

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

EVERETT W. WARREN

C.A. No. 28561

Appellant

v.

SAFECO INS. CO. OF ILL.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2016-04-1886

Appellee

DECISION AND JOURNAL ENTRY

Dated: September 13, 2017

SCHAFFER, Presiding Judge.

{¶1} Plaintiff-Appellant, Everett W. Warren, appeals the judgment of the Summit County Court of Common Pleas granting Defendant-Appellee, Safeco Insurance Company of Illinois’ (“Safeco”), motion of for summary judgment and also denying his motion for summary judgment. We affirm.

I.

{¶2} The facts of this case are not in dispute. On August 25, 2014, Mr. Warren and his wife, Marsha Warren, were crossing the street at a crosswalk when a vehicle driven by a non-party tortfeasor struck Mr. Warren. The impact from the collision threw Mr. Warren into his wife, who in turn fell and hit her head on the pavement. This incident resulted in personal injury to both Mr. Warren and his wife.

{¶3} At the time of the incident, the tortfeasor was insured under a United Services Automobile Association (USAA) motor vehicle insurance policy that provided \$30,000.00 per

person and \$60,000.00 per accident in liability coverage. At the time of the incident, Mr. Warren and his wife were insured under a motor vehicle insurance policy issued by Safeco (“the Safeco policy”) that provided \$100,000.00 per person and \$300,000.00 per accident in underinsured motorists (“UIM”) coverage. With Safeco’s approval, Mr. Warren and his wife both settled their respective claims with the tortfeasor’s insurance carrier for \$30,000.00 each, thereby exhausting the tortfeasor’s \$60,000.00 liability limits under the USAA policy. Subsequently, Mrs. Warren’s bodily injury claim and Mr. Warren’s loss of consortium claim were settled with Safeco for \$70,000.00, thus exhausting Mrs. Warren’s per person UIM coverage limit under the Safeco policy. Safeco, however, denied coverage for Mr. Warren’s UIM claim.

{¶4} On April 14, 2016, Mr. Warren filed a complaint against Safeco in the Summit County Court of Common Pleas seeking a declaratory judgment that he is entitled to \$70,000.00 in UIM coverage under the Safeco policy. Mr. Warren also pleaded a cause of action for breach of contract based on Safeco’s denial of coverage for his UIM claim. Safeco filed an answer denying the allegations set forth in Mr. Warren’s complaint. On September 30, 2016, Mr. Warren filed a motion for summary judgment. Safeco subsequently filed a combined motion for summary judgment and brief in opposition to Mr. Warren’s motion for summary judgment. Mr. Warren thereafter filed a reply brief to Safeco’s summary judgment motion, to which Safeco filed a surreply. On February 14, 2017, the trial court issued a judgment entry granting Safeco’s motion for summary judgment and denying Mr. Warren’s motion for summary judgment.

{¶5} Mr. Warren filed this timely appeal and presents one assignment of error for our review.

II.

Assignment of Error

The trial court erred by granting Safeco's motion for summary judgment and denying [Mr. Warren]'s motion for summary judgment.

{¶6} In his sole assignment of error, Mr. Warren contends that the trial court erred by granting Safeco's motion for summary judgment and by denying his motion for summary judgment.

A. Standard of Review

{¶7} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Summary judgment is only appropriate where (1) no genuine issue of material fact exists; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. Civ.R. 56(C). Before making such a contrary finding, however, a court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992).

{¶8} Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of

responding by setting forth specific facts, demonstrating that a “genuine triable issue” exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶9} The sole issue before this Court is whether Mr. Warren is entitled to \$70,000.00 in UIM coverage under the Safeco policy. As the facts of this case are not in dispute, this purely legal question is resolved by interpreting the Safeco policy and applying its provisions to the facts of this case.

B. Interpretation of Insurance Policies

{¶10} “An insurance policy is a contract whose interpretation is a matter of law.” *Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, ¶ 6. Because it is a contract, a reviewing court must interpret an insurance policy in accordance with the rules of construction applicable to all other contracts. *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 665 (1992). The role of a court in interpreting an insurance policy is to give effect to the intent of the parties to the agreement. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003–Ohio–5849, ¶ 11. Thus, “[w]e examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy.” *Id.* “[W]hen words used in a policy of insurance have a plain and ordinary meaning, it is neither necessary nor permissible to resort to construction unless the plain meaning would lead to an absurd result.” *Travelers Indemn. Co. v. Reddick*, 37 Ohio St.2d 119, 121 (1974). “As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.” *Galatis* at ¶ 11.

{¶11} “When determining whether a provision of an insurance contract is ambiguous, Courts must examine the contract as a whole and pay careful attention to context.” *Chapman v. Am. Family Ins.*, 9th Dist. Summit No. 27862, 2016-Ohio-5906, ¶ 6. “[A] court cannot create ambiguity in a contract where there is none.” *Sauer v. Crews*, 140 Ohio St.3d 314, 2014-Ohio-

3655, ¶ 12, quoting *Lager v. Miller–Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, ¶ 16. “Ambiguity exists only when a provision at issue is susceptible of more than one reasonable interpretation.” *Id.* “[I]f provisions are susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured.” (Internal quotations and citations omitted.) *Sauer* at ¶ 11.

C. The Safeco Policy

{¶12} The Safeco policy at issue in this case provides, in pertinent part, as follows:

ADDITIONAL COVERAGES

* * *

UNDERINSURED MOTORISTS COVERAGE — OHIO

INSURING AGREEMENT

A. We will pay damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury**:

1. Sustained by that **insured**; and
2. Caused by an accident.

* * *

B. “**Insured**” as used under this coverage means:

1. You or any **family member**.

* * *

(Emphasis sic.) The words and phrases in bold are all defined terms in the Safeco policy. The general definitions section of the Safeco policy states in relevant part:

A. Throughout this policy, “you” and “your” refer to:

- a. The “named insured” shown in the Declarations;

b. The spouse if a resident of the same household;

* * *

* * *

E. “Bodily injury” means bodily harm, sickness or disease, including death that results.

D. Analysis & Conclusion

{¶13} In his motion for summary judgment, Mr. Warren advanced three arguments in support of his position that he is entitled to judgment against Safeco as a matter of law. First, Mr. Warren argued that because his claim against Safeco is not based on the loss of his wife’s consortium, he has not been fully compensated for his injuries and is still “entitled to recover his damages for the mental anguish, emotional distress, anxiety, grief, and loss of enjoyment of life he suffered, and will continue to suffer, by witnessing the injury to [his wife] as part of his personal injury claim.” Second, Mr. Warren contended that the Safeco policy is ambiguous and, thus, must be construed strictly against Safeco and liberally in his favor in order to permit him to recover for *his wife’s* bodily injury. Lastly, Mr. Warren argued that the Safeco policy’s definition of the term “bodily injury” is not limited strictly to physical injury and, therefore, he is entitled to recover damages for his emotional injuries. However, after carefully reviewing Mr. Warren’s appellate brief, it appears that he has abandoned his second argument on appeal as his argument no longer focuses on his wife’s bodily injury, but his own. We will confine our analysis accordingly.

{¶14} In his appellate brief, Mr. Warren argues that since he “suffered a hematoma of his left forearm and abrasions of his left elbow and left knee as a direct and proximate result of [the tortfeasor’s] negligence[,]” he did sustain a “bodily injury” in the August 25, 2014 accident, thus obligating Safeco to pay damages to him under the express terms of the Safeco policy’s

UIM coverage provision. However, this argument differs from the argument that Mr. Warren advanced in the trial court. In his motion for summary judgment, Mr. Warren argued that he is entitled to recover UIM benefits under the per person limit of the Safeco policy for “non-economic losses” that he sustained as a result of the tortfeasor’s negligence. Specifically, Mr. Warren argued in his summary judgment motion that apart from pain and suffering, he is legally entitled to recover damages from Safeco for “any other ‘mental anguish’ and ‘intangible loss’ [he] suffered and will suffer in the future as a result of [the tortfeasor’s] negligence[,]” including anything that has negatively impacted his life as a result of the tortfeasor’s negligence, such as witnessing his wife suffer from a “severe, permanent, and debilitating brain injury[,]” now having to be his wife’s full-time caregiver, and “the reasonable market value of the nursing care [he] has provided to [his wife] and will provide to [his wife] in the future.” Thus, the crux of Mr. Warren’s argument within his summary judgment motion concerned his ability to recover for his “mental anguish” and “intangible loss,” not for his hematoma and abrasions. Accordingly, since Mr. Warren failed to develop any argument below concerning his bodily injury as it pertains to his hematoma and abrasions, we conclude that Mr. Warren has forfeited this argument on appeal and we decline to address it. *See State v. Schwarz*, 9th Dist. Medina No. 02CA0042–M, 2003–Ohio–1294, ¶ 14 (“Courts have consistently held that arguments which are not raised below may not be considered for the first time on appeal.”), citing *Belvedere Condominium Unit Owners’ Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279 (1993) (“As a general rule, this court will not consider arguments that were not raised in the court[] below.”). Although Safeco did not contest that Mr. Warren suffered a hematoma and abrasions as a result of the August 2014 accident within its opposition brief to Mr. Warren’s motion for summary judgment, Safeco was not obligated to do so. It is well-settled that a non-moving party on summary judgment is not

obligated to contest facts which were not raised in a movant's motion for summary judgment. Moreover, Mr. Warren's insistence within his appellate reply brief that he did raise this argument in his reply to Safeco's brief in opposition to his motion for summary judgment is insufficient to preserve this issue for appellate review. *See Hahn v. Wayne Cty. Children Servs.*, 9th Dist. Wayne No. 00CA0029, 2001 WL 489959, *3 (May 9, 2001) (noting it is improper to raise an issue for the first time in a reply brief to an opposing party's brief in opposition to summary judgment), quoting *Cincinnati Ins. Co. v. Colelli & Assoc., Inc.*, 9th Dist. Wayne No. 97CA0042, 1998 WL 318328, *3 (June 17, 1998) ("The purpose of a reply brief is to respond to matters raised by an opponent's brief. * * * Otherwise, a litigant may resort to summary judgment by ambush.").

{¶15} Lastly, Mr. Warren argues on appeal that, as written, the UIM coverage provision of the Safeco policy contains a condition precedent requiring an insured to sustain a "bodily injury" as a result of an accident before Safeco is obligated to pay that insured damages that he is otherwise legally entitled to recover from the tortfeasor. Mr. Warren contends that upon sustaining the hematoma and abrasions in the August 2014 accident, he satisfied this condition precedent, thereby obligating Safeco to pay him all damages that he is legally entitled to recover because of the tortfeasor's negligence, including emotional injuries. However, as noted above, Mr. Warren's argument concerning his "bodily injury" (i.e. the condition precedent) differs on appeal from what he argued in his motion for summary judgment. Accordingly, Mr. Warren's appellate argument concerning the extent of damages that he is entitled to recover under the UIM coverage provision of the Safeco policy is moot and we decline to address it.

{¶16} Based on the foregoing, we conclude that the trial court did not err by denying Mr. Warren's motion for summary judgment and by granting Safeco's motion for summary judgment.

{¶17} Mr. Warren's assignment of error is overruled.

III.

{¶18} With Mr. Warren's sole assignment of error having been overruled, the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JULIE A. SCHAFER
FOR THE COURT

TEODOSIO, J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

TIMOTHY H. HANNA, Attorney at Law, for Appellant.

STEPHEN V. FREEZE, Attorney at Law, for Appellee.