[Cite as *Gabriel v. Westfield Ins. Co.*, 2005-Ohio-4892.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JOSEPH A. GABRIEL, et al. PLAINTIFFS-APPELLEES VS. WESTFIELD INSURANCE COMPANY DEFENDANT-APPELLANT	)))))))))	CASE NO. 04 MA 179 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 03 CV 4356

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiffs-Appellees:

Atty. Charles E. Dunlap
3855 Starr's Centre Drive, Suite A
Canfield, Ohio 44406

For Defendant-Appellant:

Atty. Craig G. Pelini
Atty. Eric J. Williams
Pelini & Fischer, Ltd.
8040 Cleveland Avenue NW, Suite 400
North Canton, Ohio 44720

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 16, 2005

[Cite as *Gabriel v. Westfield Ins. Co.*, 2005-Ohio-4892.]
WAITE, J.

{¶1} Appellant Westfield Insurance Company (hereinafter "Westfield") appeals the decision of the Mahoning County Court of Common Pleas to order a stay of proceedings pending arbitration of a dispute concerning automobile insurance coverage. The record reveals that the trial court was within its discretionary authority in issuing the stay and, for the reasons that follow, the judgment of the trial court is affirmed.

History of the Case

{¶2} On December 4, 2003, Appellees Michelle and Joseph Gabriel filed a complaint against Westfield in order to collect uninsured motorist ("UM") benefits from commercial automobile policy CWP 3 809 014 (the "Policy") issued by Westfield. The complaint alleges that on or about December 10, 2001, Michelle was involved in an automobile accident with an uninsured motorist. Appellees asserted that they filed a claim with Westfield and that the parties could not agree on the amount of damages. Appellees alleged that they demanded arbitration on November 10, 2003, pursuant to the arbitration clause of the Policy. Appellees alleged that the policy allowed either party to demand arbitration. Appellees asserted that Westfield refused to enter into arbitration based on a 2004 version of the arbitration clause stating both the insured and insurer were required to agree to arbitration. Appellees presented two requests for relief: a declaration of the controlling arbitration language from the Policy, including an order compelling Westfield to arbitrate the claim; or in the alternative, judgment in the amount of $75,000.

{¶3} On May 18, 2004, Appellees filed a motion for summary judgment with respect to the arbitration provision of the Policy. Appellees argued that the arbitration clause in effect on July 1, 2001, was controlling in this case, and that this arbitration clause allowed either party to request arbitration rather than requiring the consent of both the insured and the insurer.

{¶4} On June 11, 2004, Westfield filed a response in opposition to summary judgment. Westfield admitted that Michelle was covered under the Policy: "Westfield does not dispute that Michelle Gabriel was an insured pursuant to the terms of the policy and that uninsured motorist coverage was also purchased by the Gabriels." (6/11/04 Response in Opposition to Summary Judgment, p. 3.) Westfield failed to directly address the only issue raised in Appellees' motion, namely, that the 2001 version of the arbitration clause was the correct version to apply in this case. Westfield argued, though, that even under the 2001 arbitration clause, arbitration was not appropriate. Westfield argued that the only appropriate matters for arbitration were, "whether the Plaintiffs are entitled to recover damages from an uninsured driver, or * * * the amount of damages recoverable by the Plaintiffs." (6/11/04 Response in Opposition to Summary Judgment, p. 4.) Westfield asserted that Appellees had not identified any specific uninsured tortfeasor, although Westfield itself mentioned two specific persons and the Austintown Police Department as parties who may have been responsible for the accident. Westfield also argued that, according to either arbitration clause, disputes concerning coverage under the UM endorsement could not be arbitrated.

{¶5} On June 18, 2004, Appellees filed a reply brief. Attached to this brief was an affidavit from Appellees' attorney, and a series of letters, faxes, and other correspondences from a claims specialist, Mr. J.R. Moser, who was employed by Westfield. Appellees argued that the documents indicated that Westfield had already acknowledged Appellees possessed a valid claim, and that the only dispute concerned the dollar value of the claim.

{¶6} On June 24, 2004, the trial court filed a judgment entry overruling Appellees' motion for summary judgment.

{¶7} On July 2, 2004, Appellees filed a "Motion To Stay Proceedings and Refer to Arbitration." In their motion, Appellees stated that it was filed pursuant to R.C. §§2711.01, 2701.02, and 2711.03, as well as pursuant to the terms of the Policy.

{¶8} On July 13, 2004, the trial court filed a judgment entry vacating the June 24, 2004, judgment entry and granting Appellees' motion to stay proceedings and enter into arbitration.

{¶9} On July 16, 2004, Westfield filed a memorandum in opposition to Appellees' motion to stay proceedings.

{¶10} On August 10, 2004, Westfield filed a timely notice of appeal of the July 13, 2004, judgment entry.

Assignments of Error

{¶11} Westfield presents three related assignments of error:

{¶12} "The trial court incorrectly vacated its previous order and ordered this case to arbitration, contrary to the arbitration provision at issue, which is unambiguous and discretionary.

{¶13} "The trial court incorrectly vacated its previous order and ordered this case to arbitration as there is a genuine issue of material fact as to whether or not the plaintiffs were injured by an uninsured motorist in the first instance.

{¶14} "The trial court incorrectly vacated its previous order and ordered this case to arbitration as the trial court had already rendered its decision on Plaintiff's motion and the vacation by the trial court of that decision and the compulsion of this case to arbitration was not proper."

{¶15} Westfield's arguments appear to be premised on the assumption that the trial court granted a motion for summary judgment, rather than a motion to stay proceedings pending arbitration. As Appellees correctly point out in their brief, the actual judgment under review in this case is one which granted a motion to stay proceedings pending arbitration, pursuant to R.C. §2711.12. This type of decision is reviewed for abuse of discretion on the part of the trial court. "An appellate court reviews a decision to stay proceedings pending arbitration under an abuse of discretion standard." *I Sports v. IMG Worldwide, Inc.*, 157 Ohio App.3d 593, 2004-Ohio-3113, 813 N.E.2d 4, ¶10. An abuse of discretion implies an attitude that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. On appeal, we do not engage in a de novo review, as we would in reviewing an order granting summary judgment. Based

on the totality of the record and the analysis that follows, it does not appear that the trial court abused its discretion in sustaining the motion for a stay of proceedings and submitting this case to arbitration.

{¶16} The first matter to be discussed is the trial court's decision to vacate its prior entry overruling Appellees' motion for summary judgment. Westfield argues that Appellees should not be permitted to avoid the trial court's earlier ruling by filing a subsequent motion to stay proceeding pending arbitration, when in fact, Appellees were asking for essentially the same relief that the trial court had previously denied. We disagree with Appellant's contention.

{¶17} The denial of a motion for summary judgment is an interlocutory decision by a trial court, subject to reconsideration at any time prior to a decision entering final judgment in a case. *Davis v. Becton Dickinson & Co.* (1998), 127 Ohio App.3d 203, 207, 711 N.E.2d 1098; *Citizens Fed. Bank, F.S.B. v. Brickler* (1996), 114 Ohio App.3d 401, 411, 683 N.E.2d 358. If Appellees were asking the trial court to reconsider its prior decision (and it is not at all certain that Appellees had this intent in filing their subsequent motion for a stay of proceedings), they were certainly permitted to do so under Ohio's procedural rules.

{¶18} In reviewing the procedural history of this case, we have observed that after the Gabriels filed their motion for summary judgment on the arbitration issue, Westfield responded, in part, by saying: "What the Plaintiffs * * * should have done if in deed [sic] their intent was to have this matter referred to arbitration, was to file a motion to stay this case pending arbitration." (6/11/04 Response in Opposition to

Summary Judgment, p. 8.) The Gabriels also filed additional materials in support of summary judgment on June 18, 2004. The trial court overruled the motion for summary judgment on June 24, 2004. Subsequently, on July 2, 2004, the Gabriels filed a motion to stay proceedings pending arbitration. Westfield now attempts to argue that the Gabriels should not have filed such a motion. It is Westfield, however, who on the record recommended as proper procedure to be followed that the Gabriels should file a motion for stay of proceedings. Westfield cannot in good faith argue the opposite position on appeal.

{¶19} Westfield also argues that the arbitration clause of the Policy is purely discretionary and contains no provision through which a party can be compelled into arbitration. Westfield does not actually cite the Policy provision upon which it relies. During the earlier summary judgment proceedings, Westfield failed to respond to Appellees' assertion that the version of the arbitration clause applicable to their claim is contained in form CA 00 22 02 99, as set forth in the Ohio Uninsured Motorists Coverage - Bodily Injury endorsement, which states in part:

{¶20} "a. If we and an 'insured' disagree whether the 'insured' is legally entitled to recover damages from the owner or driver of an 'uninsured motor vehicle' or do not agree as to the amount of damages that are recoverable by that 'insured', then the matter may be arbitrated. However, disputes concerning coverage under this endorsement may not be arbitrated. *Either party may make a written demand for arbitration*. * * *" (Emphasis added.)

{¶21} Because Westfield failed to directly contradict or rebut Appellees' version of the arbitration clause, we find no abuse of discretion in the trial court's apparent reliance on this arbitration clause. The clause clearly allows either party to demand arbitration. Westfield is correct that the arbitration clause begins as a discretionary provision, and does not force either party to initiate arbitration proceedings. The clause, though, becomes mandatory once any party files a demand. There is no dispute that Appellees have demanded arbitration. Thus, the arbitration clause compels arbitration.

{¶22} Westfield's final argument is that the controversy Appellees have attempted to arbitrate is not one of the two issues that may be arbitrated under the Policy. Westfield contends that the matter being arbitrated is a dispute about coverage, which is not permitted under the arbitration clause. Based on the record before us, we disagree.

{¶23} The record reflects that at the time the trial court ruled on the motion for stay, it had all the materials from the summary judgment proceedings before it, including many letters from a claims agent at Westfield, summarized as follows:

{¶24} 1. 12/1/03 letter from Westfield claim agent J.R. Moser to the Gabriels' attorney, Charles Dunlap. This letter rejects the request for arbitration, and states: "We still have what we feel is a fair and equitable offer to you." (Exhibit E, attached to Complaint and referenced in affidavit.)

{¶25} 2. 6/19/02 letter from J.R. Moser to the Mahoning County Sheriff's Dept., which states: "There appears to be negligence on behalf of your department, and we

are seeking recovery for any and all damages paid by Westfield under our policy." (Exhibit G, attached to affidavit.)

{¶26} 3. 6/19/02 letter from J.R. Moser to Charles Dunlap. This letter requests doctors' reports, physical therapy progress notes, and prescription information. It also asks whether or not governmental immunity applies. It requests a meeting with Michelle Gabriel, "since she is an insured under the policy." (Exhibit H.)

{¶27} 4. 1/9/03 letter from J.R. Moser to Charles Dunlap. This letter requests an update on the status of the injury claim. It asks that all medical information be forwarded. It also states: "If your client is finished with treatment and is ready to settle the injury claim, please forward to me a complete demand package so that we may attempt to resolve same." (Exhibit L.)

{¶28} 5. 3/27/03 letter from J.R. Moser to Charles Dunlap. The letter states: "we wish to get together with you to resolve an uninsured motorist claim of the insured." The letter also requests a medical update, and asks if there is coverage available from other tortfeasors. (Exhibit M.)

{¶29} 6. 4/24/03 letter from J.R. Moser to Charles Dunlap. Same letter as 3/27/03.

{¶30} 7. 5/23/03 letter from J.R. Moser to Charles Dunlap. Same letter as 3/27/03.

{¶31} 8. 8/25/03 letter from J.R. Moser to Charles Dunlap, which states: "I have not heard further from you since payment information was provided per your FAX request of June 26, 2003." (Exhibit P.)

{¶32} Nothing in any of the letters from the claims agent explicitly asserts or even hints at the possibility that the Gabriels have no coverage. Westfield did not respond to the Gabriels' secondary filing in support of summary judgment (which included the letters from the claims agent), and provided absolutely no evidence to dispute the Gabriels' contention that coverage exists. Not one of the documents before the trial court even hinted at a coverage dispute, and Westfield has conceded throughout this litigation that Mrs. Gabriel is an insured under the Policy. In addition, we note that there is no reservation of rights notification in the record. One would have expected Westfield to respond with some type of rebuttal to a stack of documents that all presume that coverage is available, even though the parties obviously disagree over the specific dollar amount of the claim.

{¶33} A question has arisen as to whether the trial court followed the proper procedure in ruling upon the motion for stay of proceedings pending arbitration. The trial court ruled on the Gabriels' motion for stay on July 13, 2004. Westfield had not yet responded to the motion. The trial court was not required to hold a hearing on the motion, but could issue a ruling, "upon being satisfied that the issue involved in the action is referable to arbitration[.]" R.C. §2711.02(B); *Maestle v. Best Buy*, 100 Ohio St.3d 330, 800 N.E.2d 7, 2003-Ohio-6465, ¶7. Thus, it appears that the trial court followed the proper procedure in rendering its judgment.

{¶34} The trial court's decision to grant the stay of proceedings pending arbitration is reasonable given that Westfield suggested the Gabriels should file a motion for stay of proceedings pending arbitration, failed to respond to the motion, and

failed to present anything to contradict the implication (as gleaned from the letters from the claims agent) that Appellees' claim was covered under the Policy. Since the trial court's judgment concerning a motion to stay proceedings pending arbitration is only reviewed for abuse of discretion, we cannot say that the court abused its discretion in this case, and we affirm the judgment of the trial court.

Donofrio, P.J., concurs.

DeGenaro, J., dissents; see dissenting opinion.

DeGenaro, J., dissenting:

{¶35} The arbitration clause in the Ohio Uninsured Motorists Coverage – Bodily Injury endorsement portion of the Gabriels' insurance policy provides that any dispute between the parties can be arbitrated with one exception. That endorsement specifically states that "disputes concerning coverage under this endorsement may not be arbitrated." The majority concludes that this exception does not apply in this case because it finds "absolutely no evidence" that Westfield ever disputed whether the Gabriels were covered under the policy. I must respectfully disagree. The correspondence between Westfield and the Gabriels' attorney shows that Westfield never conceded the issue of coverage. Therefore, the trial court erred when ordering that the parties arbitrate the matter without delay.

{¶36} In order to determine whether the correspondence in the record reveals that Westfield was disputing coverage, we must first examine the coverage provided by the endorsement. The Ohio Uninsured Motorists Coverage – Bodily Injury endorsement provides:

{¶37} "A. Coverage

{¶38} "1. We will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or operator of:

{¶39} "a. An 'uninsured motor vehicle' as defined by Paragraph F.3.a., b. and c. because of 'bodily injury':

{¶40} "(1) Sustained by the 'insured'; and

{¶41} "(2) Caused by the 'accident'.

{¶42} "* * *

{¶43} "The owner's or operator's liability for these damages must result from the ownership, maintenance or use of the 'uninsured motor vehicle'.

{¶44} "* * *

{¶45} "F. Additional Definitions

{¶46} "As used in this endorsement:

{¶47} "* * *

{¶48} "3. 'Uninsured motor vehicle' means a land motor vehicle or trailer:

{¶49} "a. For which no liability bond or policy at the time of an 'accident' provides at least the amounts required by the applicable law where a covered 'auto' is principally garaged;

{¶50} "b. Which is an underinsured motor vehicle. An 'underinsured motor vehicle' means a land motor vehicle or trailer for which the sum of all liability bonds or policies applicable at the time of the 'accident' provides at least the amounts required by the applicable law where a covered 'auto' is principally garaged but their limits are less than the Limit of Insurance of this coverage.

{¶51} "c. For which an insuring or binding company denies coverage or is or becomes insolvent; * * *.

{¶52} "However, 'uninsured motor vehicle' does not include any vehicle:

{¶53} "* * *

{¶54} "c. Owned by any government unit or agency, unless the owner or operator of the 'uninsured motor vehicle'; has

{¶55} "(1) An immunity under Ohio Poitical Subdivision Tort Liability Law; or

{¶56} "(2) A diplomatic immunity."

{¶57} The policy defines the limit of insurance as follows:

{¶58} "D. Limit of Insurance

{¶59} "1. Regardless of the number of covered 'autos,' 'insureds,' premiums paid, claims made or vehicles involved in the 'accident,' the most we will pay for all damages resulting from any one 'accident' is the limit of Uninsured Motorists Coverage shown on the Schedule or Declarations.

{¶60} "2. No one will be entitled to receive duplicate payments for the same elements of 'loss' under this Coverage Form and any Liability Coverage Form.

{¶61} "We will not make a duplicate payment under this Coverage Form for any element of 'loss' for which payment has been made by or for anyone who is legally responsible.

{¶62} "3. With respect to coverage provided under Paragraph F.3.b. of the definition of 'uninsured motor vehicle', the limit of insurance shall be reduced by all sums paid for 'bodily injury' by or on behalf of anyone who is legally responsible."

{¶63} Thus, this policy only provides coverage in accidents involving underinsured vehicles. A vehicle is underinsured if the vehicle involved in the accident was either not insured in at least the amounts required by the applicable law, insured in an amount less than the limit of insurance provided by this endorsement, or insured by a company that denied coverage or became insolvent.

{¶64} Many of the letters in the record reflect Westfield's investigation into whether this really was an uninsured or underinsured motorist accident. For instance, on June 19, 2002, Westfield notified the sheriff's department that it was negligent and asked for the department to contact its insurance carrier. Subsequent correspondence between Westfield and the Gabriels' counsel showed that they believed the sheriff's department would assert governmental immunity and on September 10, 2002, the department stated that it would assert that immunity. In addition, the Gabriels' attorney notified the owner of the stolen car that he may be liable and asked him to contact his insurance carrier.

{¶65} Furthermore, Westfield continued to ask the Gabriels' attorney for additional information regarding whether the potential tortfeasors were insured. A letter sent to the Gabriels' attorney on March 27, 2003, followed up on a January 9, 2003, letter requesting medical information. That letter referred to the Gabriels' claim as a uninsured motorist claim and asked the Gabriels to advise Westfield if they had "heard from any other parties" and whether "there is other coverage from any of the tortfeasors." Westfield sent this same letter to the Gabriels' attorney on April 24, 2003, May 23, 2003, and June 13, 2003.

{¶66} In its correspondence, Westfield consistently asks for information, both from possible tortfeasors and its insureds that would prove that this accident is not an underinsured motorist accident. This inquiry would be unnecessary if Westfield was not disputing whether the accident was a covered accident under the policy. The evidence in the record shows that Westfield was not conceding coverage on this claim.

{¶67} Finally, there is no evidence in the record showing that the Gabriels' claim is actually covered by their policy with Westfield. For example, there is no evidence reading whether that vehicle was insured. Likewise, the local police department may assert immunity under Ohio's Political Subdivision Tort Liability Act. But there are exceptions to the immunity this Act provides and it is impossible at this time to tell whether those exceptions apply in this case. Either scenario may provide insurance greater than or equal to the amount provided in this policy. If the amount of insurance available through those other avenues is greater than or equal to the amount provided in this policy, then the accident is not covered by the policy. The Gabriels failure to introduce any evidence demonstrating that the coverage issues between the parties have been resolved cannot be excused by Westfield's failure to respond to the Gabriels' motion.

{¶68} The endorsement provides that "disputes concerning coverage under this endorsement may not be arbitrated." In this case, there is a valid dispute over whether the policy covers the injury. Thus, the trial court could not compel arbitration on these issues. For these reasons, the trial court abused its discretion when compelling the parties to submit to arbitration. Westfield's arguments are meritorious. The trial court's judgment should be reversed and this cause should be remanded for further proceedings.