

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

JEANNINE L. MCDANIEL, ET AL.

CASE NUMBER 1-04-82

**PLAINTIFFS-APPELLANTS
CROSS-APPELLEES**

v.

OPINION

SHAWN ROLLINS, ET AL.

DEFENDANTS-APPELLEES

And

UNIVERSAL UNDERWRITERS INS. CO.

**DEFENDANT-APPELLEE
CROSS-APPELLANT**

**CHARACTER OF PROCEEDINGS: Civil Appeal and Cross Appeal from
Common Pleas Court.**

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: June 20, 2005

ATTORNEYS:

**DAVID J. ELK
Attorney at Law
Reg. #0000789
Martin S. Delahunty, III
Attorney at Law
Reg. #0039014
Landerhaven Corporate Center**

**6110 Parkland Boulevard
Mayfield Heights, OH 44124
For Plaintiffs-Appellants
Cross-Appellees.**

**ROBERT M. O'NEAL
Attorney at Law
Reg. #0021351
Suite 1060 Talbott Tower
131 North Ludlow Street
Dayton, OH 45402-1737
For Defendant-Appellee, Progressive
Insurance Company.**

**CHRISTOPHER PARKER
Attorney at Law
Reg. #0009338
405 Madison Avenue
Suite 2200
Toledo, OH 43604
For Defendant-Appellee, Cross-Appellant,
Underwriters Insurance Company.**

Rogers, J.

{¶1} Plaintiffs-Appellants, Jeannine McDaniel and Freddie McDaniel, Senior (hereafter collectively referred to as the “McDaniels”), individually and as administrators of Freddie McDaniel, Junior’s estate, appeal from the decision of the Allen County Common Pleas Court granting summary judgment to Defendants-Appellees, Progressive Preferred Insurance Company (“Progressive”) and Universal Underwriters Insurance Company (“Universal”). In addition, Universal has filed a cross-appeal from the decision of the trial court.

{¶2} In their first assignment of error, the McDaniels contend that the trial court erred by finding that they were not entitled to recover under the uninsured/underinsured motorist (“UM/UIM”) provisions of their Progressive automobile insurance policy for the wrongful death losses they suffered as the result of their son’s death. In their second assignment of error, the McDaniels assert that the trial court erred by finding that their son was not an insured under the terms of the automobile insurance policy issued by Universal to Niswonger Chevrolet Incorporated (“Niswonger”). On cross-appeal, Universal maintains that the trial court erroneously found that the automobile insurance policy it had issued to Niswonger provided the McDaniels with conditional coverage.

{¶3} After reviewing the entire record, we find that the unambiguous terms of the Progressive policy properly limited the McDaniels’ UM/UIM coverage to situations where an insured suffers bodily harm. Accordingly, because the McDaniels’ claim against Progressive was based on wrongful death losses and not bodily harm suffered by an insured, we find the trial court did not err in granting Progressive summary judgment. With regard to the Universal policy, we find that the trial court erred by finding even conditional coverage under the policy. Nevertheless, the trial court correctly granted Universal summary judgment. As such, both of the McDaniels’ assignments of error are

overruled, Universal's sole assignment of error is sustained, and the judgment of trial court is affirmed.

{¶4} On March 11, 2001, the McDaniels' son, Freddie McDaniel, Junior ("Freddie"), was killed in an automobile accident. Shawn Rollins ("Rollins") was in the car with Freddie at the time of the accident. It is unclear from the record whether Freddie or Rollins was operating the car at the time of the accident, and this issue was contested by the parties below and on appeal. It is, however, uncontested that the car in which Rollins and Freddie were riding was owned by Niswonger and had been loaned to Freddie by Niswonger while the dealership was repairing Freddie's personal vehicle.

{¶5} As a result of the accident, the McDaniels, in both their individual capacity and as the administrators of Freddie's estate, brought suit against Rollins and numerous insurance carriers. Eventually, all of the insurance carriers except Progressive and Universal were dismissed from the case. Rollins is still a defendant in this matter, but the case against him has been stayed pending this appeal. Rollins is not a party to this appeal.

{¶6} The McDaniels' cause of action against Progressive arises out of a Progressive automobile insurance policy that lists both of the McDaniels as named insureds. It should be noted that Freddie is not a named insured under this policy. The McDaniels claim Freddie's death was caused by an uninsured/underinsured

motorist and that they suffered a wrongful death loss as a result. Consequently, they claim that they are entitled to UM/UIM coverage for this loss under their Progressive policy.

{¶7} The McDaniels claim against Universal originates from the automobile insurance policy that Universal provided to Niswonger. The McDaniels claim that Freddie was an insured under certain provisions of Niswonger's Universal policy and that his estate is entitled to recover for losses he suffered as a result of the accident. To the contrary, Universal claims that Freddie is not covered under any of the provisions of the Niswonger policy.

{¶8} Subsequent to the filing of the McDaniels' complaint, both Progressive and Universal filed motions for summary judgment. Both summary judgment motions were premised on the notion that it did not matter whether Freddie or Rollins was driving the automobile at the time of the accident. In response, the McDaniels filed briefs in opposition to these motions. Thereafter, the trial court granted Progressive summary judgment and included a certification that there was no just cause for delay.

{¶9} With respect to Universal, the trial court initially denied its motion for summary judgment; however, the trial court's ruling was contingent on two factual matters. The trial court found that Freddie would be entitled to coverage under Parts 500 and 900 of the Universal policy if he had been the driver of the

vehicle at the time of the accident and if he had been sober. According to the trial court, there would have been no coverage for Freddie under the Universal policy if either Rollins had been driving the car or if Freddie had been operating the car while intoxicated.

{¶10} Subsequently, both Universal and the McDaniels filed motions for reconsideration. The McDaniels' motion for reconsideration was based on the assertion that Freddie qualified as an insured under the Universal policy regardless of whether he had been operating the vehicle at the time of the accident. Universal's motion for reconsideration was based on evidence that Freddie had been intoxicated at the time of the accident. After considering both motions for reconsideration, the trial court denied the McDaniels' motion. However, the trial court found that the evidence provided by Universal did prove that Freddie had been intoxicated at the time of the accident. Therefore, the trial court found that either Rollins had been driving the car at the time of the accident or Freddie had been driving the car while intoxicated. Under either scenario, the trial court found that Freddie was not an insured under the Universal policy. Accordingly, the trial court granted Universal summary judgment.

{¶11} The McDaniels appeal from the decision of the trial court granting both Progressive and Universal summary judgment and present the following two assignments of error for our review.

The McDaniels' Assignment of Error I

The trial court found incorrectly that the decedent's family members could not recover UM/UIM benefits under a policy issued to them because the decedent was not also insured under the policy.

The McDaniels' Assignment of Error II

The trial court held incorrectly that appellants are not entitled to coverage under at least one of the coverages issued by Appellee Universal to the owner of the vehicle, Niswonger Chevrolet.

{¶12} On cross-appeal, Universal presents the following assignment of error for our review.

Universal's Assignment of Error

The lower court erred in finding conditional coverage under coverage parts 500 and 900 of the Universal Underwriters Insurance Company insurance policy.

{¶13} Because all of the above assignments of error address the trial court's decisions regarding summary judgment, we will use the following standard of review for all three.

Standard of Review

{¶14} An appellate court reviews a summary judgment order de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.* (1999), 131 Ohio App.3d 172, 175. Accordingly, a reviewing court will not reverse an otherwise correct judgment merely because the lower court utilized different or erroneous reasons as the basis for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distr. Co.*, 148 Ohio App.3d 596, 2002-Ohio-3932, at ¶ 25, citing *State ex rel. Cassels v.*

Dayton City School Dist. Bd. of Ed., 69 Ohio St.3d 217, 222, 1994-Ohio-92.

Summary judgment is appropriate when, looking at the evidence as a whole: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C); *Horton v. Harwick Chemical Corp.*, 73 Ohio St.3d 679, 686-687, 1995-Ohio-286. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶15} The party moving for the summary judgment has the initial burden of producing some evidence which affirmatively demonstrates the lack of a genuine issue of material fact. *State ex rel. Burnes v. Athens City Clerk of Courts*, 83 Ohio St.3d 523, 524, 1998-Ohio-3; see, also, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; they may not rest on the mere allegations or denials of their pleadings. *Id.*

The McDaniels' Assignment of Error I

{¶16} In their first assignment of error, the McDaniels challenge the trial court's decision to grant Progressive summary judgment. They contend that the trial court erred by ruling that they could not pursue a UM/UIM claim for the

wrongful death losses they suffered as a result of Freddie's death because Freddie was not an insured under their policy. We agree with the McDaniels that the trial court incorrectly interpreted the line of cases dealing with wrongful death UM/UIM claims. However, because we find that the trial court should have granted Progressive summary judgment on other grounds, we overrule the McDaniels' first assignment of error.

UM/UIM Wrongful Death Claims

{¶17} In granting Progressive summary judgment, the trial court relied on the fact that Freddie was not an insured under the Progressive policy. In its judgment entry, the trial court stated the following:

The fact still remains that the deceased was not entitled to coverage under the plaintiff's insurance. The car driven by the decedent was a replacement for a car not covered under the plaintiff's insurance. The decedent was independent and covered by his own insurance. The insurance contract in question names only the plaintiffs and their two daughters as covered by the policy. In no way may it be construed that the policy in question is in any way applicable to the decedent either as originally drafted or as amended by S.B. 267.

Based on this reasoning, the trial court found that the McDaniels were not entitled to UM/UIM coverage for their wrongful death losses associated with Freddie's death and granted Progressive summary judgment.

{¶18} The analysis of the trial court mischaracterizes the McDaniels' claim against Progressive. In *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio

St.2d 431, the Ohio Supreme Court ruled that R.C. 3937.18(A) did not allow insurers to limit UM coverage to situations where the insured suffered bodily injury. *Sexton*, 69 Ohio St.2d at 434-437. Therefore, the Court ruled that an insured's wrongful death losses that were caused by an uninsured motorist must be included in UM coverage. *Id.* This was held to be true despite the fact that the person killed by the uninsured motorist did not qualify as an insured under the applicable insurance policy. *Id.*

{¶19} Herein, the McDaniels were not seeking coverage under their policy for losses suffered by Freddie, nor did they claim that Freddie was an insured under the Progressive policy. Rather, the McDaniels sought compensation under *their* policy for the wrongful death losses *they* suffered as a result of Freddie's death, which was allegedly caused by an uninsured/underinsured driver. This is similar to the other *Sexton* claims that this Court has favorably addressed in the past. *Adams v. Crider*, 3d Dist. Nos. 10-02-18, 10-02-19, 2004-Ohio-535, at ¶ 17-20; *Parrish v. State Farm Mut. Auto. Ins. Co.*, 3d Dist. No. 4-03-11, 2003-Ohio-6714, at ¶ 16-18; *Dickerson v. State Mut. Auto. Ins. Co.*, 3d Dist. No. 4-03-12, 2003-Ohio-6704, at ¶ 12-13. Whether Freddie qualified as an insured under the Progressive policy was irrelevant to the wrongful death losses the McDaniels suffered at the hands of an uninsured/underinsured driver. Accordingly, the trial

court erred in granting Progressive summary judgment based solely on the finding that Freddie was not an insured under the policy.

{¶20} Nonetheless, there have been significant changes to R.C. 3937.18 since the Supreme Court's decision in *Sexton* that have altered the ability of insurers to limit UM/UIM coverage. An issue of contention remains between the parties concerning which version of R.C. 3937.18 applies to the Progressive policy. Therefore, we must first determine which version of R.C. 3937.18 applies to the Progressive policy and then determine whether the McDaniels' wrongful death claims are valid.

Applicable Version of R.C. 3937.18

{¶21} The statutory law in effect on the date that an automobile insurance policy is entered into is the law to be applied. *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281, syllabus of the court; *Wolfe v. Wolfe*, 88 Ohio St.3d 246, 250-251, 2000-Ohio-322; see, also, *Flowers v. Ohio Mutual Insurance Group*, 3d Dist. No. 13-02-28, 2003-Ohio-441, at ¶ 12. This seemingly simple concept can become problematic because Ohio statutory law requires insurance carriers to give insureds a two-year guaranteed coverage period. R.C. 3937.31(A). The Ohio Supreme Court has ruled that insurance policies can not be altered during the guaranteed two-year coverage period "except by agreement of the parties and in accordance with R.C. 3937.30 to 3937.39." *Wolfe*, 88 Ohio

St.3d at paragraph one of the syllabus. Thus, the beginning of each successive two-year period creates a new policy and the law in effect on the first date of each successive two-year period is the law to be applied to claims arising under that policy. *Id.* at 250-252. In order to determine the date the policy in question was entered into, and thus the applicable law, one must count successive two-year periods forward from the effective date of the original policy. *Id.*^[1]

{¶22} The McDaniels claim that an apparently incoherent list of dates on an endorsement to their policy renders the effective date of the underlying original policy a material issue of fact. Thus, they contend that this Court is unable to determine which version of R.C. 3937.18 was applicable to the Progressive policy in question and that summary judgment was inappropriate. We disagree.

{¶23} The disputed endorsement lists that it has an effective date of May 29, 1997. Furthermore, the endorsement also lists that it was created on June 17, 1997, modified on April 7, 2004, filed on May 28, 1997, and approved on June 12, 1997. The McDaniels assert that this is proof that they had an insurance policy through Progressive as early as May 29, 1997. However, Progressive entered the

^[1] We note that R.C. 3937.31 has been amended and now provides in division (E) that:

Nothing in this section prohibits an insurer from incorporating into a policy any changes that are permitted or required by this section or other sections of the Revised Code at the beginning of any policy period within the two-year period set forth in division (A) of this section.

Therefore, the holding in *Wolfe* that an insurer could not make unilateral changes to an insurance policy during the two-year guaranteed coverage period has been superseded by statute. *Arn v. Mclean*, 2nd Dist. No. 2004-CA-77, 2005-Ohio-654, at ¶ 27. However, the McDaniels entered into their first insurance contract with Progressive prior to this amendment. Because this amendment to R.C. 3937.31 does not apply retroactively, we must still apply the prior law first in order to determine what law applies to the progressive policy in question. *Slone v. Allstate Ins. Co.*, 5th Dist. No. 2004CA0021, 2004-Ohio-3990, at ¶ 21-22.

McDaniels' original insurance policy into evidence. This policy had an effective date of December 9, 1998. Furthermore, Progressive also entered into evidence an affidavit of an authorized Progressive representative, stating that the McDaniels' first policy with Progressive had been entered into on December 9, 1998 and explaining that the dates listed on the endorsement had no relation to the effective date of the original policy.

{¶24} In response, the McDaniels failed to present any evidence that the December 9, 1998 policy was not their original policy. In fact, the McDaniels failed to present any evidence concerning the date that their original policy went into effect. Moreover, nothing in the evidence contradicts Progressive's affidavit or proves that the dates listed on the endorsement relate to the effective date of the underlying original policy.

{¶25} After reviewing all of the evidence in the record in a light most favorable to the McDaniels, we find that reasonable minds could only conclude that the McDaniels' original Progressive policy was entered into on December 9, 1998. Thus, the first two-year guaranteed coverage period ran from December 9, 1998 until December 8, 2000 and the second two-year guaranteed coverage period ran from December 9, 2000 until December 8, 2002. The accident that killed Freddie occurred on March 11, 2001, during the second two-year guaranteed coverage period. Therefore, the law that applies to the Progressive policy in the

appeal before this Court is R.C. 3937.18 as amended by Senate Bill 267 on September 21, 2000, which is the version of R.C. 3937.18 that was in effect at the beginning of the applicable two-year guaranteed coverage period.

Effect of Senate Bill 267 on Sexton/Moore claims

{¶26} As noted above, in *Sexton* the Supreme Court found that insurers could not limit UM coverage to circumstances where the insured suffered bodily harm. *Sexton*, 69 Ohio St.2d at 434-437. This finding was based on a ruling that the language in R.C. 3937.18(A) was ambiguous and, as remedial legislation, must be interpreted liberally. *Id.*

{¶27} In *Moore v. State Auto. Mut. Ins. Co.*, 88 Ohio St.3d 27, 2000-Ohio-264, the Supreme Court addressed the continuing validity of *Sexton* in light of changes made to R.C. 3937.18 by Senate Bill 20, effective October 29, 1994. The Court found that despite changes in the language of R.C. 3937.18, the statute was still ambiguous as to whether an insurer could limit UM coverage to bodily injury suffered by an insured. *Moore*, 88 Ohio St.3d at 31. Thus, the Court found that it was required to determine the intent of the legislature in enacting R.C. 3937.18(A) and construe the statute in a manner that reflects that intent. *Id.* Furthermore, the Court found the R.C. 3937.18 was remedial legislation that must be interpreted liberally. *Id.* Accordingly, the Court interpreted R.C. 3937.18(A)(1), as amended by Senate Bill 20, so as to not permit an insurer to exclude from UM coverage

wrongful death losses. *Id.* at 32. In reaching this conclusion, the Court noted that if the words “for loss” and “damages” were removed from R.C. 3937.18(A) and (A)(1), then an insurer would be permitted to limit UM coverage to those instances where the insured suffered bodily injury. *Id.*; see, also, *Hedges v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 04AP-423, 2004-Ohio-6723, at ¶ 21.

{¶28} Subsequent to the Supreme Court’s decision in *Moore*, R.C. 3937.18 was amended by House Bill 261, effective September 3, 1997. Several appellate courts, including this one, have addressed this amendment to R.C. 3937.18 and found that it did not alter the holdings in either *Sexton* or *Moore*. *Crider* at ¶ 19-21, appeal not allowed by 102 Ohio St.3d 1473, 2004-Ohio-2830; *Hedges* at ¶ 33-35; *Bernabei v. The Cincinnati Ins. Cos.*, 5th Dist. No. 2002CA00078, 2004-Ohio-4939, at ¶ 61-63; *Aldrich v. Pacific Indemn. Co.*, 7th Dist. No. 02 CO 54, 2004-Ohio-1546, at ¶ 24. Accordingly, this Court has held that the version of R.C. 3937.18 as amended by House bill 261 does not allow insurers to exclude from UM/UIM coverage wrongful death losses that an insured suffers because of an underinsured motorist. *Adams* at ¶ 20. In similar rulings, both the Fifth and the Tenth Districts relied on the fact that the legislature had not removed the words “for loss” or “damages” from the 1997 version of the statute and that the legislative comments published with House Bill 261 did not indicate any intention

on the part of the legislature to overturn *Sexton*. *Hedges* at ¶ 33; *Bernabei* at ¶ 52-62.

{¶29} The version of R.C. 3937.18 that is applicable to the Progressive policy before this Court was amended by House Bill 267 on September 21, 2000. In this version, the words “for loss”, “damages”, and “against loss” have been removed from R.C. 3937.18(A), (A)(1), and (A)(2) respectively. Furthermore, comment to the amendment published by the legislature states the following:

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.

Given the subtraction of the words “for loss”, “damages”, and “against loss” from the statutory language, especially in light of the Supreme Court’s comments in *Moore*, and the clear intent of the legislature as expressed in the published comment, we find that R.C. 3937.18 as amended by House Bill 267 permits an insurer to limit UM/UIM coverage to instances where the insured suffers bodily injury.

{¶30} Therefore, Progressive could have properly limited the McDaniels’ UM/UIM coverage in such a way that an insured had to suffer bodily injury in

order to recover under these provisions. However, we must be mindful that insurance agreements are contracts and that the relationship between the insured and the insurer is purely contractual in nature. *La Plas Condo. Assoc. I and II v. Utica Ntl. Ins. Group*, 3d Dist. No. 5-04-15, 2004-Ohio-5347, at ¶ 19, citing *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St.3d 107, 109. Just because Progressive was entitled to limit UM/UIM coverage to bodily injury suffered by an insured does not mean that the insurance agreement necessarily did so. Consequently, this Court must look to the language of the Progressive policy under the following standard of review and determine if in fact UM/UIM coverage was limited to include only those claims in which an insured suffered bodily injury.

Interpreting Insurance Agreements

{¶31} As noted above, an insurance policy is a contract between the insurer and the insured. *La Plas* at ¶ 19. Thus, courts must construe the language of an insurance policy as a matter of law. *Wilson v. Smith*, 9th Dist. No. 22193, 2005-Ohio-337, at ¶ 9, citing *Leber v. Smith* (1994), 70 Ohio St.3d 548, 553.

{¶32} In interpreting an insurance agreement, a court must first consider the language of the policy itself and give the terms in the policy their plain and ordinary meaning. *Wilson* at ¶ 9, citing *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-168. A court may look no further than the four

corners of the insurance policy to find the intent of the parties when the language of the contract is clear and unambiguous. *Tuthill Energy Systems v. RJ. Burke Ins. Agency*, 3d Dist. No. 2-03-25, 2004-Ohio-1394, at ¶ 7, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. “As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.” *Progressive Max Ins. Co. v. Monroe*, 3d Dist. No. 3-03-28, 2004-Ohio-1852, at ¶ 12, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶ 11.

{¶33} However, where there are ambiguities in the language of the insurance policy, the reviewing court must interpret the insurance agreement strictly against the insurer and in favor of coverage for the insured. *Progressive* at ¶ 12, citing *Hacker v. Dickman*, 75 Ohio St.3d 118, 119-120, 1996-Ohio-98. Additionally, a court may consider extrinsic evidence to ascertain the parties’ intention when reviewing an ambiguous policy. *Westfield* at ¶ 12.

{¶34} The UM/UIM section of the McDaniels’ Progressive policy states that:

Subject to the limits of liability, if **you** pay a premium for Uninsured/Underinsured Motorist Bodily Coverage, **we** will pay for damages, other than punitive or exemplary damages, which an **insured person** is entitled to recover from **owner** or operator of an **uninsured motor vehicle** or **underinsured motor vehicle** because of **bodily injury**:

1. sustained by the **insured person**;

2. caused by **accident**; and
3. arising out of the ownership, maintenance, or use of an **uninsured motor vehicle** or **underinsured motor vehicle**.

Page 12-13 of Progressive's policy (Emphasis in original).

{¶35} The clear and unambiguous language of the Progressive policy states that the insured person seeking coverage under the policy's UM/UIM provision must have suffered bodily injury. This is a permissible limitation on UM/UIM coverage as discussed above. The McDaniels' claims against Progressive are based solely on their wrongful death losses and not on any bodily injury sustained by an insured. Accordingly, recovery for their wrongful death losses associated with Freddie's death was properly excluded from their UM/UIM coverage, and Progressive was properly granted summary judgment, although for reasons other than those given by the trial court. As a result, we affirm the decision of the trial court granting Progressive summary judgment and overrule the McDaniels' first assignment of error.

The McDaniels' Assignment of Error II and Universal's Assignment of Error I

{¶36} In their second assignment of error, the McDaniels assert that Freddie was entitled to coverage under five separate parts of the Universal policy; Part 500, Part 530, Part 900, Part 950, and Part 970. They contend that the trial court erred by finding that Freddie's coverage under Parts 500 and 900 was contingent upon Freddie being the driver of the vehicle and upon him being sober

at the time. They also maintain that it was error for the trial court to rule that Freddie was not entitled to coverage under the other three parts of the Universal policy.

{¶37} On cross-appeal, Universal also challenges the trial court's finding that Freddie's coverage under Parts 500 and 900 was contingent upon who was driving the car. Universal claims that Freddie was not entitled to coverage under these parts regardless of who was driving the car.

{¶38} Because both assignments of error relate to the interpretation of the Universal insurance policy, we elect to address them together.

Part 500 of Universal's Policy

{¶39} Part 500 of the Universal policy states that:

WE will pay all sums the INSURED legally must pay as DAMAGES (including punitive DAMAGES where insurable by law) because of INJURY to which this insurance applies caused by an OCCURRENCE arising out of GARAGE OPERATIONS or AUTO HAZARD.

Page 39 of the Universal policy (Emphasis in Original).

{¶40} The clear and unambiguous language quoted above obviously does not apply to the sort of damages sought by the McDaniels. Part 500 provides that an insured will be covered for damages the insured causes in connection with garage operations or an auto hazard. Part 500 will pay for those injuries that an insured causes not those that the insured suffers. Even if we were to assume that

Freddie was an insured under the terms of the Universal policy and that the accident could be considered either a garage operation or an auto hazard, there is still no evidence presented by the McDaniels that Freddie is liable for any damages. To the contrary, it is clear from the record that the McDaniels are seeking medical payment coverage and UM/UIM benefits under the Universal policy on behalf of Freddie's estate based upon losses Freddie suffered as a result of the accident that claimed his life. Indeed, under their theory of the case, Rollins was the driver of the vehicle and caused Freddie's wrongful death through his negligent operation of the vehicle. Nowhere in either their briefs or their complaints do the McDaniels argue that Freddie is liable for any damages.

{¶41} Accordingly, even construing the facts of the case in a light most favorable to the McDaniels, Part 500 simply does not provide the sort of coverage that they are seeking. However, the McDaniels claim that an exception to an exclusion listed in Part 500 raises an ambiguity concerning the type of coverage provided by this section. This exclusion states as follows:

This insurance does not apply to:

(i) INJURY * arising out of the ownership, use, loading or unloading of any;**

(1) AUTO, while:

(iii) leased or rented by YOU to others, except to:

(2) YOUR customers for a term of two months or less when it temporarily replaces the CUSTOMER'S AUTO, or when the customer is awaiting delivery of any AUTO purchased from YOU.

Page 42-44 of the Universal Policy (Emphasis in Original).

{¶42} They claim that by including within the general exclusion from coverage of leased or rented cars an exception for customers who lease or a rent a replacement car from a dealership for less than two months, the type of injuries sustained by Freddie were implicitly included in coverage under Part 500. This is incorrect for two reasons.

{¶43} First, there is no evidence in the record that Freddie either leased or rented the car from Niswonger. In fact, the McDaniels admit that the car was loaned by Niswonger to Freddie without any payment or formal agreement. Therefore, the exception from the exclusion quoted above did not apply to Freddie.

{¶44} Second, the exception from the exclusion did not extend coverage under Part 500 to compensate an insured for injuries sustained to himself in a replacement vehicle that had been leased or rented for less than two months. Rather, this language was clarifying that the policy would provide coverage for those injuries that are caused by an insured who leased or rented such a replacement vehicle. Nothing in this exception to the exclusion changed Part 500

from a liability section to a compensatory section. In other words, the only covered injuries under Part 500 were those for which the insured was liable, not those that the insured sustained.

{¶45} Accordingly, because the McDaniels fail to provide any argument that Freddie was liable for damages, Part 500 does not apply to the facts of the case sub judice.

Part 900

{¶46} The McDaniels next argue that Freddie should have been provided coverage for his damages under sections A and B of Part 900 of the Universal policy. The relevant sections of Part 900 states as follows:

This coverage Part applies only when it is shown in the declarations.

WE will pay:

A. INJURY – WE will pay all sums the INSURED legally must pay as DAMAGES (including punitive DAMAGES where insurable by law) because of INJURY to which this insurance applies caused by an OCCURRENCE arising out of the ownership, maintenance, use, loading or unloading of an OWNED AUTO or TEMPORARY SUBSTITUTE AUTO.

B. MEDICAL PAYMENTS – all reasonable and necessary medical, dental, and funeral expenses (incurred within three years after the OCCURRENCE) to or for each person:

(1) who sustains INJURY caused by an OCCURRENCE while OCCUPYING an OWNED AUTO or TEMPORARY SUBSTITUTE AUTO being used by an insured;

Page 54 of Universal's policy (Emphasis in Original).

{¶47} Section A of Part 900 clearly and unambiguously provides coverage only for damages for which an insured becomes liable. As we discussed above, the McDaniels' claims against Universal do not stem from any sort of liability on the part of Freddie. Therefore, Freddie was not entitled to coverage under Section A of Part 900.

{¶48} Section B of Part 900, on the other hand, is not limited to liability, but states that it will compensate persons for certain medical and funeral expenses incurred because of an accident involving either an owned auto or a temporary substitute auto. However, Part 900 also states that "[t]his Coverage Part applies only when it is shown in the declarations." A review of the declarations page reveals that the only coverage included under Part 900 for the policy in question is injury liability. Medical payments are not listed as covered under Part 900 on the declarations page. Therefore, under the clear and unambiguous terms of the insurance policy, coverage under Section B of Part 900 was not a part of the policy. Accordingly, neither Section A nor Section B of Part 900 provides coverage for the losses that Freddie incurred.

Part 950

{¶49} The relevant portion of Part 950 states as follows:

WE will pay all sums the INSURED legally must pay as DAMAGES (including punitive DAMAGES where insurable by law) because of INJURY to which this Coverage Part applies, caused by an OCCURRENCE arising out of the following hazards when shown in the declarations.

Page 61 of Universal's policy (Emphasis in Original).

{¶50} Just like the language in Part 500 and Section A of Part 900, the language in Part 950 clearly and unambiguously provided coverage only for those damages that an insured causes. Because the McDaniel's do not claim any damages were caused by Freddie, such coverage does not apply to the case herein.

Part 530

{¶51} Part 530 details Niswonger's UM coverage under the Universal policy. In relevant part it provides:

WE will pay all sums the INSURED is legally entitled to recover as compensatory DAMAGES from the owner or driver of an UNINSURED MOTOR VEHICLE.

Page 49 of Universal's policy (Emphasis in Original).

{¶52} The definition of an insured under this part is contained in Endorsement No. 092, which replaces the original definition of insured contained in the body of Part 530. Endorsement No. 092 defines an insured under Part 530 as follows:

WHO IS AN INSURED – With respect to this Coverage Part, the individual (and any FAMILY MEMBER) designated on the

**declarations as subject to this endorsement and any passengers
in a COVERED AUTO driven by the designated individual.**

Page 116 of Universal's policy (Emphasis in Original).

{¶53} The only designated individuals listed on the declarations page as subject to Endorsement No. 092 are Karl & Diane Jenkins, Jennifer Jenkins, and Inez Bovee. Neither Freddie nor Rollins is listed as a designated individual. Furthermore, there is no evidence in the record that either Freddie or Rollins is a family member of any of the designated individuals. Therefore, Freddie could not have been a passenger in a covered auto being driven by a designated individual, and he does not qualify as an insured under Part 530. Accordingly, the UM coverage applicable under Universal's policy does not apply to Freddie.

Part 970

{¶54} The relevant portion of Part 970 provides that:

**WE will pay for LOSS, subject to the terms and conditions of
this Coverage Part, in excess of:**

(a) coverage provided in any UNDERLYING INSURANCE;

Page 69 of Universal's policy (Emphasis in Original).

{¶55} Because we have already found that none of the other four Parts provide Freddie with coverage for the losses that he sustained, there is no underlying insurance to which the umbrella provisions of Part 970 could apply. Accordingly, Part 970 is not pertinent to the facts of the case before us.

{¶56} In sum, Part 500, Section A of Part 900, and Part 950 do not apply to the McDaniels' claims because these are liability sections and the McDaniels only seek to recover compensatory damages. Furthermore, Section B of Part 900 is not included on the declarations page and was not a part of the Universal policy. Part 530 does not apply to Freddie because he does not qualify as an insured under the definition in the policy. Finally, Part 970 is inapplicable as there is no underlying insurance to which it could attach.

{¶57} Accordingly, the trial court erred in finding even conditional coverage for Freddie under Parts 500 and 900 of the Universal policy. As such, the McDaniels' second assignment of error is overruled, and Universal's assignment of error is sustained. However, because we find that the trial court was correct in granting Universal summary judgment, we affirm the decision of the trial court.

{¶58} Having found no error prejudicial to the appellants herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

CUPP, P.J., and BRYANT, J., concur.

r