[Cite as *Univ. Hosps. Health Sys. v. Total Technical Servs., Inc.*, 2010-Ohio-2606.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93708

UNIVERSITY HOSPITALS HEALTH SYSTEM

PLAINTIFF-APPELLANT

vs.

TOTAL TECHNICAL SERVICES, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV- 639157

BEFORE: Blackmon, J., Rocco, P.J., and Stewart, J.

RELEASED: June 10, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Plaintiff-appellant QualChoice, Inc. ("QualChoice")[1] appeals the trial court's granting summary judgment in favor of Federal Insurance Company ("Federal") and assigns the following two errors for our review:

> **"I. The trial court committed reversible err [sic] in holding a health plan cannot recover from a 'no fault' medical payments insurer."**
>
> **"II. The trial court committed reversible err [sic] in holding a health [plan] must prove 'negligence' in order to recover from a 'no fault' medical payment insurer."**

{¶ 2} Having reviewed the record and requisite law, we affirm the trial court's judgment. The apposite facts follow.[2]

{¶ 3} Ronald Bonner was attending classes at Total Technical Services, Inc. ("Total Technical") when he injured his back. Mr. Bonner had health

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[1]Although on appeal, the clerk's office designated the appellant as University Hospitals Health System, in all the court papers below and in the appellate briefs, the plaintiff is referred to as QualChoice, Inc. Therefore, we will refer to the plaintiff as "QualChoice."

[2]This court ordered the parties to brief whether the instant appeal is a final, appealable order. The parties both agree the appeal is final, and we agree. On May 12, 2009, the trial court granted summary judgment in favor of Federal regarding QualChoice's claims. At that time, QualChoice's claims against Total Technical and Travelers Insurance remained pending. On July 16, 2009, the trial court entered an order stating, "Case is settled and dismissed. Attorneys to submit entry." On July 31, 2009, Federal, thinking the claims against Total Technical and Travelers Insurance had been resolved, filed its notice of appeal. However, because the attorneys had not yet submitted their settlement entry pursuant to the court order, the appeal was not yet final. Therefore, Federal Ins.' notice of appeal was premature. However, on September 25, 2009, the attorney's submitted their entry indicating the case was "settled and dismissed with prejudice as to Total Technical Services and Travelers Insurance only." Therefore, at that point, Federal's premature appeal became a final appealable order.

insurance coverage with QualChoice through his wife's employer. QualChoice allegedly paid $7,463 in medical bills on behalf of Mr. Bonner regarding the injury.

{¶ 4} Total Technical leased the space from the owner of the property, 8700 BrookPark LLC ("BrookPark"), which had a general liability policy with Federal Insurance. QualChoice filed suit against Federal [3] seeking reimbursement for the medical expenses it paid on Mr. Bonner's behalf under Federal's no fault medical payment clause. It did so, even though the injury was not caused by any defect on the property.

{¶ 5} Federal filed a motion for summary judgment arguing that it had no duty to reimburse QualChoice because Mr. Bonner was not a named insured under Federal's policy, nor was he an intended third party beneficiary. Federal also argued that the law does not allow QualChoice to sue the insurer before it has obtained judgment against the insured. QualChoice did not include BrookPark as a party.

{¶ 6} QualChoice opposed the motion arguing it was not required to sue BrookPark because the general liability policy that BrookPark had with Federal stated that it would make medical payments of the party injured on

[3]QualChoice also filed suit against Total Technical Services and its insurance carrier, Travelers Insurance; the claims against these defendants were settled and dismissed with prejudice.

the property regardless of fault. The trial court granted Federal's motion for summary judgment, without opinion.

{¶ 7} QualChoice's two assigned errors will be addressed together because they both concern whether Federal's general liability policy permits QualChoice to seek subrogation for medical payments it made on Mr. Bonner's behalf.

{¶ 8} We review an appeal from summary judgment under a de novo standard of review. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 746 N.E.2d 618, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212; *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 699 N.E.2d 534. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion that is adverse to the non-moving party. We conclude Federal was entitled to judgment as a matter of law.

{¶ 9} QualChoice contends that it can sue Federal directly without first obtaining a judgment against Federal's insured, BrookPark, because it is

seeking recovery for medical payments under Federal's "no fault" clause. Under the policy section regarding medical expense coverage, the policy states:

> **"Subject to the *terms and conditions of this insurance,* we will pay medical expenses for bodily injury caused by an accident to which this coverage applies. * * * We will make these payments regardless of fault." (Emphasis added.) Federal CGL Policy at 4.**

{¶ 10} We cannot read this provision in isolation. A contract is to be read as a whole and the intent of each part gathered from a consideration of the whole. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 1997-Ohio-202, 678 N.E.2d 519. If it is reasonable to do so, we must give effect to each provision of the contract. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, at ¶16. Under the section entitled "Legal Action Against Us," the policy states:

> **"No person or organization has a right under this insurance to:**
>
> *** join us as a party or otherwise bring us into a suit seeking damages from an insured; or**
>
> *** sue us on this insurance unless all of the terms and conditions of this insurance have been fully complied with.**

"A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual:

*** trial in a civil proceeding; or**

*** arbitration or other alternative dispute resolution proceeding; but we will not be liable for damages that are not payable under the terms and conditions of this insurance or that are in excess of applicable Limits of Insurance." Federal CGL Policy at 22.**

{¶ 11} Reading the policy in its entirety as we are required to do, it is clear that the policy's no fault coverage applies when a judgment against Federal's insured is obtained, or when the insured has entered into a settlement agreement. The no fault provision allows the insured to settle the case and have Federal pay medical expenses without regard to fault. This interpretation of the policy is consistent with Ohio insurance law. Ohio does not permit an injured party to sue an insurance company, of which it is not an insured, directly without first obtaining a judgment against the tortfeasor. *Chitlik v. Allstate Ins. Co.* (1973), 34 Ohio App.2d 193, 299 N.E.2d 295; R.C. 3929.06(B);[4] R.C. 2721.02(B).[5]

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[4]R.C. 3929.06(B) provides: "Division (A)(2) of this section does not authorize the commencement of a civil action against an insurer until a court enters the final judgment described in division (A)(1) of this section in a distinct civil action for damages between the plaintiff and an insured tortfeasor * * *."

[5] R.C. 2721.02(B) provides: "A plaintiff who is not an insured under a

{¶ 12} QualChoice, in spite of Ohio law and the language in Federal's policy, argues that this principle does not apply when seeking subrogation of medical payments under an insured's no fault medical payment provision. In so arguing, QualChoice refers to several cases, including this court's recent decision of *QualChoice, Inc. v. Nationwide Ins. Co.*, Cuyahoga App. No. 91964, 2009-Ohio-1696. These cases are distinguishable from the instant case.

{¶ 13} All of the cases cited by QualChoice, except one, concerned no fault clauses within an auto insurance policy, not general liability insurance. In those cases, the person injured sued their own insurance company or fell under the policy definition of who was an insured. In *QualChoice, Inc.*, we concluded there was an issue of fact whether the plaintiff had the owner's permission to use the vehicle, which was a requirement for meeting the policy's definition of who was an insured. We reversed the summary judgment and remanded the matter for further proceedings. Therefore, that case is not dispositive of the instant case.

{¶ 14} *QualChoice, Inc. v. Nationwide Ins. Co.*, 11th Dist. No. 2007-l-172, 2008-Ohio-6979, also concerned an auto insurance policy. In that case,

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particular policy of liability insurance may not commence against the insurer that issued the policy an action or proceeding under [the declaratory judgment chapter] that seeks a declaratory judgment or decree as to whether the policy's coverage provisions extend to an injury, death, or loss to person or property * * * until a court of record enters in a distinct civil action for damages between the plaintiff and that insured as a tortfeasor a final judgment awarding the plaintiff damages for the injury, death, or loss to person or property involved."

QualChoice was able to proceed directly against the insurance company because QualChoice's insured was also an insured under Nationwide's insurance policy. In the instant case, Mr. Bonner is not an insured under Federal's policy.

{¶ 15} In *Long v. Lindsey* (June 14, 2001), 10th Dist. No. 00AP-1253, Long was a passenger in Lindsey's vehicle, which was involved in an accident with an uninsured motorist. Even though Lindsey was not at fault, Long was able to sue Lindsey's uninsured motorist carrier directly under her no fault medical reimbursement clause, because as a passenger she qualified as an insured under the policy.

{¶ 16} In *Thatcher v. Sowards*, 4th Dist. No. 98CA2613, 2000-Ohio-1979, the medical insurance provider for a passenger in a car that was involved in an accident, was able to recover the passenger's medical expenses from the driver's auto insurance policy. In that case, "insured" for purposes of reimbursement of medical expenses was defined as "any person occupying [the] covered auto."

{¶ 17} In the last case, *QualChoice, Inc. v. Brotherhood Ins. Co.*, 5th Dist. No. 06CA00020, 2007-Ohio-226, a volunteer worker was injured on the premises of a church. The church had general liability insurance with Brotherhood Insurance. The court in that case held that the issue whether QualChoice could sue Brotherhood Ins. Co. directly was waived because it

was never raised at the trial court level. The court, however, went on to conclude that QualChoice's insured was an insured under Brotherhood's policy because volunteer workers were defined as insureds under the policy.

{¶ 18} As we stated before, there is no question that Mr. Bonner was not an insured under the Federal Insurance Policy. There was nothing in Federal's policy that would hold Federal liable for injury to a business invitee of BrookPark's lessee. Therefore, we conclude based on Ohio law and the language within the policy, the trial court did not err in granting summary judgment to Federal.

{¶ 19} Additionally, QualChoice's opposition to Federal's motion for summary judgment was deficient. QualChoice failed to provide evidence that Mr. Bonner was in fact its insured and that he incurred medical expenses related to being injured at Total Technical that were paid by QualChoice. QualChoice did not attach Mr. Bonner's health policy nor did it attach copies of Mr. Bonner's medical bills. Without proof of these basic facts, summary judgment was appropriate. Accordingly, QualChoice's first and second assigned errors are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR