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EXPLANATION OF WHY THIS CASE NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The relevant statute, R.C. 3937.18, removed restrictions on an insurer's ability to deny UM/UIM coverage and specifically allows insurance companies to limit uninsured motorists benefits. Further, courts have long held that insurance contracts that are clear and unambiguous are to be strictly applied. In this case, Appellee not only complied with this statute, but also clearly and unambiguously set forth a definition of an uninsured motor vehicle in the insurance contract that makes it clear Appellant is not entitled to UM benefits resulting from a single-car collision caused by her husband's negligence. Any other result would require this Court to rewrite the contract in a way that does not express the original intent of the parties.

This case presents an issue that is nothing new to Ohio courts. Insurance contract language precluding uninsured motorist coverage ("UM") where the liability portion of the contract contains an intrafamily exclusion has been consistently upheld as valid and enforceable. Nothing in Ohio case law or R.C. 3937.18 provides to the contrary, and Appellant has cited no contrary authority.

Ohio families are certainly entitled to contract for insurance in cases involving an accident with a family member. Here, Appellant agreed to an exclusion in the liability portion of the contract that excludes coverage for accidents caused by a family member, i.e. her husband. To then argue that Appellant expected UM benefits to arise in that same set of circumstances defies logic and hardly presents the bleak situation painted by Appellant. Ohio families purchase automobile insurance for many reasons, namely to provide benefits in accidents involving a second vehicle, whether it be for liability or UM/UIM purposes. The fact that this case involved a single car accident caused by the negligence of Appellant's husband does not then require a complete rewriting of the valid and enforceable insurance contract issued by Appellant and agreed to by Appellee.

The essence of Appellant's argument is that different language should have been used in the definition of an uninsured motor vehicle. The relevant insurance contract specifically provided that an uninsured motor vehicle does not include a "covered automobile for which coverage is provided under Part I of this policy." Appellant's vehicle was a covered automobile under Part I (the liability portion) of the contract. This language is essentially the same language that was used in the former version of the Code, H.B. 261, R.C. 3937.18(k)(2), in denying UM benefits for insureds such as Appellant in this set of facts. Moreover, that version of the Code allowed for this very limitation on an uninsured motor vehicle at a time when uninsured motorist benefits were required to be offered by insurance companies. Such benefits are no longer required under the current version of the Code and greater limitations are allowed when UM benefits are, in fact, provided. Appellant agreed to the provision she now seeks to rewrite under the guise of protecting Ohioans from insurance companies. The fact that different language could have been used in the contract is irrelevant. The language is unambiguous and enforceable. This issue has been determined before and there are no facts in this case requiring a different result. As such, this case does not present one of great public significance to Ohioans.

STATEMENT OF THE CASE AND FACTS

A. PROCEDURAL POSTURE

The procedural history is accurately represented by Appellant.

B. STATEMENT OF FACTS

On January 2, 2003, Appellant, Karen Luetzow, was a passenger in a single vehicle accident involving a motor vehicle operated by her husband, Gregory Luetzow. Appellant claims her husband

negligently, carelessly, and unlawfully operated her vehicle in such a manner as to cause a motor vehicle accident.

At the time of the accident, Appellant was insured under a personal automobile contract of insurance with American Select Insurance Company ("American Select"). Appellant is making a claim under American Select insurance contract, Policy No. NSA 1793800, for UM coverage. Appellant and Mr. Luetzow were married and resided with each other at the time the contract was obtained as well as on the date of the accident. The vehicle involved in the accident was owned by Appellant and specifically listed as an insured vehicle under the contract. Under the clear and unambiguous language of the American Select insurance contract, UM coverage does not apply to damages caused by covered automobiles.

ARGUMENT IN RESPONSE TO PROPOSITIONS OF LAW

Response to Proposition of Law No. 1: UM coverage benefits do not apply in this case, because the sole vehicle involved in the accident is a covered automobile under the contract, and, therefore, is not included in the definition of an uninsured motor vehicle.

The First Appellate District Court correctly decided this case when it held that Appellant is not entitled to UM benefits according to the specific terms of the insurance contract and the facts of this case. Contrary to Appellant's assertion, this decision was not in direct conflict with Kelly v. Auto-Owners Insurance Company, Hamilton App. No. C-050450, 2006-Ohio-3599, but instead, followed its sound reasoning. As the Court of Appeals pointed out in both Kelly and this case, "it would be anomalous for a policy to preclude liability coverage under an intrafamily exclusion, only to provide UM/UIM coverage on the basis that the vehicle was uninsured." While the contract language in Kelly is not exactly the same as that in the American Select Insurance Contract, the interpretation is.

The liability portion of the American Select insurance contract provides as follows:

We do not provide Liability coverage for any *insured*:

* * *

9. for *bodily injury* to *you* or any *family member*.

* * *

DEFINITIONS

- E. "*Family member*" means a person related to *you* by blood, marriage or adoption who is a resident of *your* household. * * *

Appellant and Mr. Luetzow lived together at the time of the accident. As a result, Appellant qualifies as a "family member" of Mr. Luetzow and a resident of his household, as those terms are defined in the contract. Because Appellant meets the family member definition, no liability coverage applies. Appellant does not dispute the valid application of the intrafamily exclusion in this case.

Although Appellant concedes that liability coverage does not apply, Appellant asserts that UM coverage must then be afforded instead. Both the Insurance Contract and applicable Ohio statutory law, however, mandate the contrary.

The relevant portion of the UM section of the contract provides as follows:

PART III - UNINSURED/UNDERINSURED MOTORISTS COVERAGE

Insuring Agreement

- A. Uninsured/Underinsured Motorists Bodily Injury Coverage
1. *We* will pay compensatory damages which an *insured* is legally entitled to recover from the *owner* or operator of an:
- a. *uninsured motor vehicle*

An uninsured motor vehicle is defined as:

a *land motor vehicle*:

- (1) to which no liability bond or policy applies at the time of the accident.

* * *

- (3) to which a liability bond or policy applies at the time of the accident, but the bonding or insuring company denies coverage, or is or becomes insolvent.

Under normal circumstances, the tortfeasor's vehicle would qualify as an uninsured motor vehicle because liability insurance coverage was denied. A further reading of the entire definition, however, explains the result in this case and the lower Courts' rulings. The definition goes on to state:

However, *uninsured motor vehicle* does not include any vehicle or equipment:

- (3) that is a *covered automobile* for which coverage is provided under Part I of this policy.

"Part I" of the policy is the liability section. Appellant ignores this part of the definition entirely and, instead, relies on the preceding portion of the definition without regard to the limitations that follow. The vehicle involved in the accident was specifically listed on the Declarations page of the insurance contract. It is, therefore, beyond dispute that a liability contract applied to the subject vehicle at the time of the accident.

In support of her argument, Appellant equates "for which coverage is provided under Part I" with coverage being denied. This is not the case. A review of the entire definition is required and makes it clear that an uninsured vehicle does not include a "covered automobile." In other words, although an uninsured motor vehicle is initially defined to include a vehicle to which liability coverage has been denied, the definition then states that an uninsured motor vehicle does not include

a *covered automobile* insured under this contract, regardless of whether liability coverage was denied.

To apply Appellant's tortuous reading of the insurance contract would render meaningless Section (3) of the definition of an uninsured motor vehicle. Appellee denied liability coverage due to an applicable and enforceable intrafamily provision under the contract. That denial, however, does not render the vehicle uninsured, as there can be no dispute that it remains a "covered automobile" under the contract. Nothing can affect the status of the vehicle as a "covered automobile."

It is well settled law in Ohio that "when the terms included in an existing contract are clear and unambiguous, the court cannot create a new contract by finding an intent not express in the clear and unambiguous language of the written contract." Hamilton Insurance Services, Inc. v. Nationwide Insurance Companies (1999), 86 Ohio St.3d 270, 273, 714 N.E.2d 898, 901, *citing Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.3d 241, 374 N.E.2d 146, 150. The contract in this case is clear and unambiguous.

Additionally, Appellant mistakenly asserts that Appellee applied "yet another exclusion" in denying UM coverage. Appellant's vehicle does not qualify as an uninsured vehicle through the application of the definition itself and nothing else. No exclusion comes into play at all. In fact, the exclusions actually follow the Definitions and are not relied on for any purpose in this case.

Appellant, the party seeking recovery under an insurance contract, generally bears the burden of demonstrating coverage under the contract as well as proving a loss. Westfield Ins. Co. v. Galatis (2003), 100 Ohio St.3d 216, 224, 2003-Ohio-5849, 797 N.E.2d 1253; *citing Inland Rivers Serv. Corp. v. Hartford Fire Ins. Co.* (1981), 66 Ohio St.2d 32, 34, 418 N.E.2d 1381. Appellant has the

burden of showing coverage is owed. Appellant cannot meet that burden, because she cannot trigger the threshold coverage issue.

R.C. 3937.18, as amended by Senate Bill 97 on October 29, 2001, was the statutory law in effect at the time of the accident and controls the rights and duties of the parties to the insurance contract in this case. Notably, R.C. 3937.18 no longer requires that an insurance company offer UM insurance. R.C. 3937.18 further provides that insurance companies that choose to offer UM coverage, may do so with limitations. The fact that insurance companies are permitted to limit such coverage is nothing new.

The H.B. 261 version of the code, effective September 3, 1997, specifically R.C. 3937.18(k)(2), formerly provided:

As used in this section, “uninsured motor vehicle” and “underinsured motor vehicle” do not include any of the following motor vehicles:

* * *

- (1) A motor vehicle that has applicable liability coverage in the policy under which the uninsured and underinsured motorist coverages are provided;
- (2) a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of the named insured . . .

Insurance contracts that provided limitations consistent with this section of the Code were upheld. *See Shay v. Shay* (Nov. 4, 2005), 164 Ohio App. 3d 518, 843 N.E.2d 194. Further, the former version of the Code states essentially what the American Select insurance contract provides today. While this section of the code is no longer part of R.C. 3937.18, the fact that Ohio law permitted the limitation present in the contract at a time when UM insurance was required to be offered, only bolsters Appellee’s position that such provisions are applicable and enforceable today.

The American Select insurance contract does nothing more than what has previously been

permitted under Ohio statutory law. Nothing in Ohio case law or R.C. 3937.18 requires a contrary analysis. In fact, Appellant does not cite a single source of authority to support her argument that the definition of an uninsured motor vehicle in this case is unenforceable. To the contrary, in enacting the S.B. 97 version of 3937.18, the General Assembly stated:

[I]t is the intent of the general assembly to do all of the following:

* * *

(B) express the public policy of the state to:

(3) provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist, or both uninsured and underinsured motorist coverages . . .

Further, as this Court stated in Dairyland Ins. Co. v. Finch (1987), 32 Ohio St.3d 360, 513 N.E.2d 1324, the intent of R.C. 3937.18 was to provide insureds with protection against drivers without coverage, not drivers insured under the very policy for which UM coverage is sought. The crux of this Court's decision in Dairyland is the right of an insurance company to contract with the insured in order to protect itself against collusive suits brought by family members.

This Court has acknowledged the right of insurance companies to limit coverage in a provision which defines that coverage. In Kirschbaum v. Midwestern Indemn. Co., we upheld the insurer's denial of underinsured coverage based upon exclusionary language used by the insurer as part of its definition of an underinsured motor vehicle. Our opinion is consistent with decisions rendered by our sister courts involving exclusions that were part of the terms defining coverage.

See Frederick v. Westfield Cos. (1989), 59 Ohio App.3d 34, 570 N.E.2d 1141 (citations omitted).

Similarly, in this case, Appellee is entitled to limit coverage in a provision which defines that coverage. The contract permissibly limits the definition of an uninsured motor vehicle by excluding vehicles insured under the liability section of the contract. By construing the contract as written, this

Court will further the intent behind R.C. 3937.18. To construe the contract in any other manner would insert policy language unintended by the parties and unsupported by Ohio case law.

Finally, as a last attempt to find coverage where there is none, Appellant asserts that if she is not provided uninsured motorist coverage, her coverage under the contract is illusory. Clearly that is not the case, as Appellant is provided liability coverage generally while operating a vehicle. Further, such limitations were enforceable in Ohio under H.B. 261 3937.18(k)(2), until that provision was eliminated through S.B. 267. During the time it was enforced, contracts of insurance were not deemed illusory merely by the application of such limitations.

For instance, in Smith v. GuideOne Ins., the Court held that “Where the wife was precluded from recovering under the liability and uninsured provisions of a motor vehicle policy issued to her husband, the policy was not illusory as to the wife, as she was generally covered for liability while operating the vehicle; summary judgment was properly granted to the insurer.” See Smith v. GuideOne Ins., 10th Dist. No. 02 AP-1096, 2003-Ohio-4823. Appellant paid for UM coverage for accidents involving many scenarios, the most typical of which includes a second automobile without insurance coverage. This was a single car accident involving an insured vehicle owned by Appellant and her husband and occupied by Appellant at the time of the accident. Appellant purchased insurance specifically for this vehicle. As such, the vehicle cannot be deemed an “uninsured motor vehicle,” as the lower Courts correctly held.

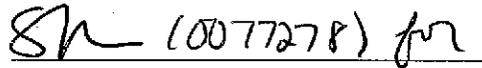
CONCLUSION

Appellant’s husband was not operating an uninsured or underinsured motor vehicle at the time of the accident. Instead, he was operating a vehicle which was specifically listed under the American Select insurance contract to which a liability contract applied at the time of the accident.

Ohio law and the insurance contract specifically provide that Appellee does not owe UM benefits to Appellant under these circumstances.

Pursuant to the mandatory authority of this Court and Ohio statutory law, Appellee, American Select Insurance Co., respectfully requests this Court affirm the lower Courts' grant of Summary Judgment and find that Appellant is not entitled to UM coverage for claims arising out of the negligence of her husband in operating their automobile.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by regular, U.S. mail this 20 day of February, 2007, upon:

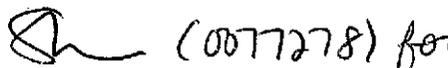
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