

85-LW-3416 (10th)

Meridian Mutual Insurance Company, Plaintiff-Appellant

v.

State Farm Mutual Automobile Insurance Company, Defendant-Appellee.

No. 84AP-1008 (REGULAR CALENDAR).
10th District Court of Appeals of Ohio, Franklin County.
Decided on July 2, 1985.

APPEAL from the Court of Common Pleas of Franklin County.

MR. DANIEL R. FREYTAG, for appellant.

MESSRS. HAMILTON, KRAMER, MYERS & CHEEK, and MR. EMERSON CHEEK, III, for appellee.

OPINION

NORRIS, J.

Plaintiff appeals the judgment of the trial court, rendered for defendant at the close of plaintiff's case, which consisted of stipulated evidence and the testimony of four witnesses.

Plaintiff issued a policy of automobile insurance to the stepfather of George Hune, the driver of a Toyota automobile which was involved in an accident. The automobile was owned by Richard Williams, whose daughter, Leslie, was a passenger in the automobile, along with three other fellow students. Williams was insured by defendant. Plaintiff sought a declaratory judgment that defendant owed liability coverage to Hune, and medical expense coverages to all occupants of the Toyota, as well as a declaration that defendant's coverage was primary, and plaintiff's was excess.

The trial court found that Leslie had her father's permission to drive the car to and from school, and to transport other students; that he had expressly forbidden her to permit any other person to drive the automobile; that Hune, an unlicensed driver and Leslie's friend, knew of the prohibition; and that Leslie had permitted Hune to drive the Toyota.

Plaintiff raises six assignments of error:

"I. Since the Toyota was being used for a purpose permitted by the named insured (i.e. commuting to and from school including the transportation of fellow students), the trial court prejudicially erred when it determined that driver George Hune was not entitled to liability coverage under the State Farm policy.

"II. Since the Toyota was being used for a purpose mutual to the driver, a passenger who was also an 'insured' and 'additional driver', and the named insured, the trial court prejudicially erred when it determined that driver George Hune was not entitled to liability coverage under the State Farm policy.

"III. The trial court prejudicially erred when it determined that the omnibus statute did not require that the State Farm policy provide liability coverage for George Hune, who was driving the Toyota with the permission of an insured.

"IV. The trial court prejudicially erred when it determined that the State Farm policy did not provide medical payments coverage for all of the occupants of the Toyota.

"V. The trial court erred by failing to make findings of fact regarding all of the ultimate facts which are determinative of the case.

"VI. The trial court's finding of fact that the named insureds had prohibited their daughter from allowing others to 'use' the Toyota is unsupported by the evidence or, alternatively, is against the manifest weight of the evidence."

By its first assignment of error, plaintiff contends that Hune was an insured under defendant's policy of insurance, relying upon these definitions of an "insured" in the policy:

"1. you [the named insured, Williams];

"3. *** relatives ***;

"4. any other person while using such a car if its use is within the scope of consent of you or your spouse; and

"5. any other person or organization liable for the use of such a car by one of the above insureds."

Plaintiff reasons that Hune was using the car within the scope of Williams' consent because he had given his daughter permission to use the automobile for the purpose of commuting to and from school (and to transport her friends on those occasions), and that this was the purpose to which it was being put at the time of the accident, regardless of the fact that Hune did not have permission to drive the automobile.

Plaintiff contends that the trial court construed the term "use" as meaning only "driving", and points to the Supreme Court's opinion in Brown v. Kennedy (1943), 141 Ohio St. 457, as support for its proposition that "use" should be regarded as synonymous with "purpose" in the context of the policy provision and circumstances of this case.

Actually, the holding in Brown v. Kennedy, supra, was a very narrow one. There, the named insured's daughter had his permission to drive his automobile to and from college, and was involved in a collision, as a passenger in the car, at a time that it was being driven by a friend with her permission, in direct contravention of instructions from her father. There, the injured party had obtained judgment against both the driver and the named insured's daughter, and filed a supplemental petition seeking payment of the judgment under the father's policy. The Supreme Court held that, under a policy provision defining an insured as a person using the automobile "provided the *** actual use is with the permission of the named insured ***", the daughter was a named insured as she was using the automobile for the purpose of commuting to college.

In that case, the person sought to be held to be an insured was the daughter, and she had permission from the named insured, as contrasted with the circumstances of this case. The Supreme Court therefore was not required to determine whether the driver was an insured under the policy language, and pointed out that it was not doing so.

Ohio follows the general rule that an original permittee, who has been given authority to use the named insured's automobile, but has been expressly forbidden to delegate this authority, cannot do so, and the use of the automobile by a second permittee, in violation of the named insured's express order, is not within the protection of the policy. Security Mut. Cas. Co. v. Hoff (1978), 54 Ohio St. 2d 426, at 428; West v. McNamara (1953), 159 Ohio St. 187, at 193.

We discern nothing in the circumstances of this case which would warrant our deviating from the general rule. Certainly, State Farm's effort at "plain language" in its policy did not produce words so radically different from those previously construed by Ohio cases so as to remove this case from the embrace of the general rule. Under the policy's language, Hune would be an insured had he used the car "within the scope of consent" of Leslie's father. At most, Williams' scope of consent included permission to Leslie to drive the automobile to and from school, and to accept fellow students as passengers. It specifically excluded delegation by Leslie to others of her permission to drive. In essence, plaintiff would have us rewrite the policy provision so that Hune would be an insured so long as the automobile was used for the general purpose of school commutation intended by Leslie's father. We are unwilling to accept the invitation to rewrite, as the provision is not fairly susceptible of that reading. Accepting plaintiff's construction could encourage delegation of permission to unqualified drivers, and lead to absurd results. For example, consider an automobile thief who, while Leslie was driving to school, commandeered the car, forced her to the passenger's seat, and then announced

that he would drop her off at school, prior to his fleeing with the car. Surely, the thief should not be considered an insured if the car were involved in an accident before it reached the school.

In view of our conclusion that Hune was not using the automobile within the scope of consent of the named insured, it follows that he was not an insured under the definition of paragraph four; nor was he, within the contemplation of paragraph five, "one of the above insureds" who was using the automobile.

Accordingly, the first assignment of error is overruled.

Plaintiff relies upon our decision in Grange Mutual Casualty Co. v. Hartley (Feb. 8, 1979), No. 78AP-537, unreported (1979 Opinions 197), for the proposition upon which its second assignment of error is based. Because there is no indication in that opinion that the named insured's son had permission to use the automobile, or that the named insured had prohibited delegation by his son of any authority that he had received to drive the car, the holding of that case does not support plaintiff's proposition. The second assignment of error is overruled.

The third assignment of error is overruled upon the authority and reasoning found in Moyer v. Aron (1964), 175 Ohio St. 490; Knapp v. State Farm Mut. Auto Ins. Co. (1982), 6 Ohio App. 3d 53. We do not agree with plaintiff's contention that this result is in conflict with dictum found in the Supreme Court's opinion in Hammon v. McLaughlin (1983), 6 Ohio St. 3d 227, especially in view of other language in that opinion indicating that R.C. 4509.51 applies to permission from the named insured.

Because the stipulated evidence establishes that defendant "had in full force and effect a policy of automobile insurance *** with respect to a 1980 Toyota automobile ***", and one of the trial court's findings of fact concludes that the policy covered the Toyota, we are hard-pressed to understand the trial court's conclusion of law that "[s]ince the 1980 Toyota was not 'a vehicle covered under the liability coverage' of the state Farm policy at the time of the accident, the State Farm policy does not provide any medical payments coverage for George Hune, Michael Wagner, Matthew Styler or Michael Westbrook, all of whom were occupants of the insured vehicle ***." Based upon that conclusion of law, the trial court's judgment entry provides that defendant's policy "provides no medical payments coverage for any person involved in the automobile accident of October 6, 1981, except Leslie L. Williams ***."

The applicable language in defendant's policy, concerning payment of medical expenses to other occupants of the Toyota, follows:

"Persons for Whom Medical Expenses are Payable.

"We will pay medical expenses for bodily injury sustained by:

"2. any other person while occupying:

"a. a vehicle covered under the liability coverage, except a non-owned car. Such vehicle has to be used by a person who is insured under the liability coverage; ***"

Since, under the uncontroverted evidence, the Toyota was included under the policy's liability coverage, and it was being used by Leslie [Brown v. Kennedy, supra], who was an insured under the policy's liability coverage, the medical expense coverage was available to all persons in the Toyota. This conclusion is not inconsistent with our holding on the first assignment of error since coverage under the medical expenses clause is predicated upon Leslie's use of the automobile, rather than upon Hune's. In addition, there is no limiting language of "scope of consent" in this area of the policy.

Accordingly, the fourth assignment of error is sustained.

The fifth assignment of error is overruled since, in view of our disposition of the previous assignments of error, the findings of fact urged by plaintiff would have been irrelevant to the resolution of the issues raised by those assignments of error. Thus, plaintiff has demonstrated no prejudice in this regard.

Likewise, in view of our disposition of the first assignment of error, plaintiff has demonstrated no prejudice in its arguments supporting the sixth assignment of error. There was evidence to support the trial court's finding that Leslie was without authority to delegate the permission she had received from her father, whether that permission is couched in terms of "use" or "operation" of the vehicle. The sixth assignment of error is overruled.

The first, second, third, fifth and sixth assignments of error are overruled; the fourth assignment of error is sustained; the judgment of the trial court is affirmed in part and reversed in part; and this cause is remanded to the trial court for further proceedings according to law and consistent with this opinion.

Judgment affirmed in part; reversed in part; and remanded.

McCORMAC and MOYER, JJ., concur.