

IN THE SUPREME COURT OF OHIO

07 - 0593

LINDA B. WOHL :

Plaintiff, :

and :

JAMES J. SLATTERY, JR. :

Plaintiff-Appellee :

v. :

TYLER C. SWINNEY :

Defendant :

MOTORISTS MUTUAL INSURANCE CO. :

Defendant/Third-Party Plaintiff-Appellant :

v. :

AMERICAN STATES INS. CO. d.b.a. INSURQUEST INS. CO. :

Third-Party Defendant-Appellee :

On appeal from the Butler County Court of Appeals, Twelfth Appellate

Court of Appeals

Case No. CA2006-05-123

MOTORISTS MUTUAL INSURANCE COMPANY'S NOTICE OF CERTIFIED CONFLICT OF DECISIONS FROM THE 8th AND 12th APPELLATE DISTRICTS

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MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

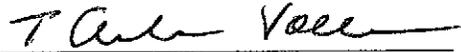
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Cincinnati, Ohio 45202
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Plaintiff-Attorney pro se - Appellee

Appellant, Motorists Mutual Insurance Company, hereby gives notice of a certified conflict. Attached to this notice is a copy of the 12th District Court of Appeals decision certifying a conflict and copies of the conflicting decisions from the 12th District and the 8th District Courts of Appeals.

Respectfully submitted,



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Motorists Mutual Insurance Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following, via ordinary mail on this 28 day of March, 2007:

James J. Slattery, Jr.
119 East Court Street
Cincinnati, Ohio 45202
Plaintiff-Attorney pro se - Appellee

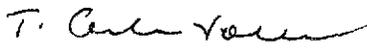
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T. Andrew Vollmar

Vollmar

IN THE COURT OF APPEALS FOR BUTLER COUNTY, OHIO

LINDA B. WOHL,	:	CASE NO: CA2006-05-123
Appellee,	:	<u>ENTRY GRANTING MOTION TO</u>
	:	<u>CERTIFY CONFLICT</u>
vs.	:	
TYLER C. SWINNEY, et al,	:	
Appellants.	:	

FILED BUTLER CO.
COURT OF APPEALS

MAR 22 2007

GINDY CARPENTER
CLERK OF COURTS

The above cause is before the court pursuant to a motion to certify a conflict to the Supreme Court of Ohio filed by counsel for appellant, Motorists Mutual Insurance Company, on February 21, 2007, a memorandum in opposition filed by third-party defendant/appellee, American States Insurance Company dba InsurQuest Insurance Company, on February 28, 2007, and a memorandum in opposition filed by counsel for appellee, James J. Slattery, Jr., on February 28, 2007.

Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. For a conflict to warrant certification, it is not enough that the reasoning expressed by the opinions of the two courts of appeal is inconsistent, the judgments of the two courts must be in conflict. *State v. Hankerson* (1989), 52 Ohio App.3d 73.

In its motion for certification, Motorists asserts that this court's opinion is in conflict with an Eighth District Court of Appeals decision, *Safeco Ins. v. Motorists Mut. Ins. Co.*, Cuyahoga App. No. 86124, 2006-Ohio-2063.

Resolution of the present case turned upon the following policy language defining an "insured" for purposes of UM/UIM motorist coverage as:

1. You or a family member.
2. Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorist coverage under another policy.

This court found subsection two of the above-quoted policy language ambiguous because it is reasonably susceptible to two interpretations. Subsection two could be interpreted to provide coverage to anyone occupying the named insured's covered vehicle who is not (a) a named insured or (b) an insured family member with UM coverage under another policy. Subsection two could also be interpreted to provide coverage to anyone occupying named insured's covered vehicle who is not (a) a named insured who has UM coverage under another policy, or (b) an insured family member who has UM coverage under another policy. We construed this ambiguity in favor of the appellant and affirmed the trial court's decision. In its opinion, this court acknowledged a conflict with the *Safeco* decision, which construed identical policy language and reached a different result.

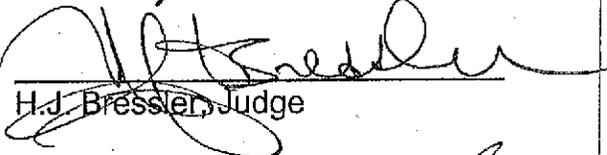
Based upon the foregoing, the motion for certification is GRANTED. The issue for certification is as follows:

Whether the definition of "insured" as "any other person occupying your covered auto who is not a named insured or insured family member for uninsured motorist's coverage under another policy" is ambiguous and should be construed against the insurer to provide coverage for a permissive operator of a covered vehicle who is not a named insured or insured family member.

IT IS SO ORDERED.



William W. Young, Presiding Judge



H.J. Bressler, Judge



Stephen W. Powell, Judge

Vollman

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CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

LINDA B. WOHL,

Plaintiff,

CASE NO. CA2006-05-123

JUDGMENT ENTRY

- vs -

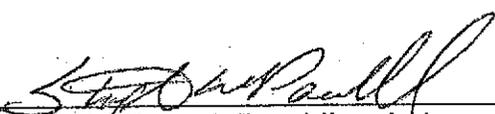
TYLER C. SWINNEY, et al.,

Defendants-Appellants.

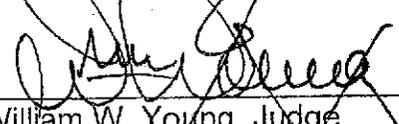
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

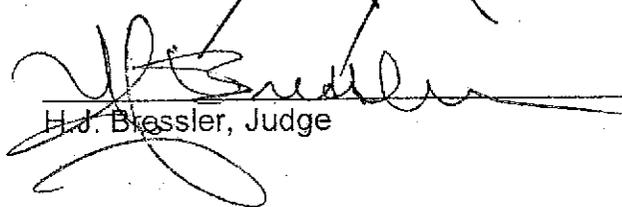
Costs to be taxed in compliance with App.R. 24.



Stephen W. Powell, Presiding Judge



William W. Young, Judge



H.J. Bressler, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

LINDA B. WOHL,

Plaintiff,

- vs -

TYLER C. SWINNEY,

Defendants-Appellants.

CASE NO. CA2006-05-123

OPINION
2/12/2007

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV04-05-1423

T. Andrew Vollmar, 1 South Main Street, Suite 1800, Dayton, Ohio 45402-2017 and Steven Zeehandler, P.O. Box 15069, Columbus, Ohio 43215, for defendant-appellant, Motorists Mutual Insurance Co.

James L. Slattery, Jr., 506 East Fourth Street, #503, Cincinnati, Ohio 45202, defendant-appellee, pro se

Scott G. Oxley, P. Christian Nordstrom, 901 Courthouse Plaza S.W., 10 North Ludlow Street, Dayton, Ohio 45402, for third party defendant-appellee, American States Insurance Co.

BRESSLER, J.

{¶1} Defendant-appellant, Motorists Mutual Insurance Company ("Motorists"), appeals a decision of the Butler County Court of Common Pleas denying its motion for summary judgment and granting summary judgment in favor of third party defendant-appellee, American States Insurance Company ("American States"), in a dispute involving

underinsured motorist coverage. Motorists also appeals a judgment entry finding in favor of James J. Slattery, Jr. on Slattery's complaint against Motorists and on Motorists' counterclaim against him. We affirm.

{¶12} On the evening of June 16, 2002, a vehicle driven by Tyler Swinney collided with a BMW roadster driven by appellee James Slattery at a West Chester intersection. The BMW was owned by Linda Wohl, who occupied the passenger seat. The accident occurred when Swinney negligently turned left into the path of the car operated by Slattery. Both Wohl and Slattery suffered extensive injuries as a result of the collision.

{¶13} At the time of the accident, Wohl had an automobile insurance policy with Motorists, which covered her 1996 BMW. The coverage provided uninsured/underinsured ("UM/UIM") limits of \$250,000 per person and \$500,000 per accident. Slattery had an automobile policy with American States d.b.a. InsurQuest. Slattery's policy provided UM/UIM limits of \$12,500 per person and \$25,000 per accident. Swinney was insured under an automobile policy issued by Progressive Insurance Company ("Progressive"), with a single limit coverage of \$500,000.

{¶14} Wohl and Slattery filed separate suits against Swinney, which were consolidated by agreement of the parties.¹ Slattery's case against Swinney included a claim for UIM coverage from Motorists. The parties agreed to a settlement releasing Swinney whereby Progressive would pay the full \$500,000 coverage amount to Wohl and Slattery, allowing them to allocate the funds amongst themselves. Slattery requested that Motorists agree to the settlement, based upon a proposed allocation of \$499,999 to Wohl and \$1 to Slattery. Motorists assented, but informed Slattery that he did not qualify as an "insured" under the UM/UIM portion of its policy with Wohl.

1. Linda Wohl did not sue Motorists for UM/UIM coverage, and is not a party to this appeal.

{15} Motorists filed a counterclaim against Slattery and a third party complaint against American States. Motorists sought a declaratory judgment that Slattery was not an insured for UM/UIM coverage under Motorists' policy with Wohl. Motorists stipulated that Slattery's damages were at least \$250,000, thus making the insurance coverage the central issue in this case.

{16} The parties filed cross motions for summary judgment. The trial court issued a decision on April 11, 2006 overruling Motorists' motion and granting American States' motion.² The following month, in accordance with its April 11 decision and the stipulated damages, the court issued an entry granting judgment in favor of Slattery on his complaint and on Motorists' counterclaim against him. The entry stated that Slattery was to receive \$249,999 in UIM benefits from Motorists. Motorists timely appealed, raising one assignment of error.

{17} This court conducts a de novo review of the trial court's summary judgment decision. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper where there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in the that party's favor. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the initial burden of informing the court of the basis for the motion, and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party meets its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing a genuine issue for trial. *Id.* We

2. As the party against whom American States' summary judgment motion was made, we construe the facts in favor of Motorists on appeal. See Civ.R. 56(C). See, e.g., *Bell v. Berryman* (2004), Franklin App. No. 03AP-500, 2004-Ohio-4708.

are mindful of these burdens in reviewing Motorists' sole assignment of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN RULING THAT SENATE BILL 97, R.C. SECTION 3937.18, AS AMENDED OCTOBER 31, 2001, REQUIRED MOTORISTS TO COVER JAMES SLATTERY FOR UM/UIM COVERAGE WHEN THE MOTORISTS POLICY LANGUAGES EXCLUDES MR. SLATTERY FROM THE DEFINITION OF 'INSURED' FOR UM/UIM COVERAGE."

{¶10} Both Slattery and American States maintain that Slattery should be afforded UIM coverage because the definition of "insured" under the UIM section of Motorists' policy with Wohl is ambiguous and should be construed in favor of coverage for Slattery.

{¶11} Motorists argues that Slattery and American States are foreclosed from addressing the issue of ambiguity on appeal because that issue was not discussed in the trial court's decision. It is axiomatic that a party cannot raise new issues or legal theories for the first time on appeal. *Lay v. Chamberlain* (Dec. 11, 2000), Madison App. No. CA99-11-030, at 21. Failure to raise an issue before the trial court results in waiver of that issue for appellate purposes. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. However, the record shows that American States' motion for summary judgment raised the issue of ambiguity in the insurance policy. Because we conduct a de novo review of the trial court's ruling on summary judgment, we are not confined to those issues disposed of by the trial court's decision. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296.

{¶12} The Motorists policy issued to Wohl that was in effect at the time of the accident included an endorsement defining an "insured" for UM/UIM coverage as:

{¶13} "1. You or any family member.

{¶14} "2. Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorist coverage under another policy."

(Emphasis omitted.)

{¶15} Motorists maintains that the language in subsection two of the above "insured" definition narrows the definition of "insured" for UIM coverage and plainly excludes Slattery due to the fact that he had UIM coverage under his policy with American States at the time of the accident.

{¶16} The issue of contractual ambiguity is a question of law for the court. *Westfield Ins. Co. v. HULS Am., Inc.* (1998), 128 Ohio App.3d 270, 291. Any ambiguities are to be construed strictly against the insurer and liberally in favor of the insured. *Towne v. Progressive Ins. Co.*, Butler App. No. CA2005-02-031, 2005-Ohio-7030, ¶8. Ambiguity exists where contract language is susceptible to two or more reasonable interpretations. *Id.* at ¶9.

{¶17} A review of Motorists' insurance policy with Wohl reveals the following ambiguity. Subsection two of the definition attempts to limit coverage by excluding "[a]ny other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorist coverage under another policy." This provision, which Motorists maintains excludes Slattery from UIM coverage, is reasonably susceptible to two interpretations. See *Towne*, 2005-Ohio-7030 at ¶9. To what does the phrase "for uninsured motorist coverage under the policy" refer? As reasoned by the dissenting opinion construing the same provision in *Safeco v. Motorists Mut. Ins. Co.*, Cuyahoga App. No. 86124, 2006-Ohio-2063:

{¶18} "In the case at bar, the majority has ignored the fundamental ambiguity of the key provision in the policy. The policy language at issue is as follows: 'Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorists coverage under another policy.'

{¶19} "In understanding this sentence, the question is what the tail prepositional phrase, 'for uninsured motorists coverage under another policy,' modifies. More specifically,

the question is whether that qualifying tail modifies only 'an insured family member,' or whether the tail also modifies 'a named insured.'

{¶20} " * * * It is quite clear that the qualifying prepositional phrase at the end of the policy sentence above modifies what immediately precedes it. It is not clear, however, that the qualifying tail reaches over and modifies what is on the other side of 'or.'

{¶21} "Thus the clause can be read to mean that UM/UIM coverage will be provided for '[a]ny other person occupying your covered auto who is not a named insured * * * for uninsured motorists coverage under another policy.' But the clause can also be read to mean that coverage will be available to '[a]ny other person occupying your covered auto who is not a named insured * * *.'" Id. at ¶29-32 (Karpinski, J., dissenting).

{¶22} The fact that the UIM definition is susceptible to two or more reasonable interpretations regarding who qualifies as an "insured" under that portion of the policy results in an ambiguity in the language. Subsection two can be interpreted to provide coverage to anyone occupying the named insured's covered vehicle who is not (a) a named insured, or (b) an insured family member for UM coverage under another policy. However, subsection two can also be interpreted to provide coverage to anyone occupying the named insured's covered vehicle who is not (a) a named insured who has UM coverage under another policy, or (b) an insured family member who has UM coverage under another policy.

{¶23} Ambiguities are typically construed in favor of the insured. See *Towne* at ¶8. However, where the claimant's status as an "insured" under an insurance policy is at issue in the case, ambiguities are to be construed in favor of the policyholder, not the claimant. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶35. Thus, the question becomes whether ruling that a permissive operator of a covered auto is entitled to UIM coverage favors the policyholder, Wohl. See id. We find that it does.

{¶24} As stated, Wohl's policy with Motorists affords UM/UIM coverage of \$250,000

per person and \$500,000 per accident. Thus, the maximum amount Wohl could have recovered under her own policy is \$250,000 in UIM benefits. Wohl obtained a higher payout in receiving the majority of the settlement money. She collected \$499,999 instead of \$250,000. Slattery then was able to pursue \$250,000 in UIM benefits under Wohl's policy. In addition, if Wohl and Slattery were to have evenly split the \$500,000 settlement, neither would have been able to pursue a UIM claim under the Motorists policy because the \$250,000 figure matches the amount of UIM coverage available per person under the Motorists policy.

{¶25} Our ruling benefits Wohl in an additional respect. As the policyholder, Wohl pays premiums for UM/UIM coverage to protect permissive users and passengers in her insured automobile. Contractually, then, Wohl benefits when such users and passengers are eligible for the UM/UIM coverage for which she pays premiums.

{¶26} We observe that our decision conflicts with the majority opinion in the Eighth Appellate District's treatment of this issue in *Safeco*, 2006-Ohio-2063. However, we conclude that, because of the ambiguities in the Motorists insurance policy, Slattery is not excluded from UIM coverage, as the permissive operator of a covered vehicle. The trial court thus did not err in awarding summary judgment to American States and in awarding UIM coverage to Slattery under the Motorists policy.

{¶27} Motorists' assignment of error is overruled.

{¶28} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

LEXSEE 2006 OHIO 2063

Caution
As of: Mar 28, 2007

**SAFECO INSURANCE COMPANY OF ILLINOIS, Plaintiff-Appellee vs.
MOTORISTS MUTUAL INSURANCE COMPANY, Defendant-Appellant**

No. 86124

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY**

2006 Ohio 2063; 2006 Ohio App. LEXIS 1891

April 27, 2006, Date of Announcement of Decision

PRIOR HISTORY: **[**1]** CHARACTER OF PROCEEDINGS: Civil appeal from Common Pleas Court. Case No. CV-468752.

DISPOSITION: REVERSED.

COUNSEL: For plaintiff-appellee: WILLIAM R. DOSLAK, ESQ., Middleburg Heights, Ohio; LISA L. PAN, ESQ., Pleasant Hill, California.

For defendant-appellant: RICHARD M. GARNER, ESQ., Davis & Young, Cleveland, Ohio.

JUDGES: SEAN C. GALLAGHER, JUDGE. COLLEEN CONWAY COONEY, P.J., CONCURS; DIANE KARPINSKI, J., DISSENTS.

OPINION BY: SEAN C. GALLAGHER

OPINION:

JOURNAL ENTRY AND OPINION

SEAN C. GALLAGHER, J.:

[*P1] Appellant Motorists Mutual Insurance Company ("Motorists") appeals from the judgment of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of appellee Safeco Insurance Company of Illinois ("Safeco"), finding coverage was to be afforded under Motorists' policy of insurance. Safeco has filed a cross-appeal from the trial court's determination that liability was to be apportioned on a "pro rata" basis. For the reasons stated below, we reverse

the decision of the trial court, enter judgment in favor of Motorists, and find the cross-appeal moot.

[*P2] The following facts give rise to this appeal. On June 26, 1999, Elizabeth Heil was a passenger in a 1994 Toyota **[**2]** Camry that was owned and operated by Diane Sielski. The vehicle was struck by an underinsured motorist whose carrier, Allstate, tendered its policy limits of \$ 25,000. Heil sought permission to accept the settlement without prejudicing the rights of any other insurance carrier and to pursue an underinsured motorist ("UIM") claim.

[*P3] At the time of the accident, Heil was a named insured under an automobile insurance policy issued by Safeco. Safeco paid Heil \$ 225,000 under the policy's uninsured/underinsured motorists ("UM/UIM") coverage. The amount included \$ 25,000 that was covered by the underinsured driver's policy with Allstate, as well as \$ 200,000 in UIM benefits under Heil's Safeco policy.

[*P4] Also in effect at the time of the accident was an automobile liability policy issued to Diane Sielski, the named insured, by Motorists that specifically identified the Toyota Camry on the declarations page of the policy. The policy included UM/UIM coverage with a policy limit of \$ 100,000 per person and \$ 300,000 per accident. Motorists denied a claim made by Heil for UIM benefits under this policy on the basis that Heil was not an insured under the policy. We shall address **[**3]** the relevant policy language in our analysis below.

[*P5] Safeco filed the instant action against Motorists for reimbursement of moneys paid in settlement of Heil's UIM claim. Safeco and Motorists stipulated to all pertinent facts and damages. The parties

filed cross-motions for summary judgment. The trial court granted Safeco's motion and found that Heil was entitled to UIM benefits under the Motorists policy. The trial court also ruled that the policies were co-primary, and Motorists was to reimburse Safeco with its pro-rata share of the \$ 200,000 plus interest at a statutory rate from July 29, 1999.

[*P6] Both parties have appealed the trial court's ruling. This court reviews a trial court's grant of summary judgment de novo. *Ekstrom v. Cuyahoga County Comm. College*, 150 Ohio App.3d 169, 2002 Ohio 6228, 779 N.E.2d 1067. Before summary judgment may be granted, a court must determine 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 the evidence most strongly in favor of the nonmoving [**4] party, that conclusion is adverse to the nonmoving party." *State ex rel. Dussell v. Lakewood Police Department*, 99 Ohio St.3d 299, 300-301, 2003 Ohio 3652, 791 N.E.2d 456, citing *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St. 3d 190, 191, 1996 Ohio 326, 672 N.E.2d 654.

[*P7] We also recognize that the interpretation of an automobile liability insurance policy presents a question of law that an appellate court reviews without deference to the trial court. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995 Ohio 214, 652 N.E.2d 684. When interpreting an automobile liability insurance policy, if the language used is clear and unambiguous, a court must enforce the contract as written, giving words used in the contract their plain and ordinary meaning. *Cincinnati Indemn. Co. v. Martin*, 85 Ohio St. 3d 604, 607, 1999 Ohio 322, 710 N.E.2d 677. A clear, unambiguous underinsured motorist coverage provision is valid and enforceable as long as the provision is not " * * * contrary to the coverage mandated by R.C. 3937.18(A)." *Moore v. State Auto Ins. Co.*, 88 Ohio St.3d 27, 28-29, 2000 Ohio 264, 723 N.E.2d 97.

[*P8] [**5] We shall begin by considering Motorists' assignment of error, which provides:

[*P9] "The trial court committed reversible error by granting summary judgment in favor of plaintiff-appellee/cross-appellant Safeco Insurance Company of Illinois."

[*P10] Motorists argues that Heil was not an insured entitled to UM/UIM coverage under its policy and therefore the trial court erred in granting summary judgment to Safeco. We agree.

[*P11] The named insured under the Motorists

policy is Diane Sielski, who was the driver and owner of the vehicle in which Heil was a passenger. The liability section of the policy defines an "insured" to include "any person while using your covered auto." However, the UM/UIM endorsement limits the definition of an insured to "any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorists coverage under another policy."

[*P12] Safeco makes a rather unpersuasive argument that because Heil was defined as an insured under the liability portion of the policy, she qualifies for UM/UIM coverage by operation of law in the absence of a valid written rejection by the named insured. This argument [**6] is meritless.

[*P13] There is no dispute that the policy includes UM/UIM coverage with limits of \$ 100,000 per person and \$ 300,000 per accident, which is equal to the amount of liability coverage. Under the applicable version of R.C. 3937.18(C), a named insured's proper selection of UM/UIM coverage is "binding on all other named insureds, insureds, or applicants." Further, pursuant to the Supreme Court of Ohio holding in *Holliman v. Allstate Ins. Co.*, 86 Ohio St.3d 414, 416-417, 1999 Ohio 116, 715 N.E.2d 532, "Nothing in R.C. 3937.18 * * * prohibits the parties to an insurance contract from defining who is an insured under the policy."

[*P14] In rejecting a similar argument to the one made here, the court in *Mitchell v. Motorists Mutual Ins. Co.*, *Franklin App. No. 04AP-589*, 2005 Ohio 3988, held that to apply the appellant's logic "would limit the parties' ability to define who is an insured for underinsured motorists coverage. * * * Nothing in R.C. 3937.18, which governs permissible terms for underinsured/uninsured motorists coverage, restricts the parties' freedom to define [**7] who is and who is not an insured."

[*P15] Indeed, R.C. 3937.18 does not mandate who must be an insured for purposes of UM/UIM coverage, and the parties to the insurance contract are free to draft and negotiate their own restrictions regarding who is and is not an insured for various coverage. *Id.* No public policy or statute prohibits this form of policy restriction. *Id.* To hold that UM/UIM coverage must be specifically offered and rejected with respect to passengers or other unnamed parties would contravene basic contract principles allowing parties to the contract to define the terms of the policy and to place restrictions on coverage. As stated in *Shepherd v. Scott*, *Hancock App. No. 5-02-22*, 2002 Ohio 4417: "This interpretation would require that Motorists anticipate all the potential users of [the] vehicle and to then offer UM/UIM insurance accordingly. Such an interpretation * * * is unreasonable and unsupported by law."

[*P16] Here, Diane Sielski's selection of UM/UIM coverage was binding on all insureds, and the contracting parties were free to limit the terms of the coverage and to whom the coverage would apply. See *Holliman*, 86 Ohio St.3d at 416-417. [**8]

[*P17] Safeco also contends that the policy's definition of an "insured" for UM/UIM coverage is ambiguous and should be construed in favor of coverage. The policy definition of a UM/UIM insured includes: "2. Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorists coverage under another policy."

[*P18] Safeco argues that this should be read to define an insured as any other person occupying your covered auto who (1) is not a named insured, or (2) is an insured family member for uninsured motorists coverage under another policy. In support of this argument, Safeco refers to the "last antecedent" grammatical rule that provides "Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent * * *." *Indep. Ins. Agents v. Fabe* (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814, quoting *Carter v. Youngstown* (1946), 146 Ohio St. 203, 209, 65 N.E.2d 63. In considering the intention of the parties, we are mindful that insurance coverage is "determined by a * * * reasonable construction [of the contract] in conformity with the intention of the parties as [**9] gathered from the ordinary and commonly understood meaning of the language employed." *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 211, 519 N.E.2d 1380, quoting *Dealers Dairy Products Co. v. Royal Ins. Co.* (1960), 170 Ohio St. 336, 164 N.E.2d 745, paragraph one of the syllabus.

[*P19] We find that the interpretation suggested by Safeco is not a reasonable construction of the contract and appears contrary to the intention of the parties. As recognized in *Mitchell*, supra: "Generally, insurance policies contain 'other insurance' provisions that attempt to either vitiate or limit an insurer's liability for covering an insured's loss when another insurance policy also covers the insured." We find that a reasonable construction of the contract here is that the parties intended to exclude coverage for persons who had UM/UIM coverage under another insurance policy and were neither a named insured nor an insured family member under the Motorists policy.

[*P20] Safeco also argues that to read the above limitation to exclude coverage to a passenger who has separate UM/UIM insurance would be to enforce a de facto "escape clause" and thwart public policy. An "escape [**10] clause" declares that the insurer is not

liable to cover an insured if there is other valid and collectible insurance covering the risk. 15 Couch, Insurance (3 Ed. 2004), Section 219:36.

[*P21] "Other insurance" clauses, including "escape" clauses, are not prohibited under Ohio law. They are a valid attempt to allocate liability between insurers. However, such a clause may be invalidated when, as applied, the clause operates to reduce the amount of UM/UIM coverage to which the insured is otherwise entitled. See *Midwestern Indem. Co. v. Nationwide Mut. Ins. Cos.* (Nov. 7, 1994), *Clermont App. No. CA94-05-032*, 1994 Ohio App. LEXIS 5021; *Curran v. Hardware Dealers Mut. Fire Ins. Co.* (1971), 25 Ohio St.2d 33, 266 N.E.2d 566.

[*P22] The public policy behind the uninsured motorist statute is to protect an injured motorist from losses suffered at the hands of an uninsured motorist that would otherwise go uncompensated. See *Midwestern Indem. Co.*, supra; *Clark v. Scarpelli*, 91 Ohio St.3d 271, 276, 2001 Ohio 39, 744 N.E.2d 719; *Martin v. Midwestern Group Ins. Co.*, 70 Ohio St.3d 478, 1994 Ohio 407, 639 N.E.2d 438, paragraph one of the syllabus. n1 Thus, in determining the validity of an [**11] exclusion of uninsured motorist coverage, a court must determine whether the exclusion conforms with *R.C. 3937.18*. *Martin*, 70 Ohio St.3d 478, 1994 Ohio 407, 639 N.E.2d 438, at paragraph two of the syllabus. If the exclusion is in conflict with the statute's purpose, it is invalid and unenforceable. *Id.* at 480.

n1 *Martin* was superseded by amendments to *R.C. 3937.18*, but the basic premises from *Martin* cited herein remain unchanged. See *Roberts v. Wausau Business Ins. Co.*, 149 Ohio App.3d 612, 2002 Ohio 4734, 778 N.E.2d 594.

[*P23] *R.C. 3937.18* mandates uninsured motorist coverage where "(1) the claimant is an insured under a policy which provides uninsured motorist coverage; (2) the claimant was injured by an uninsured motorist; and (3) the claim is recognized by Ohio tort law." *Holliman*, 86 Ohio St.3d 414, 1999 Ohio 116, 715 N.E.2d 532, citing *Martin*, 70 Ohio St.3d at 481. As we previously indicated, nothing in *R.C. 3937.18* [**12] prohibits the parties to an insurance contract from defining who is an insured under the policy. *Holliman*, 86 Ohio St.3d at 416-417. The courts in two similar cases, *Sheperd*, supra, and *Mitchell*, supra, found that a passenger was not insured under a driver's policy because the passenger was excluded from the definition of an "insured."

[*P24] Common sense would indicate that, in

accordance with *R.C. 3937.18*, a person may obtain UM/UIM coverage under his own automobile policy for protection in the event he is hit by an uninsured or underinsured motorist. In addition, there is nothing that would prohibit that person from excluding as an insured any passengers in his vehicle who have their own policies of insurance containing UM/UIM coverage.

[*P25] In the instant matter, the Motorists policy excludes Heil from the definition of an insured for UM/UIM coverage because she had UM/UIM coverage under another policy. Heil was the named insured under the Safeco policy. In compliance with *R.C. 3937.18*, Safeco provided its insured with UM/UIM coverage. We find that the Motorists policy neither violates the [**13] purpose nor the language of *R.C. 3937.18* and that Heil is not an insured for purposes of UM/UIM coverage under the Motorists policy.

[*P26] Safeco's assignment of error is overruled. We reverse the decision of the trial court, enter judgment in favor of Motorists, and find the cross-appeal is moot.

Judgment reversed.

This cause is reversed.

It is, therefore, considered that said appellant recover of said appellee costs herein.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County 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*.

COLLEEN CONWAY COONEY, P.J., CONCURS;

DIANE KARPINSKI, J., DISSENTS.
(SEE SEPARATE DISSENTING OPINION.)

SEAN C. GALLAGHER

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 [**14] 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)*.

DISSENT BY: DIANE KARPINSKI

DISSENT:

DISSENTING OPINION

KARPINSKI, J., DISSENTING:

[*P27] Respectfully, I dissent because I disagree with the majority in its reading of Motorists' Policy for uninsured motorist coverage.

[*P28] When the plain and ordinary meaning of the language of an insurance policy is clear and unambiguous, a court cannot engage in interpretation of that language. *Holliman v. Allstate Ins. Co.*, 86 Ohio St.3d 414, 418, 1999 Ohio 116, 715 N.E.2d 532. However, when "the language in an insurance policy is ambiguous and [reasonably] susceptible of more than one meaning, the policy will be liberally construed in favor of the insured and strictly against the insurer who drafted the [**15] policy." *Id.*, citing *Derr v. Westfield Cos.* (1992), 63 Ohio St.3d 537, 542, 589 N.E.2d 1278.

[*P29] In the case at bar, the majority has ignored the fundamental ambiguity of the key provision in the policy. The policy language at issue is as follows:

Any other person occupying your covered auto who is not a named insured or an insured family member **for uninsured motorists coverage under another policy.** (Emphasis added.)

[*P30] In understanding this sentence, the question is what the tail prepositional phrase, "for uninsured motorists coverage under another policy," modifies. More specifically, the question is whether that qualifying tail modifies only "an insured family member," or whether the tail also modifies "a named insured."

[*P31] The English language has a fairly rigid syntax. As a result, modifiers must be near what they modify. Because of the rigid word order of English, college composition books in this country often designate an entire chapter to the problem of the dangling or misplaced modifier. It is quite clear that the qualifying prepositional phrase at the end of the policy sentence above modifies what immediately [**16] precedes it. It is not clear, however, that the qualifying tail reaches over and modifies what is on the other side of "or."

[*P32] Thus the clause can be read to mean that UM/UIM coverage will be provided for "any other person occupying your covered auto who is not a named insured *** for uninsured motorists coverage under

another policy." But the clause can also be read to mean that coverage will be available to "any other person occupying your covered auto who is not a named insured ***." The policy's plain language can be read in more than one way. Being subject to more than one interpretation, the language is ambiguous.

[*P33] The majority never provides any syntactic analysis of the disputed provision, but any construction of the provision must begin with that kind of analysis. And once the syntax is interpreted as ambiguous, the policy must be construed in favor of providing coverage to the insured.

[*P34] The majority acknowledges Safeco's argument based on the "last antecedent" grammatical rule and even quotes the rule: ""Referential and qualifying words and phrases, where no contrary intention appears,

refer solely to the last antecedent ***." *Indep. Ins. Agents v. Fabe (1992)*, 63 Ohio St.3d 310, 314, 587 N.E.2d 814, [*17] quoting *Carter v. Youngstown 1946*, 146 Ohio St. 203, 209, 65 N.E.2d 63." Ante. The majority ignores, however, this established rule of construction. Moreover, finding no "contrary intention" in the policy itself, the majority proceeds to construe the intention of the parties by turning to what "generally, insurance policies contain." The issue for this court to decide, however, is what this policy says, not what policies "generally" say. In skipping over the necessary first stage, "the ordinary and commonly understood meaning" from the grammar of the sentence, the majority has provided an analysis that is fundamentally flawed.

[*P35] Because the policy's language is ambiguous, I would affirm the judgment of the trial court.