

For Indiana Insurance
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Gwin, P.J.

{¶1} Defendant Erie Insurance Company appeals a summary judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of plaintiffs-appellees Brandon Eslich, and Michelle and Dennis Miller. Erie assigns two errors to the trial court:

{¶2} “THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT ERIE INSURANCE COMPANY PROVIDES PRIMARY UIM COVERAGE UNDER THE POLICY ISSUED TO MICHELLE AND DENNIS MILLER.

{¶3} “THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT ANY COVERAGE UNDER THE ERIE POLICY ISSUED TO MICHELLE AND DENNIS MILLER IS PRIMARY TO THE OTHER UIM COVERAGE AVAILABLE TO APPELLEES IN THIS CASE.”

{¶4} The facts which gave rise to this case are undisputed. On November 4, 1999, Brandon Eslich was involved in an automobile collision with the alleged tortfeasor, Michael Johnson, who is not a party to this appeal. At the time of the accident, Eslich was seventeen years old and resided with his mother and step-father. Brandon’s mother owned the vehicle he was driving at the time of the collision.

{¶5} Erie Insurance Group insured Brandon and his mother under two personal auto policies.

{¶6} Eslich and his parents brought suit against the alleged tortfeasor, Erie Insurance Group, and various insurance companies which insured the employers of Brandon, his mother, and his step-father.

{¶7} The trial court entered summary judgment in favor of Brandon and his family against Erie, and found Erie's coverage was primary, subject to any set-offs of the tortfeasor.

{¶8} Eslich's other claims were made pursuant to *Scott-Pontzer v. Liberty Mutual Fire Insurance Company* (1999), 85 Ohio St. 3d 660, 710 N.E. 2d 1116, and *Ezawa v. Yasuda Fire & Marine Insurance Company* (1999), 86 Ohio St. 3d 557, 715 N.E. 2d 1142. Brandon Eslich was employed by Burlington Coat Factory and Advanced Auto Parts. Royal Indemnity Insurance Company insured Burlington Coat Factory with a business auto policy and a commercial general liability policy. The trial court found Brandon Eslich was entitled to UM/UIM coverage under the business auto policy, but not under the commercial general liability policy. Royal also insured Advanced Auto Parts, and the trial court found Brandon Eslich was entitled to UM/UIM coverage under the business auto policy, but not under the commercial general liability policy.

{¶9} Brandon Eslich's mother, Michelle Miller, was employed by the Jackson Local School District. Nationwide Agribusiness Insurance Company insured the Jackson Local School District under an education liability policy and an education umbrella policy. Indiana Insurance Company insured the Jackson Local School District under a commercial auto policy with an uninsured/underinsured motorist endorsement. The trial court found *Scott-Pontzer*, and its progeny applied to school boards, and the school board's authority to purchase UM/UIM coverage has no bearing on determining

the scope of coverage under any policies the Board may have had in place at the time of the collision. The trial court concluded Brandon Eslich and his parents are entitled to UM/UIM coverage under the Indiana Insurance Policy and under Nationwide's umbrella policy. The trial court found the educational liability policy is not a motor vehicle policy of insurance, and for this reason, Brandon Eslich and his parents were not entitled to any coverage under that policy.

{¶10} Brandon Eslich's step-father, Dennis Miller, was employed by Sentry Insurance, who was insured by Sentry under a commercial auto policy with express UM/UIM coverage. The trial court found Brandon Eslich and his parents were covered under the Sentry policy.

{¶11} The trial court found Erie Insurance, as the personal auto insurance carrier for Brandon Eslich and his parents was primary, and subject only to the tortfeasor's setoff. The trial court found that amongst the various other insurance companies, each was obligated on a pro-rata basis, after the primary coverage and the tortfeasor setoff.

{¶12} Four separate appeals were taken from this judgment, Stark Appellate Nos. 2003CA00200; 2003CA00207; 2003CA00195, and 2003CA00205. All are related and present similar issues, but for the purposes of clarity, each appeal will be addressed separately.

{¶13} The parties agree the facts herein are undisputed, and thus, the issue for us to determine is whether the trial court was correct as a matter of law.

{¶14} None of Eslich's claims against the other insurance companies survive, see related cases, *supra*.

{¶15} The trial court found the Erie policy issued to Michelle and Dennis Miller provided primary UM/UIM coverage for this accident. The trial court also found Erie's coverage was primary to the coverage provided by the various *Scott-Pontzer* carriers. During the pendency of this appeal, the Ohio Supreme Court limited its decision in *Scott-Pontzer, supra*, and overruled the *Ezawa* case.

{¶16} For the above reasons, we find the question of whether Erie's coverage is primary to the *Scott-Pontzer* claims is moot.

{¶17} The second assignment of error is overruled.

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{¶18} Erie Insurance challenges the court's finding there is coverage on Brandon Eslich arising from the policy issued to Michelle and Dennis Miller. Apparently Erie does not dispute coverage under the policy issued specifically to Brandon Eslich.

{¶19} Erie argues its policy provides UM/UIM coverage to the named insured and relatives, which includes Brandon Eslich. However, the policy also provides it covers all owned autos described in the declarations. The Ford Probe which Brandon Eslich was driving at the time of the accident is not one of the owned autos listed in the declaration sheet. Thus, for any coverage to exist, it must be provided purely because Brandon Eslich is a resident relative of Michelle and Dennis Miller.

{¶20} The Erie policy contains an UM/UIM motorist bodily coverage endorsement which contains the exclusion: This insurance does not apply: *** to bodily injury to anyone we protect *** when the vehicle is not specifically identified in the policy under which an exclusion is made.

{¶21} Erie asserts the non-listed vehicle exclusion is permitted by R.C. 3937.18, effective September 3, 1997.

{¶22} Brandon Eslich responds that H.B. 261, now R.C. 3937.18, is so ambiguous as to be unenforceable. Eslich refers us to *Morris v. United Insurance*, 2003-Ohio-1708 and *Ratkosky v. Scottsdale Surplus Lines Insurance* 2003-Ohio-2868. These cases held R.C. 3937.18 effective September 3, 1997, is internally inconsistent. The courts of appeals resolved the issue by finding portions of the statute unenforceable. Having stricken the statute, the courts found the exclusions based on the statute unenforceable.

{¶23} We cannot agree with the reasoning in *Morris* and *Rathosky*. Instead, we find no inherent conflict in the statute. Even if we did find a potential conflict, we must give effect to the words used rather than re-writing the legislation, *Erb. V. Erb.* (2001), 91 Ohio St. 3d 503, 747 N.E. 2d 230. Where the words of a statute are ambiguous, we must construe the language consistently with the intent of the General Assembly. *Clark v. Scarpelli* (2001), 91 Ohio St. 3d 271, 744 N.E. 2d 719, citations deleted.

{¶24} We find the underlying purpose of R.C. 3937.18 is to provide uninsured and underinsured motorist coverage for injured persons. However, we also find the language of the revision clearly demonstrates the General Assembly intended endorsements like the one before us to be valid and enforceable, see *Bergmeyer v. Auto Owners Insurance Company*, 2003-Ohio-133.

{¶25} We find the trial court erred in extending coverage to Brandon Eslich while occupying the Ford Probe vehicle, under the Erie Insurance policy issued to Michelle and Dennis Miller for other vehicles.

{¶26} The first assignment of error is sustained.

{¶27} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J.,

Edwards, J., and

Boggins, J., concur