

THEERSA MILLER, et al., )  
 )  
 Plaintiffs/Appellees, )  
 )  
 vs. )  
 )  
 MOTORISTS MUTUAL INSURANCE )  
 COMPANY, et al., )  
 )  
 Defendant/Appellant )

CASE NO. 12-0053

*On Appeal from the Portage County Court  
of Appeals, Eleventh Appellate District*

*Court of Appeals  
Case No. 2011-P-0016*

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**NOTICE OF APPEAL OF  
DEFENDANT/APPELLANT MOTORISTS MUTUAL INSURANCE  
COMPANY**

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**FILED**  
 JAN 11 2012  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

Defendant/Appellant Motorists Mutual Insurance Company hereby gives notice of its appeal to the Supreme Court of Ohio from the Opinion and Judgment Entry of the Portage County Court of Appeals, Eleventh Appellate District, entered and journalized in Court of Appeals Case No. 2011-P-0016 on November 28, 2011. This case raises issues of public and great general interest.

Respectfully submitted,



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**PROOF OF SERVICE**

This is to certify that a copy of the foregoing **NOTICE OF APPEAL OF DEFENDANT/APPELLANT MOTORISTS MUTUAL INSURANCE COMPANY** was sent by regular U.S. Mail, postage prepaid, this 11<sup>th</sup> day of January, 2012, to the following:

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FILED  
COURT OF APPEALS

IN THE COURT OF APPEALS

NOV 28 2011

ELEVENTH APPELLATE DISTRICT

LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

PORTAGE COUNTY, OHIO

Theresa Miller, et al.,	:	OPINION
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2011-P-0016
Motorist Mutual Insurance Company, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2010 CV 0428.

Judgment: Reversed.

*Robert P. Rutter*, Rutter & Russin, One Summit Office Park, Suite 650, 4700 Rockside Road, Independence, OH 44131 (For Plaintiffs-Appellants).

*Merle D. Evans, III*, Day Ketterer Ltd., Millennium Centre, Suite 300, 200 Market Avenue, North Canton, OH 44701-4213 (For Defendants-Appellees).

MARY JANE TRAPP, J.

{¶1} Appellants, Theresa Miller and Geoffrey Davis, appeal from a decision of the Court of Common Pleas of Portage County, granting summary judgment in favor of appellee, Motorist Mutual Insurance Company ("MMIC"), and denying appellants' motion for summary judgment. While the parties stipulate to the facts in this case and to the liability of the tortfeasor, they disagree over whether the multiple collisions giving

rise to this case constituted one "accident" for the purposes of insurance liability limits, or two. Given the failure of the insurance company to include a more precise definition of the policy term "accident," and use limiting language found in other policies that has withstood judicial scrutiny, we find that the incidents giving rise to Ms. Miller and Mr. Davis's claims constitute two accidents.

**{¶2} Substantive Facts and Procedural History**

{¶3} The facts in this case are undisputed. On the evening of July 12, 2008, Daniel Masterson was heading westbound on State Route 5, when he took his eyes off the road in order to reach to the floorboard to retrieve his lighter, and veered into the eastbound lane of traffic. The SUV Mr. Masterson was driving collided with a group of motorcycles headed eastbound. Mr. Masterson first collided with a motorcycle driven by David Perrine. In an attempt to avoid hitting Mr. Perrine's motorcycle, Michael Reese, who was driving behind Mr. Perrine, took evasive action, but was unable to avoid hitting Mr. Perrine's motorcycle and sliding into his path. Mr. Perrine and his passenger, Julia Hill, and Mr. Reese and his passenger, Kim Mook, sustained injuries.

{¶4} Within .3 seconds of striking Mr. Perrine, Mr. Masterson struck a motorcycle driven by Geoffrey Davis, and then traveled back across the westbound lane before crashing into a guardrail. Mr. Davis and his passenger, Theresa Miller, were also injured.

{¶5} Mr. Masterson was insured by MMIC, and his policy contained liability coverage for bodily injury with split limits of \$100,000 for "each person" and \$300,000 for "each accident." No dispute exists as to Mr. Masterson's liability, nor is there a

dispute that the collective value of the injuries sustained by Mr. Perrine, Ms. Hill, Mr. Reese, Ms. Mook, Mr. Davis, and Ms. Miller exceeded \$300,000.

{¶6} A dispute does exist, however, as to whether the incidents constitute one accident, limiting MMIC's liability to a single \$300,000 per accident payment, or whether they constitute two accidents, increasing MMIC's exposure in this case to, at most, \$500,000. Ms. Miller and Mr. Davis contend that Mr. Masterson's collision with their motorcycle constitutes a separate accident from the initial collision with Mr. Perrine's motorcycle, and that they are entitled to a separate \$300,000 per accident payment.

{¶7} Because MMIC's liability for at least one accident was not disputed, the parties entered into a Covenant Not to Execute, which provided that MMIC would make one "each accident" payment of \$300,000 to be split among the six injured parties, but provided for the ability to file a declaratory action seeking interpretation of MMIC's policy, and determination of whether the incidents constituted one or two accidents. The Covenant Not to Execute further provided that, should a court determine the incident to be two accidents, MMIC would pay an additional \$100,000 each to Ms. Miller and Mr. Davis.

{¶8} Ms. Miller and Mr. Davis ultimately filed a declaratory judgment action, and the parties submitted cross-motions for Summary Judgment and Declaratory Relief. The trial court granted summary judgment in favor of MMIC, finding "[t]he whole incident was one brief continuous course of conduct." The trial court relied on language in the "Limitation of Liability" portion of the policy to determine that "the term 'accident' or 'any one auto accident' includes all the vehicles involved in the collision." Applying the policy language to its finding that there was one continuous course of conduct, the trial court

held that there was only one accident, and that the parties were “therefore limited to a single recovery under the ‘Each Accident’ portion of [MMIC’s] policy, regardless of the number of motorcycles involved in the incident.”

{¶9} Ms. Miller and Mr. Davis timely appealed, and now bring the following assignment of error:

{¶10} “The trial court erred in ignoring this Court’s decision in *Godwin* and in granting MMIC’s motion for summary judgment and denying the plaintiffs’ motion for summary judgment.”

{¶11} **Standard of Review**

{¶12} We review de novo a trial court’s order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. “A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.” *Id.*, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶13} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial.’ The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element

of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

**¶14} Interpretation MMIC's Policy**

¶15} The controlling portion of MMIC's policy provides:

¶16} "A. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one auto accident. This is the most we will pay regardless of the number of:

¶17} "1. Insureds;

¶18} "2. Claims made;

¶19} "3. Vehicles or premiums show in the Declarations; or

¶20} "4. Vehicles involved in the auto accident."

{¶21} The policy, however, fails to define “accident.” Construction of written contracts, including insurance contracts, is a matter of law. *Time Warner Entertainment Co., LP v. Kleese-Beshara-Kleese*, 11th Dist. No. 2009-T-0010, 2009-Ohio-6712, ¶27, citing *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. “We review the interpretation of contracts de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108. We must give the language of an insurance policy its plain and ordinary meaning. *Dairyland Ins. Co. v. Finch* (1987), 32 Ohio St.3d 360, 362. We cannot create ambiguity where there is none; a policy must be resolved in favor of the insured only when a provision in a policy is ambiguous and susceptible to more than one reasonable interpretation. *Hacker v. Dickman*. (1996), 75 Ohio St.3d 118, 119.” *OSI Sealants, Inc. v. Wausau Underwriters Ins. Co.*, 11th Dist. No. 2003-L-181, 2005-Ohio-2528, ¶19. Because language in insurance policies is selected by the insurers, and they have ample opportunity to specifically define terms and protect themselves from liability, any ambiguity will be construed in favor of the insured. See *Gomolka v. State Auto Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 169.

{¶22} The question before the trial court and this court is whether the policy term “accident” is ambiguous. MMIC invites us, despite having failed to provide a definition for “accident,” to construe the term as the courts did in *Banner v. Raisin Valley, Inc.* (N.D. Ohio 1998), 31 F.Supp.2d 591 and *Progressive Preferred Ins. Co. v. Derby* (June 15, 2001), 6th Dist. No. F-01-002, 2001 Ohio App. LEXIS 2649, and adhere to a “causation approach.”

{¶23} The “causation approach” to policy interpretation focuses on the cause of the insured event, not the effects. See *Banner* at 593. However, “both the decisions in *Banner* and in *Derby*, while citing to the causation view in determining that one accident or occurrence had resulted in multiple injuries, were fundamentally based on construction of the term ‘accident’ in the subject liability policies. And, the definition of accident in each policy demanded those courts find that one accident or occurrence had resulted in multiple injuries.” *Nationwide Mut. Ins. Co. v. Godwin*, 11th Dist. No. 2005-L-183, 2006-Ohio-4167, ¶48.

{¶24} In both *Banner* and *Derby*, the limitation of liability clause contained the same “regardless of the number of vehicles involved in the auto accident” language found in MMIC’s policy. This is the limiting language relied upon by the trial court below. In an attempt to distinguish this case from *Godwin*, the trial court surmises that the *Godwin* court “apparently had insufficient policy language to help define the terms ‘accident’ or ‘occurrence,’ because the *Godwin* decision does not refer to such limiting language in its opinion.

{¶25} But, the real distinction lies in an omission in the MMIC policy, and it is this distinctive omission that controls the outcome of the case before us.

{¶26} While the *Godwin* decision only alludes to the policy language that controlled the outcome in *Banner* and *Derby*, we definitively find that the interpretation reached in *Banner* and *Derby* was dictated by the inclusion of a standard policy definition of the term “accident” as “a sudden, unexpected and unintended event, or a continuous or repeated exposure to substantially the same conditions.” Unlike *Banner* and *Derby*, the MMIC policy contains no such standard policy language. MMIC chose

the less descriptive and thus less limiting definitional language, and thus we have no alternative but to construe the ambiguity against the insurance company.

{¶27} Furthermore, MMIC suggests that the liability provisions, when considered as a whole, are clear and unambiguous as to the meaning of “accident.” We however, look to the plain meaning of the word. The plain and ordinary meaning of “accident” is “an unexpected and undesirable event.” Webster’s II New College Dictionary (1999) 6. “A person unversed in the technicalities of insurance law might, therefore, easily conclude that [the insured’s striking of each of the vehicles], sequentially, constituted separate accidents or occurrences, rather than the single accident or occurrence of losing control of the [car] \*\*\*.” *Godwin* at ¶49.

{¶28} We may arrive at this same conclusion from a causation analysis as well. In considering the cause of Mr. Perrine, Ms. Hill, Mr. Reese, and Ms. Mook’s injuries as compared to the cause of Ms. Miller and Mr. Davis’s injuries, they appear decidedly different. The injuries to the former group are as a direct result of Mr. Masterson’s collision with Mr. Perrine’s motorcycle. Ms. Miller and Mr. Davis’s injuries, however, do not stem from that collision; instead, they are a direct result of an independent collision between Mr. Masterson’s vehicle and their own motorcycle.

{¶29} The trial court reasoned “there is no legal or practical difference between a succession of collisions caused by a single vehicle striking one vehicle ahead of it - which strikes the next vehicle ahead, and where a single vehicle strikes multiple vehicle in succession. The *same active continuous force* is causing damage to multiple vehicles \*\*\*.” (Emphasis added.) The trial court then concludes that MMIC’s policy “clearly applies to both types of accidents and the results should be the same.”

{¶30} We would agree with the trial court, had MMIC included the “continuous or repeated exposure to substantially the same conditions” language in its policy, but it did not. Thus, as a matter of contract interpretation the results *cannot* be the same.

{¶31} MMIC’s liability policy specifically accounts for and limits its liability in an event such as the first collision, a chain reaction if you will, whereby the same automobile strike causes injuries to multiple parties and vehicles. The policy, however, does not specifically contemplate and limit MMIC’s liability in a sequence of events as presented in this case, where two separate and distinct automobile strikes cause injury to multiple parties. MMIC had the opportunity to define accident and construct its policy in a way which limited its liability in a situation such as the one before us. It chose not to do so, and thus we must construe the ambiguity in favor of Ms. Miller and Mr. Davis.

{¶32} The assignment of error is meritorious and the judgment of the Court of Common Pleas of Portage County is reversed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.

STATE OF OHIO )  
 )SS.  
COUNTY OF PORTAGE )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

THERESA MILLER, et al.,  
Plaintiffs-Appellants,

JUDGMENT ENTRY

- VS -

MOTORISTS MUTUAL INSURANCE,  
COMPANY, et al.,

Defendants-Appellees.

CASE NO. 2011-P-0016

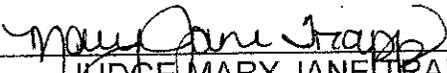
FILED  
COURT OF APPEALS

NOV 28 2011

LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

For the reasons stated in the opinion of this court, the assignment of error has merit, and it is the judgment and order of this court that the judgment of the Court of Common Pleas of Portage County is reversed and judgment is entered for the appellants.

Costs to be taxed against appellees.

  
\_\_\_\_\_  
JUDGE MARY JANE TRAPP

FOR THE COURT