[Cite as *Nobert v. Westfield Ins. Co.*, 2004-Ohio-4623.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83059

MELISSA NOBERT

Plaintiff-appellant

vs.

WESTFIELD INSURANCE CO.

Defendant-appellee

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT OF DECISION:	SEPTEMBER 2, 2004
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court, Case No. CV-431419
JUDGMENT:	Affirmed.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For plaintiff-appellant:	FREDERICK J. KREINER, ESQ. Frederick J. Kreiner co., LPA 1401 Terminal Tower 50 Public Square Cleveland, Ohio 44113
For defendant-appellee:	HENRY A. HENTEMANN, ESQ. RICHARD M. GARNER, ESQ. Davis & Young 1700 Midland Building 101 Prospect Avenue, West Cleveland, Ohio 44115-1027

KARPINSKI, J.:

{¶1} Plaintiff, Melissa Nobert, appeals the trial court granting defendant's motion for summary judgment and denying her

motion for summary judgment. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} On May 28, 1998, plaintiff was in a motor vehicle accident with two others. All three were underinsured. Plaintiff was a passenger in a vehicle owned by her employer, John C. Henck & Associates Co., L.P.A. At the time of the accident, the vehicle was being driven by Paul Appleton. The firm was covered by several insurance policies, including a business auto policy issued by defendant, Westfield Insurance Company.

{¶3} Because plaintiff had not been sufficiently compensated under Appleton's own insurance policy, she sought additional underinsured coverage from defendant under Henck's auto policy. Defendant denied plaintiff coverage and she filed suit. In the trial court, both parties filed motions for summary judgment. The trial court granted defendant's motion for summary judgment and denied plaintiff's motion. This timely appeal follows in which plaintiff presents one assignment of error.[1]

{¶4} THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY CONCLUDING THAT THE PLAINTIFF WAS NOT ENTITLED TO UNDERINSURED

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[1]In her appellate reply brief, plaintiff withdrew her second assignment of error: "THE BUSINESS AUTO POLICY ISSUED BY WESTFIELD TO HENCK IS A 'MOTOR VEHICLE LIABILITY POLICY' FOR PURPOSES OF OHIO'S UNINSURED MOTORISTS STATUTE AND THEREFORE, PLAINTIFF, AS AN EMPLOYEE OF HENCK, IS ENTITLED TO UIMBI COVERAGE THEREUNDER." Because of her voluntary withdrawal of this assignment, there are no remaining issues about whether plaintiff would be entitled to underinsured coverage under defendant's commercial general liability policy.

MOTORISTS BODILY INJURY COVERAGE PURSUANT TO THE BUSINESS AUTO POLICY ISSUED BY DEFENDANT TO PLAINTIFF'S EMPLOYER.

{¶5} Plaintiff argues the trial court erred by granting defendant summary judgment. Plaintiff concedes that the business auto policy does not include an express offer of underinsured coverage. Plaintiff maintains that underinsured coverage is, nonetheless, part of the policy because it arises by operation of law.

{¶6} This court reviews the lower court's grant of summary judgment de novo. *Piciorea v. Genesis Ins. Co.*, Cuyahoga App. No. 82097, 2003-Ohio-3955. Summary judgment is appropriate when, if the evidence is construed most strongly in favor of the nonmoving party, (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, which is adverse to the nonmoving party. Id., citing *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201; see, also, Civ.R. 56(C).

{¶7} "[F]or the purpose of determining the scope of coverage of an underinsured motorist claim, 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." *Ross v. Farmers Ins. Group of Companies* (1998), 82 Ohio St.3d 281, 1998- Ohio-381, 695 N.E.2d 732, syllabus.

{¶8} In the case at bar, it is undisputed that the effective date of the subject policy is October 14, 1997. The version of

R.C. 3937.18 in effect at that time controls the rights and obligations of the parties. R.C. 3937.18, amended September 3, 1997, in relevant part, provides as follows:

> "(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy for loss due to bodily injury or death suffered by such insureds:
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> "***
>
> "(2) Underinsured motorist coverage ***.
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> "***
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> "(L) As used in this section, "automobile liability or motor vehicle liability policy of insurance" means either of the following:
>
> "(1) Any 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.)

{¶9} The 1997 version of R.C. 3937.18(L) applies only to an automobile liability policy that specifically identifies the vehicles meant to be insured under the policy.

{¶10}Plaintiff acknowledges that the policy does not specifically list any vehicles. The policy's only reference to vehicles is for coverage for "hired" and "non-owned autos."

{¶11}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. In *Jump v. Nationwide Mutual Insurance Company*, Montgomery App. No. 18880, 2001-Ohio-1699, the insurance policy expressly provided insurance for "hired" and "non-owned" vehicles. On appeal, the court held that the policy did not qualify as an automobile liability or motor vehicle liability policy, because it did not specifically identify the vehicles. See *Lane v. State Auto Insurance Companies*, Miami App. No. 2002-CA-10, 2002-Ohio-5128.

{¶12}This court has followed *Jump*, supra. In *Bertram v. West American Ins. Co.*, Cuyahoga App. No. 81313, 2002-Ohio-6513, this court held that if particular motor vehicles are not identified, an insurance policy will not be deemed a policy for automobile liability. "Where, as here, such specific detail is absent from the policy, the policy does not fall within the parameters of R.C. 3937.18(L)(1)." Id., at ¶33. The relevant facts in the case at bar being identical to those in *Jump,* we arrive at the same holding. Following *Jump*, we also reject plaintiff's reliance on *Selander v. Erie Ins. Group* (1999), 85 Ohio St.3d 541. *Selander* involved a motor vehicle accident that occurred in 1992. The insurance policy, therefore, was construed under the old version of R.C. 3937.18, which did not require specific motor vehicles to be identified.

{¶13}Similarly, we reject plaintiff's argument that because the policy's ISO designations "8"[2] and "9"[3] refer to autos, the

[2]The ISO designation "8" refers to "HIRED 'AUTOS' ONLY. Only those 'autos' you lease, hire, rent or borrow." Policy, Form CA 00

policy is transformed into a motor vehicle policy for purposes of R.C. 3937.18. Several courts have already determined that ISO designations do not necessarily meet the "specifically identified" requirement of the statute. See, *Wikstrom v. Hilton, et al.*, Lucas App. No. L-02-1256, 2003-Ohio-4725, at ¶19, citing *Dancy v. Citizens Ins. Co.*, 5th Dist. No. 2002 AP 11 0086, 2003-Ohio-2858; *Reffitt v. State Auto. Mut. Ins. Co.*, 3d Dist. No. 1-02-38, 2002-Ohio-4885; *Jump v. Nationwide Mut. Ins. Co.* (Nov. 2, 2001), Montgomery App. No. 18880, 2001-Ohio-1699; see also, *Burkholder v. German Mut. Ins. Co.* (2003), 99 Ohio St.3d 163, 2003-Ohio-2953, 789 N.E.2d 1100. Following these courts, we conclude that the mere reference to "hired" or "nonowned" autos does not convert what is otherwise not a motor vehicle policy into such a policy for purposes of R.C. 3937.18.

{¶14}Plaintiff further argues coverage by operation of law because the policy includes an exception permitting coverage for "Parking an 'auto' on, or on the ways next to, premises you own or rent, provided the 'auto' is not owned by or rented or loaned to you or the insured." This provision, however, does not satisfy the statute either. As the Tenth District explained,

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01 1293.

[3]ISO number "9" means: "NONOWNED 'AUTOS' ONLY. Only those 'autos' you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes 'autos' owned by your employees or partners or members of their households but only while used in your business or your personal affairs." Policy, Form CA 00 01 1293.

> "Even if we assumed that the specifically identified vehicles were those automobiles, not owned by the insured, that are parked on or next to the insured's premises, the commercial policy would not serve as proof of financial responsibility for the owners/operators of those motor vehicles. The limited circumstances under which coverage is extended to the use of motor vehicles do not involve motor vehicles owned, used or operated by Old Republic and/or its employees. Rather, the coverage applied only to automobiles not owned by, or rented or loaned to Old Republic and its employees/insureds. This policy would not serve as proof of financial responsibility for the persons who operate the vehicles specifically identified in the policy, i.e., those automobiles, not owned by the insured, that are parked on or next to the insured's premises."

{¶15}*Carmona v. Blankenship*, Franklin App. No. 02 AP-14, 2002-Ohio- 5003,at ¶56. The "parking an auto" exclusion covers parking of "automobiles" on the insured's property only if those automobiles are not owned by the insured. Once again, "automobiles" are not specifically identified. Simply including the word "auto" does not convert the policy into an automobile liability policy. See, *Allen v. Transportation Insurance Company*, Franklin App. No. 02AP-49, 2002-Ohio-6449, citing *Uzhca v. Derham*, Montgomery App. No. 19106, 2002-Ohio-1814, affirmed 2003-Ohio-6422; *Burkholder v. German Mut. Ins. Co.*, Lucas App. No. L-01-1413, 2002-Ohio-1184, affirmed 2003-Ohio-2953; *Pickett v. Ohio Farmers Ins. Co.*, Stark App. No. 2001 CA00227, 2002-Ohio-259, appeal allowed, 95 Ohio St.3d 1473, 2002-Ohio-444, 768 N.E.2d 1182; *Devore v. Richmond,* Wood App. No. WD-01-044, 2002-Ohio-3965; and *Gilcreast-Hill v. Ohio Farmers Ins. Co.*, Summit App. No. 20983, 2002-Ohio-4524.

{¶16}For all the foregoing reasons, the defendant's policy does not meet the statutory definition of a motor vehicle liability

policy of insurance, and coverage, therefore, does not arise by operation of law. The trial court did not err in granting defendant's motion for summary judgment. Plaintiff's sole assignment of error is overruled.

Judgment accordingly.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN, A.J., AND

TIMOTHY E. MCMONAGLE, J., CONCUR.

DIANE KARPINSKI
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).