IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1329

Filed: 6 December 2016

Currituck County, No. 14 CVS 396

GARY WARREN SPRUILL, Plaintiff,

v.

WESTFIELD INSURANCE COMPANY, ALLSTATE PROPERTY and CASUALTY INSURANCE COMPANY, Defendants.

Appeal by defendant from order entered on or about 23 September 2015 by Judge J.C. Cole in Superior Court, Currituck County. Heard in the Court of Appeals 26 April 2016.

Hornthal, Riley, Ellis & Maland, L.L.P., by L.P. Hornthal, Jr. and L. Phillip Hornthal, III, for plaintiff-appellee.

The Valentine Law Firm, by Kevin N. Lewis, for defendant-appellee Allstate Property and Casualty Insurance Company.

McAngus, Goudelock & Courie, PLLC, by Heather G. Connor and Jeffrey B. Kuykendal, and Harman, Claytor, Corrigan & Wellman, by Carson W. Johnson, for defendant-appellant Westfield Insurance Company.

STROUD, Judge.

Defendant Westfield Insurance Company ("defendant Westfield") appeals from the superior court's order granting plaintiff's amended motion for summary judgment and denying defendant Westfield's motion for summary judgment. We find that the

trial court did not err, as plaintiff was properly considered an "insured" person under defendant Westfield's policy and the court properly concluded that defendant Westfield and defendant Allstate's policies should be pro-rated.

Facts

On 14 November 2012, plaintiff, an employee of VICO Construction Corporation ("VICO"), was directing traffic on U.S. Highway 13 when he was hit by a car traveling northbound. At the time, plaintiff was acting in the course and scope of his employment with VICO to assist his co-worker with backing a truck and trailer onto the highway from one of VICO's work sites. Plaintiff -- a superintendent with VICO who primarily supervised site work -- was at a Wal-Mart construction site. At the end of the work day, plaintiff's boss, Sam Viola ("Viola"), arrived at the jobsite with a trailer of manhole covers attached to his truck, which was owned by VICO. After plaintiff helped unload Viola's truck, Viola tried to back the truck out to leave the site but "he kept getting stuck in the construction entrance stone."[1] Viola then asked plaintiff and another worker, Juan Andra, to hold traffic so that Viola could back the truck and trailer out of the construction site onto Highway 13.

[1] Plaintiff explained in his 19 June 2014 deposition that "In a construction entrance you have to put in the big rocks and then the little rock underneath it, sort of a standard DOT entrance[.]" In addition, he stated that Viola could not just turn around and drive out because "they had soil cemented the entrance with the lime stabilization, and they didn't want us driving on it. It was wet and it has to set and cure overnight."

Plaintiff and Andra walked out into the median of the highway, and plaintiff walked to the south side of the jobsite while Andra stood on the north side to stop traffic in the opposite direction. Viola made several unsuccessful attempts to back the truck out onto the highway. After stopping traffic three times, plaintiff let the traffic on his side go and then walked into the median. Plaintiff wore an orange and yellow reflective vest and was directing traffic while standing within the median of the highway when he was hit and injured. Plaintiff "sustained catastrophic permanent personal injuries, including multiple fractures of his left leg, fractures of both ankles and internal injuries, which have resulted in multiple surgeries; well in excess of $200,000 in medical expense, loss of income and other special damages; grievous suffering of body and mind; and expensive permanent disabilities[.]"

Plaintiff received workers compensation benefits -- including full medical benefits and indemnity -- for the accident through defendant Westfield, which issued a workers compensation policy to VICO. In addition, defendant Westfield also issued a commercial package policy to VICO in Chesapeake, Virginia, which includes business auto coverage with a $1,000,000.00 limit for uninsured/underinsured motorist coverage. The uninsured motorist endorsement in defendant Westfield's policy provides the following in its "Other Insurance" provision for underinsured motorist coverage:

> d. If the injured person is entitled to underinsured motorists coverage under more than one policy, the

> following order of priority applies and any amount "available for payment" shall be credited against such policies in the following order of priority:
>
> (1) The policy covering a motor vehicle "occupied" by the injured person at the time of the "accident".
>
> (2) The policy covering a motor vehicle not involved in the "accident" under which the injured person is a named insured.
>
> (3) The policy covering a motor vehicle not involved in the "accident" under which the injured person is other than a named insured.
>
> If there is more than one insurer providing coverage under one of the payment priorities set forth in Paragraph d, above, we will pay only "our" share of the "loss". "Our" share is the proportion that "our" limit of liability bears to the total of all limits applicable on the same level of priority.

Plaintiff also had a personal automobile liability policy with defendant Allstate that affords up to $250,000.00 in underinsured motorist coverage. The Allstate policy contained the following provision:

> **Other Insurance**
> If this policy and any other auto insurance policy apply to the same accident, the maximum amount payable under all applicable policies for injuries to an **insured** caused by an **uninsured motor vehicle** shall be the sum of the highest limit of liability for this coverage under each such policy.
>
> In addition, if there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with

> respect to a vehicle you do not own shall be excess over any other collectible insurance.

Plaintiff filed an amended complaint on 28 October 2014 against Westfield Insurance Company ("defendant Westfield"), Allstate Property and Casualty Insurance Company ("defendant Allstate"), Discovery Insurance Company, and the driver of the vehicle that hit him, Gabriela Alfaro. The superior court subsequently entered a consent order dismissing Discovery Insurance Company and Mr. Alfaro as parties, finding that they "are not indispensable parties to this action and, by consent of the other parties, . . . should be dismissed as parties herein."

Plaintiff asserted in his complaint that he is entitled to recover more than $250,000.00 in damages from the legally responsible parties. He described the controversy at issue in his complaint as whether he is entitled to underinsured motorist coverage from defendant Westfield and if so, whether the underinsured motorist coverage afforded by defendant Allstate is secondary to defendant Westfield's primary coverage policy; and finally, whether the underinsured coverage afforded under both policies were "pro-rata primary[.]"

Defendant Westfield filed a motion for summary judgment on 15 June 2015, arguing that its insurance policy "does not provided [sic] underinsured motorist coverage to [p]laintiff" and that plaintiff "is not entitled to underinsured motorist benefits under the applicable Virginia law." Plaintiff responded with his own motion for summary judgment, followed by an amended summary judgment motion on or

about 9 July 2015, asking the superior court to enter an order: "(1) declaring that [defendant Westfield] affirmatively provides underinsured motorist coverage to the plaintiff under a policy of insurance for claims for damages sustained as more specifically pled in his Amended Complaint; and (2) declaring the priorities of the underinsured motorist coverage afforded to plaintiff under the subject policies issued by Westfield and [defendant Allstate]."

The parties submitted a stipulation to the court on or about 28 July 2015 containing various exhibits regarding the insurance policies and other evidence that they agreed "may be admitted into evidence without further authentication or proof and without objection." The superior court entered an order on or about 23 September 2015 allowing plaintiff's amended motion for summary judgment and denying defendant Westfield's motion for summary judgment. The court also concluded that plaintiff was entitled to declaratory judgment, pursuant to Rule 57 of the Rules of Civil Procedure, finding:

> A. That defendant Westfield affords $1,000,000.00 in Underinsured Motorist Coverage . . . to plaintiff for his injuries and damages alleged in Currituck County Superior Court File No. 13-CVS-377;
>
> B. That Allstate has admitted that it affords $250,000.00 in Underinsured Motorist Coverage, under its policy filed herein as Exhibit B, to plaintiff for his injuries and damages alleged in the aforementioned civil action; and
>
> C. That the Underinsured Motorist Coverage afforded to plaintiff under the aforementioned Westfield and Allstate policies shall be pro-rated between Westfield

and Allstate according to their respective coverages.

Defendant timely appealed to this Court.

Discussion

I. Westfield Policy

On appeal, defendant Westfield first argues that the trial court erred in finding that defendant Westfield's policy affords underinsured motorist coverage to plaintiff for his damages in the underlying lawsuit. Defendant Westfield argues that plaintiff should not be considered an "insured" under defendant Westfield's policy because he was not "occupying" the truck at the time he was injured.

First, we note that Virginia law applies to this issue, as our Supreme Court has made clear: "[T]he general rule is that an automobile insurance contract should be interpreted and the rights and liabilities of the parties thereto determined in accordance with the laws of the state where the contract was entered even if the liability of the insured arose out of an accident in North Carolina." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 465-66 (2000). Furthermore, defendant Westfield admitted in its answer that it "has denied UIM coverage to [p]laintiff pursuant to the terms and provisions of the Westfield policy and *Virginia law* where the policy was issued and delivered." (Emphasis added).

The Virginia Supreme Court addressed a very similar situation in *Slagle v. Hartford Ins. Co. of the Midwest*, 267 Va. 629, 594 S.E.2d 582 (2004). In *Slagle*, the

plaintiff -- VICO's vice-president and construction manager -- was injured after being struck by a motor vehicle while standing behind and directing another VICO employee operating a tractor-trailer unit. *Id.* at 631-32, 594 S.E.2d at 583. The Virginia Supreme Court held that the plaintiff "was an insured entitled to the underinsured motorist coverage applicable to [the tractor-trailer his co-worker was driving.]" *Id.* at 638, 594 S.E.2d at 587.

In reaching this conclusion, the *Slagle* Court evaluated whether the insured tractor-trailer was being used as a "vehicle" at the time Slagle was hit and injured and whether Slagle was himself using it in that capacity. *Id.* at 637, 594 S.E.2d at 587. The Virginia Supreme Court found that "there was a causal relationship between the incident in which Slagle was injured and the employment of the tractor-trailer as a vehicle because Slagle's acts in assisting the driver of that vehicle were an integral part of Slagle's mission to locate the construction equipment at a particular place on his company's construction site." *Id.* at 637-38, 594 S.E.2d at 587. It also noted that "[i]n reaching this conclusion . . . it was not necessary for Slagle to have physical contact with the tractor-trailer to assist the driver. . . . Similarly, it was not necessary for Slagle to have previously occupied or immediately intended to occupy the tractor-trailer to use that vehicle to accomplish his mission." *Id.* at 638, 594 S.E.2d at 587.

Here, like in *Slagle*, plaintiff was not physically occupying the VICO truck, but he was acting to assist the driver of the vehicle when he was hit and injured. Plaintiff was directing traffic for the truck and helping the driver to safely back the VICO vehicle onto the roadway. Unlike cases where someone was riding in a vehicle to a location and then doing something unrelated to the vehicle at the time of the accident, plaintiff was acting to direct traffic so that the truck could get out of the VICO construction site. There was a clear "causal relationship between the incident and the employment of the insured vehicle as a vehicle" and "as an integral part of his mission." *Id.* at 636, 594 S.E.2d at 586. As in *Slagle*, plaintiff's actions constitute "use" of the insured vehicle as a vehicle, rendering plaintiff covered under Virginia law.

Defendant Westfield cites multiple cases to support its contention that plaintiff was not "using" the vehicle at the time he was injured, but none of those cases meet the requirement that the plaintiff's injury must result from the "use" of the insured vehicle as a vehicle as explained in *Slagle*. *See, e.g.*, *State Farm Mut. Ins. Co. v. Powell*, 227 Va. 492, 502-03, 318 S.E.2d 393, 397-98 (1984) (accident and subsequent injury when gun discharged from gun rack in truck used as a gathering place did not arise from "use" of the vehicle in question and was not covered by State Farm insurance policy); *Insurance Co. of North America v. Perry*, 204 Va. 833, 838, 134 S.E.2d 418, 421 (1964) (police officer struck by car 164 feet from his parked cruiser

while serving a warrant not injured while "using" the police cruiser and therefore not an insured under policy); *U.S. Fire Ins. v. Parker*, 250 Va. 374, 378, 463 S.E.2d 464, 466 (1995) (injured employee not "using" parked pickup truck as a vehicle when injured, though it was being used as a safety barrier, to unload plans, and for communications with supervisor, because "the truck merely was used as a means of transportation so that Parker could complete her landscaping duties."); *Simpson v. Virginia Municipal Liab. Pool*, 279 Va. 694, 701, 692 S.E.2d 244, 248 (2010) (deputy sheriff injured when he tackled and handcuffed suspect after pursuit in patrol car not "using" vehicle at time of injury because injury occurred after the pursuit when both left their vehicles and suspect "was unquestionably in custody when he was tackled and taken to the ground.")

The factual situation here is almost identical to the situation presented in *Slagle*, and we are bound to follow *Slagle*. Plaintiff was assisting the backing up of the insured vehicle onto the highway, creating a direct causal relationship between the insured vehicle and plaintiff's injury. Thus, plaintiff's injury occurred from using the truck as a vehicle, rendering plaintiff an insured. Accordingly, we find that the trial court did not err in granting plaintiff's amended motion for summary judgment, denying defendant Westfield's motion for summary judgment, and determining that plaintiff is entitled to declaratory judgment on this issue.

II. Pro Rata Division

Defendant Westfield next argues that the trial court erred in finding that defendant Westfield's underinsured motorist policy and defendant Allstate's policy should be pro-rated according to their respective coverages. "Where it is impossible to determine which policy provides primary coverage due to identical 'excess' clauses, the clauses are deemed mutually repugnant and neither will be given effect." *Iodice v. Jones*, 133 N.C. App. 76, 78, 514 S.E.2d 291, 293 (1999) (citation, quotation marks, and ellipses omitted).

The trial court's order found that defendant Westfield affords $1,000,000.00 in underinsured motorist coverage and that defendant Allstate has admitted it affords $250,000.00 in underinsured motorist coverage under its policy. The court then concluded that the underinsured motorist coverage afforded to plaintiff under these policies "shall be pro-rated between [defendants] Westfield and Allstate according to their respective coverages."

Plaintiff presented no argument on appeal regarding this issue between defendant Westfield and defendant Allstate, except to note that he agreed that "where, as here, neither the facts nor the insurance terms are in dispute, resolution of the controversy is a question of law for the court." Defendant Allstate points out that both its policy and defendant Westfield's policy contain "other insurance" clauses setting forth alternative priorities of coverage for underinsured motorist purposes. Defendant Allstate relies on *Sitzman v. Government Employees Ins. Co.*, 182 N.C.

App. 259, 264, 641 S.E.2d 838, 842 (2007), a prior decision by this Court that involved similar Virginia and North Carolina "other insurance" provisions. In *Sitzman*, this Court noted that "Like North Carolina law, Virginia law also provides that when 'other insurance' clauses of two policies are *of identical effect* in that they operate mutually to reduce or eliminate the amount of collectible insurance available, neither provides primary coverage and a pro rata distribution is appropriate." *Id.* (citation, quotation marks, ellipses, and brackets omitted) (emphasis added).

Ultimately, this Court found in *Sitzman* that a North Carolina GEICO policy was primary under the "other insurance" clause in both policies, so "the excess insurance clauses [were] not mutually repugnant." *Id.* at 267, 641 S.E.2d at 844. First, under the Virginia policy, the Virginia insurer, Harleysville, had third priority since its insured vehicles were not involved in the accident and Sitzman was not a named insured under the policy, while the GEICO policy had second priority since its policy applied to a vehicle not involved in the accident under which Sitzman was named an insured. *Id.* Thus, under the Virginia policy, Harleysville had a lower priority and would be excess coverage, while GEICO, with a higher priority, would be primary. *Id.* Under the North Carolina GEICO policy, Sitzman was an insured and was riding a vehicle he owned (his bicycle) at the time of the accident, rendering GEICO primary under its excess clause provision as well. *Id.* at 263, 641 S.E.2d at 841. Thus, under the excess clause of both policies, GEICO was primary, so the

provisions were not mutually repugnant and could be read harmoniously, resulting in the North Carolina GEICO policy being primary and the Virginia Harleysville policy being secondary. *Id.* at 267, 641 S.E.2d at 844.

Defendant Westfield argues that the "other insurance" clauses in the policies in the present case are not identical and, therefore, not "mutually repugnant," so "the court should apply the facial policy language to determine distribution." Mutual repugnancy, however, comes not just from identical policy form but also when policies are identical in *effect*. *See, e.g, Nationwide Mut. Ins. Co. v. Integon Nat. Ins. Co.*, 232 N.C. App. 44, 50, 753 S.E.2d 388, 393 ("[W]hen policies are *not* identical in form or effect, they are not mutually repugnant."), *disc. review denied*, 367 N.C. 496, 757 S.E.2d 905 (2014).

In *Nationwide*, this Court laid out the procedure for evaluating whether the language in multiple excess clauses is mutually repugnant:

> First, the language used in the excess clause must be identical between the excess clauses of the respective UIM policies, or 'mutually repugnant.' If the language is not identical, the inquiry ends, as the excess policies are not mutually repugnant, and the trial court may apply the facial policy language to determine distribution.
>
> If this first prong is satisfied and the policies are repugnant, the second inquiry is to determine whether the respective UIM carriers are in the same class; if so, the trial court must apportion liabilities and credits on a pro rata basis.
>
> Only after considering the 'class' of the claimant do

> we reach the third step of the inquiry. If separate classes exist, a primary/excess distinction may be drawn despite identical language. Such identical clauses may allow a finding of non-repugnancy after applying the policies' definitions, specifically relating to ownership identified in the policy.

Id. at 49, 753 S.E.2d at 392 (citations omitted).

In this case, although the language differs in each policy, each results in the named insurer as an excess provider within their respective provisions, leading to the result of two different excess providers and no primary. Thus, the policies are ultimately identical in *effect*, in that they lead to it being impossible to determine which policy -- if either -- provides primary coverage. This situation -- where the language in the policies is not identical, yet the individual terms of the policies place each respective carrier in the position of being an excess underinsured motorist provider -- does not seem to be outright addressed in *Nationwide*. But since both policies cannot be excess providers, and since the effect of the respective policy provisions is to cancel each other out, this is in fact a "mutually repugnant" result. *See Aetna Cas. & Sur. Co. v. Continental Ins. Co.*, 110 N.C. App. 278, 282, 429 S.E.2d 406, 409 (1993) ("When two policies both contain identical excess clauses, or excess clauses which are worded in such a way that it is impossible to distinguish between them or to determine which policy is primary, the clauses are deemed mutually repugnant and neither excess clause will be given effect.") (citation and quotation marks omitted).

Thus, we treat the provisions the same way we would in a typical mutual repugnancy scenario and go back to the default position of each policy, which is for each insurer to pay its proportion of the loss. *See, e.g., Nationwide Mut. Ins. Co.*, 232 N.C. App. at 50, 753 S.E.2d at 392 ("When mutually repugnant clauses exist, the multiple UIM carriers share both credits and liabilities pro rata[.]") Therefore, as the lower court properly concluded, excess coverage should be pro-rated between the insurers according to their respective liability limits.

Conclusion

Accordingly, we find that the trial court did not err in granting plaintiff's amended motion for summary judgment, denying defendant Westfield's motion for summary judgment, and determining that plaintiff is entitled to a declaratory judgment that defendant Westfield's policy affords $1,000,000.00 in underinsured motorist coverage, as plaintiff was properly considered an "insured" person under defendant Westfield's policy. In addition, we conclude that since defendant Westfield and defendant Allstate's policies contain competing other insurance provisions, the court properly concluded that the policies should be pro-rated according to their respective coverages. We therefore affirm the trial court's order.

AFFIRMED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).