[Cite as *Nord v. Motorists Mut. Ins. Co.*, 2003-Ohio-6345.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82857

ESTATE OF PAUL NORD, ET AL.	:	
	:	
Plaintiffs-Appellants	:	JOURNAL ENTRY
	:	
-vs-	:	AND
	:	
MOTORISTS MUTUAL INSURANCE COMPANY	:	OPINION
	:	
Defendant-Appellee	:	

Date of Announcement of Decision: NOVEMBER 26, 2003

Character of Proceeding: Civil appeal from Court of Common Pleas Case No. CV-472908

Judgment: Reversed and remanded.

Date of Journalization:

Appearances:

For Plaintiffs-Appellants:
HENRY F. DeBAGGIS, ESQ.
The Illuminating Building
55 Public Square, Suite 2240
Cleveland, Ohio 44113

For Defendant-Appellee:
MARK A. GREER, ESQ.
TIMOTHY J. FITZGERALD, ESQ.
THERESA A. RICHTHAMMER, ESQ.
Bulkley Building, 7th Floor
1501 Euclid Avenue
Cleveland, Ohio 44115

JAMES J. SWEENEY, P.J.:

{¶1} Plaintiffs-appellants Estate of Paul Nord, et al. ("plaintiffs") appeal from the trial court's decision that granted defendant-appellee Motorists Mutual Insurance Company's ("Motorists") motion for summary judgment. For the reasons that follow, we reverse and remand.

{¶2} On February 26, 2001, the decedent Paul Nord was being transported by a Cleveland EMS ambulance. Mr. Nord received medical treatment from a paramedic en route to the hospital. During this process, the paramedic dropped a syringe that landed in Mr. Nord's eye causing injury and related medical expenses. The parties agree that the paramedic accidentally dropped the syringe. Mr. Nord later died from unrelated causes and his estate pursued an uninsured motorist claim against Motorist.

{¶3} The trial court granted Motorists' motion for summary judgment on the following grounds: "The injury to plaintiff's eye which occurred when a paramedic accidentally dropped a syringe while plaintiff was being transported to Fairview Hospital did not arise out of the ownership, maintenance or use of an uninsured motor vehicle. The instrumentality causing the injury was not an uninsured motor vehicle, but the EMS technician occupying the vehicle. Further, bad faith was not established since the defendant was reasonably justified in not paying the claim."

{¶4} Plaintiffs allege a sole assignment of error for our review:

{¶5} "I. The trial court erred in granting defendant's motion for summary judgment since there was a genuine issue of material fact."

{¶6} We employ a de novo review in determining whether summary judgment was warranted. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336; *Zemcik v. La Pine Truck Sales & Equipment* (1998), 124 Ohio App.3d 581, 585.[1]

{¶7} The parties focus our attention upon the following uninsured motorist provisions of the policy Motorists issued to the decedent:

{¶8} "A. We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of:

> "1. An uninsured motor vehicle as defined in Section 1., 2., and 4. of an uninsured motor vehicle because of bodily injury:
>
> "a. Sustained by an insured; and
>
> "b. Caused by an accident.

---

[1]Summary judgment is appropriate where: "(1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274." *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-70, 1998-Ohio-389.

"The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle ***."

{¶9} The policy further defines "Uninsured motor vehicle," in pertinent part, as follows:

"C. Uninsured motor vehicle means a land motor vehicle or trailer of any type:

"1. To which no bodily injury liability bond or policy applies at the time of the accident.

"2. To which a bodily injury liability bond or policy applies at the time of the accident. In this case its limit for bodily injury liability must be less than the limit of liability for this coverage.

"***

"4. To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company:

"a. Denies coverage; or

"b. Is or becomes insolvent."

Ohio's uninsured and underinsured motorist coverage statute R.C. 3937.18 further includes owners or operators of vehicles who have immunity under Chapter 2744 of the Revised Code within the definition of "uninsured motorists."[2] It is not disputed that the owner or operator of the ambulance had immunity.

{¶10} Thus, the crux of this coverage case is whether it can be said as a matter of law that the accidental dropping of the syringe

[2]While the parties seem to implicitly disagree over which version of the statute applies in this case, the versions effective November 1999, September 2000, and the current version of the statute contain this provision. Compare R.C. 3937.18(A)(1) in version effective November 2, 1999 and September 21, 2000 with R.C. 3937.18(B)(5), the version effective October 31, 2001.

in Mr. Nord's eye during his transport to the hospital did not arise out of the ownership, maintenance, or use of the ambulance. Plaintiffs maintain that reasonable minds could conclude that the injuries arose out of the ownership, use, or maintenance of the ambulance. We agree.

{¶11} "'Courts have set forth some basic guidance in determining what constitutes "use" by declaring that the term "'use'" has a broader meaning than the word "operate." *** [A] motor vehicle may be in the owner's use, even though the owner is not operating the vehicle, when the vehicle is being used for the owner's benefit, advantage, purpose, or in furtherance of the owners' interests.' *Plessinger v. Cox*, Darke App. Nos. 1428, 1429, unreported." *Grange Mutual Cas. Co. v. Darst* (1998), 129 Ohio App.3d 723, 727.

{¶12} In *Darst*, plaintiff's son died when his mother left him unattended in his car seat and he set the car afire with matches he found inside. The parents' auto liability policy excluded coverage due to an intrafamily exclusion and the trial court held that uninsured motorist coverage was barred because the injuries did not arise out of the ownership, maintenance or use of the uninsured vehicle. The appellate court reversed and found that the accident arose out of (and was thus causally connected to) the negligent parents' ownership, maintenance or use of the vehicle. Id. at 729.

{¶13} In reaching this conclusion, the court in *Darst* reasoned that "the issue is not whether the vehicle itself was the instrumentality of the underlying injuries. Rather, the issue is whether the operator's ownership, maintenance and use of the vehicle was. It was if the injuries arose out of any of those factors. The phrase 'arising out of' has been defined by courts as 'originating from,' 'growing out of,' and 'flowing from.' [citations omitted]. Although the phrase implies that there must be a causal connection between the ownership, maintenance, or use of the uninsured motor vehicle and the insured's injuries, courts have stressed that the issue is not one of proximate cause. [] Rather, 'it is sufficient if the [ownership, maintenance, or] use is connected with the accident or the creation of a condition that caused the accident *** [and that] there be a factual connection growing out of or originating with the [ownership, maintenance, or] use of the vehicle." Id. at 727.

{¶14} In this case, the decedent's injuries arose from the accidental dropping of the syringe. The ambulance, by its very nature, is equipped with syringes for use by EMTs. Thus, the presence of the syringe and the technician could be viewed as part and parcel of the ownership, maintenance or use of the ambulance. The fact that the injuries arose by virtue of a true accident rather than an unsuccessful medical procedure en route to the hospital is not in dispute. Thus, we find that reasonable minds

could conclude that these particular injuries arose out of the ownership, maintenance or use of an uninsured motorist vehicle.

{¶15} We are mindful of Motorists' reliance upon *Kish v. Central National Ins. Group of Omaha* (1981), 67 Ohio St.2d 41 and its progeny, which hold that, "the shotgun slaying of an insured following an automobile collision, which was accidental as to the insured, did not 'arise out of the ownership, maintenance or use of an uninsured vehicle' for purposes of uninsured motorist coverage, *** for purposes of automobile accident coverage." Id. paragraph 3 of the syllabus. On this basis, Motorists contends that the paramedic's action in dropping the syringe was an intervening cause of the decedent's injuries.

{¶16} *Kish* instructs that "the relevant inquiry is whether the chain of events resulting in the accident was unbroken by the intervention of any event **unrelated** to the use of the vehicle." Id. at 50, emphasis added. The injury must result from an act wholly disassociated from and independent of the use of the vehicle as such. Cases concerning the availability of uninsured motorist coverage for criminal acts committed within automobiles are not squarely on point. See *Grange*, 129 Ohio App.3d at 728, noting that in *Kish* and its progeny "the intervening cause of injury was disconnected from any negligence involved in the actor's operation, maintenance, or use of the motor vehicle.") These cases are simply unhelpful in determining whether injuries sustained from accidents caused by instrumentalities typically used in ambulance travel

arise out of the use of the ambulance. If the underlying facts established an act wholly disconnected from the use of the ambulance, such as if the EMT shot the decedent with a gun, we would reach a different conclusion under the law. That is not the case and we therefore cannot conclude that the injury to the decedent's eye resulted from an act wholly disassociated from the use of the ambulance as such and as a matter of law. For these reasons, the assigned error has merit and is sustained.

{¶17} Judgment reversed and remanded for further proceedings consistent with this opinion.

ANTHONY O. CALABRESE, JR., J. CONCURS.
COLLEEN CONWAY COONEY, J., DISSENTS.
(SEE ATTACHED DISSENTING OPINION).

JAMES J. SWEENEY
PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶18} I respectfully dissent from the majority's decision to reverse the trial court's granting summary judgment for Motorists. The majority contends that the EMT's act of dropping the syringe could be viewed as arising out of the ownership, maintenance, or use of the ambulance and thus creates a genuine issue of material fact. In reaching this conclusion, the majority states that an "ambulance, by its very nature, is equipped with syringes for use by EMTs" and that "the presence of the syringe and the technician could be viewed as part and parcel of the ownership, maintenance or use of the ambulance."

{¶19} I disagree with the majority's analysis because the EMT who dropped the syringe was neither the owner nor the operator of the ambulance. In addition, the evidence is undisputed that Nord's injury was not caused by a motor vehicle accident or the negligence of a motorist, but rather was caused by an independent act of medical negligence. The fact that the medical negligence occurred in an ambulance does not transform the incident into an automobile accident, especially since there is no evidence that the movement of the ambulance in any way contributed to the EMT's dropping the syringe.

{¶20} It is undisputed that the ambulance was not involved in a motor vehicle accident. There is no evidence that the ambulance was forced off the road by another vehicle, or that the ambulance driver was negligent in any fashion. There is also no evidence that the ambulance driver swerved to avoid any hazard in the road. To the contrary, the undisputed evidence demonstrates that the ride was uneventful except for the EMT's dropping the syringe while rendering medical treatment to Paul Nord. This "accident" could have occurred anywhere including Nord's home or at the hospital.

{¶21} The majority relies on *Grange Mutual Cas. Co. v. Darst* (1998), 129 Ohio App.3d 723, to support its conclusion that the EMT's act of dropping the syringe arose out of the ownership, maintenance, or use of the ambulance. However, the *Darst* case is distinguishable in two significant respects: the injuries in *Darst* were caused by the operator's negligent control of the motor

vehicle, and there was evidence that the vehicle itself was an instrumentality that proximately caused the underlying injuries.

{¶22} In *Darst*, the court began its analysis by declaring that "in the context of automobile liability insurance, ownership, maintenance, or use merely correspond to the element of control necessary to demonstrate potential liability." Id. at 726. The court found that:

> **"It is beyond dispute that Kendra Darst (the mother) was in control of the vehicle when these injuries occurred. She had operated it, and parked it intending to resume operating it again. She left her two young sons inside, alone and unattended. Therefore, *the necessary basis for her potential liability is demonstrated*." Id. at 727.**

{¶23} Here, there is no evidence that the EMT had control over the ambulance, a necessary basis for liability according to the *Darst* court. He was a passenger performing a medical function unrelated to the operation of the vehicle. Although the majority assumes that ambulances are equipped with syringes, the majority assumes facts not in evidence.[1] There is no evidence in the record indicating where the EMT obtained the syringe. Moreover, because there is no evidence that the movement of the ambulance caused the syringe to fall on the patient, the actions of the EMT alone were the cause of Nord's injuries. Based on these facts, I would find the Nords were not entitled to UM benefits under the Motorists policy.

---

[1] Under the majority's reasoning, if this had been a police car and an officer accidentally shot a suspect in the car, uninsured motorists coverage would apply because police cars are equipped with weapons.

{¶24} Moreover, I would follow the precedent established in the Eighth District, *Arrowood v. Lemieux* (Nov. 21, 2002), Cuyahoga App. 81312, in which this court stated:

> **"The Ohio Supreme Court has held that claims made under uninsured motorist provisions limit coverage to injuries caused by accidents arising out of the ownership, maintenance or use of an automobile. *Kish v. Central Nat. Ins. Group* (1981), 67 Ohio St.2d 41; *Howell v. Richardson* (1989), 45 Ohio St.3d 365; *Lattanzi v. Travelers Ins. Co.* (1995), 72 Ohio St.3d 350. See, also, *Stenger v. Lawson* (2001), 146 Ohio App.3d 550; *Carter v. Burns* (1993), 90 Ohio App. 3d 787.**
>
> **The key consideration in such a case is the instrumentality causing the injury. Id. Bodily injury to an insured resulting from the discharge of a firearm by a tortfeasor is not encompassed within the terms of a policy of insurance which limits coverage to injuries caused by accident resulting from the ownership, maintenance or use of an automobile. *Howell*, supra at 369. Rather, the injury must be directly inflicted by the uninsured vehicle. *Carter*, supra at 791.**
>
> **Here, the conduct that inflicted harm upon Arrowood was the act of Lemieux shooting her with his gun. Thus, the instrumentality that caused injury to Arrowood was the gun rather than the uninsured vehicle. Uninsured motorist provisions compensate for injuries caused by motor vehicles; they typically do not compensate for, or protect from, the evil that men do."**

{¶25} Similarly, in the instant case, the conduct that inflicted harm was the act of the EMT dropping a syringe. Thus, the instrumentality that caused the injury was the syringe rather than the vehicle. Because there was no negligence by the driver of the ambulance, I would affirm the trial court's granting summary judgment for Motorists.

KEY WORD SUMMARY

Uninsured motorist coverage.