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Brumbaugh v. Erie Insurance

DIRK A. BRUMBAUGH, Plaintiff, v. ERIE INSURANCE EXCHANGE, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Law, No. 2006-2211, Action for Declaratory Judgment

Insurance; Liability when the party causing the accident is immune from suit because of the Worker's Compensation Act

1. An insurance company will be held liable for underinsured/uninsured motorist insurance even when the party that caused the accident is immune from suit under the Worker's Compensation Act.

Appearances:

Denis M. DiLoreto, Esq., *Counsel for Plaintiff*

John A. Statler, Esq., *Counsel for Defendant*

OPINION

Walker, P.J., November 30, 2006

Facts

The facts in this case are not in dispute. On February 27, 2006, Dirk Brumbaugh, Plaintiff, was walking in the parking lot of his employer, Catch-Up Logistics. Chad Fauson, also an employee of Catch-Up Logistics, struck Mr. Brumbaugh with his motor vehicle, causing injury to Mr. Brumbaugh. The parties have agreed that both Mr. Brumbaugh and Mr. Fauson were acting within the course and scope of their employment.

Mr. Brumbaugh then requested and received worker's compensation benefits from the insurance carrier for Catch-Up Logistics. Mr. Brumbaugh could not recover damages from Mr. Fauson because, under the Worker's Compensation Act, 77 P.S. §72 (West 2006), Mr. Fauson could not be sued because Mr. Brumbaugh received damages through worker's compensation.

Mr. Brumbaugh then asked his own automobile insurance carrier, Erie Insurance Exchange (Erie), for benefits under the underinsured motorist portion of his policy. Erie refused to pay him. Erie refused to pay him because it believed that his inability to recover from Mr. Fauson for negligence precluded recovery from Erie, because Mr. Brumbaugh's insurance policy required that he be "legally entitled" to damages from the person responsible for the accident. Mr. Brumbaugh disagreed with Erie's interpretation of his insurance policy and filed this lawsuit.

A Motion for Summary Judgment was filed by Erie. Mr. Brumbaugh did not file an answer to this Motion for Summary Judgment. However, Mr. Brumbaugh did file his own Motion for Summary Judgment; this Motion disputed the legal analysis in Erie's motion for summary judgment. The Court will therefore treat Erie's Motion for Summary Judgment as answered by Mr. Brumbaugh's Motion for Summary Judgment.

Legal Analysis

After filing of the pleadings, both parties filed motions for summary judgment.[1] Erie believes that since Mr. Brumbaugh would not be entitled to recover from his co-worker in a legal action, he should not be entitled to recover from Erie based upon his uninsured motorist coverage. Erie qualifies its underinsured motorist coverage by limiting payments to accidents where "[the insured is] legally entitled to recover..."

The standard for summary judgment is provided for by Pa.R.C.P. 1035.2. That rule provides that a party can request "summary judgment in whole or in part as a matter of law: (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report."

In a motion for summary judgment, the Court must construe all evidence in favor of the nonmoving party. Then, the Court must determine if there is "a genuine issue of material fact." Martin v. Hale Products, Inc., 699 A.2d 1283, 1287 (Pa. Super. 1997). As discussed above, Defendant and Plaintiff both agree on the material facts of this litigation.

The major issue in this case, therefore, is whether Erie is obligated to pay Mr. Brumbaugh (its own insured) underinsured motorist insurance when Mr. Brumbaugh would not be able to recover from Mr. Fauson had he sued him directly. This case also turns on the interpretation of the phrase "legally entitled to recover" as used in Mr. Brumbaugh's insurance policy.

At oral argument, both parties agreed that there does not appear to be any binding case law in Pennsylvania that discusses this issue. This Court has been unable to find any binding Pennsylvania case law on this issue either.

Defendant cites Nationwide Mutual Ins. Co. v. Chiao, 186 Fed. Appx. 181 (3rd Cir. 2006), which has facts substantially similar to the case at bar.[2] In that case, Ms. Chiao was traveling, in the course of her employment, as a passenger in a motor vehicle driven by a colleague. She was involved in a motor vehicle accident. Although she recovered from her employer under worker's compensation and from the driver's insurance company, her own insurance carrier, Nationwide Mutual Insurance Company (Nationwide), refused to pay her benefits. Id. at 181-2.

The discussion in that case centered upon the meaning of the phrase "due by law." The trial court found this phrase to be ambiguous and required Nationwide to pay under the insurance policy. The Third Circuit Court of Appeals disagreed and reversed the trial court. This reversal caused Ms. Chiao to be unable to recover proceeds from her insurance company. The Court interpreted "due by law" to prevent her from recovering underinsured motorist insurance. Id. at 185.

As noted in Footnote 2, this case is not precedent for a federal court sitting in an area covered by the Federal Third Circuit Court of Appeal. This Court may use cases from the Third Circuit as persuasive authority. However, it may also decline to use cases as persuasive authority and in this case will do so because of other cases that it finds more persuasive.

A number of cases have provided for recovery of uninsured or underinsured motorist benefits when worker's compensation benefits were involved or when an insured's recovery options were limited for other reasons.

One case cited by Plaintiff is Holland v. Geico General Ins. Co., 62 Fed. Appx. 415 (3rd Cir. 2002), which allowed a defendant to recover uninsured motorist benefits from her insurance company. The Court in that case rested its decision on the fact that the statutes in effect at the time (75 Pa.C.S. §§1735 and 1737) appeared, to that Court, to permit the recovery. Id. at 416-7.[3] Those statutes were repealed in 1993. See Gardner v. Erie Ins. Co., 722 A.2d 1041, 1042-43 (Pa. 1999). Since the Holland decision was based upon §§1735 and 1737, this Court finds that case to be of very limited value in determining the outcome in this case, since the accident in the case at bar occurred in 2006.

Plaintiff also cites Gardner in support of its argument for summary judgment. In that case, the Supreme Court of Pennsylvania discussed the effect of the repeal of §§1735 and 1737. The Court stated that the purpose of §1735 was to "limit insurance companies when they write insurance policies with respect to suing workers' compensation benefits as a set-off, **not to determine whether an insured has any claim to workers compensation benefits and uninsured or underinsured motorist benefits**." Gardner at 1044 (citing Ducjai v. Denis, 636 A.2d 1130, 1137 (1994)) (emphasis in Gardner).

A Superior Court case, Warner v. Continental/CNA Ins. Cos., 688 A.2d 177 (Pa. Super. 1996), also supports Plaintiff's argument. In that case, an employee was injured in a motor vehicle accident while driving his employer's vehicle in the course and scope of his employment. He received worker's compensation from his employer's worker's compensation insurance carrier, Continental/CNA Insurance

Companies (Continental). Id. at 178-9. He also received damages from the other party's automobile insurance company. He then asked his employer's automobile insurance company (also Continental) for damages. His employer's automobile insurance carrier refused to pay damages. Continental claimed that he was ineligible to receive insurance benefits because he had recovered worker's compensation from his employer. Continental claimed that since he could not sue his employer, he should not be able to obtain money from his employer's automobile insurance carrier either. Id. at 179.

The Superior Court disagreed with Continental. The Court explained that although an employer's worker's compensation insurer would not expect to have to pay for an employer's negligence, the situation in that case differed because the accident was caused by a third party, not the employer. Id. at 184.

Chatham v. Aetna Life & Casualty Co., 570 A.2d 509 (Pa. Super. 1989) has very similar facts to Continental. Ms. Chatham, after being rear-ended by an uninsured motorist while driving her vehicle on the job, received worker's compensation. Id. at 510-11. She then asked her employer's automobile insurance carrier, Aetna Life & Casualty Co. (Aetna), for uninsured motorist benefits. Aetna refused to pay because she had received worker's compensation insurance. Id. at 510-11. The Chatham Court, citing Selected Risks Ins. Co. v. Thompson, 552 A.2d 1382 (Pa. 1989), explained that: "first, uninsured motorist insurance is paid for by a separate premium, and to give the uninsured motorist carrier a set-off based on the fortuitous existence of a collateral source would result in a windfall to the carrier; second, uninsured motorist coverage is mandated by statute and any variation from that statutory mandate should come from the legislature; third, workmen's compensation only covers a fraction of what tort damages would cover., and fourth, there is no public policy against an individual purchasing additional uninsured motorist coverage to protect himself and his family against the shortfall which could result from a dependency on workmen's compensation benefits." Id. at 512. Aetna was required to pay Ms. Chatham employment benefits. Id. at 512.

Defendant argues that Continental and Chatham are not directly on point, since they discuss accidents that both involved an employee injured by a non-employee. Defendant argues that the fault of the non-employee was not at issue in that case, while here, an **employee** is at fault. Although Continental and Chatham have different factual scenarios and therefore could be distinguished (as Defendant argues), the Court is not persuaded that Continental and Chatham are so different from the case at bar as to require this Court to ignore the reasoning set forth by both cases.

Defendant in its Brief in Opposition to Plaintiff's Motion for Summary Judgment argues that the employees in Continental and Chatham would have a reasonable expectation of coverage under their employer's insurance policy, since they were driving in the scope of their employment. Defendant believes that Mr. Brumbaugh did not have a reasonable expectation of coverage.

The Court, however, believes that Mr. Brumbaugh had a reasonable expectation of coverage under his personal insurance policy, even though the accident occurred in the course of his employment. Mr. Brumbaugh purchased insurance so that if, for whatever reason, he was not able to recover from the person at fault in the accident, he would still receive damages from an alternative source. The Court therefore does not agree with Defendant when it argues that Chatham and Continental are "entirely dissimilar."

Gardner is persuasive to this Court. In Gardner, the co-employee's insurance provider was required to pay money, even though he also recovered damages through worker's compensation. The co-employee in that case was not negligent in the accident. Gardner v. Erie Ins. Co., 722 A.2d 1041 (Pa. 1999), 1041-7.

The Pennsylvania Supreme Court noted in dicta that "many jurisdictions" do not permit recovery of underinsured motorist insurance when the co-worker was at fault. Id. at 1046, fn. 12. From this dicta, it appears that the Pennsylvania Supreme Court might not permit a co-worker to recover in an action for underinsured or uninsured motorist benefits when the co-worker was at fault for the accident. However, the Pennsylvania Supreme Court noted a contrary case, Barfield v. Barfield, 742 P.2d 1107 (Okla. 1987), which this Court finds persuasive. Gardner at 1046, fn. 12. Barfield both supports the award of underinsured motorist benefits in a similar situation and also provides an interpretation of "legally entitled to recover" which this Court finds reasonable.

The court in that case interpreted the phrase "legally entitled to recover" and determined that phrase to mean "that the insured must be able to establish **fault** on the part of the uninsured motorist which gives rise to damages and prove the extent of those damages." Id. at 1112 (emphasis in original). The case involved the widow of a man injured while a co-worker was driving. The widow had sued for damages from her husband's insurer, and her husband's insurer refused to pay because it believed - as Erie believes - that since the woman could not sue the driver because of worker's compensation, she should not be able to recover damages. Id. at 1109. The Barfield Court did not specifically state whether or not the driver was actually negligent in that case. The Court cited a number of cases from other

jurisdictions that supported its view. Id. at 1112

The Court is also persuaded by Kmonk-Sullivan v. State Farm Mutual Automobile Ins. Co., 746 A.2d 1118 (Pa. Super. 1999). In that case, State Farm refused to pay underinsured motorist benefits because the vehicle involved in the accident was owned by the Commonwealth of Pennsylvania. State Farm argued that Commonwealth vehicles were specifically excluded from the policy and, therefore, State Farm should not be required to make up the difference between the plaintiff's actual damages and the amount that the Commonwealth was statutorily required to pay. Id. at 1119-21.

The Superior Court disagreed with State Farm. The Superior Court noted that the Motor Vehicle Financial Responsibility Law (MVFRL) was intended to create a liberal compensatory scheme for motorists. The plaintiffs in State Farm purchased their underinsured motorist insurance to pass the risk of loss due to underinsured motorists to their insurance carrier. Id. at 1122-26.

This Court believes that the legislature did not intend the phrase "legally entitled" to be used as the Defendant would have it defined. The Court will interpret "legally entitled" as interpreted by the Oklahoma Supreme Court in Barfield, thus permitting recovery because Mr. Fauson is, indisputably, at fault for this vehicular accident. Usually, exclusions of coverage are against the public policy of the MVFRL. See Kmonk-Sullivan at 1125.

In close cases, this Court must interpret insurance contract language to favor the insured and promote legislative intent. Id. at 1123. Interpreting the language in the same manner as the Oklahoma Supreme Court is therefore appropriate.

The Pennsylvania Legislature was quite concerned that potential insureds be aware of the implications of waiving uninsured or underinsured motorist coverage. For waivers of uninsured or underinsured motorist insurance, the legislature provides a special form in the statute which explains, in clear English, the implications of waiver to a potential insured. See 75 Pa.C.S. §1731.[4] The legislature was obviously concerned that people had uninsured or underinsured motorist insurance or, at least, fully understood the consequences of not purchasing it. This further supports the Court's interpretation of the contract to permit recovery by Mr. Brumbaugh.

Mr. Brumbaugh purchased underinsured motorist insurance so that if he was involved in an accident with someone who did not have the ability to pay damages, Erie would make up the difference. When a person pays premiums for an additional benefit, the Superior Court has been reluctant to deprive him of a benefit he paid for, thus creating a windfall for his insurer. See Chatham at 512 (citing Selected Risks Ins. v. Thompson, 552 A.2d 1382 (Pa. 1989)).

Mr. Brumbaugh paid a separate premium to shift the risk of an accident with an uninsured or underinsured person from himself to Erie. To not permit him to receive uninsured motorist benefits simply because the person who caused the accident happened to be a co-employee would create a windfall for Erie.

For all of the reasons stated above, the Court will grant Plaintiff's motion for summary judgment.

ORDER OF COURT

And now this 30th day of November, 2006, the Court hereby orders that Plaintiff's Motion for Summary Judgment on the Action for Declaratory Judgment is granted. Defendant's Motion for Summary Judgment is denied.

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[1] *See* the recitation of the facts, *infra*.

[2] The case was not selected for publication and therefore is not precedent for a federal court sitting in the Third Circuit.

[3] According to the Circuit Court in *Holland*, Section 1735 read as follows: "The underinsured motorist coverages required by this subchapter shall not be made subject to an exclusion or reduction in amount because of any workmen's compensation benefits payable as a result of the same injury." Section 1737 read as follows: "Notwithstanding anything contained in .. the Pennsylvania Workmen's Compensation Act, no employee who was otherwise eligible shall be precluded from recovery of uninsured or underinsured motorist benefits from an employer's motor vehicle policy under this chapter or the [Uninsured Motorist

Act].

[4] The language required by statute to appear on the form used to waive underinsured motorist coverage reads as follows: "By signing this waiver I am rejecting underinsured motorist coverage under this policy, for myself and all relatives residing in my household. Underinsured coverage protects me and relatives living in my household for losses and damages suffered if injury is caused by the negligence of a driver who does not have enough insurance to pay for all losses and damages. I knowingly and voluntarily reject this coverage." The wording for the uninsured motorists waiver is similar.