

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Ruth A. Brown, et al.

Court of Appeals No. S-11-045

Appellees

Trial Court No. 08 CV 0000538

v.

Britain L. Morris, et al.

Defendants

DECISION AND JUDGMENT

[Allstate Insurance
Company—Appellant]

Decided: December 21, 2012

* * * * *

John T. Barga and Susan M. Jones, for appellees.

Bradley B. Gibbs, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas on the issue of damages in this action that arose from a fatal automobile accident. For the reasons that follow, the judgment of the trial court is reversed in part and affirmed in part.

{¶ 2} On June 14, 2006, Jessica Larson died when the 4-wheel all-terrain vehicle (“ATV”) on which she was a passenger struck a car driven by appellee Ruth Brown on County Road 175 in Sandusky County, Ohio. The ATV was driven by Britain Morris, who was uninsured. On May 9, 2008, Brown and her husband filed suit against Britain Morris and Robert Morris (believed to be the owner of the ATV), and against her insurance carrier, Allstate Insurance Company (“Allstate”), under her uninsured/underinsured motorist provision.¹ On June 18, 2008, Allstate filed its answer. On May 14, 2009, the trial court found that Britain Morris had failed to move, plead or otherwise defend the action, and ruled that Morris was legally liable for the Browns’ property damage and personal injuries. Accordingly, the trial court entered a default judgment pursuant to Civ.R. 55 and set the matter for a hearing on damages.

{¶ 3} The evidentiary hearing on damages was held on October 28, 2010. Counsel for Allstate was present, but informed the court that he did not wish to participate in the hearing. Counsel was excused by the court and left before the start of testimony. At the hearing, Brown testified to lost wages, emotional damages, and out-of-pocket expenses for a new car purchased when she was dissatisfied with the repairs made on the car that was damaged in the accident. At the close of evidence, Britain Morris consented to the damages as testified to by Ruth Brown. The trial court then orally awarded judgment against Britain Morris in the amount of \$60,136 plus interest. The award was set forth in the trial court’s November 4, 2010 judgment entry as follows: \$25,000 for property loss;

¹ The Browns dismissed their claims against Robert Morris on December 6, 2010.

\$136 for lost wages, \$25,000 for Ruth Brown's emotional distress, and \$10,000 for her husband John Brown's emotional distress.

{¶ 4} On April 5, 2011, Allstate filed a motion for summary judgment, arguing that Ohio law does not permit a plaintiff to recover for emotional distress related to the death of a person involved in a motor-vehicle accident unless the plaintiff was in the same motor vehicle as the decedent. On May 9, 2011, the trial court dismissed Allstate's motion for summary judgment, stating that it had been waived by Allstate's failure to participate in the damages hearing and was untimely made. On July 25, 2011, Allstate filed another motion for summary judgment *instanter*, on the issues of property damage and emotional and psychological distress, despite the trial court having dismissed Allstate's first motion for summary judgment which raised the issue of emotional distress.

{¶ 5} Thereafter, in another judgment entry filed September 22, 2011, the trial court summarily ordered that the Browns recover the sum of \$60,136 plus interest against Allstate Insurance and denied Allstate's motion for summary judgment. It is from that judgment that Allstate appeals.

{¶ 6} In its first assignment of error, Allstate asserts that the trial court erred in determining that the Browns are entitled to recover the default judgment entered against Britain Morris from Allstate as their uninsured/underinsured motorist. Appellant argues that Ohio law does not require a defendant to appear and oppose the validity of a claim at

the default judgment hearing of another party and that one defendant cannot be held to a co-defendant's failure to answer or otherwise defend against the claims.

{¶ 7} The record reflects that on May 14, 2009, upon written application of the Browns for a default judgment, the trial court found that Britain Morris had failed to move, plead or otherwise defend this action. At that time, Allstate had filed an answer. The trial court found the application well-taken and set the matter for a damages hearing. Allstate's attorney was present at the beginning of the hearing on October 28, 2010, but upon his request was excused. The hearing was solely on damages. Morris had been found legally liable; there was no judgment against Allstate until the trial court held the insurance company responsible for the amount of the default judgment against Morris.

{¶ 8} Inexplicably, sometime between October 28, 2010, and September 22, 2011, the trial court determined that Allstate should be held responsible for the default judgment against Britain Morris despite its November 4, 2010 judgment entry stating only that “* * * judgment is rendered in favor of Ruth A. Brown and John C. Brown against Britain L. Morris, as set forth above in the sum of \$60,136.00, plus interest at the legal rate of 4% per annum.” In its September 22, 2011 judgment entry, the trial court does not provide any rationale for the order.

{¶ 9} It is evident Allstate did not have an opportunity to be heard and present its own defense. It has long been the rule in Ohio that where one co-defendant defaults, the other co-defendant may continue to defend. “The reason for this rule is obvious. A person ought not to be held liable unless he has had the chance to defend – to have his

day in court. This is basic constitutional due process. See *Kluth vs. Anrus* (1950) 58 OLA 230, 94 N.E.2d 823, aff'd 157 Ohio St. 279; *In Re Appropriation* (1957) 148 N.E.2d 242." *Westfield Cos. v. Jarrell*, 4th Dist. No. 417, 1979 WL 206926 (Dec. 7, 1979).

{¶ 10} Allstate cannot be held liable for co-defendant Britain Morris' failure to defend resulting in a default judgment. Further, there is nothing in the record to show that Allstate waived its right to be heard and present a defense. Based on the foregoing, we find that the trial court erred by ordering that the Browns recover the amount of the default judgment from Allstate Insurance. Accordingly, appellant Allstate's first assignment of error is well-taken.

{¶ 11} In light of our finding as to appellant Allstate's first assignment of error, Allstate's second assignment of error asserting that the trial court erred in determining that the only remaining claims in this action are those of Allstate against the Morrises is rendered moot.

{¶ 12} In its third assignment of error, Allstate asserts that the trial court erred by denying the insurance company's motion for summary judgment *instanter*, which addressed the issue of damages. We note at the outset that Allstate filed the motion on July 25, 2011, nine months after the default judgment was entered orally at the close of the October 28, 2010 damages hearing and eight months after the November 4, 2010 judgment entry was filed specifying damages that included emotional distress and

property loss. The motion was clearly out of time and properly denied for that reason. Appellant's third assignment of error is not well-taken.

{¶ 13} This court notes that if the trial court had considered the Browns' emotional distress claims, Ohio law would have prohibited recovery under the facts of this case based on the decision of the Ohio Supreme Court in *Binns v. Fredendall*, 32 Ohio St.3d 244, 513 N.E.2d 278 (1987). In *Binns*, the plaintiff was a passenger in a car struck by a vehicle negligently operated by defendant Fredendall. Plaintiff sustained physical injuries as a result of the accident and Binns, the driver, died. Plaintiff brought suit seeking damages for her own physical injuries and for psychological injuries from witnessing Binns' death. In *Binns*, the Supreme Court held that

recovery for negligently inflicted emotional and psychiatric injuries accompanied by contemporaneous physical injury may include damages for mental anguish, emotional distress, anxiety, grief or loss of enjoyment of life caused by the death or injury of another. We strictly limit such recoveries to those plaintiffs directly involved and contemporaneously injured in the same motor vehicle and accident with the deceased or other injured person. *Id.* at 247. (Emphasis added.)

{¶ 14} Upon consideration whereof, the decision of the Sandusky County Court of Common Pleas is reversed as to the trial court's order finding Allstate Insurance Company liable for \$60,136 in damages resulting from defendant Britain Morris' default judgment, and affirmed as to its denial of Allstate Insurance Company's motion for

summary judgment. This matter is remanded to the trial court for proceedings consistent with this decision. Pursuant to App.R. 24, costs of this appeal are assessed equally to appellees and appellant Allstate Insurance Company.

Judgment reversed in part
and affirmed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.