[Cite as *Shepherd v. Scott*, 2002-Ohio-4417.]

IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY

CHARLOTTE S. SHEPHERD, ET AL.

PLAINTIFFS-APPELLEES **CASE NO. 5-02-22**

v.

GERALD SCOTT, ET AL.

O P I N I O N

DEFENDANTS-APPELLANTS

CHARACTER OF PROCEEDINGS: **Civil Appeal from Common Pleas Court**

JUDGMENT: **Judgment Affirmed.**

DATE OF JUDGMENT ENTRY: **August 29, 2002**

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BRYANT, J.

{¶1} This appeal is brought by defendant-appellant The Cincinnati Casualty Company (Cincinnati) from the judgment of the Court of Common Pleas, Hancock County granting summary judgment to defendant-appellee Motorists Mutual Insurance Company (Motorists).

{¶2} The parties have stipulated to the following facts. On January 15, 1999, Plaintiff Charlotte S. Shepherd was a passenger in a vehicle driven by Sandra D. Hites when it was struck from the rear by a vehicle driven by Defendant Gerald Scott. At the time of the accident, Sheppard was insured with Appellant Cincinnati through an insurance policy issued to her husband, Edward R. Shepherd. Cincinnati's policy included coverage for uninsured/underinsured (UM/UIM) coverage. Hites was insured by Appellee Motorists through an automobile policy in which she was the named insured. The Motorist policy also included UM/UIM coverage. Sheppard and Hites do not live in the same household nor are they family members.

{¶3} On January 4, 2001 Sheppard filed a complaint in the Hancock County Court of Common Pleas alleging that Defendant Scott was liable for her injuries. The complaint further alleged that Scott was an underinsured motorist and therefore sought underinsured motorist coverage pursuant to either or both of the Cincinnati and Motorists polices. Scott, through his liability insurance provider, settled with Sheppard for his policy limit of $12,500.00 and thereafter was dismissed with prejudice from this matter.

{¶4} In September 2001, both Appellant and Appellee filed motions for declaratory judgment each alleging that the other was responsible for Sheppard's underinsured motorist claim. The trial court treated both motions for declaratory judgment as motions for summary judgment and on March 29, 2001 ruled in favor of Motorists. It is from this order that Appellant now appeals.

{¶5} Appellant raises the following assignments of error:

{¶6} "The trial court committed reversible error in granting Defendant/Appellee Motorists Mutual Insurance Company's Motion for Declaratory Judgment where it determined that Motorists' policy issued to Sandy Hites provided no underinsured motorist coverage to Plaintiff Charlotte S. Shepherd for the motor vehicle accident of January 15, 1999, since Motorists' policy contained an invalid and unenforceable escape clause."

{¶7} "The trial court committed reversible error in granting Defendant/Appellee Motorists Mutual Insurance Company's Motion for Declaratory Judgment when it determined that that Motorists' policy issued to Sandy Hites provided no underinsured motorist coverage to Plaintiff Charlotte S. Shepherd for the motor vehicle accident of January 15, 1999, since uninsured motorist coverage language in the Motorists' policy was ambiguous and unenforceable."

{¶8} Appellant asserts two assignments of error alleging that the trial court erred when it awarded summary judgment to Appellee based on a finding that Charlotte Sheppard was not an insured pursuant to Motorists' policy for UM/UIM coverage. In the first assignment of error, Appellant alleges that the trial court based its decision on an invalid escape clause contained in the Motorist policy. In the second assignment of error, Appellant argues in the alternative that the language in the Motorists policy was ambiguous and therefore unenforceable. For the reasons set forth in the opinion below, we overrule both assignments of error.

Summary Judgment Standard

{¶9} An appellate court reviews the grant of a motion for summary judgment independently and does not give deference to the trial court's determination. *Schuch v. Rogers* (1996), 113 Ohio App.3d 718, 720, 681 N.E.2d

1388. Accordingly, we apply the same standard for summary judgment as did the trial court. *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co*. (1988), 42 Ohio App.3d 6, 8, 536 N.E.2d 411. Summary judgment is proper when, looking at the evidence as a whole (1) no genuine issue of 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, construed most strongly in favor of the nonmoving party, that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C); *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686-687, 1995-Ohio-286. To make this showing the initial burden lies with the movant to inform the trial court of the basis for the motion and identify those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 1996-Ohio-107.

{¶10} Once the movant has satisfied this initial burden, the burden shifts to the nonmovant to set forth specific facts, in the manner prescribed by Civ.R. 56(C), indicating that a genuine issue of material fact exists for trial. *Id.* at 293. The non-moving party is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

First Assignment of Error

{¶11} Appellee Motorists moved for summary judgment on the grounds that Charlotte Sheppard was not an insured according to the terms of their underinsured motorist policy issued to driver Sandy Hites. The Motorists Mutual Uninsured Motorist policy defines an insured as follows:

{¶12} "B. Insured as used in this endorsement means:

{¶13} "You or any family member

{¶14} "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."

{¶15} Appellant Cincinnati argues that Section B(2) of the Motorists Policy is an invalid and unenforceable escape clause designed to preclude coverage for an insured in the event of other coverage and therefore, the Motorists Policy is the primary insurer for Sheppard's injuries. Cincinnati bases its argument on the Ohio Supreme Court's holdings in *State Farm Mut. Auto. Ins. Co. v. Home Indemnity Ins. Co.* (1970), 23 Ohio St.2d 45 and our holding in *Halcyon Insurance Co. v. Empire Fire and Marine Insurance Co*., (Sept. 28, 2001), Allen App. No. 1-01-88. We do not find Appellant's argument to be well taken.

{¶16} Escape clauses in the context of UM/UIM policies are not per se invalid as Appellant suggests. Rather, an escape clause is one form of an "other

insurance" clause and is valid as a means of preventing an insured from attempting to pyramid separate policies in order to recover more than his or her actual loss. *Saccucci v. State Farm Mutual Automobile Insurance Co*. (1987), 32 Ohio St.3d 273, 277, 512 N.E.2d 1160 (holding that excess escape clause which sought to avoid or limit recovery was valid and enforceable and precluded stacking of the uninsured motorist coverages.)

{¶17} In *Halcyon Insurance Co. v. Empire Fire and Marine Insurance Co*., (Sept. 28, 2001), Allen App. No. 1-01-88, on which Appellant relies, this court recognized and applied the Ohio Supreme Court's ruling in *State Farm Mut. Auto. Ins. Co. v. Home Indemnity Ins. Co*. (1970), 23 Ohio St.2d 45. In *State Farm*, the Court addressed a conflict between an excess clause and an escape clause in a policy for automobile liability insurance and concluded that a policy containing an escape clause is considered the primary insurance when construed with another policy containing an excess clause. *Halcyon*, supra. Since Motorists' policy contains an escape clause and the Appellant's policy contains an excess clause, Appellant argues that Motorists' policy should be the primary policy. We do not find *Halcyon* or *State Farm* determinative of the case at bar since neither case was decided in the context of UM/UIM coverage. On the contrary, the determinative issue when assessing the validity of an insurance policy exclusion in the context of UM/UIM coverage is the exclusion's conformity with R.C. 3937.18. *Martin v.*

Midwestern Insurance Group Co. (1994), 70 Ohio St.3d 478, 480, 639 N.E.2d 438.

{¶18} R.C. 3937.18 requires UM/UIM coverage if (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. *State Farm Auto. Ins. Co. v. Alexander* (1992), 62 Ohio St.3d 397, 583 N.E.2d 309. In addition, at all times pertinent to this matter, R.C. 3937.18 required that an insurer offer UM/UIM coverage in the same amount as any liability coverage provided, and if such coverage was not expressly rejected, the coverage is provided by operation of law. *Schumacher v. Kreiner* (2000), 88 Ohio St.3d 358, 725 N.E.2d 1138. The purpose of R.C. 3937.18 is "to protect persons from losses which, because of the tortfeasor's lack of liability coverage, would otherwise go uncompensated." *Cincinnati Indemn. Co. v. Martin* (1999), 85 Ohio St.3d 604, 608, 710 N.E.2d 677, 680. As a general rule, automobile insurance policies may not use liability exclusions to eliminate or reduce uninsured or underinsured motorist coverage. *Martin v. Midwestern Group Ins. Co.* (1994), 70 Ohio St.3d at 480.

{¶19} That is not to say that insurance providers are precluded from limiting UM/UIM coverage in all regards. It is perfectly within the province of an insurance provider to define who will be an insured. See *Holliman v. Allstate*

Insurance Co. Corp. (1999), 86 Ohio St.3d 414, 715 N.E.2d 532. For instance, in *Critelli v. TIG Insurance Co.* (1997), 123 Ohio App.3d 436, 704 N.E.2d 331, the Ninth District Court of Appeals held that a passenger who was injured in an uninsured vehicle driven by her fiancée did not qualify as an "insured" under an insurance policy issued to the driver's parents and, thus, was not entitled to uninsured motorist (UM) coverage under the policy. The policy in *Critelli* defined "insured" as "you or any family member" and "any other person occupying your covered auto." The court determined that the passenger was not a named insured on the declaration sheet, was not related to the driver's parents, and the vehicle at issue was not shown on the declaration sheet, was not owned by the driver's parents and was not a temporary substitute vehicle. The *Critelli* court then concluded:

{¶20} "[T]he UM motorist provision is intended to protect persons, not specific vehicles, but only 'for persons insured thereunder' and when 'the claimant is an insured.' Appellant does not qualify as an 'insured' as that term is defined under the *** policy's UM coverage." (citations omitted)

{¶21} A similar situation in which a passenger sought UM/UIM coverage under a driver's policy arose in *Wayne Mutual Insurance Co. v. Mills* (1998), 81 Ohio St.3d 1224,1225, 689 N.E.2d 44. In that case, Progressive Insurance Co., the UM/UIM insurance provider for a driver involved in a motor vehicle accident,

argued against UM/UIM coverage for the driver's passengers because the driver was not driving an "insured car" under his Progressive policy. Justice Sweeney, dissenting from the dismissal of the case as having been improvidently allowed, argued that Progressive's definition of an insured as, "(a.) [y]ou or any relative; (b.) any person while occupying your insured car" was proper under R.C. 3937.18 and rejected the assertion that Progressive's definition of an insured violated public policy. Justices Cook and Lundberg Stratton concurred in Justice Sweeny's dissent. *Id*. at 1225 (*Sweeny, J*., dissenting from a sua sponte dismissal as having been improvidently allowed.),

{¶22} The Ohio Supreme Court revisited this issue one year later in *Holliman v. Allstate Insurance Co. Corp*., supra, in which the decedents of passengers killed in a motor vehicle accident recovered under the driver's UM/UIM policy. Thereafter, the passengers sought further UM/UIM coverage under an umbrella policy providing excess UM/UIM coverage to the insured driver by Allstate. Allstate denied the claims arguing that the passengers were not insureds under the UM/UIM umbrella policy. *Hollman v. Allstate Insurance Co., Corp.* (1999), 86 Ohio St.3d at 415. The court agreed with Allstate and held:

{¶23} "Here, [the passengers] fail the first prong of the *Martin* test, in that they are not insureds under the Allstate umbrella policy. Although plaintiffs may suggest that the narrow definition of "insured persons" contained in the umbrella

policy is simply an attempt to circumvent *Martin*, the argument is unpersuasive. Unlike the claimant in *Martin*, plaintiffs are not seeking uninsured motorist coverage under their policies. Rather, they contend that because they were passengers in an automobile driven by an individual who was an insured under an uninsured motorist policy, they are entitled to relief under that policy, even though they are not named as insureds in it. Nothing in R.C. 3937.18 or *Martin* prohibits the parties to an insurance contract from defining who is an insured person under the policy. " Id. (citations omitted)

{¶24} We find *Holliman* to be controlling in the matter sub judice. Appellant, like the plaintiff in *Holliman,* argues that Sheppard, the passenger in Hites' vehicle, is entitled to UM/UIM coverage simply because that vehicle was driven by a person who was insured under a UM/UIM policy. The *Holliman* court rejected this argument and so must we. Therefore, the clause identified as section B(2), defining who will be an insured for purposes of UM/UIM coverage is not invalid and unenforceable.

{¶25} In the alternative to the argument that Section B(2) of Motorists' UM/UIM policy was an invalid definition of an insured, Appellant-Cincinnati argues that the provision violates the former R.C. 3937.18(A)(1) which provided that UM/UIM coverage shall be offered "***in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage*** ***." (emphasis

added) If UM/UIM coverage is not offered, it becomes part of the policy by operation of law. *Abate v. Pioneer Mut. Cas. Co.* (1970), 22 Ohio St.2d 161, 258 N.E.2d 429, paragraphs one and two of the syllabus. Appellant reasons that since Sheppard qualifies as an insured for purposes of liability insurance under Hites' policy with Motorists, UM/UIM coverage in the same amount should arise by operation of the law.

{¶26} The Motorists Liability Policy issued to Sandy Hites defines an insured as including "any person using your covered auto." Appellant asks this court to interpret the former R.C. 3937.18(A)(1) to require Motorists to offer UM/UIM coverage to any person who uses Hites' vehicle. This interpretation would require that Motorists anticipate all the potential users of Hites' vehicle and to then offer UM/UIM insurance accordingly. Such an interpretation of the former R.C. 3937.18(A)(1) is unreasonable and unsupported by law. Therefore, we find that Section B(2) in Motorists' UM/UIM policy does not violate R.C. 3937.18 and is not otherwise invalid as a matter of law. Appellant's first assignment of error is overruled.

Second Assignment of Error

{¶27} Appellant's second assignment of error alleges that the Section B(2) of the Motorists UM/UIM Policy issued to Sandy Hites is ambiguous and therefore unenforceable. Once again, Section B(2) reads as follows:

{¶28} "B. Insured as used in this endorsement means:

{¶29} "***

{¶30} "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."

{¶31} According to Cincinnati, the term "family member," as used above, could be interpreted to refer to a family member of Sandy Hites'. The argument is best summarized as follows. Since family member in the UM/UIM section B(2) occurs in bold print, we must look to the definition section of the Motorists policy to define it. Motorists' policy defines family member as "a person related to you by blood, marriage or adoption who is a resident of your household." Cincinnati claims that since the definition of family member contains "you" and "your" and those terms are defined within the Motorist policy as Sandy Hites or her husband, the family member in Section B(2) could be interpreted to refer to Hites' family members. We do not agree.

{¶32} Insurance coverage is determined by reasonably construing the contract "in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed." *Dealers Dairy Products Co. v. Royal Ins. Co.* (1960), 170 Ohio St. 336, paragraph one of the syllabus. "Where provisions of a contract of insurance are reasonably

susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *Reinbolt v. Gloor* (Sept. 10, 2001), Henry App. No. 7-01-05, 2001-Ohio-2224, at ¶ 9; citing *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, syllabus. The operative term in this matter is "reasonably susceptible." We do not find the term "family member" to be reasonable susceptible to the meaning that Appellant suggests.

{¶33} First of all, the "you" and "your" within the definition of family member are not in bold print, and therefore the reader is not directed to Motorists' policy definition of "you" and "your." Secondly and most importantly, we find no ambiguity in the Motorist UM/UIM Policy Section B(2) as stated above. Clearly the section provides that Sheppard, as an occupant of Hites' covered auto, would be covered so long as she was not a named insured or an insured *family member under another UM/UIM policy.* The prepositional phrase, "under another UM/UIM policy" unambiguously modifies the term "family member" and is therefore susceptible to only one meaning. Charlotte Sheppard is an insured family member (by marriage) under the UM/UIM policy issued to her husband Edward Sheppard. This much the parties have stipulated. Therefore, Charlotte Sheppard is not an insured under the Motorists UM/UIM policy issued to Sandy Hites. Appellant's second assignment of error is overruled.

{¶34} In conclusion, we do not find well taken Appellant-Cincinnati's arguments that Appellee-Motorists' UM/UIM policy definition of an insured is invalid, ambiguous, or otherwise unenforceable. Said policy definition clearly precludes coverage for Charlotte Sheppard. Therefore, judgment as a matter of law is proper as to Appellee-Motorists Mutual Insurance Company. For the reasons stated it is the order of this Court that the judgment of the Court of Hancock County is hereby affirmed.

Judgment affirmed.

SHAW, P.J. and HADLEY, J., concur.