[Cite as *Darno v. Westfield Ins. Co.*, 2015-Ohio-2619.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

THOMAS DARNO	C.A. No. 27546
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
TERRANCE DAVIDSON, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV-2012-03-1225

DECISION AND JOURNAL ENTRY

Dated: June 30, 2015

SCHAFER, Judge.

{¶1} Plaintiff-Appellant, Thomas Darno, appeals the judgment of the Summit County Court of Common Pleas that granted summary judgment in favor of Defendant-Appellee, Westfield Insurance Company. We reverse.

I.

{¶2} On November 13, 2010, Mr. Darno went "mudding" in his 1995 Jeep Cherokee with two friends. Afterwards, Mr. Darno drove his Jeep onto State Route 45 intending to drive home. While attempting to crossover the southbound lane to the northbound lane, the Jeep stalled. Mr. Darno and his friend, Jacob Marquette, exited the vehicle and attempted to push it off of the road. While pushing the Jeep, Mr. Marquette observed oncoming automobile headlights and yelled out for Mr. Darno to run. Mr. Darno heard Mr. Marquette and began running away from the Jeep. After taking only a couple of steps from his Jeep, Mr. Darno was struck by a vehicle driven by Terrance Davidson.

{¶3} On March 2, 2012, Mr. Darno filed a complaint in the Summit County Court of Common Pleas seeking uninsured motorist/underinsured motorist coverage from Westfield under the terms of the insurance policy held by his father, John Darno. Westfield asserted that Mr. Darno was excluded from coverage because, under the terms of the policy, he was "occupying" the Jeep at the time of the accident. The father's insurance policy explicitly excludes coverage for bodily injuries sustained by "[a]n individual Named Insured while 'occupying' or when struck by any vehicle owned by that Named Insured that is not a covered 'auto' for Uninsured Motorists Coverage and/or Underinsured Motor Coverage[.]" It is undisputed that the insurance policy does not cover Mr. Darno's Jeep.

{¶4} Westfield filed a motion for summary judgment on the issue of whether Mr. Darno was occupying his Jeep at the time he was struck by Mr. Davidson's vehicle. The trial court subsequently entered a judgment granting Westfield's motion. Mr. Darno then appealed and on September 30, 2013, this Court concluded that summary judgment was premature given the scant discovery material in the record. *Darno v. Davidson*, 9th Dist. Summit No. 26760, 2013-Ohio-4262, ¶ 10 ("*Darno I*"). This Court reversed the decision of the trial court and remanded the matter for further proceedings. *Id*. at ¶ 11.

{¶5} After additional discovery on remand, Westfield again moved for summary judgment. Mr. Darno filed a brief in opposition to Westfield's motion for summary judgment. The trial court again granted summary judgment in favor of Westfield. Specifically, the trial court found that Mr. Darno was occupying his vehicle at the time of the accident because he "had a sufficient relationship to the Jeep by pushing the stalled Jeep off of the road, which is a foreseeably identifiable use of the Jeep, and only ceased such activity in attempt to avoid being stuck by the oncoming vehicle."

{¶6} Mr. Darno now appeals from the trial court's September 22, 2014 judgment and raises one assignment of error for this Court's review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN GRANTING WESTFIELD'S MOTION FOR SUMMARY JUDGMENT; WESTFIELD INSURANCE IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

{¶7} The sole issue before this Court is whether Mr. Darno was "occupying" his Jeep when he was struck by Mr. Davidson's vehicle. If he was occupying the Jeep, then Mr. Darno is excluded from coverage under his father's insurance policy. If not, then Mr. Darno is able to recover against Westfield pursuant to the policy. Because no factual disputes exist, the resolution to this question is a wholly legal determination.

{¶8} In his sole assignment of error, Mr. Darno argues that the trial court erred in granting summary judgment because, under the plain meaning of his father's insurance policy, he was no longer occupying his Jeep at the time that he was struck by Mr. Davidson's vehicle. In the alternative, Mr. Darno argues that the language of his father's insurance policy is ambiguous and, therefore, the policy must be interpreted in favor of coverage. Westfield, on the other hand, contends that Mr. Darno was occupying his Jeep when the accident occurred because by pushing the stalled vehicle, he had a sufficient relationship with the Jeep. Westfield also argues that Mr. Darno was occupying his Jeep because he sustained his injuries within a reasonable geographic proximity to the vehicle. Lastly, Westfield argues that even if the policy at issue is ambiguous, as a third-party beneficiary, Mr. Darno is not in a position to urge that the contract be strictly construed against the insurer, who is a party to the contract. We agree with Mr. Darno's fallback argument.

{¶9} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court views the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party. *Viock v. Stowe–Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983). Pursuant to Civ.R. 56(C), summary judgment is proper if:

> (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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶10} Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶11} In reviewing a policy, we must construe the language of the insurance contract in accordance with the same rules of construction as other written contracts. *See Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 665 (1992). Thus, if the language of the policy is clear and unambiguous, the words and phrases used therein must be given their natural

and commonly accepted meaning consistent with the intent of the parties. *Tomlinson v. Skolnik*, 44 Ohio St.3d 11, 12 (1989), *overruled on other grounds*, *Schaefer v. Allstate Ins. Co.*, 76 Ohio St.3d 553 (1996). In contrast, any ambiguity in the contract language must be "strictly construed against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208 (1988), syllabus.

{¶12} The meaning of the term "occupying" has been the subject of much litigation in the area of uninsured motorist and medical payment coverage. In examining the wide array of factual situations that have been litigated on this topic, "it is apparent that determining whether a person is 'occupying' a vehicle is not as easy as it might appear at first blush." *Robson v. Lightning Rod Mut. Ins. Co.*, 59 Ohio App.2d 261, 263 (10th Dist.1978). The Supreme Court of Ohio has stated that "the word 'occupying' should not be given an unduly narrow definition." *Kish v. Cent. Nat. Ins. Group*, 67 Ohio St.2d 41, 51 (1981). Ohio courts favor a liberal interpretation because "although the term 'occupying' as defined in the insurance contract may not seem ambiguous on its face, it often becomes ambiguous when determining whether insurance coverage should be extended in certain factual circumstances." *Etter v. Travelers Ins. Cos.*, 102 Ohio App.3d 325, 328 (2d Dist.1995), citing *Robson* at 263.

{¶13} Here, the policy at issue defines "occupying" as "in, upon, getting in, on, out or off" of the vehicle. Applying this definition to the facts of this case, the only question is whether Mr. Darno was still "occupying" the Jeep at the same time he was running away from it. In giving the policy's definition of "occupying" a liberal, but plain and ordinary reading, we determine that the policy is ambiguous. On the one hand, Mr. Darno had completely exited the Jeep and was running away from it when he was struck by the oncoming vehicle. On the other

hand, Mr. Darno was two or three feet away from the Jeep when he was struck, thus within close geographical proximity.

{¶14} Recognizing the term "occupying" to be ambiguous in a separate case, the Supreme Court of Ohio has provided guidance for determining whether a person is "occupying" a vehicle by adopting the following standard:

> In construing uninsured motorist provisions of automobile insurance policies which provide coverage to persons "occupying" insured vehicles, the determination of whether a vehicle was occupied by the claimant at the time of an accident should take into account the immediate relationship the claimant had to the vehicle, within a reasonable geographic area.

Joins v. Bonner, 28 Ohio St.3d 398, 401 (1986). Ohio courts have adopted several tests for determining whether a claimant has a sufficient relationship to require coverage. *See Morris v. Continental Ins. Cos.*, 71 Ohio App.3d 581, 587 (10th Dist.1991) (holding a sufficient relationship exists if the claimant is performing a task related to the operation of an insured vehicle); *Yoerger v. Gen. Acc. Ins. Co. of Am.*, 98 Ohio App.3d 505, 507 (1994) (determining a sufficient relationship exists if the claimant's conduct is "foreseeably identifiable with the normal use of the vehicle"); *State Farm Mut. Auto. Ins. Co. v. Cincinnati Ins. Co.*, 8th Dist. Cuyahoga No. 62930, 1993 WL 215450, *5 (June 17, 1993) (determining a sufficient relationship exists if the claimant is "vehicle-oriented" as opposed to "highway-oriented" at the time of the accident).

{¶15} However, when this matter was first before this Court, we stated as follows:

> It is important to note at the outset that the posture of this case is different than many other cases interpreting the term "occupying." This is perhaps due in part to the fact that exclusions like the one in this policy were invalid under previous versions of R.C. 3937.18. R.C. 3937.18(I) now permits this type of exclusion. Many cases that interpret the word "occupying," however, do so in a context in which a broad definition of the term favors coverage. This case presents the opposite scenario, as the exclusion at issue here would deny coverage to Mr. Darno.

(Internal citations omitted.) *Darno I*, 2013-Ohio-4262, at ¶ 7. As we previously noted, courts have only applied these various tests "where a gray area exists concerning whether a person was" an occupant of a vehicle *and thus entitled to coverage*. *Robson*, 59 Ohio App.2d at 264-265. Applying these tests in situations like this one, where being an occupant of a vehicle excludes a claimant from coverage, would be self-defeating and would contradict the well-settled rule of liberal construction in favor of an insured and against the insurer. *See id.*, citing *Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95 (1974), syllabus; *Joins* at 405. Because we determined that the term "occupying" within the policy is ambiguous, the policy must be strictly construed against Westfield, which requires us to conclude that Mr. Darno was not an occupant of his Jeep at the time of the accident. The trial court therefore erred in determining as a matter of law that Mr. Darno was occupying his Jeep because he had a "sufficient relationship" with the vehicle at the time of the accident.

{¶16} Westfield's contention that Mr. Darno lacks standing to have the policy construed in his favor is unavailing. While it is true that Mr. Darno was not a named party to the insurance policy between his father and Westfield, he certainly was an intended third-party beneficiary, as evidenced by the policy's extension of coverage to "family members."

{¶17} The Supreme Court of Ohio has "explained that, in the insurance context, courts must construe ambiguities in favor of the insured." *Hickin v. Am. Guar. and Liab. Ins. Co.*, 9th Dist. Summit No. 21487, 2003-Ohio-6579, ¶ 28. " 'A claimant, however, is not necessarily an insured. An insured can be the policyholder or another who is entitled to insurance coverage under the terms of the policy. When a court decides whether a claimant is insured under a policy, ambiguities are construed in favor of the *policyholder*, not the claimant.' " (Emphasis sic.) *Id.*, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 34-35.

{¶18} As we have already determined that the policy here is ambiguous, we are required to construe the policy here in favor of the policyholder. *See Joins*, 28 Ohio St.3d at 405. Here, the policyholder is John Darno, Mr. Darno's father. As a family member of John Darno, Mr. Darno is explicitly covered under the language of the insurance policy. Therefore, we determine that construing the policy in favor of John Darno requires Westfield to provide coverage to Mr. Darno. To conclude otherwise would be violative of the clear intent of the policy.

{¶19} Mr. Darno's assignment of error is sustained.

III.

{¶20} Mr. Darno's sole assignment of error is sustained, and the judgment of the Summit County Court of Common Pleas is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

JULIE A. SCHAFER
FOR THE COURT

MOORE, J.
CONCURS.

HENSAL, P. J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶21} The Ohio Supreme Court has held that, "[i]n construing * * * provisions of automobile insurance policies which provide coverage to persons 'occupying' insured vehicles, the determination of whether a vehicle was occupied by the claimant at the time of an accident should take into account the immediate relationship the claimant had to the vehicle, within a reasonable geographic area." *Joins v. Bonner*, 28 Ohio St.3d 398, 401 (1986); *see also Kish v. Cent. Nat. Ins. Group*, 67 Ohio St.2d 41, 51 (1981) (noting that "[o]ccupying" has been liberally construed to permit recovery). That rule does not apply in this case because the policy provision at issue does not provide coverage, it excludes it. Accordingly, there was no reason for the trial court to look beyond the plain and ordinary meaning of the words used to define "occupying" when it evaluated whether Westfield was entitled to summary judgment. As such, I respectfully dissent, in part, as I would remand this case to the trial court for it to reconsider the motion for summary judgment in light of that standard.

APPEARANCES:

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DAVID G. UTLEY, Attorney at Law, for Appellee.