM coverage exists under the policy issued by it to Tracy Thom. Western Reserve argues that UM/UIM coverage is limited under the UM/UIM insuring agreement to an agreement to pay compensatory damages which an insured is legally entitled to recover. Western Reserve contends that the limitation operates to bar coverage where the responsible tortfeasor is immune from recovery due to governmental immunity. Western Reserve also argues that Thom's claims are barred under a policy exclusion excluding UM/UIM coverage where the tortfeasor operated a vehicle owned or operated by a self-insurer.

{¶ 10} 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.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Civ.R. 56(C) provides:

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.

{¶ 11} The Ohio Supreme Court held in *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978) that for summary judgment to be granted, the moving party must demonstrate :

(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.

{¶ 12} “An insurance policy is a contract whose interpretation is a matter of law.” *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, 875 N.E.2d 31, ¶ 7, quoting *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 6. In interpreting such contracts, “the role of the court is to give effect to the intent of the parties to the agreement.” (Citations omitted.) *Westfield*

Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11. In *Westfield Ins. Co. v. Galatis*, the Ohio Supreme Court outlined the analysis required:

We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 7 O.O.3d 403, 374 N.E.2d 146, paragraph two of the syllabus. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *Id.* As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. *Gulf Ins. Co. v. Burns Motors, Inc.* (Tex.2000), 22 S.W.3d 417, 423. *Id.*

**Agreement to Pay Compensatory Damages
Insured is Legally Entitled to Recover.**

{¶ 13} Based upon the Ohio Supreme Court's decision in *Snyder v. American Family Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574, Western Reserve argues that a limitation in the insuring agreement for UM/UIM coverage in its policy that limits UM/UIM coverage to compensatory damages an insured is "legally entitled to recover" bars Thom's claims. The insuring agreement of the Uninsured/Underinsured

Motorists Coverage endorsement for the Western Reserve personal auto policy provides in part:

Part C. Uninsured/Underinsured Motorists Coverage

INSURING AGREEMENT

A. We will pay compensatory damages which an “insured” is

legally entitled to recover from the owner or operator of:

1. An “uninsured/underinsured motor vehicle” as defined * * *:
 - a. Sustained by an “insured”; and
 - b. Caused by an accident. (Emphasis by italics added.)

{¶ 14} Western Reserve argues that under *Snyder*, the limitation in the insuring agreement to pay "damages which an insured is legally entitled to recover" clearly and unambiguously excludes UM/UIM coverage where recovery against the responsible tortfeasor is barred by immunity under R.C. Chapter 2744.

{¶ 15} In *Snyder*, the Ohio Supreme Court held that insurers are not prohibited under R.C. 3937.18 from excluding UM/UIM claims when the tortfeasor is statutorily immune from liability. *Snyder* at ¶ 2. The court also considered the effect of a policy provision limiting the agreement to pay UM/UIM benefits to compensatory damages an insured is “legally entitled to recover.” *Id.* at ¶ 1. The Ohio Supreme Court held that such language “unambiguously denies coverage for injuries caused by uninsured motorists who are immune from liability under R.C. Chapter 2744 or R.C. 4123.741.” *Id.* at ¶ 2.

{¶ 16} Thom argues that the decision in *Snyder* does not apply because the Western Reserve policy is different than the policy considered in *Snyder*. Thom contends that the insurance policy considered here includes other policy language that conflicts with a blanket denial of UM/UIM coverage in circumstances as presented here. Thom refers to an uninsured/underinsured motor vehicle exclusion that generally excludes government owned vehicles from being considered uninsured/underinsured motor vehicles under the policy except where the owner or operator is immune from liability under R.C. Chapter 2744, Ohio's Political Subdivision Liability Act:

Part C. Uninsured/Underinsured Motorists Coverage

INSURING AGREEMENT

* * *

C. "Uninsured/underinsured motor vehicle" means a land motor vehicle or trailer of any type:

* * *

However, "uninsured/underinsured motor vehicle" does not include any vehicle or equipment:

* * *

3. *Owned by any governmental unit or agency, unless the owner or operator of the "uninsured/underinsured motor vehicle" has:*

a. *An immunity under the Ohio Political Subdivision Tort Liability*

Law; or

b. A diplomatic immunity. (Emphasis by italics added.)

{¶ 17} Thom argues that to treat the statement in the insuring agreement that the insurers will pay "damages which an insured is legally entitled to recover" as a blanket limitation on UM/UIM coverage that denies coverage where the tortfeasor is immune under R.C. Chapter 2744, would make meaningless the policy's exception allowing governmentally owned vehicles to be considered uninsured/underinsured motor vehicles where immunity exists under R.C. Chapter 2744. The exercise of determining whether the vehicle was government owned and the owner or operator was immune from liability under R.C. Chapter 2744 would serve no purpose if the "legally entitle to recover" provision precludes any UM/UIM coverage in any event.

{¶ 18} The Twelfth District Court of Appeals in *Payton v. Peskins*, 12th Dist. No. CA2010-10-022, 2011-Ohio-3905, considered these two UM/UIM coverage provisions. The court held that the addition of contract language that excludes a government vehicle from being an uninsured/underinsured motor vehicle unless the owner or operator is immune from liability under the Ohio Political Subdivision Liability Act distinguished the policy from the Ohio Family Insurance policy considered by the Ohio Supreme in *Snyder v. American Family*. The court reasoned that "[t]he additional wording contained in * * * [the] * * * policy (which was not in the American Family policy) clearly

informed the insured that he could recover damages caused by an uninsured motorist, including a vehicle operator who has statutory immunity." *Payton v. Peskins* at ¶ 12.

{¶ 19} The Twelfth District Court of Appeals construed the policy to provide UM/UIM coverage to the policyholder who was injured by the negligence of a police officer of the village of Georgetown in the operation of a village police cruiser. The court of appeals concluded that interpreting the insurance policy to provide UM/UIM coverage in such circumstances was also supported "under the generally applicable rules governing contract interpretation that specific provisions take precedence over more general provisions. *Id.* at ¶ 14.

{¶ 20} Where ambiguity exists, a contract is to be interpreted as a whole and an interpretation making contract provisions meaningless or superfluous is to be avoided. *Fifth Third Mtge. Co. v. Rankin*, 4th Dist. No. 10CA45, 2011-Ohio-2757, ¶ 24; *Gates v. Ohio Savings Assn.*, 11th Dist. No. 2009-G-2881, 2009-Ohio-6230, ¶ 28.

It is generally the role of the finder of fact to resolve ambiguity.

See, e.g., *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 609 N.E.2d 144. However, where the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party. *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 413, 16 O.O.3d 441, 406 N.E.2d 515. In the insurance context, the insurer customarily drafts the contract. Thus, an ambiguity in an insurance

contract is ordinarily interpreted against the insurer and in favor of the insured. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus. *Westfield Ins. Co. v. Galatis* at ¶ 13.

{¶ 21} The Eighth District Court of Appeals recently applied *Snyder* in its decision in *Marusa v. Erie Ins. Co.*, 8th Dist. No. 96556, 2011-Ohio-6276. The court held *Snyder* was controlling and denied coverage despite a claimed conflict in the policy with respect to the definition of an uninsured vehicle. *Marusa* at ¶ 12, 16.

{¶ 22} The policy definition of “uninsured vehicle” for purposes of UM/UIM coverage considered in *Marusa* included vehicles “[f]or which the owner or operator of the ‘motor vehicle’ has immunity under the Ohio Political Subdivision Tort Liability or a diplomatic immunity.” *Marusa* at ¶ 12. A dissent in the case argued that the wording of the coverage grant and the definition of uninsured vehicle were in conflict and under the reasoning of the Twelfth District Court of Appeals decision in *Payton v. Peskins*, the Ohio Supreme Court decision in *Snyder* did not apply. *Marusa* at ¶ 21-25 (Stewart, J. dissenting).

{¶ 23} We agree with the decision of the Twelfth District Court of Appeals in *Payton v. Peskins* and conclude that a conflict in policy provisions distinguishes this case from *Snyder*. Construing policy against the insurer, we conclude that the statement in the insuring agreement that the company will pay compensatory damages an insured is legally entitled to recover does not operate to bar any UM/UIM coverage to appellee under the Western Reserve policy.

Exclusion Where Vehicle Owned or Operated by Self-Insurer

{¶ 24} Western Reserve alternatively argues that UM/UIM benefits are excluded under its policy under a UM/UIM exclusion that excludes vehicles owned or operated by a self-insurer from being considered uninsured/underinsured motor vehicles under the policy:

Part C – Uninsured Motorists Coverage

Insuring Agreement

* * *

C. “Uninsured/underinsured motor vehicle” means * * *:

* * *

However, “uninsured/underinsured motor vehicle” does not include any vehicle or equipment:

* * *

2. Owned or operated by a self-insurer under any applicable motor vehicle law, except a self-insurer which is or becomes insolvent.

(Emphasis added.)

{¶ 25} The parties agree that Perkins Township was a member of the Ohio Township Association Risk Management Authority ("OTARMA"), a local government risk pool, and entered into a Legal Defense and Claim Payment Agreement. Among other things, the agreement provided for coverage of automobile liability claims under terms and conditions set forth in the agreement with coverage limits of \$10,000,000. The

agreement was in effect at the time of the collision involving Tracy Thom. Appellee agrees that Perkins Township through its membership in OTARMA is a member of a joint self-insurance pool authorized under R.C. 2744.081.

{¶ 26} Western Reserve argues that the policy clearly and unambiguously excludes motor vehicles “owned or operated by a self-insurer” from constituting uninsured/underinsured motor vehicles under the policy unless the self-insurer is or becomes insolvent. Western Reserve argues that Perkins Township was a self-insurer at the time of the accident through its membership in the OTARMA joint self-insurance pool. Thom responds by denying that Perkins Township is a self-insurer within the ordinary meaning of the word.

{¶ 27} The Western Reserve policy does not define the term. Thom refers to dictionary definitions to aid in interpretation of the term. *Merriam Webster's Collegiate Dictionary* 1061 (10th Ed.1996) defines self-insure and self-insurance as follows:

self-insure * * * vb (1932): to insure oneself; esp: to practice self-insurance—**self-insurer** * * * n.

self-insurance: * * * n. (ca. 1897): insurance of oneself or of one's own interests by setting aside of money at regular intervals to provide a fund to cover possible losses.

{¶ 28} *Black's Law Dictionary* 819 (8th Ed.2004) defines self-insurance as:

self-insurance: A plan under which a business maintains its own special funds to cover any loss. • Unlike other forms of insurance, there is no contract with an insurance company. – Also termed *first-party insurance*.

{¶ 29} The parties agree that OTARMA is not an insurer. *See* R.C.

2744.081(E)(2). Thom argues, OTARMA is an entity, created by statute that spreads the risk among government entities that are its members. Thom argues that the agreement is not self-insurance because it does not protect only Perkins Township against risk.

{¶ 30} Western Reserve argues that Perkins Township is self-insured with respect to the collision that caused injuries to Thom. It argues that the fact that political subdivisions in Ohio are authorized to jointly administer self-insurance programs through joint self-insurance pools and that Perkins Township chose that option through OTARMA does not alter the fact that the township remains a self-insurer under such an agreement. We agree. OTARMA permits Perkins Township to protect itself against risk of loss by contributions to the joint self-insurance risk pool. OTARMA is not an insurer. Perkins Township has not entered into any insurance contract providing coverage for the loss.

{¶ 31} We find appellant's Assignment of Error well-taken. We reverse the November 5, 2010 judgment of the Erie County Court of Common Pleas that granted summary judgment in favor of appellee Tracy Thom and against appellant Western

Reserve on the issue of uninsured/underinsured motorists insurance coverage. We enter judgment in favor of Western Reserve and against Tracy Thom on the cross-motions for summary judgment. Appellee Thom is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.