[Cite as *Roos v. Roos*, 2012-Ohio-5243.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

JUSTIS ROOS, a Minor, et al.,	:	
		CASE NO. CA2012-02-033
Plaintiffs-Appellants,	:	
		O P I N I O N
	:	11/13/2012
- vs -		
	:	
BRYON ROOS, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV10-12-5123

Dennis L. Adams, 120 North Second Street, Hamilton, Ohio 45011, for plaintiffs-appellants

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S. POWELL, P.J.

{¶ 1} Appellant, Justis Roos, appeals a decision of the Butler County Court of Common Pleas granting summary judgment in an insurance dispute in favor of appellee, American Family Insurance Company (insurer).

{¶ 2} On December 23, 2008, Justis, age 11, was injured in a single-car automobile accident while a passenger in a vehicle driven by his father, Bryon Roos. On that date, Bryon was transporting Justis to a medical appointment when he lost control of his truck and

collided with a barn near the side of the roadway.

{¶ 3} At the time of the accident, Bryon and Justis' mother were divorced and had separate insurance policies with insurer. Initially, Justis and his mother filed a lawsuit against Bryon for coverage under Bryon's policy. However, Bryon's policy did not cover Justis' injuries. Thereafter, Justis filed an amended complaint seeking uninsured motorist coverage from insurer under his mother's policy.

{¶ 4} The mother's insurance policy provides compensatory damages for bodily injuries sustained by an insured person as a result of an accident by an uninsured vehicle. An uninsured vehicle is defined as a vehicle which is "[i]nsured by a bodily injury liability bond or policy at the time of the accident but the company denies coverage * * *." However, an uninsured vehicle is not a vehicle which is "[o]wned by or *furnished or available for the regular use* of you or any resident of your household." (Emphasis added.)

{¶ 5} Insurer then took Bryon's deposition regarding his role in providing transportation for Justis. Bryon testified that at the time of the accident, he and mother shared custody of Justis. The custody arrangement is governed by a Shared Parenting Plan and a subsequent Agreed Entry. These documents provide that Bryon has parenting time with Justis on his days off work. Bryon's time off occurs in two-day segments and amounts to approximately ten days a month. Bryon testified that Justis would stay with him during his allotted parenting time and also visit him in addition to this time because Justis had difficulty getting along with his future stepfather. The Shared Parenting Plan and Agreed Entry stated that Bryon shall provide transportation to parenting time exchanges, to gymnastics, and in general during his parenting time. Bryon stated that he complied with these documents and transported Justis to school, shopping, medical appointments, and other extracurricular events. Bryon always provided transportation in his personal vehicle, the same vehicle that was involved in the 2008 accident.

{¶ 6} On February 2, 2012, the trial court granted insurer's summary judgment motion as it found that the mother's insurance policy did not cover Justis' injuries because Justis was a resident of mother's household and Bryon's vehicle was furnished for Justis' regular use. The court reasoned that the vehicle was "furnished" to Justis because of the Shared Parenting Plan's requirements that Bryon provide transportation to Justis. Moreover, Justis "used" the vehicle as a passenger because he benefited from being transported to various activities.

{¶ 7} Justis now appeals the trial court's decision, raising a single assignment of error:

{¶ 8} THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

{¶ 9} Justis argues that the trial court erred when it found that the regular-use provision in the mother's insurance policy excluded Justis' injuries. Specifically, Justis contends that he did not regularly use Bryon's vehicle because he could not use the vehicle without an adult and Bryon's permission. On the other hand, insurer argues that Justis fell within the regular-use exclusion because he frequently rode in the vehicle and the Shared Parenting Plan mandated that Bryon provide transportation.

{¶ 10} This court's review of a trial court's ruling on a summary judgment motion is de novo, which means that we review the judgment independently and without deference to the trial court's determination. *Simmons v. Yingling*, 12th Dist. No. CA2010-11-117, 2011-Ohio-4041, ¶ 18. We utilize the same standard in our review that the trial court uses in its evaluation of the motion. *Id.*

{¶ 11} Summary judgment is appropriate when there are no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving

party. Civ.R. 56(C); *Williams v. McFarland Properties, L.L.C.*, 177 Ohio App.3d 490, 2008-Ohio-3594, ¶ 7 (12th Dist.). To prevail on a motion for summary judgment, the moving party must be able to point to evidentiary materials that show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The nonmoving party must then present evidence that some issue of material fact remains to be resolved; it may not rest on the mere allegations or denials in its pleadings. *Id.* All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First Natl. Bank & Trust Co.*, 21 Ohio St.2d 25, 28 (1970).

{¶ 12} This case involves the interpretation of a provision in an insurance policy. An insurance policy is a contract. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 9. The interpretation of a clear and unambiguous insurance contract is a matter of law. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995). When confronted with an issue of contract interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *Westfield* at ¶ 9. An insurance contract must be examined as a whole and it is presumed that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132 (1987). Courts look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *Westfield* at ¶ 11.

{¶ 13} The words "regular use" in an automobile liability insurance policy are unambiguous and are to be given their ordinary meaning. *Barnickel v. Auto Owners Ins. Co.*, 186 Ohio App.3d 722, 2010-Ohio-1100, ¶ 24 (12th Dist.). "Regular use" refers to use that is "frequent, steady, constant or systematic." *Sanderson v. Ohio Edison Co.*, 69 Ohio St.3d 582, 589 (1994). Determination of regular use is a fact-specific inquiry to be determined on a case-by-case basis. *Barnickel* at ¶ 24.

{¶ 14} The Ohio Supreme Court has on several occasions examined regular-use exclusions in automobile insurance policies. In *Thompson v. Preferred Risk Mut. Ins. Co.*, 32 Ohio St.3d 340 (1987), the Supreme Court found that an automobile was not "furnished for the regular use" of a driver where the owner of the vehicle maintained sole dominion and control over the vehicle. The court reasoned that because the owner retained the only set of keys to the vehicle and the owner required the driver to seek her permission before the driver used the vehicle, the vehicle was not furnished for the regular use of the driver. *Id.* at 343.

{¶ 15} The Supreme Court has also found that a truck was not regularly used by an employee when the truck was a company vehicle, it was to be used only for tasks relating to employment, and the employee drove the truck eight to ten times per year. *Sanderson*, 69 Ohio St.3d at 589-590. However, the Supreme Court has found that a police officer regularly used a police cruiser when the officer was assigned to drive the cruiser 122 out of 164 working days. *Kenney v. Emps. Liab. Assur. Corp.*, 5 Ohio St.2d 131 (1966). Additionally, the Supreme Court has found that "use" as employed in an insurance provision not associated with UM or UIM coverage included situations where one was a passenger. *Brown v. Kennedy*, 141 Ohio St. 457, 464 (1943). *See also, Grange Mut. Cas. Co. v. Rosko*, 146 Ohio App.3d 698, 2001-Ohio-3508, ¶ 26 (7th Dist.) (Reasoning that "use" includes all proper uses of an automobile).

{¶ 16} Appellate courts have also interpreted regular-use exclusions in insurance contracts. The Ninth District found that a passenger, whose job primarily consisted of riding on the back of a garbage truck, was "regularly using" the truck. *McCall v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 23601, 2007-Ohio-5109. In so holding, the court noted that the passenger's use of the truck was "regular" because he rode in the garbage truck almost every day during the work week. *Id.* at ¶ 15. Further, the passenger was "using" the truck even though he was not operating the vehicle. *Id.* at ¶ 17. The court reasoned that "use"

has been defined as "the privilege or benefit of using something" and that the passenger fell within this definition as he had the benefit of using the truck to complete his job requirements. *Id.*

{¶ 17} Justis maintains that the Supreme Court cases support his position that Bryon's vehicle was not "furnished for the regular use" of child.[1] Like *Thompson*, Justis does not own the vehicle and must not only seek permission to use the vehicle but additionally must have an adult operate it. However, we find that *Thompson* is distinguishable from the case at bar because the Shared Parenting Plan and Agreed Entry requires that Bryon provide transportation to and from parenting time, extracurricular activities, and generally throughout Bryon's parenting time. Therefore, a characterization of Justis' use of the vehicle as requiring "permission" is incorrect because the Shared Parenting Plan actually mandates that Bryon provide transportation. Instead, Justis had "dominion and control" over the vehicle because a legal document required his father to provide transportation.

{¶ 18} We find that this case is more similar to *Kenney* and *McCall* because of the frequency of Justis' use and the benefits he received from riding in the vehicle. The Shared Parenting Plan and Agreed Entry provides that Justis is to visit his father approximately ten days a month or 120 days a year. During parenting time, Bryon is required to transport Justis to many activities, including to and from parenting time exchanges, school, and extracurricular activities. Similar to *Kenney*, these requirements result in Justis riding in his father's vehicle frequently, almost every day that Justis is with his father. Additionally, like *McCall*, Justis is always a passenger in the vehicle but benefits from its use because he is transported to many activities in the vehicle. Therefore, the facts of this case show that Justis "regularly used" Bryon's automobile.

1. We note that the regular-use exclusion in mother's insurance policy is consistent with the language of R.C. 3937.18(I)(1), the statute that discusses underinsured and uninsured motorist coverage.

{¶ 19} Justis argues that *Kenney* is not applicable to the case at bar because in *Kenney* the court was interpreting regular use in a liability insurance provision instead of an uninsured motorist provision as in *Thompson*. Justis maintains that our inquiry should focus on *Thompson's* concerns, namely, whether Justis had dominion and control over the vehicle, instead of the other considerations stated in *Kenney*. However, we find that both *Thompson* and *Kenney* are applicable in interpreting regular use. In addressing a similar argument, the First District has found that *Thompson* did not redefine regular-use exclusions as the factual situations in *Thompson* and *Kenney* were "too distinct to conclude that *Thompson* marks a change of direction in Ohio." *Coleman v. Progressive*, 1st Dist. No. C-070779, 2008-Ohio-3568, ¶ 22. Instead, the court reasoned that these cases simply discuss the important considerations in defining regular use. *Id.*

{¶ 20} Also, in support of his position, Justis points to the five signposts developed by the Sixth District in determining whether a vehicle has been furnished for regular use. *Hartman v. Progressive Max Ins. Co.*, 6th Dist. No. WM-05-007, 2006-Ohio-1629; *Barnickel*, 186 Ohio App.3d 722, 2010-Ohio-1100. However, we find that the application of these signposts actually undermine Justis' argument. In *Hartman*, the court stated that although none of the factors are unilaterally dispositive, courts should consider,

> (1) whether the vehicle was available most of the time to the insured;
>
> (2) whether the insured made more than mere occasional use of the vehicle;
>
> (3) whether the insured needed to obtain permission to use the vehicle;
>
> (4) whether there was an express purpose conditioning use of the vehicle; and
>
> (5) whether the vehicle was being used in an area where its use would be expected.

Id. at ¶ 13.

{¶ 21} In applying these signposts, we find that the facts of this case show that Justis regularly used the vehicle. First, although the vehicle is not available to Justis when he is not with his father, the Shared Parenting Plan's requirements that Bryon transport Justis to many activities shows that while Justis is with his father, the vehicle is available to him. Second, Justis' use of the vehicle is more than occasional because Justis visits his father approximately 120 days out of the year and the Shared Parenting Plan's transportation requirements result in Justis using the vehicle on almost all of these days. Third, as discussed above, Justis need not obtain "permission" from his father to use the vehicle because the Shared Parenting Plan requires Bryon to provide transportation. Fourth, the "express purpose" of the vehicle when Justis is with his father, is to transport Justis, as stated in the Shared Parenting Plan. Fifth, the vehicle was in an area where its use could be expected because Bryon always used this vehicle to transport Justis.

{¶ 22} Our finding that the vehicle was "furnished or available for regular use" by Justis is also further supported by the purpose of the regular-use exclusion. The Tenth District has noted that "[t]he overriding purpose of the regular-use exclusion is to protect insurance companies from insured individuals purchasing coverage on one vehicle and then using that coverage for protection while continually driving nonowned vehicles for which no premium was paid." *Sullivan v. Williams*, 196 Ohio App. 3d 759, 2011-Ohio-6131, ¶ 8 (10th Dist.); *Grange Mut. Cas. Co. v. Herron*, 12th Dist. No. 88-09-067, 1989 WL 33724, *2 (April 10, 1989). In this case, allowing insurance coverage to Justis under his mother's policy for an accident that occurred in his father's vehicle would achieve this exact result.

{¶ 23} Therefore, the trial court did not err in granting insurer's motion for summary judgment. There were no genuine issues of material fact and insurer was entitled to judgment as a matter of law as the vehicle was "furnished or available for regular use" of

Justis. The sole assignment of error is overruled.

{¶ 24} Judgment affirmed.

HENDRICKSON and PIPER, JJ., concur.