

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BROWN COUNTY

KEN R. PAYTON, :  
 :  
 Plaintiff-Appellee, : CASE NO. CA2010-10-022  
 :  
 - vs - : OPINION  
 : 8/8/2011  
 :  
 STEVEN PESKINS, et al., :  
 :  
 Defendants-Appellants. :

CIVIL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS  
Case No. CV20090569

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**PIPER, J.**

{¶1} Defendant-appellant, Progressive Insurance Company (Progressive), appeals the decision of the Brown County Court of Common Pleas denying its motion for summary judgment and granting judgment to plaintiff-appellee, Ken Payton. We affirm the decision of the trial court.

{¶2} Payton was riding his motorcycle home from work, on State Route 68 at approximately 1:00 a.m. when he collided with Steven Peskins, a police officer with the village of Georgetown. According to Payton's deposition testimony, the police car was approaching the same intersection he was, slowed but did not stop, and collided with him. Just before the accident, Payton saw Peskin's emergency lights, but was unable to avoid colliding with the police cruiser.

{¶3} Payton brought suit against Peskins for negligence, and against the village of Georgetown for among other claims, negligent entrustment. Payton also sued his insurance company, Progressive, for denying his claim for uninsured motorist coverage. Peskins and the village of Georgetown filed motions for summary judgment, claiming statutory immunity according to R.C. Chapter 2744 because Peskins was responding to an emergency call at the time of the accident. The trial court granted summary judgment to Peskins and the village of Georgetown, but denied summary judgment to Progressive regarding its policy exclusion for uninsured motorist coverage. Progressive now appeals the decision of the trial court denying its motion for summary judgment, and raises the following assignment of error.

{¶4} "THE TRIAL COURT INCORRECTLY DENIED DEFENDANT-APPELLANT PROGRESSIVE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT WHEN IT DETERMINED THAT BECAUSE THE INSURANCE POLICY IN SNYDER V. AMERICAN FAMILY [sic] INSURANCE DID NOT CONTAIN THE DEFINITION OF AN UNINSURED MOTORIST, AS THE PROGRESSIVE POLICY IN THE CASE AT BAR DID, THE SNYDER CASE WAS INAPPLICABLE. "

{¶5} Progressive argues in its sole assignment of error that the trial court erred in its application of *Snyder v. American Family Insurance Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, and therefore improperly denied its motion for summary judgment. We disagree.

{¶6} This court's review of a trial court's ruling on a summary judgment motion is de

novo. *Broadnax v. Greene Credit Service* (1997), 118 Ohio App.3d 881, 887. Civ.R. 56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶7} In *Snyder v. American Family*, the Ohio Supreme Court considered whether R.C. 3937.18 permits a motor vehicle insurance policy to exclude claims for uninsured motorist benefits when the tortfeasor is statutorily immune from liability. The court found that the statute does not prohibit enforcement of a policy that unambiguously excludes coverage for injuries caused by a driver who is immune from liability under R.C. Chapter 2744.

{¶8} In *Snyder*, the policy in question provided, "[American Family] will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle**." 2007-Ohio-4004 at ¶5. (Emphasis sic.)

{¶9} In finding that the American Family policy language unambiguously excluded immune drivers, the court analyzed the changes made to R.C. 3937.18(A) by the General Assembly in 2001 regarding the state's now-defunct requirement that all insurance policies offer uninsured/underinsured motorist coverage. The court found that "R.C. 3937.18(I) expressly permits the parties to agree to other specified conditions to, or exclusions from, uninsured/underinsured-motorist coverage. A more accurate view is that R.C. 3937.18(D) is a default provision, governing in the absence of additional policy provisions requiring more." *Id.* at ¶26.

{¶10} The court went on to state that "had the policy in this case not contained the

'legally entitled to recover' language, the police cruiser would have been an uninsured vehicle within the meaning of R.C. 3937.18(B)(5), and, absent another policy condition excluding coverage, Snyder would have been entitled to recover. But this policy did contain an additional condition for coverage, and under the facts of this matter, Snyder did not meet that condition." *Id.* at ¶28. However, the court concluded that "our ruling here, of course, does not prevent insurers from responding to consumer demand by offering uninsured-motorist coverage without precluding recovery because of a tortfeasor's immunity." *Id.* at ¶33.

{¶11} Under the uninsured/underinsured portion of Payton's insurance policy with Progressive, Part III states that Progressive "will pay for damages that an insured person is legally entitled to recover from an uninsured motorist or underinsured motorist because of bodily injury." However, and unlike *Snyder*, the Progressive policy at issue goes on to state, "an 'uninsured motorist' does not include an owner or operator of a motor vehicle: (c) that is owned by any governmental unit or agency *unless the operator of the motor vehicle has immunity under Chapter 2744 of the Ohio Revised Code* (relating to certain political subdivisions operating a fire department, police department, or emergency medical service)." (Emphasis added.)

{¶12} The additional wording contained in Progressive's policy (which was not in the American Family policy) clearly informed the insured that he could recover damages caused by an uninsured motorist, including a vehicle operator who has statutory immunity.

{¶13} While the preamble to Part III states that Progressive will pay only that which an insured is 'legally entitled to recover,' the fact that the policy goes on to state that the policy excludes a vehicle owned by a governmental unit unless the operator has immunity wholly distinguishes this case from *Snyder*.

{¶14} The court in *Snyder* found that the general term "legally entitled to recover" was an additional condition for coverage that unambiguously excluded coverage for injuries

caused by a driver who is immune from liability under R.C. Chapter 2744. Payton's Progressive policy, however, specifically took the general preamble to Section III's uninsured/underinsured section and made a more specific coverage condition, mainly that vehicles owned by any governmental unit or agency were not covered unless the operator of the vehicle has immunity under R.C. Chapter 2744. "It is well-established under the generally applicable rules governing contract interpretation that specific provisions take precedence over more general provisions." *Smith v. Littrell*, Preble App. No. CA2001-02-004, 6, 2001-Ohio-8642.

{¶15} The Ohio Supreme Court made it clear in *Snyder* that insurance companies and their customers have the right to agree to uninsured-motorist coverage without precluding recovery because of a tortfeasor's immunity. The Progressive policy did just that. It carved out an exception to the "legally entitled to recover" language listed in *Snyder* by stating that the policy holder could not recover for uninsured motorist protection when bodily injury was caused by a government-owned vehicle unless that vehicle was driven by an operator who has immunity under R.C. Chapter 2744. The parties stipulated that Peskins and the village of Georgetown are immune under R.C. Chapter 2744, and Progressive cannot now claim that the general statement made in the preamble to its uninsured motorist section subjugates the more specific statement granting coverage when the driver has immunity, as Peskins did in this case.

{¶16} Having found that the trial court properly denied Progressive's motion for summary judgment, its sole assignment of error is overruled.

{¶17} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.