IN THE SUPREME COURT OF THE STATE OF NEVADA

RONDA TENAS AND BARBARA BARNES,
Appellants,
vs.
PROGRESSIVE PREFERRED INSURANCE COMPANY,
Respondent.

No. 49355

FILED

SEP 16 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court summary judgment in an insurance action. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.[1]

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Appellant Ronda Tenas was injured in a motor vehicle accident in Montana; she was a passenger in an uninsured vehicle that was being driven by an acquaintance. At the time of the accident, Tenas was a minor and was insured by a policy held by her mother, appellant Barbara Barnes. Tenas and Barnes were residents of Nevada when the insurance policy was issued. Respondent Progressive Preferred Insurance Company had insured two of Barnes's vehicles for $25,000 for each person and $50,000 for each accident. Because the vehicle in which Tenas was injured was uninsured, Progressive paid uninsured motorist benefits to Tenas.

[1]The Honorable Nancy M. Saitta, Justice, did not participate in the decision of this matter.

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After paying $25,000 in uninsured motorist benefits to Tenas, Progressive instituted an action for declaratory relief in Nevada—as Tenas was seeking an additional $25,000 in uninsured motorist benefits under the theory of stacking. A few days later, Tenas filed an action for $25,000 in Montana.

The Montana district court ultimately granted summary judgment to Tenas for $25,000 in addition to attorney fees and costs. The Montana district court determined that because the insurance policy's anti-stacking provision violated Montana public policy, Montana law, which allowed for stacking, would apply. An appeal from the Montana district court's grant of summary judgment is still pending in the Supreme Court of Montana.

Notwithstanding the Montana district court's grant of summary judgment to Tenas, the Nevada district court subsequently granted summary judgment to Progressive. In reaching its decision, the district court determined that Nevada law as to anti-stacking was applicable and that Tenas and Barnes could not stack their uninsured motorist coverage from Barnes's two vehicles. This appeal followed.

This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.[2]

Tenas and Barnes argue that the district court should not have granted summary judgment to Progressive and should have abated or stayed its proceedings because the Montana district court had already

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[2]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (citing Caughlin Homeowners Ass'n v. Caughlin Club, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993)).

adjudicated the issues raised by Progressive in the Nevada action. We disagree.

While relying on Fitzharris v. Phillips,[3] Tenas and Barnes contend that it was contrary to fundamental judicial procedure for the district court to permit the Nevada action to proceed, as the issues giving rise to the Nevada action had already been adjudicated in Montana. Tenas and Barnes consequently argue that the district court should have abated or stayed the determination of the Nevada action because summary judgment had been granted to Tenas in Montana.

Progressive responds and argues that the district court did not err in granting summary judgment because Nevada had priority jurisdiction over Montana; Progressive relies upon Diet Center, Inc. v. Basford,[4] among other authorities, as support. While relying on Sotirakis

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[3]74 Nev. 371, 375-76, 333 P.2d 721, 723-24 (1958) (holding that if a judgment in an action by a mother against a daughter and the daughter's husband for the restitution of real property had been final, the doctrine of res judicata would have precluded the second action by the mother against the daughter and the daughter's husband in which the mother sought to set aside the deed from herself to the defendants), overruled on other grounds by Lee v. GNLV Corp., 116 Nev. 424, 428 n.3, 996 P.2d 416, 428 n.3 (2000) ("To the extent that Fitzharris v. Phillips suggests that a summary judgment order is not a final judgment, we hereby disapprove of that portion of Fitzharris." (citation omitted)).

[4]855 P.2d 481, 483 (Idaho 1993) ("Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action.").

v. United Services Automobile Ass'n,[5] Progressive contends that the district court's grant of summary judgment was also appropriate because Nevada was the best forum to dispute the insurance policy, which had been issued in Nevada.

We conclude that the Nevada district court did not err in exercising jurisdiction in this matter. As recognized by the Supreme Court of Montana, the "first to file" rule is "'a generally recognized doctrine of . . . comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district.'"[6] We conclude that despite Montana's interests in resolving the issue as to stacking of the uninsured motorist coverage in Barnes's insurance policy, the Montana district court should have declined jurisdiction because Progressive already had an identical pending action in Nevada that had been commenced before the Montana action.[7] While the "first to file" rule "'is not a rigid or inflexible rule to be mechanically applied,'" we agree with Progressive that Montana should not have adjudicated this matter because Nevada was the best forum to dispute the underlying issue; the insurance policy had been

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[5]106 Nev. 123, 787 P.2d 788 (1990) (holding that the state whose law is applied in a conflict of laws issue must have substantial relation with the transaction, and the transaction must not be contrary to the public policy of forum).

[6]Wamsley v. Nodak Mut. Ins. Co., 178 P.3d 102, 109-10 (Mont. 2008) (quoting Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 94-95 (9th Cir. 1982)).

[7]See id.

issued in Nevada to Tenas and Barnes, who were Nevada residents.[8] Even though "Montana has a well-established practice of applying Montana law to automobile accidents occurring within its borders," the insurance policy in this case was governed by Nevada law, as provided in the insurance policy's choice of law provision.[9] Therefore, we conclude that the Nevada district court did not err in adjudicating this matter, as Montana law had compelled the Montana district court to abate or stay Tenas's subsequently filed action in Montana.[10]

Based on our review of the record, however, we conclude that the district court erred in granting summary judgment to Progressive because there is a genuine issue of material fact as to whether Progressive's anti-stacking provision for Barnes's uninsured motorist coverage was void under NRS 687B.145(1). NRS 687B.145 provides in pertinent part

> 1. Any policy of insurance or endorsement providing coverage under the provisions of NRS 690B.020 or other policy of casualty insurance may provide that if the insured has coverage available to him under more than one policy or provision of coverage, any recovery or benefits may equal but not exceed the higher of the applicable limits of the respective coverages, and the recovery or benefits must be prorated between the applicable coverages in the proportion that their respective limits bear to the aggregate of their

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[8]See id. (quoting Pacesetter Systems, 678 F.2d at 94-95).

[9]See id. (citing Kemp v. Allstate Ins. Co., 601 P.2d 20, 24 (Mont. 1979).

[10]See id.

> limits. Any provision which limits benefits pursuant to this section must be in clear language and be prominently displayed in the policy, binder or endorsement. Any limiting provision is void if the named insured has purchased separate coverage on the same risk and has paid a premium calculated for full reimbursement under that coverage.

(Emphasis added.)

In particular, there is a genuine issue of material fact as to whether Barnes paid separate full premiums for uninsured motorist coverage for her two vehicles or whether she was afforded an anti-stacking discount for her two vehicles, which would render the anti-stacking provision as being not void under NRS 687B.145(1).

While the declarations page for Barnes's insurance policy provides a "multi-car discount" and "dual airbag discount" for her two vehicles, the declarations page does not unambiguously indicate whether Barnes had received a discount as to anti-stacking. While considering the evidence in the light most favorable to Tenas and Barnes, a trier of fact could conclude that Barnes had paid separate full premiums for uninsured motorist coverage for her two vehicles and that there had been no discount provided as a result of the anti-stacking provision.[11] Even though Progressive's motion for summary judgment was supported by Rakesh Patel's affidavit, which provides that Barnes was not charged separate full premiums for uninsured motorist coverage for her two vehicles, we

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[11]See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

conclude that there are genuine issues of material fact in this matter for which summary judgment was not appropriate.[12]

Therefore, we conclude that the district court erred in granting summary judgment to Progressive. Accordingly, we

ORDER the judgment of the district court REVERSED.

_____, C.J.
Gibbons

_____, J.
Maupin

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

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[12]We further conclude that the district court abused its discretion in not granting Tenas and Barnes a discovery continuance under NRCP 56(f). As Tenas and Barnes sought a discovery continuance in a matter that had been pending for less than a year, the district court should have given Tenas and Barnes additional time to conduct discovery and to compile additional facts to oppose the motion for summary judgment; moreover, there is no indication in the record that Tenas and Barnes were dilatory in conducting discovery. See Aviation Ventures v. Joan Morris, Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005).

cc: Hon. Jackie Glass, District Judge
Thomas F. Christensen, Settlement Judge
Matthew L. Sharp
Dennett Winspear, LLP
Eighth District Court Clerk