

[Cite as *W. Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 2010-Ohio-6311.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

WEST AMERICAN INSURANCE COMPANY,	:	APPEAL NO. C-100012 TRIAL NO. A-0811147
	:	
Plaintiff-Appellee,	:	<i>DECISION.</i>
vs.	:	
	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:	
	:	
Defendant-Appellant,	:	
and	:	
	:	
WILLIAM BAUMGARDNER	:	
	:	
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: December 23, 2010

Terrence E. Kelly and Heis & Weinstrup, Co. L.P.A., for Plaintiff-Appellee,

William R. Gallagher and Gallagher, Gams, Pryor, Tallan & Littrell, L.P., for
Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

J. HOWARD SUNDERMANN, Judge.

{¶1} Defendant-appellant State Farm Automobile Insurance Company appeals from the trial court's entry denying its motion for summary judgment and granting summary judgment to plaintiff-appellee West American Insurance Company on West American's subrogation claim for uninsured motorist ("UM") benefits under State Farm's policy. For the reasons that follow, we reverse the judgment of the trial court.

{¶2} The following facts are undisputed. Kelly Uhlmansiek was a passenger in a vehicle driven by Jason Anderson when the vehicle was struck by an uninsured motorist, defendant William Baumgardner. Uhlmansiek was injured in the collision. At the time of the collision, Uhlmansiek's mother had in effect an automobile insurance policy with West American that contained UM coverage. The Anderson vehicle was insured by State Farm. The State Farm policy also contained UM coverage. Uhlmansiek made a claim for UM coverage under both policies. State Farm denied Uhlmansiek's claim because it claimed she did not qualify as an insured under the UM coverage of the policy. Thereafter, West American paid Uhlmansiek \$12,450 in settlement of her UM claim.

{¶3} West American then filed suit against Baumgardner and State Farm to recover the monies it had paid in settlement of Uhlmansiek's UM claim. West American alleged Baumgardner had negligently operated his vehicle. West American also claimed to be subrogated to the rights of Uhlmansiek to pursue UM benefits under the Andersons' State Farm policy. West American alleged that State Farm had breached the insurance contract and had acted in bad faith by denying Uhlmansiek's

UM claim. West American subsequently moved for and was granted a default judgment against Baumgardner for \$12,200.

{¶4} State Farm then filed a motion for summary judgment. It asked the court to declare that there was no UM coverage available to Uhlmansiek under the Andersons' State Farm policy because she did not qualify as an "insured" under the policy. West American filed a cross-motion for summary judgment seeking a declaration that Uhlmansiek was an insured under the State Farm policy; that State Farm's policy provided primary coverage to Uhlmansiek; and that West American's policy only provided excess coverage under the circumstances.

{¶5} The trial court granted summary judgment to West American and denied State Farm's motion for summary judgment. In an agreed judgment entry, State Farm stipulated that the total amount of damages to Uhlmansiek was \$12,450. In exchange, West American dismissed with prejudice the bad faith claim against State Farm. This appeal followed.

{¶6} In its sole assignment of error, State Farm argues that the trial court erred in granting West American's motion for summary judgment and denying its cross-motion for summary judgment.

{¶7} "Summary judgment is appropriate where there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion. We review the entry of summary judgment as a matter of law under a de novo standard."¹

¹ *Morton v. Continental Casualty Co.*, 1st Dist. Nos. C-030771 and C-030799, 2004-Ohio-7126, at ¶6.

{¶8} State Farm argues that it is entitled to summary judgment on West American’s subrogation claim because its insured, Uhlmansiek, does not qualify as an insured under the UM coverage of the State Farm policy issued to the Andersons. We agree.

{¶9} State Farm’s policy defines who qualifies as an insured for purposes of UM/UIM coverage to include guest passengers only if such passengers do not have their own policies of UM coverage.

“Who Is an Insured

{¶10} “**Insured** – means the person or persons covered by Uninsured Motor Vehicle Coverage.

{¶11} “This is:

{¶12} 1. the first **person** named in the declarations;

{¶13} 2. his or her **spouse**;

{¶14} 3. their **relatives**; and

{¶15} 4. any other **person** who is not insured for uninsured motorist vehicle coverage under another vehicle policy while occupying your car * * *.”

{¶16} The Ohio Supreme Court has unequivocally ruled that an insurer issuing an automobile insurance policy may define the class of persons who qualify as insureds under that policy. In *Holliman v. Allstate Ins. Co.*,² the Ohio Supreme Court addressed a definition of “insured person” in an umbrella policy that was more restrictive than in the underlying policy. The Supreme Court rejected the argument that the more restrictive definition of an insured person contravened Ohio law by stating that: “Nothing in R.C. 3937.18 or [*Martin v. Midwestern Group Ins. Co.*

² 86 Ohio St.3d 414, 1999-Ohio-116, 715 N.E.2d 532.

(1994), 70 Ohio St.3d 478] prohibits the parties to an insurance contract from defining who is an insured under the policy.”³

{¶17} In *Wohl v. Swinney*,⁴ the Ohio Supreme Court considered the issue before this court, whether an insurer may restrictively define who qualifies as an insured under the UM coverage of a policy to exclude passengers who have their own UM coverage. The supreme court held that there is nothing ambiguous about an insurance policy definition for UM coverage that specifically defined as an insured: “[a]ny other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorists coverage under another policy.”⁵ The court, therefore, found “[a]s someone who was occupying the covered auto but who was a named insured for uninsured motorists coverage under another policy (his own), Slattery was not insured for UM coverage under Wohl’s motorist policy.”⁶

{¶18} A number of Ohio appellate courts have also enforced definitions similar to the one set forth in State Farm’s policy. In so doing, they have specifically rejected the argument that West American makes on appeal, namely that defining who is an insured based on their UM coverage under another policy, constitutes an “other insurance escape clause” that when coupled with the excess clause set forth in West American’s policy is invalid and unenforceable under the Ohio Supreme Court’s decision in *State Farm Mut. Auto Ins. Co. v. Home Indem. Co.*⁷ These courts have held that the *Home Indemnity* decision only applies to situations where two policies cover the same person, but have conflicting “other insurance” provisions. Thus, where an injured passenger having his own UM policy does not qualify as an insured

³ Id. at 417.

⁴ 118 Ohio St.3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, at ¶1.

⁵ Id. at ¶1.

⁶ Id. at ¶24.

⁷ (1970), 23 Ohio St.2d 45, 261 N.E.2d 128.

under the car owner's insurance policy, a court need not compare the effects of the other insurance clauses in the respective insurance contracts.

{¶19} In *Shepherd v. Scott*, for example, the Third Appellate District, citing *Holliman*, stated that “[i]t is perfectly within the province of an insurance provider to define who will be an insured.”⁸ The *Shepherd* Court, reviewed a definition almost identical to the definition in the State Farm policy before this court, and held that a passenger who had his own UM policy, did not qualify as an insured under the policy covering the car involved in the accident.⁹ In so doing, the Third Appellate District explicitly rejected the argument that the definition constituted an invalid and unenforceable escape clause designed to preclude coverage for an insured in the event of other coverage.¹⁰

{¶20} In *Keffer v. Central Mut. Ins. Co.*,¹¹ the Fourth Appellate District held that “nothing prohibits Central Insurance from defining who is an insured under the UIM policy provisions.”¹² In *Keffer*, the insurance policy had defined the term “insured” as: “1. You or any ‘family member.’ 2. Any other person occupying your covered auto who is not a named insured or an insured family member for UM/UIM coverage under another policy.”¹³ The Fourth Appellate District held that a guest passenger was limited to recovering UM coverage under his own policy under which he qualified as an insured.¹⁴ It relied upon the rationales expressed in case law from the Third, Eighth, and Tenth Appellate Districts, in rejecting an argument that

⁸ 3rd Dist. No. 5-02-22, 2002-Ohio-4417, at ¶19.

⁹ Id. at ¶11-24.

¹⁰ Id.

¹¹ 4th Dist. No. 06CA652, 2007-Ohio-3984.

¹² Id. at ¶16.

¹³ Id.

¹⁴ Id.

limiting the definition of an insured as Central Mutual had done in the case before it, had contravened R.C. 3937.18.¹⁵

{¶21} Similarly, in *Safeco Ins. Co. of Illinois v. Motorists Mut. Ins. Co.*,¹⁶ the Eighth Appellate District held that a definition in a Motorists Mutual insurance policy which excluded a passenger from qualifying as an insured for UM coverage where the passenger had his own UM coverage did “not violate the purpose nor the language of R.C. 3937.18, and that the passenger, therefore, was not an insured for purposes of UM/UIM coverage under the policy.”¹⁷ The Sixth, Ninth, and Tenth Appellate Districts have likewise, reached the same conclusion that guest passengers who had their own UM/UIM coverage would not qualify as insureds under the UM/UIM coverage of the policy covering the vehicle.¹⁸ These courts held that a definitional clause, which did not include guest passengers having their own UM coverage as additional insureds, did not constitute an escape clause, but rather was a permissible limitation on who qualified as an insured under the policy in the first instance.¹⁹

{¶22} Similarly in this case, State Farm’s policy excluded from its definition of an insured any person who is insured for UM coverage under another policy. Uhlmansiek was insured for UM coverage by West American. Consequently, she did not qualify as an insured under State Farm’s policy with the Andersons, and West American, as Uhlmansiek’s subrogee, was not entitled to recover UM coverage from

¹⁵ *Id.*; see, also, *Crabtree v. 21st Century Ins. Co.* 176 Ohio App.3d 507, 2008-Ohio-3335, 892 N.E.2d 925, at ¶18.

¹⁶ 8th Dist. No. 86124, 2006-Ohio-2063.

¹⁷ *Id.* at ¶25.

¹⁸ *Engler v. Stafford*, 6th Dist. No. L-06-1257, 2007-Ohio-2256, at ¶44; *Lightning Rod Mut. Ins. Co. v. Grange Mut. Cas. Co.*, 168 Ohio App.3d 505, 2006-Ohio-4411, 860 N.E.2d 1049, at ¶12-17; *Mitchell v. Motorists Mut. Ins. Co.*, 10th Dist. No. 04AP-589, 2005-Ohio-3988, at ¶22-30; *Ashcraft v. Grange Mut. Cas. Co.*, 10th Dist. No. 07AP-943, 2008-Ohio-1519, at ¶7-18.

¹⁹ *Engler*, supra, at ¶47-49; *Lightning Rod*, supra, at ¶15-16; *Mitchell*, supra, at ¶27-28; *Ashcraft*, supra, at ¶15-17.

State Farm. As a result, the *Home Indemnity* decision, which compared competing “other insurance” clauses does not apply. Based on the foregoing, we sustain State Farm’s sole assignment of error, reverse the judgment of the trial court, and remand this case to the trial court so that it may enter judgment for State Farm on West American’s subrogation claim.

Reversed and cause remanded.

CUNNINGHAM, P.J., and HENDON, J., concur.

Please Note:

The court has recorded its own entry this date.