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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-456

Filed: 20 March 2018

Mecklenburg County, No. 15-CVS-6455

THEODORE CREED, Plaintiff,

v.

WIILIAM CREED, NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY, INC., ESSENTIA INSURANCE COMPANY, and OWNERS INSURANCE COMPANY, Defendants.

Appeal by Defendant, Nationwide Property & Casualty Insurance Company, Inc., from order entered 14 November 2016 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 October 2017.

Schwaba Law Firm, PLLC, by Andrew J. Schwaba, for plaintiff-appellee.

Robinson Elliot & Smith, by William C. Robinson and Dorothy M. Gooding, for defendant-appellant Nationwide Property & Casualty Insurance Company, Inc.

MURPHY, Judge.

The question before our Court is whether the primary underinsured motorist ("UIM") insurer(s) is(are) entitled to an offset credit for all liability payments when there are multiple UIM insurers.

Defendant, Nationwide Property & Casualty Insurance Company, Inc. ("Nationwide"), appeals from an order denying its motion for summary judgment and granting Theodore Creed's ("Theodore") motion for summary judgment. On appeal, Nationwide argues that the trial court erred in its determination of applying offset credits to its UIM coverage. After careful review, we reverse the trial court's order granting Theodore's motion for summary judgment and remand for entry of an order granting Nationwide's motion for summary judgment.

BACKGROUND

The facts of this case are not in dispute. On 4 April 2012, William Creed ("William") drove his son Theodore's vehicle. William's wife was in the front passenger seat, and Theodore was in the back seat. William fell asleep while driving, and the car veered off the highway and collided with a tree at a high rate of speed. William's wife died as a result of the crash. Theodore suffered injuries and incurred medical and other expenses which are not in dispute.

At the time of the accident, Theodore had three separate insurance policies with Nationwide. Each policy provided liability and UIM coverage limits of $100,000 per policy per person and $300,000 per accident. One of these policies (*4697) covered the vehicle involved in this accident, while the two other policies (*4690, *8811) covered different vehicles owned by Theodore. Additionally, William had insurance policies through Essentia Insurance Company ("Essentia") (*4731) and Auto-Owners

Insurance Company ("Owners") (*1200) in the same amounts of coverage. All five insurance policies had identical language and provided liability and UIM coverage with limits of $100,000 per person and $300,000 per accident.

Theodore filed a complaint alleging that William acted negligently, and that Theodore was entitled to UIM benefits. In its amended answer, Nationwide moved for credit or setoff as a defense. Theodore filed a motion for summary judgment, and Nationwide filed its own motion for summary judgment. Prior to the hearing on the motions for summary judgment the following occurred:

- Theodore and Nationwide stipulated that the UIM policies were to "stack."
- Nationwide tendered $100,000 to Theodore for liability coverage through its policy (*4697).
- Essentia tendered $100,000 to Theodore for liability coverage.
- Owners also tendered $100,000 to Theodore for liability coverage.
- Theodore and Nationwide stipulated that Nationwide's $100,000 policy (*4697) covering Theodore's vehicle provided "primary coverage."
- Theodore settled all liability and UIM claims with Essentia and Owners.

The trial court held a hearing on both motions for summary judgment. The court took the matter under advisement and later entered a judgment granting Theodore's motion for summary judgment and denying Nationwide's motion for summary judgment. Accordingly, the trial court determined Nationwide's policy (*4697) paid $100,000 in liability coverage, and Theodore was entitled to UIM coverage under all five policies, with only a $100,000 offset credit, for a potential UIM recovery of $400,000.

Obligations per Trial Court's Order		
Prior liability coverage tendered	$300,000 • $100,000, Nationwide (*4697) • $100,000, Essentia (*4731) • $100,000, Owners (*1200)	 Paid (*4697) Paid (*4731) Paid (*1200)
Total UIM recovery available through "stacked" policies as stipulated	$400,000 • $100,000, Nationwide (*4690) • $100,000, Nationwide (*8811) • $100,000, Essentia (*4731) • $100,000, Owners (*1200)	 Owed (*4690) Owed (*8811) Settled (*4731) Settled (*1200)

Nationwide timely appealed.

ANALYSIS

The trial court's order was properly certified for appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure and is properly before us. N.C. R. Civ. P. 54(b). "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine

issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

The parties agree that the issue is whether Nationwide is entitled to an offset credit for all three liability payments or if Nationwide is obligated to Theodore for an additional $200,000 in UIM coverage. The parties disagree on the law that controls the resolution of the offset credits to be applied to UIM coverage. Theodore contends that *Lunsford v. Mills*, 367 N.C. 618, 766 S.E.2d 297 (2014), supports the trial court's order, while Nationwide contends that *Iodice v. Jones,* 133 N.C. App. 76, 514 S.E.2d 291 (1999), is the applicable authority. Theodore argues that even if the proper offset credit is $300,000, then the "reduction clauses" in all of the policies reduce Essentia and Owners UIM coverage, leaving Nationwide obligated for the remaining $200,000.[1] We first analyze the relevant cases on application of the offset credit, and then we review Theodore's reduction clause argument.

I. Nationwide's UIM Coverage

Theodore relies extensively on *Lunsford*, where our Supreme Court addressed the "situation in which there is more than one at-fault driver responsible for the

[1] Theodore also argues that the Essentia and Owners policies are not "collectible." However, based on the Record and transcript, this argument was not made at the trial level, and a party cannot change its argument on appeal. *Balawejder v. Balawejder*, 216 N.C. App. 301, 307, 721 S.E.2d 679, 683 (2011); *State v. Fuller*, ___ N.C. App. ___, 809 S.E.2d 157, 162 (2017).

accident causing the insured's injuries" and how the insured can recover under UIM policies.[2] *Lunsford*, at 619, 766 S.E.2d at 298. The Court in *Lunsford* concluded, "the insured is only required to exhaust the liability insurance coverage of a single at-fault motorist in order to *trigger* the insurer's obligation to provide UIM benefits." *Id.* at 619, 766 S.E.2d at 298-99 (emphasis added). The Court reasoned that by not advancing UIM policy limits in accordance with N.C.G.S. § 20-279.21(b)(4), the insurer had "waived" subrogation rights to the proceeds of any settlement. *Id.* at 628-29, 766 S.E.2d at 304. *Lunsford* did not otherwise hold that an insured was entitled to a windfall. *Id.* at 628, 766 S.E.2d at 304. We note that *Lunsford* did not address "primary" versus "excess" UIM coverage or how to apply offset credits for liability coverage.

Nationwide relies on *Iodice*, where we addressed whether one UIM insurer was entitled to an entire offset credit. *Iodice*, 133 N.C. App. 76, 514 S.E.2d 291. At trial, the UIM offset credit was distributed on a pro rata basis. *Id.* at 77-78, 514 S.E.2d at 292-93. At issue was an "excess" clause in two insurers' UIM policies. *Id.* at 78, 514 S.E.2d at 293. One insurer appealed and argued it was entitled to the full amount of the offset credit because it provided "primary" UIM coverage. *Id.* We held that identically worded "excess" clauses had different meanings due to who owned the

[2] *Lunsford* explained that N.C.G.S. § 20-279.21(b)(4) should be "liberally construed" in order to protect innocent victims injured by financially irresponsible motorists. *Lunsford*, at 626, 766 S.E.2d at 303 (quoting *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 224-25, 376 S.E.2d 761, 763 (1989)).

vehicle involved in the accident. *Id.* at 78-79, 514 S.E.2d at 293-94. In *Iodice*, we reasoned:

> Because "you" is expressly defined as the named insured and spouse, the Nationwide "excess" clause reads: "[A]ny insurance we provide with respect to a vehicle [Penney] do[es] not own shall be excess over any other collectible insurance." It follows that Nationwide's UIM coverage is *not* "excess" over other collectible insurance (and is, therefore, primary), because the vehicle in which the accident occurred is owned by Penney. The GEICO "excess" clause reads: "[A]ny insurance we provide with respect to a vehicle [Iodice's mother] do[es] not own shall be excess over any other collectible insurance." It follows that GEICO's UIM coverage is "excess" (and is, therefore, secondary), because the vehicle in which the accident occurred is not owned by Iodice's mother. Accordingly, Nationwide provides primary UIM coverage in this case. As such, Nationwide is entitled to set off the entire $62,500.00 against any UIM amounts it owes Iodice, because "the primary provider of UIM coverage . . . is entitled to the credit for the liability coverage. The excess UIM coverage providers still get the benefit of the credit for the coverage because their UIM coverage does not apply until the liability coverage and the primary UIM coverage are exhausted."

Id. at 78-79, 514 S.E.2d at 293 (omission in original) (citation omitted).

Like in *Iodice*, the language of the "Other Insurance" clauses of the policies at issue here have identical language but different meanings. Following the reasoning from *Iodice*, Theodore's "Other Insurance" clauses read:

> (*4697) "any insurance [Nationwide] provide[s] with respect to a vehicle [Theodore] do[es] not own shall be excess over any other collectible insurance."

> (*4690) "any insurance [Nationwide] provide[s] with respect to a vehicle [Theodore] do[es] not own shall be excess over any other collectible insurance."
>
> (*8811) "any insurance [Nationwide] provide[s] with respect to a vehicle [Theodore] do[es] not own shall be excess over any other collectible insurance."

William's "Other Insurance" clauses read:

> (*4731) "any insurance [Essentia] provide[s] with respect to a vehicle [William] do[es] not own shall be excess over any other collectible insurance."
>
> (*1200) "any insurance [Owners] provide[s] with respect to a vehicle [William] do[es] not own shall be excess over any other collectible insurance."

Interpreting the language of the policies, since Theodore owns the vehicle involved in the accident, William's insurers' UIM coverage is "excess," and Nationwide's UIM coverages are "primary." Further, we have held that the provider of primary UIM coverage is entitled to the entire offset credit from a liability payment. *Benton v. Hanford*, 195 N.C. App. 88, 97, 671 S.E.2d 31, 36 (2009). To rule that because Nationwide had three policies it is not entitled to the same interpretation of its contractual language would allow for a windfall to Theodore.

"UIM coverage is intended to place a policy holder in the *same position* that the policy holder would have been in if the tortfeasor had had liability coverage equal to the amount of the UM/UIM coverage." *Nationwide Mut. Ins. Co. v. Haight*, 152 N.C. App. 137, 142, 566 S.E.2d 835, 838 (2002) (citation and quotation marks

omitted). Here, UIM coverage satisfied the Financial Responsibility Act's goal of placing Theodore in the same position as if the tortfeasor had liability coverage equal to $500,000, the stacked value of UIM coverage. Theodore has already received payments of $300,000 in liability coverage. We conclude that Nationwide's argument does not run afoul of *Lunsford*, which dealt with when UIM coverage is triggered. 367 N.C. at 619, 766 S.E.2d at 298-99. In the case *sub judice*, all parties agree that UIM coverage was triggered, and, unlike *Lunsford*, Nationwide did not waive its rights to subrogation. All parties have stipulated that there were liability payments of $300,000. We have previously held that "because [Defendant] is the primary provider of UIM coverage, [Defendant] is entitled to the credit for the liability coverage." *Falls v. N.C. Farm Bureau Mut. Ins. Co.*, 114 N.C. App. 203, 208, 441 S.E.2d 583, 586 (1994). Here, we have found that Nationwide provided "primary" UIM coverage, and, as a result, it is entitled to an offset credit for the amount of all liability payments against its stacked UIM coverage. As Essentia and Owners UIM coverage is "excess," Nationwide's offset credit is not subject to any pro rata reductions. Nationwide has fulfilled its $300,000 UIM obligation to Theodore.

Accordingly, we hold that the primary UIM insurer(s) is(are) entitled to an offset credit for all liability payments. We believe this interpretation to be consistent with the Financial Responsibility Act, the precedent of this Court, our Supreme Court, and the contracts entered into by the parties and their family members.

II. Reduction Clause

Theodore argues that because the Nationwide (*4697), Essentia (*4731), and Owners (*1200) policies each paid out $100,000, this reduces each parties UIM coverage by the same amount. All of the policies state:

> The limit of bodily injury liability shown in the Declarations for each person and each accident for this [UIM] coverage shall be reduced by all sums:
>
> 1. Paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A [Liability Coverage][.]

Assuming, *arguendo*, that Theodore's interpretation is the correct application of the "reduction clause," this would not change the outcome of this case. If UIM coverage is reduced, then there would be no UIM coverage, because the liability payout would be greater than the remaining UIM coverage ($300,000 liability payout compared to $200,000 in remaining UIM coverage). "[T]he limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident." N.C.G.S. § 20-279.21(b)(4) (2017). Even if these payments do not reduce the total UIM coverage, Nationwide would still get $300,000 in an offset credit as discussed *supra*, and would not be obligated to Theodore for any additional UIM

coverage. Further, because Theodore settled all claims with Essentia and Owners, we hold that this issue is moot.

CONCLUSION

For the reasons stated above, under de novo review, we reverse the trial court's order granting Theodore's motion for summary judgment and remand for entry of an order granting Nationwide's motion for summary judgment. It is so ordered.

REVERSED AND REMANDED.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).