

IN THE SUPREME COURT OF OHIO

THERESA MILLER, et al.)
)
 Plaintiff-Appellees)
)
 v.)
)
 MOTORISTS MUTUAL INSURANCE)
 COMPANIES, et al.)
)
 Defendant-Appellant)
)

CASE NO. 2012-0053

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

Court of Appeals Case No. 2011-P- 0016

PLAINTIFF-APPELLEES' MEMORANDUM OPPOSING JURISDICTION

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I. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This case involves the interpretation of the single word “accident” in a policy issued by Motorists Mutual Insurance Company (“MMIC”). MMIC did not define the word “accident” in its policy, leading the court of appeals to interpret the word according to its common, everyday meaning. MMIC is unhappy with this construction. It wants “accident” to be construed in the same manner as it was in other cases in which insurers defined accident to mean “a sudden, unexpected and unintended event, or a continuous or repeated exposure to substantially the same conditions.” *Greater Cincinnati Chamber of Commerce v. Ghanbar*, 157 Ohio App.3d 233, 2004-Ohio-2724, 810 N.E.2d 455 (1st Dist.)

Armed with this definition, MMIC would be justified in arguing that only one accident took place in this case despite that fact that its insured’s vehicle had two separate collisions with two separate motorcycles.

Although the outcome of this lawsuit is of significance to the parties, the case does not present any issues of public or great general interest. The fact pattern is unusual and MMIC’s policy language—or lack of policy language—is the exception and not the rule since most liability insurance policies contain a definition of “accident.” MMIC asserts on page two of its brief that “the language found in the Motorists’ policy exists in countless liability policies issued to insureds throughout the State of Ohio,” but there is no evidence of this in the record, and a review of the reported cases discussed in this brief suggests otherwise.

The court of appeals did not make new law, it merely followed its own decision in a nearly identical case — *Nationwide Mut. Ins. v. Godwin*, 11th Dist. No. 2005-L-183, 2006-Ohio-4167. This case raises no issues of significance in the insurance coverage arena, and given its unusual facts it is not likely to serve as a precedent to any landslide of cases, as MMIC suggests.

In summary, this case presents no issues of public or great general interest. We simply have an insurance company that wants the Court to make its policy say something that it does not.

II. STATEMENT OF THE CASE AND FACTS

Daniel Masterson (“Masterson”) seriously injured six people riding on three motorcycles when he lost control of his SUV, collided with a motorcycle driven by David Perrine, forced a second motorcycle driven by Michael Reese off the road, and then struck a third motorcycle driven by Geoffrey Davis. The collisions injured Perrine and Davis as well as their respective passengers, Julia Hill and Theresa Miller. Although Reese managed to dodge Masterson’s incoming SUV, this evasive action forced Reese’s bike into a collision with Perrine’s bike, which injured both Reese and his passenger, Kim Mook.

Masterson was insured by MMIC with limits of \$100,000 for each person and \$300,000 per accident. Masterson’s liability was not disputed. There was also no dispute that the collective value of the injuries to Perrine, Reese, Davis, Hill, Miller, and Mook (“the Injured Parties”) exceeded \$300,000 since both Perrine and Miller lost their legs. MMIC and the Injured Parties disagreed, however, as to the number of accidents that occurred for coverage purposes. MMIC argued that a single “accident” occurred under the policy and thus MMIC’s liability was limited to a single \$300,000 “each accident” payment. The Injured Parties disagreed, contending that Masterson’s separate collisions with Perrine and Davis’s respective motorcycles constitute separate accidents under the rationale set forth in *Nationwide Mut. Ins. v. Godwin*, 11th Dist. No. 2005-L-183, 2006-Ohio-4167.

Since Masterson was unquestionably liable for at least one accident, the parties entered a Covenant not to Execute which stipulated that MMIC would make one \$300,000 “each accident”

payment. The Covenant allowed for the filing of a declaratory judgment action to obtain a judicial determination of whether the incident constituted one accident or two accidents, and whether MMIC is liable for more than a single “each accident” payment based on the rationale set forth in *Godwin* and any other applicable Ohio law. The Covenant further provides that in the event this Court determines that the incident constituted two “accidents,” as that term is used in MMIC’s policy, then MMIC will pay an additional \$100,000 to Miller and an additional \$100,000 to Davis.

Pursuant to this Covenant, the matter was submitted to the trial court on cross-motions for declaratory relief and summary judgment with the facts stipulated by the parties. Judge John A. Enlow issued his opinion on March 8, 2011, and (1) granted MMIC’s motion for summary judgment; (2) declared that the undefined term “accident” was unambiguous and provided a single recovery to Plaintiffs under the “each accident” policy limit; and (3) denied Plaintiffs’ motion.

The 11th District Court of Appeals reversed, finding that the cases relied on by MMIC were distinguishable because they all involved policies which defined “accident” as “a sudden, unexpected and unintended event, or a continuous or repeated exposure to substantially the same conditions.” The MMIC did not define “accident,” so the Court of Appeals looked to the plain meaning of the word—“an unexpected and undesirable event”—and held that

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.

* * *

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.

III. RULES OF INSURANCE POLICY INTERPRETATION

The interpretation of an insurance contract is a matter of law to be determined by the court. *Leber v. Smith*, 70 Ohio St.3d 548, 639 N.E.2d 1159 (1994). When confronted with an issue of contractual interpretation, the court should give effect to the intent of the parties as reflected in the language used in the policy. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

When there are undefined terms in a policy, the court must look to the plain and ordinary meaning of the language used in the policy, and when the language is clear, the court may look no further than the writing itself to find the intent of the parties. *Galatis*.

Ohio follows the doctrine of *contra proferentum*. *Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95, 313 N.E.2d 844 (1974) held in its syllabus:

Language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer.

Under this doctrine, ambiguities within a policy are always resolved in favor of the insured. *Bobier v. Nat'l. Cas. Co.*, 143 Ohio St. 215, 54 N.E.2d 798 (1944). Furthermore, when a policy can be reasonably interpreted in more than one way, the reviewing court **should not review the choices and pick the most reasonable interpretation**. Rather, as stated in Kalis, *Policyholders Guide to Insurance Coverage*, § 20.02 (2011), the doctrine of *contra proferentum* **requires** the court to adopt the most liberal interpretation of the policy that is reasonably possible:

Under this interpretive principle, a policyholder must show only that its interpretation of the ambiguous policy language is not unreasonable. On the other hand, the insurer must show both (i) that the policy is capable of the interpretation it favors; and (ii) that its interpretation is the only fair interpretation of the language. The insurer cannot meet this burden by

merely showing that its interpretation is more reasonable than the policyholder's. If the insurer fails to meet its burden, the doctrine of *contra proferentum* will operate to **require** a coverage-enhancing interpretation of the policy.

Accordingly, the court must adopt *any* reasonable interpretation of the policy resulting in coverage for the insured. *Butche v. Ohio Cas. Ins. Co.*, 174 Ohio St. 144, 187 N.E.2d 20 (1962); *see also Akins v. Harco Ins. Co.*, 158 Ohio App.3d 292, 2004-Ohio-4267, 815 N.E.2d 686 (“[A]ny reasonable construction which results in coverage of the insured must be adopted by the trial court.”); *Sterling Merch. Co. v. Hartford Ins. Co.*, 30 Ohio App.3d 131, 506 N.E.2d 1192 (6th Dist. 1986).

The test to be applied by the court in determining whether there is an ambiguity is not what the insurer intended the words to mean, but what a reasonably prudent person applying for insurance would have understood. Thus, the standard is ambiguity from the standpoint of a layperson, not a lawyer. *Snedegar v. Midwestern Indem. Co.*, 64 Ohio App.3d 600, 582 N.E.2d 617 (10th Dist. 1989).

The rule of liberal construction applies with “greater force to language that purports to limit or to qualify coverage.” *Watkins v. Brown*, 97 Ohio App.3d 160, 164, 646 N.E.2d 485, 487 (2nd Dist. 1994). Therefore, exclusions are strictly construed against the insurer. In order to apply, exclusions must be clear and exact. *Moorman v. Prudential Ins. Co.*, 4 Ohio St.3d 20, 445 N.E.2d 1122 (1983). “An exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded.” *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 597 N.E.2d 1096 (1992).

In an insurance coverage action, the insured bears the burden of proving the essential terms of the relevant insurance policy and the general requirements specified in the policy's basic insuring agreement. The insurance company has the affirmative burden of proving that any

policy exclusions or limitations apply to preclude the coverage claimed by the policyholder. *Snedegar v. Midwestern Indem. Co.*, 64 Ohio App.3d 600, 582 N.E.2d 617 (10th Dist. 1989).

IV. THE RELEVANT POLICY LANGUAGE

Section A of the auto policy grants coverage under the following terms:

We will pay damages for **bodily injury or property damage** for which any **insured** becomes legally responsible because of an auto accident.

The policy limits liability coverage for bodily injury “because of an auto accident” to \$100,000 “each person” and \$300,000 “each accident.”

The policy does not define “accident.”

V. ARGUMENTS AGAINST PROPOSITIONS OF LAW

MMIC’s Proposition of Law No. 1: When there is but one proximate, uninterrupted and continuing cause of a motor vehicle accident involving multiple vehicles, the “causation approach” applies and requires the finding that a single “accident” occurred for purposes of liability coverage under an insurance policy, even if the word “accident” is not defined in the policy.

A. **The Approach Used by a Court in Interpreting a Policy is Dictated by the Policy Language, Not the Other Way Around.**

In order for MMIC to escape liability in this lone case, it asks the Court to ignore longstanding rules of insurance policy construction, which give great significance to policy language, and instead use a “one size fits all” approach. As the court stated in *Am. Cyanamid Co. v. Am. Home Assurance Co.*, 30 Cal.App.4th 969, 35 Cal. Rptr.2d 920 (Cal. Dist. Ct. App. 1994):

In questions of insurance coverage the court’s initial focus must be upon the language of the policy itself, not upon ‘general’ rules of coverage that are not necessarily responsive to the policy language.

See also Cincinnati Ins. Co. v. ACE INA Holdings, 175 Ohio App.3d 266, ¶56, 2007-Ohio-5576, 886 N.E.2d 876, (1st Dist.) (“[I]n calculating the number of occurrences under an

insurance policy, blanket judicial application of any one test could frustrate the contracting parties' intent. Courts must adhere to policy language in making a determination whether the cause test applies.”).

Without question, many cases have followed the “cause” view and thereby determined the number of accidents under the policy limits clause by referring to the cause or causes of the damages. The reason for this is simple—most liability policies define accident as “a sudden, unexpected and unintended event, **or a continuous or repeated exposure to substantially the same conditions.**” Most cases that have considered this language have held that the section in bold letters constitutes a contractual agreement to use the cause test in determining the number of accidents.

For example, in *Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. Nos. 91932, 92002, 2009-Ohio-1783, a case relied on by MMIC, the court was called on to decide whether the cause or effects view applied to determine the number of accidents that occurred under a motor vehicle policy. In doing so, the court noted the clear and definite meaning that the phrase “continuous or repeated exposure to same conditions” has acquired by consistent judicial construction:

[C]ourts both within and outside of Ohio, that have addressed this issue uniformly follow the “causation” view, when, as here, the term ‘accident’ includes the unambiguous phrase ‘continuous or repeated exposure to the same conditions’ when referring to multiple parties involved in the same continuous course of conduct.

Because the definition of “accident” in the *Acuity* policy included this unambiguous phrase, the court had no trouble concluding that a plain reading of the policy required application of the “cause” view.

Given this clear definition, the court in *Acuity* also found *Godwin* distinguishable:

[*Godwin*] is factually distinguishable from the case at bar in that it involved policy terms “accident” and “occurrence” that were left

undefined by the drafters. Having no language to rely on in the policy, the Eleventh District construed such terms against the drafters and in favor of the insureds. Here, the policy terms are defined; the only discrepancy is how those terms should be applied. Therefore, [*Godwin*] is inapplicable to these facts.

As the analysis set forth in *Acuity* illustrates, when the policy contains an unambiguous definition of the term “accident,” applying the cause test (or any other test) is simply a matter of giving effect to the clear policy language.

Given the consistent and clear meaning that the phrase “continuous or repeated exposure to the same conditions” has acquired by judicial construction, the fact that MMIC and its army of attorneys and insurance experts failed to define “accident” in this manner suggests that MMIC did *not* intend that this term be restricted to the “cause” view. At a minimum, MMIC is plainly not entitled to have this causal language read into the policy, which is what the trial court effectively did.

B. The Other Cases Cited by MMIC in Support of Its ‘Cause’ Argument Are Similarly Distinguishable.

In addition to *Acuity*, MMIC relies on two other cases to support its ‘cause’ argument, *Progressive Preferred Ins. Co. v. Derby*, 6th Dist. No. F-01-002, 2001 WL 672177 (June 15, 2001); and *Banner v. Raisin Valley, Inc.*, 31 F.Supp.2d 591 (N.D. Ohio 1998). These cases are distinguishable for the same reason as *Acuity* — they both dealt with policies that defined “accident” to include “continuous or repeated exposure to the same conditions.”

Godwin recognized the distinction:

In sum, 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 from multiple injuries.

By contrast, when, as in *Godwin* and the instant case, the term “accident” is not defined, the word must be construed according to its plain and ordinary meaning, and resolve any ambiguity in favor of the insured. MMIC is not entitled to have its policy construed in the same manner and according to the same “cause” test as policies that contain a definition of “accident” that is not contained in MMIC’s policy.

MMIC also relies on *Greater Cincinnati Chamber of Commerce v. Ghanbar*, 157 Ohio App.3d 233, 2004-Ohio-2724, 810 N.E.2d 455 (1st Dist.), where the court stated that even in the absence of “continuous or repeated exposure” language, the trial court properly determined the number of accidents based on its cause. The policy defined “accident” as “a sudden, unexpected and unintended occurrence.” *Ghanbar*, however, fails to be persuasive because this cursory statement is not based on an interpretation of the insurance policy. As set forth above, the plain meaning of “accident” can support finding either one or more accidents depending on one’s perspective. Unlike this Court’s decision in *Godwin* and the 8th District court’s decision in *Acuity*, the *Ghanbar* court did not consider these different interpretations in light of the policy language before it. Absent such analysis, this Court should follow its decision in *Godwin* and decline to rely upon *Ghanbar*.

C. Because “Accident” Can Be Reasonably Construed to Mean That Separate Collisions Constitute Separate Accidents Under an “Each Accident” Liability Limit, the Court of Appeals Correctly Adopted That Construction.

As noted above, while MMIC’s policy limits liability to pay damages for bodily injury to \$300,000 “each accident,” it does not define the term “accident.” Thus, the court of appeals was required to look to the plain and ordinary meaning of the term “accident,” and resolve any ambiguity in favor of the insured.

The plain and ordinary meaning of “accident” is “an unforeseen and unplanned event or circumstance.” MERRIAM-WEBSTER ONLINE DICTIONARY, *available at* <http://www.merriam-webster.com/dictionary/accident>. Although this definition may be unambiguous in the abstract or when applied to certain facts, it is ambiguous when applied to facts such as we have in this case. *See Longaberger Co. v. U.S. Fidelity & Guar. Co.*, 31 F. Supp.2d 595 (S.D. Ohio 1998) (holding that the ambiguity of a policy provision must be judged in reference to the facts of the particular case).

In the instant case, relying on the plain meaning of “accident” for purposes of determining the number of accidents under a liability policy is problematic because what seems like a single unforeseen event to the person triggering the incident may be perceived as multiple accidents by those who sustained injury or damage as a result of the insured’s conduct. This is especially so since two separate motorcycles were struck in two separate collisions. From the point of view of the motorcyclists, there were two collisions and two “unforeseen events.” In short, the term “accident” is ambiguous when applied to our facts because its plain meaning can support finding either one or more accidents depending on one’s perspective.

This ambiguity is demonstrated by the conflicting meanings that courts have ascribed to the term in calculating the number of accidents under an insurance policy’s “each accident” liability limit. Generally, courts have interpreted “accident” in three ways: (1) the cause view; (2) the effects view, and (3) the event view. *See, e.g., Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. Nos. 91932, 92002, 2009-Ohio-1783; *Olsen v. Moore*, 56 Wis.2d 340, 202 N.W.2d 236 (Wis. 1972); *Nicor, Inc. v. Associated Elec. And Gas Ins. Services*, 223 Ill.2d 407, 860 N.E.2d 280 (Ill. 2006); *Banner v. Raisin Valley Inc.*, 31 F. Supp.2d 591 (N.D. Ohio 1998); *Anchor Cas. Co. v. McCaleb*, 178 F.2d 322 (5th Cir. 1949).

Under the cause view, the number of accidents is determined by referring to the cause or causes of the accident. That is, if one proximate, uninterrupted and continuing cause results in multiple injuries, then there is a single accident. Conversely, the effects view determines the number of accidents by looking at the effect an event had, that is to say, how many individual impacts or injuries resulted from the incident. See *Cincinnati Ins. Co. v. ACE INA Holdings*, 175 Ohio App.3d 266, ¶56, 2007-Ohio-5576, 886 N.E.2d 876, (1st Dist.) (applying effects view to determine number of occurrences in context of insurance dispute over asbestos exposure injuries). Finally, the event view appears to determine an accident by reference to the liability triggering event. See, e.g., *Banner*, 31 F. Supp.2d at 593; *Hartford Accident & Indemn. Co. v. Wesolowski*, 33 N.Y. 169, 305 N.E.2d 907 (N.Y. 1973).

Thus, while an accident is clearly something that is unexpected, the term is nonetheless ambiguous because it can be reasonably construed in three different ways:

- (1) by reference to the cause or causes of the accident (“cause approach”);
- (2) from the point of view of the person being injured (“effects approach”); or,
- (3) by reference to the number of events that resulted in the injuries and liability in question (“events approach”).

MMIC’s policy does not dictate the approach that should be taken in construing the policy because it fails to define what it means by accident. From Davis’ and Miller’s points of view, when Masterson struck their motorcycle it was a collision separate and apart from Masterson’s collision with Perrine. When a policy can be reasonably interpreted in more than one way, the reviewing court **should not review the choices and pick the most reasonable interpretation**. Rather, the court *must* adopt the most liberal interpretation of the policy that is reasonably possible. Because the policy term restricting MMIC’s liability for “each accident”

can be reasonably construed from the point of view of the person struck by Masterson's car, that interpretation must be adopted because it is the most liberal one under the facts of this case.

D. The Court of Appeals Correctly Found That Two Accidents Occurred Even Under a Causation Analysis.

Perhaps all of this discussion about the relative merits of the cause view versus effects views is unnecessary since the court of appeals, while finding that it was required to use the effects analysis, held that its decision would be the same even if it applied the cause analysis:

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. ¶28

* * *

[MMIC's] 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. ¶31

Proposition of Law No. 2: The undefined word "accident" in a liability insurance policy is not ambiguous when the policy, interpreted as a whole, establishes the intent of the parties that multiple vehicles may be involved in and multiple claims may arise out of a single auto accident.

MMIC asks this Court to adopt the flawed logic of the trial court, which disregarded the plain and ordinary meaning of the undefined term "accident." Instead, the trial court relied on the Limit of Liability paragraph of the policy, which provides:

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:

1. Insureds;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the auto accident.

MMIC's argument is nothing more than a slight-of-hand attempt to obtain the benefit of the definition of "accident" used in most liability policies without having to include the definition in MMIC's policy. The answer seems obvious — if MMIC wants its policies to be interpreted in the same manner as policies that define "accident," then it should define "accident" in its policies.

Further, the trial court's reliance on the Limit of Liability provision to determine the meaning of "accident" was misplaced because the Limit of Liability provision only applies to events that *first meet the definition of "accident."* For this reason, the language in the Limit of Liability section of the policy is not helpful in making the initial determination of the meaning of "accident" because it is necessary to determine which events qualify as "accidents" before the limitation on accidents becomes applicable.

Moreover, it is easy to visualize a single accident that involves more than one insured, claim, or vehicle. For example, an insured driving three passengers rear-ends a car containing two people. The accident involves multiple claimants, claims, and vehicles, but it is still a single accident and the single limit of liability applies. In such a case, the most the insurer would be liable for is a single "each accident" limit — even if four people are injured and the collective value of their injuries exceeds that amount.

These examples are not meant to provide an exhaustive list of scenarios or circumstances for which MMIC's limitation might apply. Rather, they illustrate that, contrary to MMIC's assertion, the Limit of Liability paragraph is not helpful in construing the meaning of "accident." The fact that this limitation may not be broad enough to limit MMIC's liability to a single "each accident" payment when *Godwin* is applied to the particular facts of this case is hardly a reason for this Court not to apply that decision.

VI. CONCLUSION

The Court should decline to exercise jurisdiction over this case. The facts are unique and MMIC's policy language—or lack of policy language—is the exception and not the rule. There is no issue presented in this case of public or great general interest. We simply have an insurance company that wishes its policy said something that it does not.

Respectfully submitted,



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A copy of this Memorandum Opposing Jurisdiction was mailed on January 24th, 2012

to the following:

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