

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

Mark A. Roeser, et al.

Court of Appeals No. E-09-003

Appellants

Trial Court No. 2008-CV-0458

v.

State Farm Insurance Companies

DECISION AND JUDGMENT

Appellee

Decided: July 10, 2009

* * * * *

James W. Hart and Carl J. Kamm III, for appellants.

Paul D. Eklund, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals a summary judgment issued by the Erie County Court of Common Pleas in favor of an insurer in a coverage dispute. For the reasons that follow, we reverse.

{¶ 2} Appellant, Mark A. Roeser,¹ worked as an auto mechanic at a Sandusky Ford dealership. On August 1, 2005, appellant's employer asked him to quiet the brakes on a new vehicle owned by the dealership. Appellant repaired the brakes and took the car for a test drive to verify his work.

{¶ 3} Within minutes of leaving the dealership, appellant reduced speed to accommodate a car slowing to make a right turn in front of him. At that point the vehicle appellant was driving was struck in the rear by a car driven by Timothy Harris. It is undisputed that Harris's negligence caused the collision. Appellant was injured.

{¶ 4} Appellant pursued and apparently settled a personal injury claim with Harris. He also initiated a claim for underinsured motorist's coverage from his own insurer, appellee State Farm Mutual Insurance Co. When appellee denied his claim, appellant brought the suit that underlies this appeal. Appellant sought a declaration of coverage. He coupled with this an assertion that appellee had denied his claim in bad faith.

{¶ 5} Appellee answered appellant's complaint, responding that it denied coverage because appellant's policy excluded coverage for an injury incurred when the insured was operating a vehicle provided for his regular use and not insured by appellee. Moreover, appellee insisted, its denial of coverage was made in good faith.

{¶ 6} Following discovery, the matter was submitted to the court on cross motions for summary judgment. On consideration, the trial court concluded that

¹Mark Roeser's wife, Marlene Roeser, is also an appellant by virtue of a loss of consortium claim. For clarity we shall refer to Mark Roeser as appellant.

appellant was not entitled to coverage, granted appellee's motion and denied appellant's. From this judgment, appellant now brings this appeal. Appellant sets forth the following two assignments of error:

{¶ 7} "I. The trial court erred in granting the motion of defendant for summary judgment, ruling that plaintiffs Mark and Marlene Roeser were not entitled to underinsured motorist insurance coverage from defendant State Farm Mutual Auto Insurance Company.

{¶ 8} "II. The trial court erred by denying the motion of plaintiffs for partial summary judgment."

{¶ 9} Appellate review of an award of summary judgment is de novo, employing the same standard for summary judgment as a trial court. *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} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112,

syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶ 12} There are no questions of material fact in this matter. The only issue is whether, as a matter of law, appellant is entitled to underinsured motorist coverage under the terms of the insurance contract as applied in this factual context.

{¶ 13} This insurance policy issued by appellee to appellant provides:

{¶ 14} "We will pay damages for ***bodily injury*** an insured: 1. is legally entitled to collect from an ***uninsured motorist*** * * *." An uninsured motorist is defined in the policy to include, "the owner or operator of: 1. a ***motor vehicle*** * * * (b) insured or bonded for bodily injury at the time of the accident; but * * * (2) the limits of liability: (a) are less than the limits ***you*** carry for uninsured motor vehicle coverage under this policy * * *." Appellee admitted in its answer that Harris's bodily injury coverage was less than the limits of appellant's "U" coverage in the policy at issue. As a result, appellant is presumptively covered.

{¶ 15} The policy, however, excludes coverage, "2. FOR DAMAGES ARISING OUT OF AND DUE TO **BODILY INJURY** TO AN **INSURED**: a. WHILE OPERATING OR **OCCUPYING A MOTOR VEHICLE** OWNED BY, LEASED TO, FURNISHED TO, OR AVAILABLE FOR THE REGULAR USE OF **YOU** * * * IF THAT **MOTOR VEHICLE** IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY. * * *." It is this provision that is the source of contention here.

{¶ 16} Here, as he did in the trial court, appellant directs our attention to this court's decisions in *Auto-Owners Ins. Co. v. Merillat*, 167 Ohio App.3d 148, 2006-Ohio-2491 and *Hartman v. Progressive Max Ins. Co.*, 6th Dist. No. WM-05-007, 2006-Ohio-1629. Appellant suggests that by applying to the facts of this case the five "signposts" utilized in those decisions, it could only be concluded appellant had not been provided the car in which he was injured for regular use.

{¶ 17} It is undisputed, appellant insists, that he only drove the car once. Permission for his use of the car was only in the scope of his repair of the vehicle. He could not drive that car or any other owned by the dealership without authorization. His authorization to drive this car was only in connection with a test of his repair. He had been driving the car for less than five minutes. All of these facts, appellant maintains, militate against a conclusion that the car in which he was injured had been provided to him for his regular use.

{¶ 18} Appellee responds, pointing to appellant's deposition testimony, that he daily test drove vehicles, arguing that this is sufficient to demonstrate that appellant's

employer provided or made available to him a vehicle for his regular use. Appellee insists that it is of no consequence that appellant had never before been in the vehicle in which he was injured, nor was it of any import that his time in this vehicle was measured in minutes. Appellant testified that he test drove his employer's vehicles on a regular basis and this is sufficient. Appellee cites *Kenney v. Employers' Liab. Assurance Corp.* (1966), 5 Ohio St.2d 131, and cases from out-of-district for the proposition that one does not need to be assigned a specific vehicle to be considered in regular use of a provided vehicle.

{¶ 19} The trial court found *Merillat* "inapposite," because it involved an analysis of liability coverage rather than uninsured motorist coverage. Instead, the court relied on *Kinney* and out-of-district cases to conclude that appellant was excluded from coverage by the "regular use" provision. On this conclusion, the court granted appellee's summary judgment motion and denied appellant's.

{¶ 20} In *Merillat*, ¶ 43, we noted that the phrase "regular use" was unambiguous, but "fact specific" in its determination. We reiterated our previous adoption of five "signposts" as an analytical structure to determine whether a vehicle at issue was provided for an insured's "regular use." Id. at ¶ 44, citing *Hartman v. Progressive Max. Ins. Co.*, supra, at ¶ 13, which cited the court's original adoption of the test in *Nationwide Ins. Co. v. Siefert* (Aug. 8, 1980), 6th Dist. No. L-79-361.

{¶ 21} "They include '(1) whether the vehicle was available most of the time to the insured; (2) whether the insured made more than mere occasional use of the vehicle; (3)

whether the insured needed to obtain permission to use the vehicle; (4) whether there was an express purpose conditioning use of the vehicle; and (5) whether the vehicle was being used in an area where its use would be expected." *Merillat* at ¶ 44.

{¶ 22} Applying this framework to the facts in this matter, it is abundantly clear that appellant had not been provided the vehicle in which he was injured for his "regular use." (1) Neither this vehicle nor any other at the dealership was available to appellant for most of the time. (2) Appellant's use of this vehicle or any other was, at best, occasional. (3) Appellant's use of this vehicle or any other at the dealership required permission. There is nothing in the record suggesting that appellant had any authority to use any dealership vehicle at will. (4) Appellant's use of any vehicle owned by the dealership or its customers was only within the circumscribed scope of his duties as a mechanic. (5) There is nothing in the record to suggest that appellant was on any frolic or detour for his own purposes. Consequently, none of the five signposts articulated in the controlling precedents of this court points to a conclusion that appellant was provided the vehicle within which he was injured for his "regular use."

{¶ 23} With respect to the trial court's attempt to distinguish *Merillat* on the ground that it interpreted the liability portion of the insurance contract rather than "U" coverage, this ignores the *Hartman* case upon which *Merillat* was founded. *Hartman* was a "U" coverage case.

{¶ 24} Concerning the out-of-district cases upon which the court relied, these were fleet cases in which the driver spent most of his or her working day on one of several

vehicles provided by his or her employer. *Fleetwood v. Doe*, 8th Dist. No. 80877, 2002-Ohio-3907, ¶ 2 (bus driver); *Hostottle v. Nationwide Mut. Ins. Co.*, 8th Dist. No. 89036, 2007-Ohio-5857, ¶ 3 (police officer); *Brill v. Progressive Ins. Co.*, 8th Dist. No. 84665, 2005-Ohio-626, ¶ 6 (police officer); *McCall v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 23601, 2007-Ohio-5109, ¶ 2 (sanitation worker); *Yoder v. Thorpe*, 10th Dist. No. 07AP-225, No. 07AP-302, 2007-Ohio-5866, ¶ 2 (police officer); and *Farm Bureau Mut. Ins. Auth. Co. v. Boecher* (1942), 37 Ohio Law Abs. 553, 554 (used car salesman permitted take home vehicles). Without doubt these are examples of when furnished vehicles were available most of the time in satisfaction of signpost one and in contrast to appellant's access to his employer's vehicles.

{¶ 25} The trial court purports to follow *Kenney v. Employers Liability Assur. Group, Ltd.*, supra, which involved a police patrol officer. *Kenney*, at 135, concluded that the officer was furnished a vehicle for his "regular use," interestingly, arriving at this conclusion in at least partial reliance on *Farm Bureau Mut. Auto. Ins. Co. v. Marr* (D. N.J. 1955), 128 F. Supp. 67. *Marr*, at 70, first articulated the five signpost analysis adopted and consistently used in this court for determining whether "regular use" has been demonstrated. *Siefert*, supra. In that regard, *Kenney* in no way conflicts with our jurisprudence on this issue.

{¶ 26} It is abundantly clear that the "regular use" exclusion is not applicable in this case. Accordingly, appellant's first assignment of error is well-taken. Concomitantly, since appellee puts forth no alternative justification for denial of

coverage, appellant is entitled to his requested partial summary judgment of a declaration of coverage. As a result, appellant's second assignment of error is well-taken. The "bad faith" issue is a matter to be considered on remand.

{¶ 27} On consideration whereof, the judgment of the Erie County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. Appellee is ordered to pay costs 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James R. Sherck, J.
CONCUR.

JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

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:
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