NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

KENNETH ASHLEY Appellant v. CINDY ASHLEY AND/OR NATIONWIDE MUTUAL INSURANCE COMPANY Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1486 WDA 2012

Appeal from the Order August 27, 2012
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD-12-000572

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and MUSMANNO, J.

MEMORANDUM BY OTT, J.: FILED: November 27, 2013

Kenneth Ashley appeals from the order entered August 27, 2012, in the Court of Common Pleas of Allegheny County granting defendant Nationwide Mutual Insurance Company's motion for judgment on the pleadings.[1] Ashley claims the trial court erred in dismissing the action where ambiguous language in the insurance policy allowed for recovery of both liability damages and underinsured motorist benefits from the same policy. Additionally, Ashley claims Nationwide's prior conduct in resolving a previous claim under the same policy estopped Nationwide from denying coverage in

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[1] Although the original complaint in this matter brought claims against Cindy Ashley and Nationwide, the claims were severed by order of court on September 18, 2012, thereby making the order in question a final order, disposing of all claims against Nationwide Mutual Insurance Company.

this matter. Following a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm.

> Our scope of review on an appeal from the grant of judgment on the pleadings is plenary. Entry of judgment on the pleadings is permitted under Pennsylvania Rule of Civil Procedure 1034, which provides that after the pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for judgment on the pleadings. A motion for judgment on the pleadings is similar to a demurrer. It may be entered when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. In determining if there is a dispute as to facts, the [trial] court must confine its consideration to the pleadings and relevant documents. On appeal, we accept as true all well-pleaded allegations in the complaint.
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> On appeal, our task is to determine whether the trial court's ruling was based on a clear error of law or whether there were facts disclosed by the pleadings, which should properly be tried before a jury, or by a judge sitting without a jury.
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> Neither party can be deemed to have admitted either conclusions of law or unjustified inferences. Moreover, in conducting its inquiry, the [trial] court should confine itself to the pleadings themselves and any documents or exhibits properly attached to them. It may not consider inadmissible evidence in determining a motion for judgment on the pleadings. Only when the moving party's case is clear and free from doubt such that a trial would prove fruitless will an appellate court affirm a motion for judgment on the pleadings.

Grimes v. Enterprise Leasing Co. of Philadelphia, LLC, 66 A.3d 330, 334-35 (Pa. Super. 2013) (citation omitted).

We recite the factual and procedural history of this matter as related by the trial court:

> This case arises out of a one car accident that occurred on January 16, 2010. Plaintiff, Kenneth Ashley, was a passenger in a car driven by his wife, Defendant Cindy Ashley ("Defendant"), when it crashed on the Pennsylvania Turnpike. Both parties were insured by a policy of automobile insurance issued by Defendant Nationwide Mutual Insurance Company ("Nationwide").
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> Plaintiff filed suit against Defendant and Nationwide. Plaintiff's count against Defendant seeks damages based on a negligence claim. Plaintiff's count against Nationwide seeks Underinsured Motorist benefits (UIM) from the same policy from which bodily injury ("BI") liability damages are sought. Nationwide filed a Motion for Judgment on the Pleadings based on an argument that, under the policy and applicable law, Plaintiff is not entitled to recover both for BI and UIM from the same policy of insurance. This court granted Nationwide's Motion. Plaintiff appealed.

Trial Court Opinion, 10/22/12, at 2.

Ashley acknowledges that the general rule in Pennsylvania does not allow a claimant to collect both UIM benefits and BI damages from the same policy. ***See*** Appellant's Brief, at 11; ***Cooperstein v. Liberty Mutual Fire Ins. Co.***, 611 A.2d 721 (Pa. Super. 1992); ***Sturkie v. Erie Ins. Group***, 595 A.2d 152 (Pa. Super. 1991); ***Wolgemuth v. Harleysville Mut. Ins. Co.***, 535 A.2d 1145 (Pa. Super. 1988). However, Ashley argues that there are irreconcilable clauses found in the UIM section of Nationwide's policy that create an ambiguity in Nationwide's duty to provide benefits. As ambiguities in an insurance policy are construed against the insurer, ***Standard Venetian Blind Co. v. American Empire Ins. Co.***, 469 A.2d 563 (Pa. 1983), he contends Nationwide should be compelled to provide both BI and UIM coverage.

The two clauses are found in the Underinsured Motorists section of the Nationwide policy, under a subsection entitled, "Limits and Conditions of Payments, Amounts Payable for Underinsured Motorist Losses." Paragraph 3 states: "Any payment under this coverage shall be reduced by any amount paid under the Auto Liability coverage of this policy." Paragraph 4 states: "The insured may recover for bodily injury under the Auto Liability coverage or the Underinsured Motorists coverage of this policy, but not under both coverages." ***See*** Nationwide Automobile Insurance Policy, UI4. Ashley claims that Paragraph 3 clearly allows for payment of benefits under both liability and UIM coverages, while Paragraph 4 clearly disallows such payments. He maintains these clauses are irreconcilable thereby creating an ambiguity in coverage, and, in turn, the ambiguity required Nationwide to provide both BI and UIM coverage.

In granting Nationwide's motion for judgment on the pleadings the trial court cited the unambiguous language of Paragraph 4, which prohibits obtaining payment under both coverages. The trial court further noted prior case law that provides that UIM and BI may not be obtained from the same policy.[2] Our review of the certified record and relevant law leads to the

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[2] In addition to ***Sturkie***, ***supra***, and ***Wolgemuth***, ***supra***, the trial judge also cited ***Cooperstein v. Liberty Mutual Fire Ins. Co.***, 611 A.2d 721 (Pa. Super. 1992), ***Caldararo v. Keystone Ins. Co.***, 573 A.2d 1108 (Pa. Super. 1990), and ***Newkirk v. United Services Automobile Association***, 564 A.2d 1263 (Pa. Super. 1989), in support of his decision.

conclusion that, under the facts presented, the trial judge correctly determined that, as a matter of law, Ashley was not entitled to both UIM and liability coverage from his own policy. To the trial judge's analysis we add that rather than being ambiguous, paragraphs 3 and 4 simply state two differing aspects of the law. In this regard, this court's decision in ***Bowersox v. Progressive Casualty Insurance Company***, 781 A.2d 1236 (Pa. Super. 2001) is illustrative.

In ***Bowersox***, Paul Bowersox was killed in a motor vehicle accident involving three cars. Bowersox was a passenger in a car driven, non-negligently, by Heather Lyons, who was also killed in the accident. One of the other vehicles involved in the accident was driven by Matthew Lytle, who was insured by State Farm. The other vehicle involved was driven by Joel Lyons, Heather's brother. Joel and Heather Lyons were both insured under the same policy issued by Progressive. The Estate of Bowersox obtained full payment of liability coverage from Progressive for Joel Lyon's negligence, and from State Farm for Lytle's negligence. Because the liability coverages from Progressive and State Farm were insufficient to provide full compensation, the Estate sought UIM coverage from the Progressive policy that also covered Heather Lyon's vehicle in which Bowersox was a passenger.

The arbitration panel found in favor of Progressive, which had denied coverage since the "set-off" provision in the UIM section of the Progressive

policy reduced the amount payable to zero.[3] The Estate appealed the UIM arbitration decision to the Court of Common Pleas.[4]

The Court of Common Pleas affirmed the arbitration decision because, pursuant to ***Wolgemuth***, ***Cooperstein***, *et al*, "An injured plaintiff (or his/her estate) is precluded from recovering under the liability and underinsurance coverages of the same motor vehicle insurance policy. A claimant cannot recover third party liability benefits and underinsured motorist coverage from the same policy." ***Bowersox***, 781 A.2d at 1240 (citing Order, 7/25/00).

The ***Bowersox*** Court added:

> This statement is only partially correct. Rather, a plaintiff cannot recover both liability and underinsured motorist coverage from the same policy where *only one policy of insurance* is implicated under the circumstances.

Id. (italics in original). The ***Bowersox*** Court then determined that since the case before it involved two applicable policies of insurance, "the trial court's conclusion that a claimant is precluded from recovering under the liability and underinsured motorists coverages of the same motor vehicle insurance policy *under any circumstances* is incorrect." ***Id***. at 1241 (emphasis in

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[3] The language of that provision is similar to the language of Paragraph 3 of the Nationwide policy.

[4] Because the Progressive policy provided for appellate review pursuant to the Arbitration Act of 1927, the Court of Common Pleas was allowed to review the decision for errors of law.

original). The ***Bowersox*** opinion went on to discuss how the set-off clause operated in the situation in which multiple insurance policies were applicable.

In reading ***Bowersox*** and ***Wolgemuth***, *et al*, together, we discern the rule that where only one insurance policy is implicated, a claimant may only obtain one form of coverage, either liability or underinsured, but not both; where there are multiple policies available to the claimant, the set-off provision applies. This rule corresponds with the Nationwide policy provisions that exclude any vehicle covered under the policy from the definition of an "underinsured vehicle" and forbid the application of both liability and underinsured benefits to a claimant. ***See*** Nationwide Policy, Additional Definitions 4, UI1; Paragraph 4. Because the instant matter involves a single-car accident for which only one insurance policy applies, the ***Wolgemuth*** rule is followed, forbidding Ashley from obtaining dual coverage from the same policy. Therefore, the trial court correctly determined that as a matter of law, Ashley was not entitled to coverage under the UIM provisions of the Nationwide policy.

The propriety of interpreting Paragraph 3 under the ***Bowersox*** rule is confirmed by Ashley's own exhibit, regarding his 2010 Nationwide claim. ***See*** Reply to New Matter, Exhibit.[5] This exhibit is a letter from Nationwide

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[5] Specifically, the exhibit is a letter, dated 9/14/10, from Nationwide to counsel for Ashley, regarding Ashley's claim.

that discusses an earlier accident in which Ashley was a passenger in a car owned by his daughter. The car was insured under a Progressive Insurance policy, not under the Nationwide policy. The daughter was at fault for the accident and the Progressive policy liability coverage applied to him. The Nationwide letter then states, in relevant part:

> The insured [Ashley] carries $50,000 stacked UI coverage with three vehicles on Nationwide policy 58 37 C 961897 for a total of $150,000 in UI coverage. As you are aware, the insured is presenting an excess bodily injury claim against his own Nationwide aforementioned policy. The bodily injury limit is $50,000.
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> I refer your attention to pages UI3 and UI4 of the policy, certified copy attached, which states in pertinent part, the following:
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> > "LIMITS AND CONDITIONS OF PAYMENT
> > 3. Any payment under this coverage shall be reduced by any amount paid under the Auto Liability coverage of this policy."
>
> Under this claim scenario, if the Nationwide bodily injury liability coverage pays the $50,000 limit, the available amount of UI coverage is $100,000 ($150,000 - $50,000 = $100,000).

Exhibit, at 1.

This previous claim by Ashley implicated two policies, Ashley's Nationwide policy and his daughter's Progressive policy. Ashley's claim therefore required the application of the ***Bowersox*** rule in which the set-off clause, Paragraph 3 of the Nationwide policy, applied. The letter from Nationwide to Ashley's counsel describes the application of the set-off clause precisely as described in ***Bowersox***.

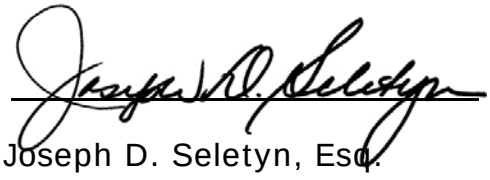
Understanding the difference between the ***Wolgemuth*** and ***Bowersox*** rules, we disagree with Ashley's allegation that Paragraphs 3 and 4 are irreconcilable and create an ambiguity.

Ashley has also claimed that Nationwide's application of Paragraph 3 in the previous claim estops it from denying UIM coverage in the instant matter. This argument is unavailing. Without specifically detailing the different applications of paragraphs 3 and 4, the trial court correctly determined that the factual situations of the two claims were "drastically different and distinguishable." ***See*** Trial Court Opinion at 3. Here, Nationwide correctly applied the law to the provisions of its policies in both instances and is not estopped from denying UIM coverage in the instant matter.

Because Paragraphs 3 and 4 of the relevant section of the Nationwide automobile insurance policy are not irreconcilable and correctly state different aspects of the law, the policy is not ambiguous. Further, Nationwide's prior interpretation of Paragraph 3 was a proper interpretation of that clause under the case law and did not operate to estop Nationwide's denial of coverage in this matter. Accordingly, the trial court did not commit an error of law in granting judgment on the pleadings in favor of Nationwide.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/27/2013