[Cite as *Govt. Emps. Ins. Co. v. Hughes*, 2009-Ohio-5780.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Government Employees Insurance Company,	:	
	:	
Plaintiff-Appellant,	:	No. 08AP-1120
v.		(C.P.C. No. 07CVH07-10026)
	:	
Lynda D. Hughes et al.,		(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 3, 2009

Pyper Alexander & Nordstrom, *LLC*, and *P. Christian Nordstrom*, for appellant.

Volkema Thomas LPA, and *Michael S. Miller*; *Otto Beatty*, *Jr. and Assocs.*, and *Otto Beatty*, *Jr.*, for appellee Lynda D. Hughes.

ON MOTION TO CERTIFY CONFLICT

SADLER, J.

{¶1} Pursuant to App.R. 25, plaintiff-appellant, Government Employees Insurance Company ("appellant"), moves this court for an order certifying a conflict to the Supreme Court of Ohio. Specifically, appellant contends that our judgment in the within

case, *Govt. Emps. Ins. Co. v. Hughes,* 10th Dist. No. 08AP-1120, 2009-Ohio-5023, conflicts with the decision of the First Appellate District in *Cincinnati Ins. Co. v. Kramer* (1993), 91 Ohio App.3d 528, and with the decision of the Eighth Appellate District in *Williams v. Aetna Ins. Co.*, 8th Dist. No. 83340, 2004-Ohio-2390. It proposes that we certify the following "rule of law"[1] to the Supreme Court of Ohio:

> When the owner of a rental vehicle gives permission to use that vehicle to an original permittee, who is expressly forbidden by the vehicle owner to delegate that authority, the original permittee cannot grant permission to use the rental vehicle to the second permittee sufficient to trigger liability coverage conditioned on the second permittee having the original permittee's permission to use the rental vehicle.

Defendant-appellee, Lynda D. Hughes ("appellee"), has filed a memorandum in opposition to the motion, and the motion is now submitted to this court for decision.

{¶2} Motions seeking an order to certify a conflict are governed by Section 3(B)(4), Article IV of the Ohio Constitution, which provides:

> Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

{¶3} In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223, the Supreme Court of Ohio set forth the standard for courts of appeals to use in passing upon a motion to certify:

> [A]t least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. First, the certifying court

[1] Appellant proposes a "rule of law" not an "issue" as specified in App.R. 25(A). We have reprinted the proposed rule of law as it appears in appellant's motion.

> must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

(Emphasis sic.) Id. at 596.

{¶4} However, " 'there is no reason for a Court of Appeals to certify its judgment as conflicting with that of another Court of Appeals where * * * the point upon which the conflict exists had no arguable effect upon the judgment of the certifying court.' " *Penrod v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 04AP-1118, 2005-Ohio-6611, ¶4, quoting *Pincelli v. Ohio Bridge Corp.* (1966), 5 Ohio St.2d 41, 44. "Questions certified should have actually arisen and should be necessarily involved in the court's ruling or decision." *Pincelli* at 44.

{¶5} One of the issues presented in the present case was whether the rented Chevy Malibu that appellee's sister, Louisa, was driving at the time appellee was injured, was an "owned auto" for purposes of the automobile liability policy that appellant issued to appellee's mother, Barbara. This issue was important because appellant contended that Louisa was not an "insured" under the policy, and the definition of who is an "insured" is different under the policy depending upon whether the vehicle involved was an "owned auto" or a "non-owned auto."

{¶6} The definition of "owned auto" included a "temporary substitute auto." The policy defined "temporary substitute auto" as "an automobile or trailer, not owned by you, temporarily used with the permission of the owner." The definition further specified that

"[t]his vehicle must be used as a substitute for the owned auto or trailer when withdrawn from normal use because of its * * * repair." It was undisputed that Barbara rented the Malibu to use while her Ford Expedition was being repaired. It was also undisputed that Enterprise Rent-a-Car was the titled owner of the Malibu and that the rental contract specified that Barbara was forbidden to allow anyone else to drive the Malibu.

{¶7} The issue resolved to whether the Malibu was "temporarily used with the permission of the owner" and, thus, a "temporary substitute auto." Appellant argued that we should look to whether Louisa was using the Malibu "with the permission of the owner" while appellee argued that the proper inquiry was whether Barbara was using the Malibu "with the permission of the owner." Appellant cited the *Kramer* and *Williams* cases in support of its position. We rejected appellant's argument, explaining our reasoning as follows:

> [I]n *Kramer* the policy owner sought coverage for damage he caused while driving a rental car that he had *not rented*. (His acquaintance had rented the vehicle and, contrary to the language of the rental contract, had allowed the policy owner to drive it.) The policy at issue stated "Liability coverage applies to you while driving your covered auto and to you while driving any auto other than your covered auto, if you have permission from the owner." The case did not involve the definition of a "non-owned auto" or a "temporary substitute auto." It involved language that expressly conditioned coverage on whether, "while driving" any particular vehicle that he did not own, *the named insured* had the owner's *permission to drive* (not permission to temporarily use) the vehicle.
>
> In * * * [*Williams*] the vehicle involved was, as in this case, a car that the policy owner had rented and then, contrary to the terms of the rental agreement, allowed another person to drive * * * [and] * * * the court[ ] of appeals determined there was no coverage. However, in *Williams*, where the court of appeals made clear that it was relying on the specific

> language of that policy, the policy did not contain reference to, or a definition of, a "temporary substitute auto," whereas in the instant case, the policy includes coverage for a "temporary substitute auto," which, by definition, is a vehicle owned by someone else but is treated under the policy as an "owned auto."

Hughes at ¶15-16.

{¶8} We went on to conclude:

> We agree with the trial court that if appellant treats as "owned" by the policyholder a vehicle that is, in reality, not *titled* to the policyholder, then to require the permission of both the "owner" of the "owned" auto (the policyholder) and the titleholder of the vehicle (in this case, Enterprise) for a third party to drive it, the policy must so specify. Instead, the policy in this case simply provides coverage when a vehicle that is not titled to the policyholder is being "temporarily used with the permission of the owner * * * as a substitute for the owned auto." The only person that could be using the vehicle as a substitute for the owned auto would be the policyholder; thus, that same person is the one that must be using the vehicle "with the permission of the owner." It is undisputed that Barbara was using the Malibu "as a substitute for the owned auto" (her Ford Expedition) and was using the Malibu "with the permission of the owner" (Enterprise); and that Louisa was using the Malibu (which had become an "owned auto" under the policy) with "your" (Barbara's) permission. In light of these facts and the plain language of the policy, no more was required for Louisa to be an insured and for coverage to apply to appellee's losses under Section I of the policy.

Id. at ¶17.

{¶9} Appellant argues that our resolution of the issue whether the Malibu was a "temporary substitute auto" and thus an "owned auto" is in direct conflict with the *Kramer* court's holding that, "[w]hen an owner gives permission to use an automobile to an original permittee, who is expressly forbidden to delegate that authority, unless the owner's conduct implicitly revokes the prohibition, the original permittee cannot grant

permission to a second permittee." *Kramer* at 531. Appellant also argues that our resolution of the "temporary substitute auto" question conflicts with the *Williams* case because the policy language in that case, though different, was, according to appellant, "operationally the same."[2] Thus, appellant maintains, because the facts of that case were so similar to those in this case, and because the *Williams* court reached a contrary result, the two cases are in direct conflict.

{¶10} In response, appellee argues that *Kramer* and *Williams* did not set forth principles of law that apply regardless of the policy language; rather, she argues, they examined and applied the unique policy language at issue, just as this court did in the instant case. She points out that, unlike the policies in *Kramer* and *Williams*, the policy in this case expressly defined an "owned auto" as one being temporarily used as a substitute for the insured's owned auto (including rentals), and expressly extended coverage to those using an "owned" auto with "your" (defined as the named insured's – here, Barbara's) permission.

{¶11} We do not perceive a conflict between our decision in this case and the decision of the First Appellate District in *Kramer*. As noted in our previous decision, the driver sought coverage under his own policy for damage he caused while driving a rental car that someone else had rented; the policy at issue stated that coverage applied to the policyholder "while driving any auto other than your covered auto, if you have permission from the owner." *Hughes* at ¶15. Thus, the case involved the simple meaning of the word "owner" as being the titled owner. *Kramer* did not involve language like that at issue in this case, which first defines an "owned auto" as one used as a temporary substitute

[2] Motion to Certify Conflict, 4.

for the policyholder's listed auto (a use to which only the policyholder could put the substitute vehicle) and also used (again, by the policyholder, since it did not specify otherwise) with the permission of the owner, meaning the rental company; and then defining which other individuals would be covered while using a vehicle now classified as an "owned auto" with "your" (meaning the policyholder's) permission. Both *Kramer* and this case were decided on the particular policy language at issue in each, and neither case utilized a principle of law contrary to that espoused in the other.

{¶12} We likewise perceive no conflict between our decision in this case and that of the Eighth Appellate District in *Williams*. Though the factual scenarios in the two cases are virtually identical, the policy language was different. In *Williams*, an "insured auto" included a "substitute auto," which was defined as "a non-owned auto being temporarily used *by you or a resident relative with the permission of the owner* while your insured auto is being serviced or repaired." (Emphasis added.) *Williams* at ¶13. Thus, in that case, the policy made it clear that either "you" (the policyholder) or a "resident relative" could be using the non-owned auto as a temporary substitute while the insured auto was being repaired; thus when doing so, both needed to have the permission of the owner of the substitute vehicle.

{¶13} In the instant case, however, the language did not clearly so indicate. As noted in our previous decision, "the policy in this case simply provides coverage when a vehicle that is not titled to the policyholder is being 'temporarily used with the permission of the owner * * * as a substitute for the owned auto.' The only person that could be using the vehicle as a substitute for the owned auto would be the policyholder; thus, that same person is the one that must be using the vehicle 'with the permission of the owner.' "

Hughes at ¶17. We agreed with the trial court's reasoning that, "a 'temporary substitute auto' is, by definition, legally owned by someone other than the named insured, and if the policy was intended to require the permission of both 'you' (meaning the named insured) and the titled owner (here, Enterprise), the policy would have specifically required that." Id. at ¶10. Absent express language to that effect, we refused to read into the policy a requirement for permission from two different sources. The *Williams* court did not have to read such a requirement into the policy because the policy language clearly contained it. Accordingly, we find no conflict between our decision in this case and that of the Eighth Appellate District in *Williams*.

{¶14} For all of the foregoing reasons, appellant's motion to certify a conflict is denied.

Motion to certify conflict denied.

FRENCH, P.J., and CONNOR, J., concur.

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