[Cite as *Passmore v. Universal Underwriters Ins. Co.*, 2005-Ohio-4484.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

BRIAN PASSMORE, INDIVIDUALLY AND AS CO-ADMINISTRATOR FOR THE ESTATE OF BRIAN E. PASSMORE, II, DECEASED, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2003-A-0016**
- vs -	:	
UNIVERSAL UNDERWRITERS INSURANCE COMPANY, et al.,	:	
Defendant-Appellant,	:	
CIGNA/ACE USA PROPERTY & CASUALTY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2001 CV 429.

Judgment: Affirmed.

Todd O. Rosenberg, Landerhaven Corporate Center, 6110 Parkland Boulevard, Mayfield Heights, OH 44124 (For Plaintiffs-Appellees).

Shawn W. Maestle, 2500 Terminal Tower, 50 Public Square, Cleveland, OH 44113 (For Defendant-Appellant).

Brian N. Ramm, 900 Penton Building, 1300 East Ninth Street, Cleveland, OH 44114 (For Defendant-Appellee).

WILLIAM M. O'NEILL, J.

{¶1} This appeal arises from the Ashtabula County Court of Common Pleas. Appellant, Universal Underwriters Insurance Company ("Universal"), appeals the judgment of the trial court, which entered summary judgment in favor of appellees, Brian Passmore and Brandy J. Javorich, both individually and as co-administrators for the estate of Brian E. Passmore, II (collectively referred to hereinafter as "appellees").

{¶2} On June 10, 1999, Deborah Butcher brought her personal automobile into Nassief Pontiac Cadillac, Inc. ("Nassief") in order to have it repaired. On that same date, she signed a rental agreement for the use of a rental car while her car was being serviced. The rental agreement provided that Deborah Butcher and her husband, Robert E. Butcher, were authorized drivers for the rental car, a 1999 Chevrolet Lumina, for use until June 11, 1999. The rental agreement also stated, "under no circumstances shall anyone under 21 years of age operate this vehicle."

{¶3} On June 13, 1999, the Butchers' twelve-year-old son, Robert K. Butcher, operated the rental vehicle, with his parents' permission. According to police statements, the Butchers' son was driving the vehicle up and down their street doing "burn-outs" and "fish-tailing." As he was driving, he noticed his friend, nine-year-old David Bradnan, and Bradnan's cousin, eight-year-old Brian E. Passmore, II riding their bikes down the road. He stopped and asked them if they wanted to go for a ride. He then followed the boys to the Butcher home where they left their bikes and fishing poles and then got in the car. Bradnan sat in the center, using the passenger-side seatbelt, while Passmore sat next to the window on the passenger side, without a seatbelt. Butcher continued driving up and down the street and, on the final pass, veered off the

road into a roadside ditch, overturning the vehicle and causing Passmore to be expelled from the vehicle. Passmore died from his injuries a short time later.

{¶4} Following the death, appellees collected $100,000 from the tortfeasor's liability insurer and $150,000 in underinsured motorist coverage from their personal automobile insurer.

{¶5} On June 8, 2001, appellees filed a complaint in the Ashtabula County Court of Common Pleas, seeking underinsured motorist coverage from a number of defendant insurance companies including Cigna/ACE USA Property & Casualty ("ACE") and Universal. ACE issued a business automobile insurance policy to GMAC, the owner of the rental vehicle. Universal had issued insurance policies to Nassief, which had rented the vehicle to the Butchers.

{¶6} ACE, Universal, and appellees all subsequently filed summary judgment motions. In a judgment entry filed December 31, 2002, the trial court entered summary judgment in favor of appellees, finding they were entitled to underinsured motorist coverage under both the ACE and Universal policies.

{¶7} On January 28, 2003, Universal appealed the December 31, 2002 judgment entry to this court.[1] This court concluded the December 31, 2002 judgment entry was not a final appealable order, as issues remained unresolved regarding ACE's coverage and appellees' claims and the trial court did not find there was "no just reason for delay." Thus, this court asked the trial court to make a determination as to appellees' loss of consortium claims under the ACE and Universal policies.

1. See companion case, *Passmore v. Universal Underwriters Ins. Co.*, 11th Dist. No. 2003-A-0095.

{¶8} On July 9, 2003, the trial court issued a judgment entry finding that its December 31, 2002 judgment entry was a final appealable order and there was "no just reason for delay."

{¶9} Universal presents a single assignment of error:

{¶10} "The trial court erred in determining that [Brian E. Passmore, II] was an insured under either the business policy or the umbrella policy issued to Nassief."

{¶11} We begin by noting the standard for addressing a motion for summary judgment is set forth in Civ.R. 56(C). In order to prevail, the moving party must establish that: "'(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the [nonmoving party], that conclusion is adverse to the [nonmovant].'"[2] "An appellate court applies a *de novo* standard of review when determining whether a trial court properly granted summary judgment."[3]

{¶12} Universal contends Brian E. Passmore, II is not an "insured" under the business auto or the umbrella policy because he was not occupying a vehicle listed on the declaration. Section 530 of the business policy is the UM/UIM endorsement. The named insureds under the policy are "Nassief Che-Pon-Cad, Inc.," under the $25,000 coverage, and "George, Helen and Todd Nassief," under the $500,000 coverage. Insureds are defined as follows:

{¶13} "(A) you;

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2. *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 268, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. See, also, Civ.R. 56(C).
3. (Citations omitted.) *Burkholder v. Straughn* (June 26, 1998), 11th Dist. No. 97-T-0146, 1998 Ohio App. LEXIS 2895, at *6.

{¶14} "(B) any of your partners, paid employees, directors[.]

{¶15} "(C) any other person while occupying a covered auto;

{¶16} "(D) anyone for damages they are entitled to recover because of bodily injury sustained by another insured."

{¶17} The UM/UIM part of the policy defines a "covered auto" as "any land motor vehicle, trailer or semi-trailer designed for travel on public roads which is insured by this Coverage Part and shown on the declarations."

{¶18} It is well-settled in Ohio that "where a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent."[4] Ambiguities in an insurance policy should be construed against the insurer and in favor of the insured.[5]

{¶19} In the instant case, the definition of an "insured" involves the "covered auto" language. A "covered auto" is defined under the policy as, "any land motor vehicle, trailer or semi-trailer designed for travel on public roads which is insured by this Coverage Part and shown on the declarations." Thus, the policy references the vehicles listed in the declarations; however, there are no vehicles listed at all in the declarations, which does little to inform the insured which autos are truly "covered" under the policy. Thus, in light of this ambiguity, we must look to the intent of the parties to determine whether Brian E. Passmore, II is an "insured" under the policy.

{¶20} The policy at issue was issued from Universal to Nassief to cover the automobiles used during the course of Nassief's business, including those vehicles rented to its customers. Therefore, although not listed on the declarations page, it was the intent of the parties to provide insurance coverage for the vehicles used in the

4. (Citation omitted.) *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶12.
5. Id. at ¶13.

business. Therefore, the vehicle rented to the Butchers is a "covered auto" for purposes of the policy.

{¶21} Thus, we return to the definition of "insured" under section 530 of the policy. An "insured" is defined as "any other person while occupying a covered auto." As we have determined that "covered auto" was ambiguous and, in construing the language in favor of the insured, the vehicle at issue was a covered auto. Therefore, the phrase "any other person" applies to permit coverage to Brian E. Passmore, II as an insured as he was occupying a covered auto.

{¶22} Inasmuch as Brian E. Passmore, II was an insured under the business auto policy, and the declarations page for part 980, umbrella unicover coverage, states, "[a]ll umbrella coverage is afforded under the Master Policy 178665 $2,000,000 limit," then appellees have underinsured motorist coverage available under both the business auto policy and the umbrella portion of the policy.

{¶23} Universal also cites the exclusions portion of the policy, which states, "[t]his insurance does not apply to: *** (f) Anyone using a vehicle without a reasonable belief that the person is entitled to do so." Based on this provision, Universal contends appellees are not entitled to coverage as Brian E. Passmore, II "was without any entitlement to use the accident vehicle." We disagree. Brian E. Passmore, II was a passenger in the '99 Lumina when the accident occurred. The record here would support the inference that the eight-year-old Brian E. Passmore, II was permitted to be in the vehicle at the time.

{¶24} Universal contends that, as the vehicle involved in the accident is not listed on the declarations page, it is not a covered auto and, therefore, there is no

coverage. Universal also avers that appellees have no standing to argue that Brian E. Passmore, II was an "insured" under the policy since he was not a party to the original contract. Citing the Supreme Court of Ohio's holding in *Westfield v. Galatis*, Universal avers that a determination as to whether an individual is an insured under a particular insurance policy, "should not be interpreted in favor of one who was not a party to the contract."[6] We disagree.

{¶25} Nassief, in its car-rental capacity, intended to provide rental cars to its customers. Moreover, the policy at issue provides coverage for such vehicles.

{¶26} Appellees contend there are no vehicles listed on the declarations page and, thus, the "covered auto" language is ambiguous.

{¶27} The trial court also concluded that the reduction in liability coverage from $500,000 to $25,000 does not comport with the requirements set forth by the Supreme Court of Ohio in *Linko v. Indemn. Ins. Co. of N. Am.*[7]

{¶28} *Linko v. Indemn. Ins. Co. of N. Am.* states that, to properly offer underinsured motorist coverage, the insurer must: "[1] inform the insured of the availability of UM/UIM coverage, [2] set forth the premium for UM/UIM coverage, [3] include a brief description of the coverage, and [4] expressly state the UM/UIM coverage limits in its offer."[8]

{¶29} We agree with the trial court that the policy does not conform to the *Linko* requirements. Specifically, there is no rejection form, nor a premium or a description of the coverage, and its limits. Thus, Universal failed to properly offer UM/UIM coverage

6. (Citation omitted.) *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶49.
7. *Linko v. Indemn. Ins. Co. of N. Am.* (2000), 90 Ohio St.3d 445.
8. Id. at 447-448.

for Nassief Che-Pon-Cad, Inc. at the $25,000 level. Therefore, the policy limit of $500,000 applies and appellees have underinsured motorist coverage under the policy.

{¶30} Therefore, the trial court did not err in finding Brian E. Passmore, II was an insured under the business auto and umbrella policies and entering summary judgment in favor of appellees.

{¶31} Based on the foregoing, the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DONALD R. FORD, P.J., concurs,

JUDITH A. CHRISTLEY, J., Ret.,
Eleventh Appellate District,
sitting by assignment, dissents with Dissenting Opinion.

JUDITH A. CHRISTLEY, J., Ret., dissents with Dissenting Opinion.

{¶32} For the following reasons, I respectfully dissent. The majority correctly determines that the decedent was initially qualified as an insured for underinsured motorist coverage ("UIM") under appellant's business insurance policy and umbrella coverage. However, I believe the majority incorrectly concludes that the subsequent exclusionary provision of appellant's policy was not applicable. First, as a matter of law and public policy, the decedent could not have reasonably believed that he was legally "entitled" to use the vehicle. Second, no jury could reasonably conclude that the eight-year-old decedent had a reasonable belief that he would be legally "entitled" to use the vehicle driven by the twelve-year-old driver.

{¶33} The relevant exclusionary provision states as follows: "This insurance does not apply to: *** (f) Anyone using a vehicle without a reasonable belief that the person is entitled to do so." The clear and unambiguous language of the exclusionary provision establishes that if an individual does not have a reasonable belief that they are "entitled" to use the vehicle, then they are excluded from appellant's insurance coverage. It is implicit that any such entitlement or use must be a legal entitlement or use.

{¶34} The majority bases its decision upon the conclusion that "[t]he record here would support the inference that the eight-year-old deceased *was permitted* to be in the vehicle at the time." (Emphasis added.) The fact that the decedent was "permitted" to be a passenger is irrelevant when determining whether the exclusionary provision applies. Instead, the issue is the decedent's reasonable belief that he was legally "entitled" to use the vehicle, not whether he was "permitted" to be a passenger. The applicability of the exclusionary provision turns upon whether, in light of the standards for a summary judgment exercise, evidence was presented establishing the decedent could have a reasonable belief that he was "entitled" to use the vehicle.

{¶35} Summary judgment is proper when the following three pronged test has been satisfied: (1) there is no genuine issue as to any material fact; (2) *the moving party is entitled to judgment as a matter of law*; and (3) *reasonable minds can come but to one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence construed most strongly in his favor*. Civ.R. 56(C); *Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 268, 1993-Ohio-12.

{¶36} In this case, the evidence demonstrated that the unlicensed twelve-year-old, was driving up and down his street in his mother's rental car while doing "burn-outs" and "fish tailing." Allegedly he had his parents' permission to drive the vehicle. At some point, the twelve-year-old pulled over and invited a nine-year-old and the eight-year-old decedent to join him in the vehicle. The decedent accepted the invitation and was ultimately killed due to the twelve-year-old's negligent, unlicensed driving.

{¶37} Logic and well-established law dictates that a legal "entitlement" of use cannot be transferred or granted by one who is not "entitled" to such use. See, e.g., *Long v. Noah's Lost Ark, Inc.*, 158 Ohio App.3d 206, 2004-Ohio-4155, at ¶43 (holding that no one can transfer a greater right or better title than he himself possesses). See, also, *Hamet v. Letcher* (1881), 37 Ohio St. 356, 359. In the instant case, there were two illegitimate attempts to transfer an "entitlement" of use.

{¶38} First, the parents of the twelve-year-old driver now claim that he had their permission to drive the vehicle. However, any such permission constituted the crime of contributing to the delinquency of a minor by allowing an unlicensed twelve-year-old to drive a motor vehicle on public roads. R.C. 2919.24. Despite their apparent status as legal guardians of the twelve-year-old driver, the parents had no legal authority to grant permission or to legally "entitle" the unlicensed minor to perform an illegal act. R.C. 2919.24(A). See, e.g., *State v. Ellis* (1989), 64 Ohio App.3d 158. Therefore, as an illegal and "unentitled" user/driver, the twelve-year-old had no legal authority to subsequently vest the decedent with any "entitlement" to use the vehicle.

{¶39} Accordingly, regardless of what the parents now claim, they could not legally "entitle" the twelve-year-old driver to use the vehicle and, thus, he could not

legally "entitle" the eight-year-old decedent to use the vehicle. Therefore, as a matter of law, the decedent could not have had a "reasonable belief" that he was legally "entitled" to use the vehicle, even if the facts demonstrated that the twelve-year-old had been permitted by his parents to use the vehicle.[9] Even under the majority's analysis, the decedent was neither legally "permitted" nor legally "entitled" to use the vehicle. For this primary reason, I would reverse the judgment of the trial court as the second prong of the summary judgment exercise has not been satisfied.

{¶40} Moreover, "[t]he Supreme Court of Ohio has consistently held it is against public policy to provide coverage for intentional torts or criminal actions. *** Furthermore, *** when it is substantially certain that an intentional act will cause injury, said actions will not be deemed to fall within coverage limits." *Allstate Ins. Co. v. Ray* (Dec. 18, 1998), 7th Dist. No. 96 CA 20, 1998 Ohio App. LEXIS 6189, at 11, citing *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 36. As discussed previously, the parents engaged in criminal conduct - contributing to the delinquency of a minor - by allowing their twelve-year-old to drive the vehicle. Also, the intentional act of allowing a twelve-year-old to drive a rented vehicle, unsupervised, on a public road is substantially certain to cause an injury. Thus, for this reason as well, based upon Ohio public policy, appellant was not required to provide insurance coverage for injuries arising from the insured's criminal and intentional acts.

{¶41} Finally, the third-prong of the summary judgment test has not been satisfied. As the nonmoving party, appellant insurance company was required to have the foregoing evidence construed most strongly in its favor. Accordingly, based upon

9. During the summary judgment exercise, the minority of the decedent was never raised as a potential issue.

the evidence, reasonable minds could conclude that the decedent could not reasonably believe that he was legally "entitled" to use the vehicle. In short, construing the evidence most strongly in appellant's favor, reasonable minds could not conclude that the eight-year-old decedent believed that he was legally "entitled" to use a vehicle which was being driven by a twelve-year-old. As a result, appellees have failed to establish the third prong of the summary judgment test.

{¶42} As a brief aside, appellant maintains that appellees have no standing to argue that the decedent was not an "insured" per the Ohio Supreme Court's holding in *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. Specifically, appellant's standing argument states that the *Galatis* Court determined a plaintiff who was not a party to an insurance contract had no standing to argue he or she was an insured. Id. at ¶49.

{¶43} Although I agree with the majority's determination that appellant's standing argument has no merit, I believe further clarification is necessary. The language cited to by appellant did not represent a holding by the *Galatis* Court that only a party to an insurance contract has standing to argue who is or who is not an insured. Rather, the Court merely stated that an insurance contract would not be interpreted in favor of a plaintiff not a party to the contract and to the detriment of the contracting parties. Id. at ¶49. Thus, appellant's reliance upon *Galatis* is misplaced.

{¶44} Regardless of appellant's standing argument, it is clear that appellees have failed to satisfy the second and third prongs necessary to succeed in a summary judgment exercise. Thus, I would reverse the trial court's decision granting summary

judgment and remand this matter for further proceedings. To that end, I respectfully dissent.