

**85-LW-3008 (10th)**

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Stephen H. McClary, Plaintiff-Appellant

v.

The Cincinnati Insurance Company, Defendant-Appellee.

No. 84AP-223 (REGULAR CALENDAR).  
10th District Court of Appeals of Ohio, Franklin County.  
Decided on May 16, 1985.

APPEAL from the Franklin County Common Pleas Court.

MESSRS. ISAAC, BRANT, LEDMAN &amp; BECKER, MR. DOUGLAS S. ROBERTS, MR. DAVID H. MEADE and MR. CHARLES E. BRANT, for appellant.

MESSRS. LANE, ALTON &amp; HORST and MR. JOHN M. ALTON, for appellee.

## OPINION

STRAUSBAUGH, J.

Plaintiff, Stephen H. McClary, appeals from the judgment of the Franklin County Common Pleas Court granting defendant's motion for summary judgment and dismissing his complaint. In consideration of its precedential value and the unique issues involved, this appeal is assigned sua sponte to the regular calendar pursuant to App. R. 11.1 and Loc. R. 4 of the Tenth District Court of Appeals.

The record reveals that on April 11, 1983 plaintiff filed a complaint against defendant, The Cincinnati Insurance Company, claiming that under his family combination automobile policy and the uninsured motorist provision therein he was entitled to damages in the amount of \$100,000 resulting from injuries sustained in a motorcycle accident on March 6, 1983 involving an automobile driven by an individual with no insurance. He further added that as a result of the injuries sustained in the collision, he filed a claim with defendant on March 31, 1983, pursuant to the uninsured motorist provision of his policy. On April 7, 1983, a letter was sent from defendant to plaintiff indicating that coverage had been denied for his injuries. A copy of the letter was attached to plaintiff's complaint.

In his complaint, plaintiff requested a declaratory judgment establishing his rights to coverage under the insurance policy issued to him by defendant and for judgment in the amount of \$100,000 based upon his previous claim. In its answer to plaintiff's complaint, defendant admitted that it had written plaintiff a letter on April 7 advising him that the uninsured motorist provisions of his policy did not cover his particular claim, however, defendant also added that it now agreed that coverage was afforded under the policy and it was willing to arbitrate the claim pursuant to the terms of the policy if a settlement could not be reached.

Plaintiff then filed a motion for leave to file an amended complaint so that he could include a prayer for punitive damages. However, on August 23, 1983, the trial court overruled the motion, based upon the fact that the suit was brought under an uninsured motorist provision.

On October 6, 1983, defendant filed a motion for summary judgment, claiming that since it had admitted coverage in its answer plaintiff's request for declaratory relief was moot. Further, defendant argued that any disputes regarding the existence, nature and extent of plaintiff's alleged injuries were required, under the contract for insurance, to be resolved through arbitration as set forth in Part IV - "Family Protection Coverage" of the insurance policy. Defendant requested that plaintiff's action be dismissed and the parties be instructed to comply with the terms of the insurance contract to arbitrate the dispute. Plaintiff filed a memorandum contra to defendant's motion, claiming that since defendant had denied coverage under the policy until after suit was brought, the right to compel arbitration pursuant to the insurance policy was waived.

On February 13, 1984, the trial court granted defendant's motion for summary judgment and dismissed plaintiff's complaint. From this judgment plaintiff now appeals, raising the following three assignments of error:

"1. The trial court erred in denying the motion of plaintiff, Stephen H. McClary, to amend his complaint to include a request for punitive damages.

"2. The trial court erred in granting the motion for summary judgment of defendant, The Cincinnati Insurance Company.

"3. The trial court erred in dismissing this case and in ordering that plaintiff's claim be arbitrated in accordance with the terms of the insurance contract."

In support of his second assignment of error, plaintiff contends that defendant waived its right to demand arbitration by denying liability in its letter of April 7, 1983. Citing the Supreme Court case of Phoenix Ins. Co. v. Carnahan (1900), 63 Ohio St. 258, plaintiff argues that the right to arbitrate may be waived by an insurer who denies liability under such circumstances as to make arbitration fruitless or to support the belief of the insured that further contact short of litigation would be futile. In an attempt to describe the type of conduct that would fall under the standard established in Phoenix, plaintiff cites the Indiana case of McNall v. Farmers Ins. Group (1979), 392 N.E. 2d 520, as support for the proposition that the mere denial of coverage without any acknowledgment of the right of arbitration is sufficient to constitute a waiver.

In Phoenix, the Supreme Court ruled that the condition appearing in the insurance policy as to arbitration or appraisal was a condition precedent, and before the insured could maintain an action to recover under the policy he must show that he has complied with the condition or that he has a legal excuse for nonperformance. In case of a dispute between the insured and the insurer as to the amount of the loss, the contract does not convey any right of action on the policy, rather, the insured only has a right to enforce the award arising from the arbitration or appraisal unless the insurer has waived the condition by refusal to proceed under it, when requested, or otherwise. Graham v. German American Insurance Co. (1907), 75 Ohio St. 374, citing Phoenix. The syllabus in Phoenix in regard to the issue of waiver specifically provides as follows:

"6. A denial of ultimate liability, on the part of the insurer is not necessarily a denial of the amount of the loss, and is not so inconsistent therewith as to amount to a waiver of the condition as to arbitration or appraisal of the amount of the loss, unless such denial is made under such circumstances, or is accompanied by such conduct, as would make such arbitration or appraisal fruitless, or such as would justify the insured in believing that an attempt on his part to perform the conditions would not be responded to by the insurer."

Other jurisdictions, as well, recognize that the right to arbitration may be waived by an insurer when dealing specifically with an uninsured motorist provision in an insurance policy. See 24 A.L.R. 3d, Uninsured Motorist Endorsement-Arbitration-Waiver Thereof, 1325.

However, it should be noted that the facts in both the Phoenix and Graham cases differ materially from the facts in the case at bar. In the policies involved in both Graham and Phoenix, there was an unqualified requirement that the amount of the loss in the event of disagreement be ascertained by arbitration or appraisal. Those policies all provided that, upon the parties' failing to agree as to the amount of loss, the amount "shall" be ascertained by arbitration or appraisal. In addition, each policy also stated that no suit or action could be maintained for the recovery of any claim in any court of law or equity until after full compliance by the insured with all the foregoing requirements. Because of such mandatory language, the requirements of arbitration and appraisal were viewed as a condition precedent to the commencement of a suit. The first paragraph of Part IV of plaintiff's insurance policy reads as follows:

"Coverage J-Family Protection (Damages for Bodily Injury). To pay all sums which the insured or his legal representatives shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover

such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration." (Emphasis added.)

From the language set forth above, it would appear that arbitration is an unqualified requirement should a dispute arise as to the liability of the uninsured driver or the amount of damages; however, later in Part IV, the following paragraph appears concerning "arbitration":

"Arbitration. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this Part, then, upon written demand of either the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this Part." (Emphasis added.)

In the paragraph above, arbitration was provided for only "upon written demand of either." As such, this latter paragraph in the policy refers to arbitration as being optional for both parties. Neither party is required to invoke it, but either party may do so. Arbitration acts as a substitute for litigation and not necessarily a prelude to it. This distinction was specifically referred to in the case of Fire Association of Philadelphia v. Agresta (1926), 115 Ohio St. 426. Citing language similar to that set forth in the last paragraph above, the Supreme Court held in Fire Association that since the appraisal was optional with either party and not to be employed unless one party should demand it, if neither party should invoke the right then the provision should be disregarded. To insist that no action could be maintained until after the amount of loss had been ascertained by appraisal would render meaningless the optional language of the appraisal provision. The Supreme Court went on to add: "It follows, \*\*\* that neither the Graham case nor the Carnahan [Phoenix] case was intended as an authority in a suit upon a policy which did contain a clause making an appraisal in the event of disagreement optional with either party." Id., at 430.

Where one party to a contract is responsible for the language used and such language contains an ambiguity or words of doubtful meaning, such a contract must be strictly construed against the party who drafted it and in favor of the opposing party. Id. The same rule has been followed when interpreting the language of an insurance contract. Any ambiguity that may exist in the policy must be construed liberally for the insured. Buckeye Union Ins. Co. v. Price (1974), 39 Ohio St. 2d 95; American Financial Corp. v. Fireman's Fund Ins. Co. (1968), 15 Ohio St. 2d 171. Because of the conflicting provisions found under Part IV of plaintiff's policy and the liberal construction required in favor of the insured, arbitration must be viewed as optional and not an unqualified requirement under the policy. In light of this interpretation, plaintiff was not required to seek arbitration of a dispute arising over the amount of the loss claimed before filing suit against defendant where no demand had been made for arbitration. Because it is equally optional to both parties of the contract no duty can be imposed upon the insured to demand an arbitration. Until there is such written request, neither party is compelled to arbitrate.

In Fire Association, plaintiff filed suit against his insurance company to recover the amount of loss by fire which destroyed his store and stock of goods. Notice had previously been filed with the defendant for the loss but the insurance company denied ultimate liability. Upon appeal by defendant, the Supreme Court held that in any suit to recover under an insurance policy two separate issues are involved: first, the question of ultimate liability, and second, the amount of the loss. Although the insurance company may dispute ultimate liability it may not desire to have the issue of the amount of loss submitted to a court and jury. Therefore, it may demand arbitration and by doing so it would not be precluded from denying ultimate liability. After reviewing the facts of the case at hand, the Supreme Court concluded that under the plaintiff's policy the insurance company had the option of submitting both issues for determination by the court and jury, and, since it had failed to request an appraisal before the commencement of plaintiff's suit, it was presumed to have preferred to have both issues determined in a single action.

In the instant case, if neither party had demanded arbitration during negotiations before filing of the suit, according to the Fire Association decision, plaintiff would not be prohibited from proceeding with its action under the arbitration provision of the insurance policy. However, again the facts herein create a different situation from those set forth in the case law reviewed above. Plaintiff's letter of March 31, 1983 (attached to its memorandum in response to defendant's motion for summary judgment) provided:

"As a result of this accident, Mr. McClary has incurred significant medical expenses and suffered

permanent injuries. On his behalf, we hereby demand \$100,000.00 pursuant to Part IV of the policy.

"If this demand is contested, then we hereby request that the issue be arbitrated pursuant to the arbitration clause in the policy."

As such, plaintiff specifically demanded arbitration of its claim. Although the Phoenix decision has no applicability to cases involving insurance policies with an optional arbitration or appraisal provision, in those cases which distinguish it, the option was never exercised by either party. The language of the arbitration provision herein provides that, upon written demand of either, the matter "shall" be settled by arbitration. Therefore, once demand is made, the option is exercised and both parties are bound by the provisions providing for binding arbitration. An unqualified requirement of arbitration arises thereafter from which the amount of loss must be ascertained. The letter of April 7, 1983 from defendant, in response to plaintiff's claim, reads in pertinent part as follows:

"My review of your letter and the police report provided discloses that Mr. McClary was injured while operating a 1978 Harley FXC motorcycle.

"Review of the insurance contract found that this contract provides coverage on a 1977 Chevrolet Pickup truck only. Further review of the contract, in particular Part IV also disclosed no coverage for Mr. McClary's injuries.

"Since this is the case, I must respectfully deny any coverage under the above captioned policy for Mr. McClary's injuries."

No mention is made that defendant refused to go ahead with arbitration of the amount of loss. The letter indicates only that defendant denied ultimate liability for the claim because plaintiff was riding a motorcycle at the time of the accident. As noted in the facts recited above, plaintiff filed suit only four days after defendant's letter was sent. There is no evidence of conduct on the part of defendant indicating an unfair effort to avoid arbitration or to mislead plaintiff into believing arbitration would be useless. Without some further discussions between the parties, defendant's letter by itself does not indicate that it rejected any right to arbitration on the issue of the amount of the loss. As stated in the Phoenix decision, a denial of coverage on the part of the insurer is not necessarily a denial of the amount of the loss and, under the circumstances presented herein, there was no evidence of conduct on the part of defendant suggesting that arbitration would be fruitless.

As for plaintiff's reliance on the Indiana case of McNall, for the proposition that denial of coverage is enough to waive the right to compel arbitration, the language of Phoenix is clear that in Ohio denial of coverage is not proof enough of a waiver. Accordingly, there being no genuine issue of material fact, reasonable minds could come to but one conclusion, that the moving party was entitled to judgment as a matter of law. Plaintiff's second assignment of error is therefore overruled.

In support of his first assignment of error, plaintiff argues that the trial court was in error when it ruled that, because his suit was based upon an uninsured motorist provision, his motion for leave to file an amended complaint to include a claim for punitive damages must be overruled.

This court has recently held in Hutchinson v. J.C. Penney Casualty Ins'. Co. (Feb. 7, 1984), No. 83AP-136, unreported (1984 Opinions 176), that punitive as well as compensatory damages were recoverable under a provision for uninsured motorist coverage where the language of the applicable provision specifically provided for "damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury \*\*\*." The only qualification for coverage under the policy was that the owner's or operator's liability had to arise out of the ownership or use of the uninsured motor vehicle.

The language of the uninsured motorist provision involved herein is almost identical to the provision found in Hutchinson. It provides that payments shall be made for all sums "which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury \*\*\*." Therefore, punitive damages were recoverable under the coverage provided for in plaintiff's policy. Accordingly, it was error for the trial court to have denied plaintiff's motion to amend his complaint. However, in light of our previous ruling concerning plaintiff's second assignment of error, and the fact that punitive damages may still be sought in arbitration, plaintiff was not prejudiced by the error and his first assignment of error is overruled.

As for plaintiff's third assignment of error, although R.C. 2711.02 provides that the trial court shall stay any suit or proceeding brought upon any issue referable to arbitration, it is applicable only upon application of one of the parties. R.C. 2711.02 reads as follows:

"If any suit or proceeding is brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceedings is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." (Emphasis added.)

The language of R.C. 2711.02 is clear that, when a party moves for stay of a suit which is brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court must grant the motion and cannot dismiss the complaint. *Mills v. Jaguar-Cleveland Motors, Inc.* (1980), 69 Ohio App. 2d 111. However, in the instant case, neither party requested a stay of the proceedings triggering R.C. 2711.02. Therefore, the court did not abuse its discretion in dismissing plaintiff's complaint pursuant to defendant's motion for summary judgment and ordering the matter to be submitted to arbitration in accordance with the agreement. Accordingly, plaintiff's third assignment of error is overruled.

For the foregoing reasons, all of plaintiff's assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

WHITESIDE and MOYER, JJ., concur.