

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

Alan Kirshner as Executor of
The Estate of Willis J. Shinaberry,
deceased, and as Executor of The
Estate of Patricia Bodi, deceased

Court of Appeals No. L-09-1320

Trial Court No. CI0200806819

Appellant

v.

Connie Nieves, et al.

DECISION AND JUDGMENT

Appellee

Decided: June 11, 2010

* * * * *

Alan Kirshner for appellant.

Michael J. Tyminski for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant executor appeals a judgment of the Lucas County Court of Common Pleas granting summary judgment to an insurer and denying his cross-motion for summary judgment. For the reasons that follow, we reverse.

{¶ 2} On September 16, 2006, an automobile driven by Connie Nieves ran a red light at an intersection, striking a vehicle operated by Willis J. Shinaberry. Patricia Bodi was a passenger in the Shinaberry vehicle. Bodi and Shinaberry both died as the result of the collision.

{¶ 3} Nieves and the car she was driving were uninsured. When the crash occurred, Shinaberry carried \$12,500 per person/ \$25,000 per accident uninsured motorist coverage through a policy issued by appellee, Allstate Insurance Company ("Allstate"). Bodi was insured by a policy issued by Auto Owners Insurance Company with uninsured motorist coverage in the amount of \$250,000 per person/ \$500,000 per occurrence. By the time the present suit was instituted, both insurers had paid the per person limits of their uninsured motorist coverage to the estates of their respective insureds.

{¶ 4} Appellant is Alan Kirshner, executor of the estates of both Willis J. Shinaberry and Patricia Bodi. On September 16, 2008, appellant sued Nieves, the owner of the car she was driving, Allstate and Auto Owners. Appellant sought a personal injury judgment against Nieves and the uninsured auto owner. He asked for subrogation for the insurance companies in the amounts they had paid. Appellant also sought the sum of \$12,500 from Allstate as its "proportionate share" for Patricia Bodi.

{¶ 5} Appellant obtained a default judgment against Nieves and the owner of the car. Auto Owners, having paid the limits of the Bodi policy, determined that subrogation by Nieves and her car owner was "not practical" and effectively withdrew from the case.

On the remaining issue, the matter was submitted to the trial court on cross-motions for summary judgment.

{¶ 6} Initially, the trial court denied both motions for summary judgment on the ground that each insurer had already paid the maximum uninsured motorist's coverage provided to its insureds and made no demand for setoff. Thus, the court declared the issue moot. The court later entered a nunc pro tunc entry, granting Allstate's motion for summary judgment and denying appellant's motion for partial summary judgment.

{¶ 7} From this judgment, appellant now brings this appeal, setting forth the following single assignment of error:

{¶ 8} "The trial court erred in granting Allstate Insurance Company's Motion for Summary Judgment and in failing to grant the Estate of Patricia Bodi's Motion for Partial Summary Judgment."

{¶ 9} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 10} "* * * (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." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 11} There are no disputed facts in this matter, only a question of the legal consequences of the insurance policies.

{¶ 12} Shinaberry's Allstate policy provides that, if the declaration page of the policy shows a premium for uninsured motorists coverage:

{¶ 13} "[W]e will pay those damages which an **insured person** or an **additional insured person**:

{¶ 14} "1. is legally entitled to recover from the owner or operator of an **uninsured auto** * * *."

{¶ 15} "'**Additional insured person(s)**' means:

{¶ 16} "a. any other person occupying, but not operating, an **insured auto**.

{¶ 17} "b. any other person who is legally entitled to recover because of **bodily injury** to a person occupying, but not operating, an **insured auto**."

{¶ 18} Applying this provision, Bodi and her estate are "additional insured persons" under Shinaberry's policy and would be entitled to the \$12,500 per person limit contained therein. The policy, however, contains the following limitation of liability:

{¶ 19} "* * *

{¶ 20} "An **additional insured person** shall be insured only to the extent that the limits of liability for Underinsured Motorist Insurance for Bodily Injury under this policy *exceed the limits of liability* for similar coverage under any other policy.

{¶ 21} "* * *

{¶ 22} "**If There Is Other Insurance**

{¶ 23} " * * *

{¶ 24} "We will bear our proportionate share with other uninsured motorists insurance benefits. Our share is determined by adding the limits of liability of this insurance to the limits of all other insurance that apply on the same basis and finding the percentage of the total that our limits represent. * * * " (Emphasis added.)

{¶ 25} Bodi's Auto Owners policy uninsured motorist's section contains the following provision:

{¶ 26} "5. **OTHER INSURANCE**

{¶ 27} "If there is other Uninsured Motorist Coverage which applies, **we** will pay **our** share of the damages. **Our** share will be the ratio of **our** limit of liability to the total of all limits which apply. Total damages payable for one **occurrence** shall be considered not to exceed the limit of liability of the applicable policy that has the highest limit of liability.

{¶ 28} "The coverage extended to **automobiles** not owned by:

{¶ 29} "a. the first named insured; or

{¶ 30} "b. if the first named insured is an individual, his or her spouse, if a resident of the same household; *will be excess over any other insurance* available to the injured person." (Emphasis added.)

{¶ 31} Appellant insists that, because both the Shinaberry and Bodi insurance policies provide uninsured motorist coverage as excess over other policies and each

policy contains a proportionality provision, the syllabus rule of *Buckeye Union Ins. Co. v. State Auto. Mut. Ins. Co.* (1977), 49 Ohio St.2d 213, applies. This rule mandates that:

{¶ 32} "Where two insurance policies cover the same risk and both provide that their liability with regard to that risk shall be excess insurance over other valid, collectible insurance, the two insurers become liable in proportion to the amount of insurance provided by their respective policies."

{¶ 33} It is important that we note that we are dealing solely with the damages to Bodi. As a passenger in Shinaberry's car, she was an additional insured of his Allstate policy. Shinaberry was not an insured in Bodi's Auto Owners policy. The estates of both Bodi and Shinaberry have been paid by their own respective insurers.

{¶ 34} Following the *Buckeye Union* rule, insurers become liable in proportion to their respective coverage limits. Here, since the wrongful death of Bodi likely exceeds combined coverage, Auto Owners would contribute \$250,000, which has already been provided, and Allstate would contribute \$12,500, the amount here in dispute. Such proration "* * * assures indemnification for the insured up to the maximum amount of coverage afforded by each policy[.]" *Id.* at 218.

{¶ 35} It is difficult to tell from the trial court's initial or nunc pro tunc entry the basis for its decision. Allstate proceeds as if the trial court had determined that the Bodi policy was primary. In support of this argument, Allstate quotes the Bodi policy's coverage provision which provides that:

{¶ 36} "If the first named insured shown on the Declarations page [Bodi] is an individual:

{¶ 37} "(1) we will pay compensatory damages the first named insured is legally entitled to recover"

{¶ 38} "(a) from the owner or operator of an [uninsured] automobile. * * * "

{¶ 39} This is a specious argument, however, as the "Other Insurance" provision in the Auto Owners policy plainly states that, if the claim involves a non-owned auto and the insured is an individual, uninsured motorists coverage is excess over other available insurance. As a result, both policies provide uninsured motorists coverage in these circumstances as excess only. The Allstate and Auto Owners policies thus both cover the same risk and both provide that such coverage shall be excess to other valid collectable insurance. In such a circumstance, the syllabus rule of *Buckeye Union*, supra, directs that the insurers prorate their contribution to a combined fund that assures the insured indemnification "up to the maximum amount of coverage afforded by each policy." Id. at 218.

{¶ 40} Accordingly, appellant's sole assignment of error is well-taken. The trial court erred in granting Allstate's motion for summary judgment and in denying appellant's motion for partial summary judgment.

{¶ 41} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings

consistent with this decision. It is ordered that appellee pay cost 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

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.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>.