

**88-LW-1648 (5th)**

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R. Kenneth KUNKEL, Administrator of the Estate of Carla Renee Curry, deceased Plaintiff-Appellee

v.

CHESAPEAKE AND OHIO RAILROAD, Defendant

and Thomas E. Curry, Administrator of the Estate of Thomas E. Curry II, deceased Defendant

and The Cincinnati Insurance Co. Defendant-Appellant

No. 87-CA-20.  
5th District Court of Appeals of Ohio, Delaware County.  
Decided on May 4, 1988.

Civil Appeal from the Court of Common Pleas, Case No. 81 CIV 87.

Gerald S. Leeseberg, Wolske & Blue, Columbus, for plaintiff-appellee.

John M. Alton, Robert D. Erney, Lane, Alton & Horst, Columbus, for defendant-appellant.

Before MILLIGAN, P.J., and HOFFMAN and TURPIN, JJ.

OPINION

TURPIN, Judge.

This case arose upon the following facts:

Appellee Kunkel is administrator of the estate of Carla Curry. She was killed when the truck in which she was a passenger was struck by a train. Her husband, the driver of the truck, was also killed. Appellee sued the railroad, the estate of her husband, and his auto insurance company. This appeal addresses only the liability of the insurance company. Appellee successfully argued to the trial court that under Ohio law and the applicable insurance policy, he was entitled to recover on separate per person policy limits of \$25,000 for each of the causes of action arising out of Carla Curry's death, namely wrongful death and survivorship. The insurance policy states in pertinent part:

Limits of Liability. The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence

Appellant Cincinnati Insurance Company assigns a single error to the trial court:

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DECLARING THAT APPELLEE IS ENTITLED TO RECOVER SEPARATE PER-PERSON LIABILITY INSURANCE POLICY LIMITS OF \$25,000 FOR EACH OF HIS WRONGFUL DEATH AND SURVIVAL ACTIONS.

For the reasons set forth below, we agree with appellant that the trial court erred, and accordingly we reverse and remand.

First of all, it is agreed by the parties that this is a "general" liability coverage question, as opposed to uninsured or underinsured coverage. Appellee argues that he has two separate causes of action, one for the wrongful death of his decedent, and the second for loss of services, emotional distress and mental anguish of those persons who survive her. In support of the trial court's decision, appellee directs our attention to Sexton v. State Farm Mutual Auto Ins. Co.

(1982), 69 Ohio St.2d 431, and Auto-Owners v. Lewis (1984), 10 Ohio St.3d 156. In both Lewis and Sexton, the claimants were permitted separate recoveries for bodily injury and for loss of services. Appellee urges us that if this were an uninsured or underinsured coverage case, there would be no doubt that he would be entitled to dual recovery.

The issue of what the policy limit is, and whether or not separate limits are available for each cause of action, is a matter of contractual language. We read the policy to state clearly and unambiguously that the limit of liability denoted as "each person" includes all damages, including damages for care and loss of services arising out of bodily injury sustained by one person. Here, where one person, decedent, suffered bodily injury, a single per-person limit is clearly anticipated.

Neither is appellee correct in saying that if this were an uninsured or underinsured case, he would certainly be entitled to two recoveries.

An insurance policy provision that limits recovery for all causes of action arising out of bodily injury to one person to a single limit of liability is a valid restriction of uninsured automobile coverage.

Dues v. Hodge (1988), 36 Ohio St.3d 46, syllabus 2.

Appellee's case is not strengthened by the fact that this is general, not uninsured coverage. Uninsured coverage is mandated by Ohio law. Lewis, Sexton, and Dues all dealt with parents seeking to recover against policies which they owned and which insured their dependents who had suffered bodily injury. Here, claimant is a third party who has no interest in the insurance policy and whose rights are not dictated by statutory fiat. The owner in the policy in the case before us was the tortfeasor, decedent, Thomas Curry II. If an insurance company can restrict recovery of its own insured under Dues, we see no reason why a company cannot limit recovery here.

We find the recent case of The Cincinnati Ins. Co. v. Phillips (Dec. 31, 1987), Preeble App. No. CA-87-05-011, unreported, very helpful. In Phillips, the Court of Appeals found that the insurance company's liability was limited to a single per person limit for all damages sustained as a result of a single person's bodily injury, regardless of whether the damages are direct, incidental, or consequential, and regardless of how many persons are legally entitled to participate in the recovery.

Appellee also urges us to find that the damages of the survivors are "bodily injury" to them under a negligent infliction of emotional distress tort claim such as was permitted in Paugh v. Hanks (1983), 6 Ohio St.3d 72. We simply do not think that the policy language permits a definition of bodily injury so elastic as to stretch to cover this type of survivorship claim.

We hold that under the law of Ohio and the unambiguous terms of the insurance policy, appellee is entitled to a single per-person limit of \$25,000 total, for his two separate causes of action.

Accordingly, we sustain the assignment of error, reverse the decision of the Court of Common Pleas, Delaware County, and remand the cause to that court for further proceedings in conformity with this opinion.

HOFFMAN, J., concurs.

MILLIGAN, P.J., concurs separately.

MILLIGAN, Presiding Judge, concurring.

I agree with the opinion and judgment reversing the stacking declaratory judgment of the trial court. The foundation of appellee's theory was destroyed when the Supreme Court reversed syllabus 2 of Auto Owners, supra, (1984), 10 Ohio St.3d 156, 462 N.E.2d 396, in Dues v. Hodge (1988), 36 Ohio St.3d 46, --- N.E.2d ----.

I write separately to raise concern about the issue of proper parties. I find no authority for the proposition that an injured party has standing to sue the insurance carrier of the tortfeasor. 60 O.Jur.3d, Insurance, section 1448, and the cases cited.

Additionally, there is a per se conflict of interest between the insurer and the insured. I am not satisfied, from the record, that this conflict has been adequately dealt with by the insurance carrier and the insured.

JUDGEMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Delaware County, Ohio, is reversed and this cause is remanded to that court for further proceedings in accord with applicable law.