[Cite as *Yates v. Estate of Ferguson*, 2010-Ohio-892.]

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

SHERRY YATES,

Plaintiff,

vs.

ESTATE OF JEFFERY R. FERGUSON,

Defendant,

and

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant,

and

SAFECO INSURANCE COMPANY OF ILLINOIS,

Defendant-Appellee.

APPEAL NO. C-090494
TRIAL NO. A-0808401

D E C I S I O N.

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: March 12, 2010

Timothy P. Heather, for Defendant-Appellant,

Jeffery A. Kaleda, for Defendant-Appellee.

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

WILLIAM L. MALLORY JR., Judge.

I. Statement of Facts and Procedural Posture

{¶1} On May 31, 2005, Jeffrey Ferguson was permissively driving an automobile belonging to Marcus and Allison DeGraff. Sherry Yates was a passenger. Ferguson crashed the car and Yates was injured. Both Ferguson and the DeGraffs owned automobile insurance policies, Ferguson with Allstate Insurance Company and the DeGraffs with Safeco Insurance Company of Illinois. Ferguson's Allstate policy and the DeGraffs' Safeco policy each had "other insurance" clauses that limited the amount paid on a claim if another insurance policy also applied to the same claim. The applicable language from the Allstate policy's "other insurance" clause read, "If an insured person is using a substitute auto or non-owned auto, our liability insurance will be excess over other collectible insurance." The applicable language from the Safeco policy's "other insurance" clause read, "If there is other applicable liability 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."

{¶2} Yates filed a civil lawsuit in March 2007 and named, among others, Ferguson, Allstate, and Safeco as co-defendants (Hamilton C.P. No. A-0702045).[1] At the outset, Allstate, believing it had the primary duty to pay for Ferguson's defense, provided legal counsel for Ferguson. During discovery, however, Ferguson's attorney and Allstate's counsel came to believe that Safeco, not Allstate, had the primary duty to defend Ferguson. Allstate's counsel purported to express this belief to Safeco's counsel on November 7, 2007. And on December 20, 2007, Ferguson's attorney sent

[1] Ferguson died on June 5, 2005. Throughout this decision, "Ferguson" and "Ferguson's Estate" are used interchangeably.

a letter to both Allstate's and Safeco's attorneys that informed them that he too believed that Safeco had the primary responsibility to furnish Ferguson's defense. In spite of this, Allstate continued to finance Ferguson's defense until Yates voluntarily dismissed the case on May 1, 2008.

{¶3} Yates refiled her lawsuit on September 8, 2008 (Hamilton C.P. No. A-080401). Again, Allstate continued to finance Ferguson's defense. However, on September 17, 2008, Allstate sent a letter to Safeco that formally tendered Ferguson's defense to Safeco. On October 21, 2008, Safeco rejected Allstate's tender in an email sent to Allstate.

{¶4} Both Allstate and Safeco filed competing motions for summary judgment with the trial court, each asking the trial court to declare which insurance company had the primary duty to represent Ferguson. Allstate argued that Safeco had the primary responsibility and also sought indemnification for legal expenses incurred on behalf of Ferguson for the first lawsuit, and for expenses incurred to date on Ferguson's behalf for the second lawsuit. Safeco argued that Allstate had voluntarily assumed Ferguson's defense during the first and second lawsuits, and, therefore, that it did not owe a duty to reimburse Allstate for expenses incurred on Ferguson's behalf. The trial court determined that Allstate had the primary responsibility to defend Ferguson. For this reason, it granted Safeco's motion for summary judgment and overruled Allstate's. This appeal followed.

{¶5} On appeal, Allstate brings forth two related assignments of error. Allstate asserts that the trial court erred in denying Allstate's motion for summary judgment. Allstate also argues that the trial court erred in granting Safeco's motion for summary judgment. Allstate asks this court to declare that Safeco had the

primary duty to finance Ferguson's defense, and to award it indemnification for legal fees it had paid on Ferguson's behalf in defense of the first and second lawsuits.

{¶6} Initially, we point out that R.C. 3937.21 states that "any disputes between insurers regarding the obligation to defend shall be settled without expense to the insured by agreement between the insurers involved or, if they fail to agree, by arbitration or a declaratory judgment proceeding." Although Allstate maintains that it was not primarily responsible for Ferguson's defense, it has continued to finance Ferguson's defense throughout both lawsuits. At no point has Ferguson been without legal counsel.

{¶7} Civ.R. 56(C) states that before summary judgment is granted, it must be determined that (1) there exists no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) from the evidence it appears that reasonable minds can come to but one conclusion, and with the evidence viewed most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.[2] Further, a ruling on summary judgment poses a question of law that is subject to a de novo standard of review.[3]

II. The Parties' Arguments and Statutory Language

{¶8} Allstate argues that, based upon the specific language of the two "other insurance" clauses in the policies, Safeco had the primary duty to provide Ferguson's defense. Specifically, Allstate points out that its "other insurance" clause is most commonly referred to as an "excess clause." In other words, if two or more policies applied to one claim, Allstate would only pay on the claim once the other policy's coverage limits had been reached. On the other hand, Safeco's "other

[2] *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 219, 631 N.E.2d 150.
[3] *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145, 147, 593 N.E.2d 286.

insurance" clause is referred to as a "pro rata clause." If two or more polices applied to one claim, Safeco would be obligated to make available its coverage limits in proportion to all other applicable limits. In Ohio, when one policy's excess clause and another policy's pro rata clause are in conflict, the pro rata clause provides the primary coverage. In such a circumstance, the pro rata clause would pay first until its limits are exhausted. Only then would the excess clause take effect and pay the remainder.[4]

{¶9} Safeco does not dispute Allstate's argument concerning the difference between excess clauses and pro rata clauses. Rather, Safeco argues that Allstate voluntarily assumed Ferguson's defense and, therefore, that R.C. 3937.21 relieved Safeco of its duty to defend Ferguson. In addition, Safeco maintains that Allstate failed to announce a reservation of its rights and was therefore estopped from tendering Ferguson's defense. To tender the defense at this stage of litigation, almost three years since the filing of the original lawsuit, Safeco argues, would unfairly prejudice Safeco. Under either theory, Safeco insists that Allstate should remain primarily liable, and that Allstate is not entitled to any indemnification.

{¶10} The applicable part of R.C. 3937.21 provides, "No insurance company issuing a policy of automobile or motor vehicle liability insurance shall be relieved of its contractual obligation to defend its insured against any *claim* on the basis of coverage for such claim being provided by any other policy, *unless the insurer of such other policy has assumed and is performing the obligation to provide such defense*." (Emphasis added.)

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[4] *Motorists Mut. Ins. Co. v. The Lumbermens Mut. Ins. Co.* (1965), 1 Ohio St.2d 105, 106, 205 N.E.2d 67, citing *Trinity Universal Ins. Co. v. Gen. Acc. Fire & Life Assur. Corp. Ltd.* (1941), 138 Ohio St. 488, 35 N.E.2d 836.

III. Yates's First Lawsuit and Allstate's Voluntary Assumption

{¶11} The record indicates that, at least throughout the first lawsuit, Allstate had voluntarily assumed primary responsibility for Ferguson's defense. Yates filed her initial complaint on March 2, 2007. Ferguson filed his answer on May 3, 2007. Over eight months after the lawsuit was first filed, on November 7, 2007, during Yates's deposition, Allstate first became aware that it might not have had primary responsibility for Ferguson's defense. Allstate allegedly tendered Ferguson's defense to Safeco at that time; however, the alleged tender was made verbally, and Safeco disputes whether Allstate actually tendered Ferguson's defense on November 7, 2007. Allstate's counsel submitted an affidavit to the trial court in support of its position that Allstate tendered Ferguson's defense on November 7, 2007, but the affidavit merely attests that Allstate's and Safeco's attorneys discussed the matter and compared the applicable insurance policy provisions.

{¶12} What is undisputed, however, is that Allstate formally tendered Ferguson's defense by letter on December 20, 2007. Both Allstate and Safeco submitted affidavits to the trial court admitting that a tender occurred on this date.[5] So, under the timeline of Yates's first lawsuit, Allstate did not tender Ferguson's defense until approximately nine and one-half months after Yates had first filed her complaint. Under these circumstances, in view of Allstate's voluntary assumption of Ferguson's defense, and the length of time that had elapsed since the inception of the lawsuit, Allstate was not entitled to indemnification for Ferguson's defense in Yates's first lawsuit.

[5] Allstate's affidavit was filed on December 24, 2008. Safeco's was filed on February 19, 2009.

IV. Yates's Second Lawsuit and Safeco's Improper Refusal of the Tender

{¶13} Yates refiled her lawsuit on September 8, 2008. Almost immediately, in a letter dated September 17, 2008, Allstate formally tendered Ferguson's defense to Safeco. Safeco rejected Allstate's tender on October 21, 2008.

{¶14} In support of its argument that Allstate should remain primarily responsible for Ferguson's defense, Safeco argues that Yates's claims for relief in the first lawsuit and the second lawsuit are identical. Thus, because Allstate voluntarily assumed Ferguson's defense in the first lawsuit, and because Yates's claim against Ferguson did not change, Safeco argues that the plain language of R.C. 3937.21 forced Allstate to defend Ferguson in the second lawsuit as well.

{¶15} We disagree with Safeco's interpretation of R.C. 3937.21. Regarding the second lawsuit, even though the claim did not change, Allstate did not assume Ferguson's defense. The plain language of R.C. 3937.21 makes clear that for one to be relieved of its obligation to defend an insured, another must assume the insured's defense. Allstate tendered its defense of Ferguson approximately one week after the filing of the second lawsuit, before any responsive pleading was filed. Without more, we are not prepared to hold that simply because Yates's claim against Ferguson remained the same, and because Allstate had voluntarily assumed Ferguson's defense in the first lawsuit, Allstate was statutorily obligated to defend Ferguson in the second lawsuit as well.

{¶16} Additionally, Safeco argues that because Allstate failed to announce a reservation of its rights, Allstate was estopped from tendering Ferguson's defense. According to Safeco, a tender at this point in the litigation would prejudice Safeco, specifically its litigation strategy. Safeco relies on the holding of *Ins. Co. of N. Am. v.*

Travelers Ins. Co.,[6] which held that an insurance company that had assumed an insured's defense was estopped from tendering the defense to another insurance company because it had failed to announce a reservation of its rights.[7] This failure to announce a reservation of rights was sufficient to establish prejudice for the other insurance company, who had refused the tender.[8]

{¶17} The facts in this case are distinguishable from *Travelers*. In *Travelers*, Insurance Company of North America ("INA"), the company that had attempted to tender the insured's defense, did so one week prior to trial. The Eighth Appellate District determined that INA had "assumed [the insured's] defense upon the filing of the * * * action, investigated the claim, and conducted discovery," and that to allow a tender one week prior to trial would have been "unfair and unreasonable" to Travelers Insurance Company, the other insurance company.[9] In this case, Allstate attempted to tender approximately one week *after* the second lawsuit's complaint was filed. And while it is true that Allstate investigated the claim and conducted discovery in the first lawsuit, it did not in the second. If Safeco had accepted the tender, it would have had the opportunity to conduct discovery and control the litigation in any manner it chose. Safeco simply has not demonstrated that it would have been prejudiced in the sense recognized in *Travelers*.

{¶18} Further, the *Travelers* case lists certain factors that courts may consider when determining actual prejudice. These factors include "the loss of a favorable settlement opportunity, inability to produce all testimony existing in support of a case, inability to produce favorable witnesses, loss of benefit of any

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[6] (1997), 118 Ohio App.3d 302, 692 N.E.2d 1028.
[7] Id. at 323.
[8] Id.
[9] Id. at 322.

defense in law or fact through reliance upon the insurer's promise to defend, or withdrawal so near the time of trial that the insured is hampered in the preparation of its defense."[10] The record in this case does not indicate that any of these factors were present when Allstate attempted to tender Ferguson's defense to Safeco one week after the filing of the second lawsuit.

V. Conclusion

{¶19} For these reasons, we hold that Allstate voluntarily assumed Ferguson's defense during the initial lawsuit. We also determine that Allstate formally tendered Ferguson's defense to Safeco on September 17, 2008. This tender was improperly refused by Safeco on October 21, 2008. Because Safeco did not demonstrate that it would have been prejudiced in assuming Ferguson's defense, it cannot claim that Allstate was estopped from tendering Ferguson's defense to Safeco. Allstate is entitled to indemnification for legal fees relating to Ferguson's defense from September 8, 2008, the date that Yates's second lawsuit was filed.

{¶20} Accordingly, we reverse that part of the trial court's judgment pertaining to which insurer bore responsibility for the second lawsuit and remand this case for further proceedings in accordance with the terms of this decision. In all other respects, the trial court's judgment is affirmed.

Judgment accordingly.

CUNNINGHAM, P.J., and **DINKELACKER, J.,** concur.

Please Note:

The court has recorded its own entry this date.

[10] Id. at 326 (Patton, J., dissenting), citing 7C Appleman, Insurance Law and Practice (1979).