[Cite as *Geico Ins. Co. v. Kraft,* 2014-Ohio-3562.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GEICO INSURANCE COMPANY	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
MARC C. KRAFT, ET AL.	:	Case No. 14 CAE 02 0011
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 13 CV H 02 0124
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	August 11, 2014

APPEARANCES:

For Plaintiff-Appellant

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Farmer, J.

{¶1} On November 8, 2012, Marc Kraft was driving a vehicle owned by his employer, Charles Harsh, when a serious collison occurred, killing Heidi Hecker and injuring her fiancé, Brad Weaver, and their child, Peyton Weaver. Mr. Harsh had granted permission to Mr. Kraft to drive his vehicle home and then return in the morning. Mr. Kraft went home, consumed alcohol, and then left in the vehicle to make some purchases. The accident occurred when Mr. Kraft was returning to his home.

{¶2} On February 11, 2013, appellees, Brad Weaver, as administartor of the estate of Heidi Hecker, as parent and natural guardian of Peyton Weaver, and individually, filed a complaint against Mr. Kraft, Mr. Harsh, and others as a result of the collision (Case No. 13 CV H 02 0124).

{¶3} On April 5, 2013, appellant, GEICO Insurance Company, filed a separate declaratory judgment action (Case No. 13 CV H 04 0287). Appellant was the insurer of Mr. Harsh (Policy No. 4124-04-60-71), and argued it did not have a duty to provide coverage because Mr. Kraft did not have permission to operate Mr. Harsh's vehicle at the time of the accident and/or exceeded the scope of the permission.

{¶4} On July 23, 2013, the trial court consolidated the cases with Case No. 13 CV H 02 0124 being the controlling case number. On December 30, 2013, the parties filed an agreed entry, naming all parties in the underlying tort action as parties in the declaratory judgment action.

{¶5} Appellees and appellant filed motions for summary judgment. By judgment entry filed January 15, 2014, the trial court found Mr. Kraft was utilizing Mr. Harsh's vehicle for purposes within the scope of permission and therefore granted

appellees' motion for summary judgment and denied appellant's motion for summary judgment.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶7} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS, BRAD A. WEAVER, AS ADMINISTRATOR OF THE ESTATE OF HEIDI K. HECKER, DECEASED, AND AS PARENT AND NATURAL GUARDIAN OF PEYTON I. WEAVER, A MINOR, AND THE TRIAL COURT ERRED IN DENYING GEICO'S MOTION FOR SUMMARY JUDGMENT."

I

{¶8} Appellant claims the trial court erred in granting summary judgment to appellees as its policy of insurance for Mr. Harsh did not cover Mr. Kraft as he was not operating Mr. Harsh's vehicle within the scope of the permission granted when the accident occurred. We disagree.

{¶9} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined 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 party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶10} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35 (1987).

{¶11} It is appellant's position that Mr. Kraft was neither a named nor definitional insured under Mr. Harsh's policy, Policy No. 4124-04-60-71. The policy under "Section I – LIABILITY COVERAGES" provides the following in pertinent part (as cited by appellant in its brief):

> **DEFINITIONS**
>
> The words italicized in Section I of this policy are defined below.
>
> 4. ***Insured*** means a person or organization described under PERSONS INSURED.
>
> 8. ***Relative*** means a person related to ***you*** who resides in ***your*** household.

13. ***You*** and ***your*** means the policyholder named in the declarations or his or her spouse if a resident of the same household.

LOSSES WE WILL PAY FOR YOU UNDER SECTION I

Under Section I, we will pay damages which an ***insured*** becomes legally obligated to pay because of:

1. ***bodily injury,*** sustained by a person, or;

2. damage to or destruction of property, arising out of the ownership, maintenance or use of the ***owned auto*** or a ***non-owned auto.*** We will defend any suit for damages payable under the terms of this policy. We may investigate and settle any claim or suit.

PERSONS INSURED

Who Is Covered

Section I applies to the following as ***insureds*** with regard to an **owned auto:**

1. ***you*** and ***your*** relatives;

2. any other person who is using the auto with ***your*** permission but only if such person is not insured by any other vehicle liability insurance policy, a self-insurance liability program, or a liability bond while using the auto. The actual use must be within the scope of that permission. However, if this policy is certified as proof of financial responsibility, then Section I applies to any other person using this auto with ***your*** permission. The actual use must be within the scope of that permission;

3. any other person or organization for his or its liability because of acts or omissions of an ***insured*** under 1 or 2 above.

{¶12} Appellant also cites to the following "EXCLUSIONS" under "Section I – LIABILITY COVERAGES" under a subsequent amendment to the policy:

15. We do not cover punitive or exemplary damages recovered or potentially recoverable from any ***insured****.*

The following exclusions are added:

16. We do not cover attorney fees or litigation costs or expenses awarded against or recoverable from an ***insured*** except all courts costs charged to an ***insured*** in a covered lawsuit.

{¶13} The gravamen of this case is whether at the time of the accident, Mr. Kraft was operating Mr. Harsh's vehicle outside of the scope of the permission granted by Mr. Harsh.

{¶14} The facts of the day in question are not in dispute. As per their usual habit, Mr. Harsh picked up his employee, Mr. Kraft, on Dempsey Road and drove him to his residence/shop on Olentangy Road. Kraft depo. at 46; October 14, 2013 Harsh depo. at 124. During the course of the day, Mr. Harsh left early and told Mr. Kraft that once he finished his work, he could take his vehicle to go home and to return in the morning. Kraft depo. at 47-48; February 8, 2013 Harsh depo. at 25, 81-82; October 14, 2013 Harsh depo. at 122-123. Mr. Kraft drove home, consumed alcohol, and then left in

the vehicle to make some purchases. The accident occurred when Mr. Kraft was returning to his home.

{¶15} Mr. Harsh testified this was the first time he gave Mr. Kraft permission to drive his vehicle on a public highway, but on occasion had permitted him to drive vehicles around his property. February 8, 2013 Harsh depo. at 82-85. Mr. Kraft testified Mr. Harsh let him drive his vehicles on the public highway prior to the accident on two separate occasions. Kraft depo. at 39-43, 82, 88.

{¶16} Mr. Kraft testified Mr. Harsh was okay with him making stops on the way home "cuz I did it before, and he never - - he never said anything about it." Kraft depo. at 43-44, 81, 89, 99. Mr. Harsh's testimony differs as to whether side trips were within the scope of the permission, and is probably clouded by the outcome of Mr. Kraft's actions. Mr. Harsh stated he did not give Mr. Kraft permission to make any side trips. February 8, 2013 Harsh depo. at 82-85. However, in a later deposition, Mr. Harsh admitted that he did not limit Mr. Kraft's use and would not have had a problem with Mr. Kraft making some side trips as "I anticipated him going to his - - the house, stay, maybe go down to the strip mall and get some groceries or, you know, what have you, come home." October 14, 2013 Harsh depo. at 124, 126, 167. He modified this concession by stating he never anticipated that Mr. Kraft would drive drunk and cause an accident. *Id.* at 126.

{¶17} Once clearing the shaft from the wheat, what is revealed is that Mr. Harsh granted permission to Mr. Kraft to operate his vehicle and even initiated its use to accommodate his own schedule and to provide transportation to Mr. Kraft.

{¶18} In *Erie Insurance Group v. Fisher,* 15 Ohio St.3d 380, 383 (1984), the Supreme Court of Ohio addressed "scope of the permission granted," specifically rejecting the "liberal" or "initial permission rule":

> Next, Hess challenges the merits of the determination that Fisher was not an insured at the time of the accident. Whether he was an insured turns on whether he was operating the vehicle within the scope of the permission granted, express or implied.
>
> Hess urges this court to adopt the "liberal" or "initial permission rule" for determining whether the use of a vehicle is within the scope of the permission granted. The rule provides that when an owner of a motor vehicle initially consents to its use by a permittee, subsequent use by the permittee, short of conversion or theft, remains permissive, notwithstanding that the use exceeded limitations included in the initial grant of permission. *Milbank Mut. Ins. Co. v. United States Fidelity & Guaranty Co.* (Minn.1983), 332 N.W.2d 160.
>
> This issue was recently addressed by this court in *Frankenmuth Mut. Ins. Co. v. Selz* (1983), 6 Ohio St.3d 169, 451 N.E.2d 1203, wherein we reaffirmed the minor deviation rule as adopted in *Gulla v. Reynolds* (1949), 151 Ohio St. 147, 85 N.E.2d 116 [39 O.O. 2]. *Selz,* 6 Ohio St.3d, provided at 171, 451 N.E.2d 1203, that:
>
> "[W]here the use of the property deviates only slightly from the purpose for which permission was initially granted, the standard omnibus

clause in a liability insurance policy will be interpreted to extend coverage. However, if the use represents a complete departure or gross deviation from the scope of permission, no coverage will be afforded."

The initial permission rule was rejected, as it "lends itself to gross abuse by an unscrupulous individual who, in violation of his express instructions, might retain possession of the automobile indefinitely and operate it over unlimited territory with the insurance still in effect." *Gulla v. Reynolds, supra,* 151 Ohio St., at 154, 85 N.E.2d 116. As this rationale remains valid, we decline appellant's invitation to adopt the initial permission rule.

{¶19} In the case sub judice, the grantor, Mr. Harsh, did not limit the specific use of the vehicle, and in fact tacitly assented to deviations for personal use. Mr. Harsh exhibited an understanding of the plight of the homeless and the down and out. October 14, 2013 Harsh depo. at 45-46, 64-65, 76. Mr. Harsh had a very liberal approach to Mr. Kraft by permitting him to live rent free in one of his rental properties. *Id.* at 77-78.

{¶20} We find the scope of the permission, explicit or implied, substantiated that a trip to the store, even after reaching home base, was not a complete departure or a gross deviation. Upon review, we find the trial court did not err in granting summary judgment to appellees and in denying appellant's motion.

{¶21} The sole assignment of error is denied.

{¶22} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

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