

[Cite as *Adams. v. Crider*, 2004-Ohio-535.]

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
MERCER COUNTY**

**LAURA ADAMS, ET AL.**

**CASE NUMBER 10-02-18**

**PLAINTIFFS-APPELLANTS**

**v.**

**OPINION**

**CHRISTOPHER A. CRIDER, ET AL.**

**DEFENDANTS-APPELLEES**

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**LAURA ADAMS, ET AL.**

**CASE NUMBER 10-02-19**

**PLAINTIFFS-APPELLANTS**

**v.**

**OPINION**

**CHRISTOPHER A. CRIDER, ET AL.**

**DEFENDANTS-APPELLEES**

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**CHARACTER OF PROCEEDINGS:** Civil Appeals from Common Pleas Court.

**JUDGMENTS:** Judgments affirmed in part and reversed in part and cause remanded.

**DATE OF JUDGMENT ENTRIES:** February 9, 2004.

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**CUPP, J.**

{¶1} Plaintiffs-appellants, Laura Adams, et al., (hereinafter, “appellants”) appeal the judgment of the Mercer County Common Pleas Court, granting summary judgment to defendants-appellees, Grange Mutual Casualty Company and Motorist Mutual Insurance Company.

{¶2} The facts and procedural history pertinent to the case sub judice are as follows.

{¶3} On June 14, 1998, Christopher Crider was operating a Kawasaki 125 motor bike and crossed the center line of Shelly Road striking head on a 1985

Honda ATV 200 driven by Laura Adams. Laura's two sons, Adam Kiracofe and Brody Adams, were also occupying the ATV at the time of the collision. Adam Kiracofe died as a result of the collision and Laura and Brody suffered bodily injury. Laura's husband, Dan Adams was the owner of the ATV involved in the accident. It was agreed, for purposes of the summary judgment motions, that Christopher Crider was at fault, and that he was an uninsured motorist.

{¶4} Appellants had three policies of insurance in effect when the accident occurred, including a personal automobile policy with Grange Mutual Casualty Company (hereinafter, "Grange Insurance"), a farmowner's policy with Grange Insurance, and a business policy with Motorist Mutual Insurance Company (hereinafter, "Motorist Mutual").

{¶5} Appellants filed complaints against the tortfeasor, Christopher Crider, and their two insurance providers for uninsured motorist coverage under the three policies of insurance listed above.<sup>1</sup> Appellants moved for summary judgment against Grange Insurance and Motorist Mutual. In response to appellants' motion, Grange Insurance and Motorist Mutual moved for summary judgment against appellants. The trial court granted summary judgment to Grange Insurance and Motorist Mutual.

{¶6} It is from this judgment that appellants appeal and present the following six assignments of error for our review.

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<sup>1</sup> The separate complaints of the estate of Adam Kiracofe and Laura Adams, et al., were joined at the trial court level for motion purposes and have been joined in this court.

### *Standard of Review*

{¶7} Because the issues herein relate to the trial court's decision to grant Grange Insurance and Motorist Mutual's motions for summary judgment, we begin by establishing this Court's standard of review.

{¶8} A court may not grant a motion for summary judgment unless the record demonstrates: 1) that no genuine issue of material fact remains to be litigated; 2) that the moving party is entitled to judgment as a matter of law, and; 3) that, after construing the evidence most strongly in the nonmovant's favor, reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. Civ.R. 56(C); *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679, 686-687. In ruling on a summary judgment motion, the trial court is not permitted to weigh evidence or choose among reasonable inferences; rather, the court must evaluate evidence, taking all permissible inferences and resolving questions of credibility in favor of the nonmovant. *Jacobs v. Racevskis* (1995), 105 Ohio App.3d 1, 7. In addition, appellate review of summary judgment determinations is conducted on a de novo basis. *Griner v. Minster Bd. of Education* (1998), 128 Ohio App.3d 425, 430. Therefore, this Court considers the motion independently and without deference to the trial court's findings. *J.A. Industries, Inc. v. All American Plastics, Inc.* (1999), 133 Ohio App.3d 76, 82.

### **ASSIGNMENT OF ERROR NO. I**

**The trial court erred in denying plaintiff's/appellant's motion for summary judgment against Grange Insurance on the issue of uninsured motorist coverage on plaintiff's/appellant's automobile policy. Said error is reflected in the interpretation of the uninsured motorist portion of the insurance policy.**

## **ASSIGNMENT OF ERROR NO. II**

**The trial court erred in granting summary judgment to Grange Insurance against plaintiffs/appellants on the issue of uninsured motorist coverage on plaintiffs/appellants automobile policy.**

{¶9} On the date of the accident, appellee, Grange Insurance, had in effect with Daniel and Laura Adams a personal auto policy (No. FA 5945626-00).

Daniel and Laura were listed as the “named insureds” under the personal auto policy. It is undisputed that by virtue of being “family members” of the “named insureds,” Adam Kiracofe, Amanda Adams, and Brody Adams were also “insureds” under the personal auto policy issued to Dan and Laura Adams. It is also undisputed that, as contained within the personal auto policy, appellants were provided with uninsured motorist (hereinafter “UM”) coverage.

{¶10} Appellants first argue that their bodily injury is compensable under the UM portion of the Grange personal auto insurance policy. Contrarily, Grange Insurance argues that because Laura and Brody Adams and Adam Kiracofe suffered injuries while occupying an automobile not covered by the automobile policy, no UM coverage is extended to them.

{¶11} As determined by the Ohio Supreme Court in *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281, syllabus, the statutory law in effect at the time of entering into a contract for automobile liability insurance controls the

rights and duties of the contracting parties. The Grange personal auto policy became effective on January 17, 1998, and remained in effect on the date of the accident on June 14, 1998. Therefore, the version of R.C. 3937.18 as amended by Am. Sub. H.B. 261, effective September 3, 1997, controls.

{¶12} In *Martin v. Midwestern Group. Ins. Co.* (1994), 70 Ohio St.3d 478, the Ohio Supreme Court held that UM coverage was designed to protect persons, not vehicles. Therefore, pursuant to *Martin*, an automobile liability insurance policy provision which eliminates UM coverage for persons injured while occupying a motor vehicle owned by an insured but not specifically listed in the policy was invalid and unenforceable as being contrary to R.C. 3937.18.

{¶13} Version H.B. 261 of R.C. 3937.18, however, effectively superceded the holding in *Martin*, supra, and allowed an insurer to effectively limit UM coverage by a provision commonly referred to as the “other-owned auto exclusion.”

{¶14} Pursuant to R.C. 3937.18(J)(1), an insurer may deny coverage when the injured party is occupying a motor vehicle owned by a named insured, spouse, or resident relative of a named insured, if the motor vehicle itself is not insured under the policy of insurance.<sup>2</sup>

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<sup>2</sup> R.C. 3937.18(J) provides:

The coverages offered under division (A) of this section or selected in accordance with division (C) of this section may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle

{¶15} The “other-owned auto exclusion” found in Part C of appellants’ personal auto liability policy with Grange Insurance provides that:

**EXCLUSIONS**

**A. We do not provide Uninsured Motorist Coverage for *bodily injury* sustained by any person:**

- 1. While occupying or when struck by, any motor vehicle owned by you or any family member which is not insured for this coverage under this policy. (emphasis added).**

{¶16} It is undisputed that the ATV involved in the accident and occupied by Laura and Brody Adams and Adam Kiracofe was not a covered vehicle listed on the declarations page of the personal auto policy. The policy only lists three vehicles, a 1987 Dodge Omni, a 1983 Chevrolet Caprice Classic, and a 1987 Dodge Dakota, as covered autos. Because the ATV was owned by appellant, Dan Adams, a named insured under the personal auto policy, and was not a covered auto for purposes of appellants’ personal auto liability policy with Grange Insurance, it necessarily follows that Laura and Brody Adams and Adam Kiracofe are, by virtue of the “other-owned auto exclusion,” barred from recovery under the UM portion of the Grange auto policy for their bodily injuries. The exclusion is not contrary to version H.B. 261 of R.C. 3937.18 and is, therefore, enforceable.<sup>3</sup>

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is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided;

<sup>3</sup> “The validity of an insurance policy exclusion of uninsured motorist coverage depends on whether it conforms to R.C. 3937.18.” *Martin*, supra, paragraph 2 of the syllabus.

{¶17} Appellants, however, maintain that Laura, Amanda and Brody Adams are entitled to recover for their losses resulting from the death of Adam Kiracofe. They assert that even if Laura and Brody are excluded from recovering for their *bodily injury* by virtue of the “other-owned auto exclusion,” they are not, pursuant to *Moore v. State Auto. Mut. Ins. Co.*, 88 Ohio St.3d 27, 2000-Ohio-264, and *Sexton v. State Mut. Auto. Ins. Co.* (1982), 69 Ohio St.2d 431, precluded from recovering the damages they suffered as a result of the death of Adam Kiracofe. Contrarily, Grange Insurance again argues that because there is an “other-owned auto exclusion” within the personal auto policy, *Moore*, supra, is inapplicable to the case at bar.

{¶18} In *Moore*, supra, a case involving wrongful death claims, the Ohio Supreme Court held that R.C. 3937.18(A)(1), version S.B. No. 20 (effective October 20, 1994), “does not permit an insurer to limit uninsured motorist coverage in such a way that an insured must suffer bodily injury, sickness, or disease in order to recover damages from the insurer,” and went on to hold that the limitation in the plaintiff’s policy, therein, requiring that the insured suffer *bodily injury* in order to recover UM benefits to be invalid and unenforceable because it was an attempt to provide less coverage than that which is mandated by law.<sup>4</sup>

{¶19} The personal auto policy in the case at bar contains the same type of language as the policy found in *Moore*, which, in effect, limits UM coverage to

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<sup>4</sup> *Moore*, 88 Ohio St.3d 27, [2000-Ohio-264](#), syllabus. The Court went onto allow the plaintiff in *Moore* to maintain her claim against her insurer to recover UM benefits for the damages which arose out of the wrongful death of her son. For damages available to a wrongful death claimant see R.C. 2125.02.

accidents in which an insured sustains *bodily injury*.<sup>5</sup> Although *Moore* was decided under a prior version of R.C. 3937.18, the language of version H.B. 261 of 3937.18, applicable to the insurance policy in the present case, is not substantively different on this issue.

{¶20} The H.B. 261 version of R.C. 3937.18(J)(1) only allows an insurer to exclude coverage for “*bodily injury or death* suffered by *an insured*” arising from the use of “other-owned vehicles.” It does not allow for the exclusion of *all damages*, such as damages for the wrongful death of another arising out of the use of an “other-owned auto.” Because H.B. 261 version of R.C. 3937.18 does not significantly depart in any pertinent way from that of S.B. No. 20, we are constrained to follow the holding in *Moore*.<sup>6</sup> The amendments to R.C. 3937.18, which effectively permit an insurer to limit UM coverage in such a way that an insured must suffer bodily injury, sickness, death or disease in order to recover from the insurer, did not become effective until September 21, 2000.<sup>7</sup> We, therefore, conclude that Laura, Amanda, and Brody Adamses’ wrongful death

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<sup>5</sup> The uninsured motorist coverage provided by the personal auto policy in the case sub judice is found in Part C of the policy and provides that:

INSURANCE AGREEMENT

A. We will pay damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of

1. Bodily injury suffered by the insured and caused by an accident; \* \* \*

<sup>6</sup> See, also, *Parrish v. State Farm Mut. Auto. Ins. Co.*, Defiance App. No. 4-03-11, [2003-Ohio-6714](#); *Dickerson v. State Mut. Auto. Ins. Co.*, Defiance App. No. 4-03-12, [2003-Ohio-6704](#).

<sup>7</sup> See Am.Sub.S.B. No. 267, eff. 9-21-00. “It is the intent of the General Assembly in amending division (A) of section 3937.18 of the Revised Code to supersede the holdings of the Ohio Supreme Court in *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St.2d 431, and *Moore v. State Auto. Mut. Ins. Co.* (2000), 88 Ohio St.3d 27, that division (A)(1) of section 3937.18 of the Revised Code does not permit an insurer to limit uninsured or underinsured motorist coverage in such a way that an insured must suffer bodily injury, sickness, death or disease for any other insured to recover from the insurer.” Section 3, Am.Sub.S.B., No. 267, eff. 9-21-00.

claims arising out of the death of Adam Kiracofe against defendant Grange Mutual Casualty Company are not barred by the "other-owned auto exclusion."

{¶21} Accordingly, the trial court erred in granting summary judgment in favor of Grange Insurance; rather, summary judgment should have been granted in favor of appellants but only as to their claims for the wrongful death of Adam Kiracofe. Appellants' first and second assignments of error are, therefore, sustained in part and overruled in part.

### **ASSIGNMENT OF ERROR NO. III**

**The trial court erred in denying plaintiff's/appellant's motion for summary judgment against Grange Insurance on the issue of uninsured motorist coverage on plaintiff's/appellant's farm policy. Said error is reflected in the interpretation of the uninsured motorist portion of the insurance policy.**

### **ASSIGNMENT OF ERROR NO. IV**

**The trial court erred in granting summary judgment to Grange Insurance against plaintiffs/appellants on the issue of uninsured motorist coverage on plaintiffs/appellants farm policy.**

{¶22} At the time of the accident, both Daniel and Laura Adams were the "named insureds" under a farmowner's policy (No. FA 34 0 0775763) issued by Grange Insurance. It is undisputed that, as residents of the household of the named insureds, Adam Kiracofe, Amanda Adams, and Brody Adams were within the definition of "insured" and covered by the policy. The issue, however, is not whether appellants were insured under the policy but whether the policy is a "motor vehicle liability policy of insurance" for purposes of R.C. 3937.18, giving rise to UM coverage for appellants by operation of law. For the purpose of

determining the scope of coverage for such a claim, we must first determine the applicable statutory law.

{¶23} The effective date of the farmowner’s policy at issue is December 12, 1997. Accordingly, the H.B. 261 amendments to R.C. 3937.18, effective September 3, 1997, control the rights and obligations of the parties herein. See *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281, syllabus.

{¶24} R.C. §3937.18(A) requires an auto insurer to offer UM/UIM coverage for every “automobile liability or motor vehicle liability policy.” If the insurer fails to offer UM/UIM coverage, it arises by operation of law. *Abate v. Pioneer Mut. Cas. Co.* (1970), 22 Ohio St.2d 161, 163. Appellants specifically assert that the farmowner’s policy is a “motor vehicle liability policy of insurance” because it allows for, and includes, coverage for the use of motor vehicles by “residence employees.”<sup>8</sup> Appellants, therefore, maintain that because UM coverage was not offered as part of the farmowner’s policy, UM coverage arises by operation of law and extends to all those who are “insureds” under the farmowner’s policy.

{¶25} In the case sub judice, it is undisputed that the farmowner’s policy did not offer or provide for UM coverage. The first issue, therefore, is whether the

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<sup>8</sup> Appellants’ asserts that because Form FO-9 (04-96), Coverage G “Farmers Comprehensive Personal Liability” of the farmowner’s policy provides in Paragraph 1(A) that Grange will “pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury \* \* \*,” which, according to appellants, would include liability arising from the acts from a servant or agent. Appellants then state that because Paragraph 5(i) of the form defines “residence employees” as “an employee of an Insured, other than a farm employee, who is exclusively engaged in the performance of household, domestic, or other services, including the maintenance or use of automobiles or teams \* \* \*,” the farmowner’s policy, by virtue of including coverage for the use of motor vehicles by such employees, UM coverage must be offered pursuant to R.C. 3937.18(A).\*

farmowner's policy is a "motor vehicle liability policy" for purposes of R.C. 3937.18.

{¶26} Pertinent to the case at bar, the H.B. 261 version of R.C. 3937.18(L)<sup>9</sup> defines an "automobile liability or motor vehicle liability policy of insurance" as:

**[a]ny policy of insurance that serves as *proof of financial responsibility*, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles *specifically identified in the policy of insurance*[,] (emphasis added).**

The farmowner's policy in the case herein fails to meet the definition of an "automobile or motor vehicle liability policy of insurance" on two separate grounds.

{¶27} First, the farmowner's policy does not serve as proof of financial responsibility for motor vehicles. Consistent with *Burkholder v. German Mut. Ins. Co.*, Lucas App. No. L-01-1413, 2002-Ohio-1184; affirmed by *Burkholder*, 99 Ohio St.3d 163, 2003-Ohio-2953, we find that the residence employee exception does not convert the farmowner's policy into an automobile or motor vehicle liability policy. In *Burkholder*, supra, the Ohio Supreme Court affirmed the decision of the Sixth District Appellate Court denying UM/UIM coverage to an insured under a farmowner's policy.<sup>10</sup> The Sixth District Appellate Court found

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<sup>9</sup> H.B. 261 amended R.C. 3937.18 to include a legislative definition of an "automobile liability or motor vehicle liability policy," whereas the prior version of R.C. 3937.18 failed to legislatively define what constituted an "automobile liability or motor vehicle liability policy," thereby leaving the determination of which insurance policies were considered to be "automobile liability or motor vehicle liability policy" to the interpretation of the judiciary.

<sup>10</sup> *Burkholder*, supra, was affirmed on the authority of *Hillyer v. State Farm Fire & Cas. Co.* (2002), 97 Ohio St.3d 411, [2002-Ohio-6662](#), wherein the Ohio Supreme Court held that a "residence employee" clause in an

that a “residence employee” exception in the farmowner’s policy, as argued by appellants herein, did not convert the farmowner’s policy into a motor vehicle liability policy of insurance.

{¶28} Second, the policy does not contain any “specifically identified” motor vehicles. This court has previously held that the "specifically identified" language contained in R.C. 3937.18(L)(1) requires that motor vehicles be "precisely, particularly and individually identified in order to meet the statutory definition." *Reffitt v. State Auto. Mut. Ins. Co.*, Allen App. No. 1-02-38, 2002-Ohio-4885, at ¶ 16; appeal not allowed by *Reffitt*, 98 Ohio St.3d 1424, 2003-Ohio-259; quoting *Burkholder*, supra. In the case sub judice, no vehicles are listed as covered autos anywhere in the policy. Therefore, the definition of “residence employee,” without specifically identifying any motor vehicles, will not act to impose UM coverage by operation of law.

{¶29} Because the policy does not expressly provide for UM coverage, and because UM coverage does not arise by operation of law, appellants’ third and fourth assignments of error are hereby overruled.

#### ASSIGNMENT OF ERROR NO. V

**The trial court erred in denying plaintiff’s/appellant’s motion for summary judgment against Motorist Mutual Insurance on the issue of uninsured motorist coverage on plaintiff’s/appellant’s business policy. Said error is reflected in the interpretation of the uninsured motorist portion of the insurance policy.**

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insurance policy that provides coverage incidental to home ownership does not convert the policy into a motor vehicle liability insurance policy which would require an insurer to offer UM/UIM coverage.

## ASSIGNMENT OF ERROR NO. VI

**The trial court erred in granting summary judgment to Motorist Mutual Insurance against plaintiffs/appellants on the issue of uninsured motorist coverage on plaintiffs/appellants business policy.**

{¶30} Motorist argues that appellants are not entitled to recover UM benefits under the business auto policy (No. 33.190139-09E) issued to Dan Adams because Laura and Brody Adams and Adam Kiracofe were not occupying a covered auto entitled to UM benefits at the time of the accident. Contrarily, appellants maintain that because the ATV was not “owned by any family member occupying it,” they are therefore not prevented from being covered by the UM portion of the Motorist policy.

{¶31} The effective date of the Motorist Mutual business auto policy issued to Dan Adams is May 9, 1998. Accordingly, version H.B. 261 of R.C. 3937.18, effective September 3, 1997, control the rights and obligations of the parties herein. See *Ross* (1998), 82 Ohio St.3d 281, syllabus.

{¶32} R.C. 3937.18(J)(1) provides, in pertinent part, that UM coverage may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured while the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made.

{¶33} The Ohio uninsured motorist coverage endorsement to the business auto policy in the case herein defines “who is an insured,” in pertinent part, as: (1) You; (2) If you are an individual, any “family member.” The business auto coverage form provides that the word “You” refers to the “named insured” shown in the declarations page. The business insurance policy declarations page names Dan Adams as the only “named insured.” Accordingly, Laura, Brody, and Amanda Adams, and Adam Kiracofe, as family members of Dan, are “insureds” under the business auto policy. However, Item Two, “Schedule of Coverages and Covered Autos,” found in the Business Auto Coverage Form Declarations Page (Form CA 7000 [04-96]) provides that:

**[e]ach of the following coverage will apply only to those “autos” shown as covered “autos.” Covered “autos” are designated for a particular coverage by the entry of one or more Covered Auto Symbols described in Section I of the Business Auto Coverage Form, CA 0001. (Emphasis added.)**

{¶34} The declarations page then goes onto provide that UM coverage applies only to those “auto” designated under “Symbol 7” in the business auto coverage form (CA 0001). Section I of the business auto coverage form defines “symbol 7” covered autos as: “Specifically Described ‘Autos.’ Only those ‘autos’ described in Item Three of the declarations for which a premium charge is shown \* \* \*.” Item Three of the business auto coverage form indicates that the “schedule of covered autos” are found in Form 7002. Form 7002 lists three autos, a 1989 Chevrolet, a 1992 Trailer, and 1987 GMC, and lists the premiums therefore. The 1985 Honda ATV, driven by Laura at the time of the accident, is not included in

the schedule of covered autos. Therefore, by virtue of not being included in the schedule of covered autos (Form No. CA 7002), no UM coverage arises.<sup>11</sup>

{¶35} Because appellants are excluded from UM coverage under the Motorist business auto policy by virtue of not occupying a covered auto as defined by “Symbol 7,” there is also no UM coverage under this policy for appellants’ wrongful death claims.

{¶36} Accordingly, appellants’ fifth and sixth assignments of error are hereby overruled.

{¶37} In summary, appellants’ first and second assignments of error are sustained in part and overruled in part, and their third, fourth, fifth and sixth assignments of error are overruled.

{¶38} Having found error prejudicial to appellants herein, in the particulars assigned and argued, we affirm in part and reverse in part the judgment of the trial court and remand the matter for further proceedings consistent with this opinion.

Judgment affirmed in part,  
reversed in part  
and cause remanded.

SHAW, P.J., and BRYANT, J., concur.

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<sup>11</sup> In their brief, appellants also argue that they are not excluded from UM coverage because the exclusions found in Section C of the “Ohio Uninsured Motorist Coverage – Bodily Injury” endorsement to the business policy (Form CA 70 74 12 97) fail to effectively exclude any of the “insureds” under the policy. The effectiveness of these exclusions (found in Section C[5][a][b][c] and [d]) to the facts specific to this appeal, however, need not be determined by this court because appellant’s UM recovery under the business policy is excluded by Item Two of the Business Auto Coverage Form Declarations Page (Form CA 7000 [04-96]), discussed supra.