[Cite as *Fellman v. Sedzmak*, 2016-Ohio-1444.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ROBERT S. FELLMAN, et al., NOREEN UDELL EXECUTRIX, et al., PLAINTIFFS-APPELLANTS, VS. PAUL SEDZMAK, et al., DEFENDANTS-APPELLEES.	)))))))))	CASE NO. 15 MA 0095 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 2013 CV 1599

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiffs-Appellants:

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Atty. Justin A. Markota
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For Defendants-Appellees:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 23, 2016

ROBB, J.

{¶1} Plaintiff-Appellants Robert and Cathy Fellman appeal the decision of the Mahoning County Common Pleas Court granting summary judgment in favor of Defendant-Appellee Erie Insurance Group. The Fellmans contend the court erred in finding Mr. Fellman was not covered by the underinsured motorist's endorsement in the policy issued to his businesses since he was not occupying a vehicle when his injury occurred. The issue is whether a clause in the endorsement provides underinsured motorists coverage to Mr. Fellman as an active member or active executive officer of the insured organizations regardless of his occupancy of a vehicle. For the following reasons, the trial court's order granting summary judgment in favor of Erie Insurance Group is affirmed.

STATEMENT OF THE CASE

{¶2} In 2011, Paul Sedzmak lost control of a vehicle and crashed into La Villa Sports Bar and Grille. A television inside of the building fell onto Mr. Fellman causing him injuries. In 2013, the Fellmans sued their personal automobile insurer, the driver of the vehicle, the owner of the vehicle, the establishment, the owner of the establishment, and Erie Insurance. Through various agreements, the case was settled and dismissed against all defendants except Erie Insurance, the issuer of a garage auto policy from which the Fellmans sought underinsured motorist's coverage.

{¶3} The named insureds under the Erie Insurance policy are: Boardman Imports; Boardman Subaru; RCJR, Inc.; and RCJR Holdings, Ltd.[1] At the time of the accident, Mr. Fellman owned Boardman Subaru and worked there full-time. (R. Fellman Depo. at 8-9). He was the president of RCJR, Inc. and the sole active member of the limited liability company RCJR Holdings, Ltd. (R. Fellman Affidavit).

{¶4} Erie Insurance filed a motion for summary judgment arguing Mr. Fellman was not covered by the uninsured/underinsured motorist's endorsement since he was not occupying a vehicle at the time of his injury. Erie emphasized that

[1] The Declarations page at Item 1 lists Boardman Imports as the named insured. Item 6, which contains the endorsements and exceptions to the Declarations, says the named insured shall include all four listed entities.

sitting inside an establishment cannot be equated with even the broadest definition of occupying a vehicle.

{¶5} The Fellmans' response and cross motion for summary judgment urged Mr. Fellman was covered because he was an active member of the insured limited liability company and/or an active executive officer of the insured corporation. They argued that the occupying a vehicle requirement was positioned before a semi-colon and did not apply to the independent clause dealing with active members.

{¶6} On May 18, 2015, the trial court granted summary judgment in favor of Erie Insurance and overruled the summary judgment request filed by the Fellmans. The court found that reasonable minds could only come to the conclusion that Mr. Fellman did not occupy a covered auto while sustaining injury. The court specified that an active member or active executive officer of the organization must still occupy a covered vehicle in order to be considered an insured under the underinsured endorsement. The Fellmans' appeal followed.

POLICY INTERPRETATION

{¶7} Summary judgment can be granted only when there remain no genuine issues of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). We consider the propriety of granting summary judgment under a de novo standard of review. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. We also review the question of whether an insurance policy has plain language under a de novo standard of review. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995).

{¶8} It is impermissible to resort to construction of the language in a policy if that language can be given a plain and ordinary meaning. *Id.* at 108. A contract and the terms within it are unambiguous if the terms can be given a definite legal meaning. *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 219, 2003-Ohio-5849, 797 N.E.2d 1256, 1261, ¶ 11; *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, 875 N.E.2d 31, ¶ 7.

{¶9} The principles that a contract is to be construed against the drafter and an insurance policy is to be construed in favor of the insured are not applicable unless there exists an ambiguity. *See Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, ¶ 15. Ambiguity exists if the provisions at issue are susceptible of more than one *reasonable* interpretation. *Id.* at ¶ 16. A court cannot construe an ambiguity in favor of the insured where it would result in "an unreasonable interpretation of the words of the policy." *CPS Holdings, Inc.*, 115 Ohio St.3d 306 at ¶ 8 (give effect to each provision if it is reasonable to do so).

POLICY LANGUAGE

{¶10} The uninsured/underinsured motorist bodily injury coverage endorsement provides that the insurer "will pay damages for bodily injury that an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle or an underinsured motor vehicle." The damages must "involve bodily injury sustained by an insured." This leads to the section entitled, "WHO IS AN INSURED," which states in full:

> *INDIVIDUAL AS NAMED INSURED*
>
> If an individual is named in Item 1. on the Declarations, then the following are insureds:
>
> 1. an individual named in Item 1. on the Declarations and any resident relative.
>
> 2. anyone while occupying an owned auto, a temporary substitute auto or a newly acquired auto.
>
> 3. anyone who is entitled to recover damages because of bodily injury sustained by any person insured under this endorsement.
>
> *ORGANIZATION AS NAMED INSURED*
>
> **If an organization is named in Item 1. on the Declarations, then the following are insureds:**

> **1. anyone while occupying an owned auto, a temporary substitute auto or a newly acquired auto; active partners, active members, or active executive officers of the organization named in Item 1. on the Declarations and their spouses residing in the same household are also insureds while driving any auto, but only if** the auto is not owned by, furnished to, or available for the regular use of the active partner, active member, or active executive officer or the spouse of that active partner, active member, or active executive officer residing in the same household.
>
> 2. anyone who is entitled to recover damages because of bodily injury sustained by any person insured under this endorsement.

(Disputed clause in bold; italics original.)

{¶11} Thereafter, the policy defines an individual as a natural person. An organization is defined as a partnership, corporation, association, limited liability company, or any other form of organization. An insured is defined as any person or organization specifically said to be covered in the "WHO IS AN INSURED" section of the endorsement.

ASSIGNMENT OF ERROR: MUST INSURED OCCUPY AUTO?

{¶12} The Fellmans' sole assignment of error provides:

> The trial court erred, as a matter of law, in granting Defendant's motion for summary judgment and denying Plaintiff's Cross Motion because Robert Fellman is NOT required to be 'occupying' an auto for Uninsured/Underinsured Motorist coverage to apply pursuant to the Policy due to his classification as an active member of the insured organization.

{¶13} The Fellmans contend the first sub-section in the "Organization As Named Insured" section of the uninsured/underinsured motorist's endorsement fails to clearly and unambiguously require an active member of the insured organization to occupy an auto in order to receive coverage. They urge it is reasonable to interpret this sub-section as providing coverage to an active member of the organization as a

result of his status alone. They note that if this is a reasonable interpretation, then the court must construe the policy in favor of coverage and against the insurer.

{¶14} The Fellmans focus on the semicolon in the sentence, urging it completely separates the active member category from the occupying category of insureds. In addition, they suggest the phrase "while driving any auto" applies only to spouses of active partners, members, or executive officers. For comparison purposes, the Fellmans point to the "Individual As Named Insured" section as an example of how separate categories can be listed in an unambiguous manner.

{¶15} Erie Insurance insists that the insured must be occupying a vehicle in order to be covered. They initially cite to the clause under "Individual As Named Insured," which provides an insured is anyone while occupying an owned auto, a temporary substitute auto, or a newly acquired auto. (This same method of coverage is listed under the "Organization as Named Insured" section.) Erie Insurance acknowledges that "anyone" can include an active member but emphasizes that the active member must be occupying an auto.

{¶16} Then, Erie Insurance quotes from the first sub-section of the "Organization As Named Insured" section. As to the language after the semi-colon, they urge the phrase "are also insured while driving any auto" applies to the active member as well as the spouse (and not solely to the spouse). They alternatively argue the semi-colon merely creates a sub-category to the preceding definition, which maintains the occupying requirement but adds coverage for "any auto" driven by an active member or spouse (as long as certain other conditions are met).

{¶17} As a natural person is not named in Item 1 of the Declarations, we do not evaluate "Who is an Insured" under the section applicable when "an individual is named in Item 1. on the Declarations * * *." *See* Policy Endorsement's definition of Individual. *Compare* Policy Endorsement's definition of Organization. Rather, we evaluate "Who is an Insured" by applying the section applicable "[i]f an organization is named in Item 1. on the Declarations * * *."

{¶18} The "Organization as Named Insured" section contains two numbered sub-sections. Only the first numbered sub-section is in dispute here. The question is whether the first sub-section of "Organization as Named Insured" provides Mr.

Fellman with underinsured motorists coverage merely due to his status in the insured organization without regard to any other qualifying condition. This sub-section involves one sentence containing more than one concept.

{¶19} First, it provides that "anyone" is an insured while "occupying" an owned auto, a temporary substitute auto, or a newly acquired auto. This would include an active member in the insured organization, his spouse, his child, a neighbor, a customer, etc., as long as that individual was occupying one of those listed autos. The parties do not dispute that Mr. Fellman was not occupying a vehicle at the time of his injury (let alone one of the listed types of vehicles).

{¶20} The second concept in the sentence occurs after the semi-colon. This relates only to active members, active partners, active executive officers, and their spouses (residing in the same household). The active member's coverage is not limited to occupying the insured organizations' owned auto, temporary substitute auto, or newly acquired auto but applies to driving any auto under certain conditions.

{¶21} The Fellmans urge that the occupying portion of the clause (which is before the semi-colon) has no relation to the active member portion of the clause (which is after the semi-colon). A semi-colon is often used to grammatically link two independent clauses into one sentence in order to signal to the reader they are separate, *but related*, thoughts. *See In re Miller's Estate*, 160 Ohio St. 529, 541, 117 N.E.2d 598 (1954). As the Fellmans point out, a semi-colon can also be used when listing distinct paths to coverage. For ease of reading, we re-quote the pertinent language here:

> * * * the following are insureds:
>
> 1. anyone while occupying an owned auto, a temporary substitute auto or a newly acquired auto; active partners, active members, or active executive officers of the organization named in Item 1. on the Declarations and their spouses residing in the same household are also insureds while driving any auto, but only if the auto is not owned by, furnished to, or available for the regular use of the active partner, active member, or active executive

> officer or the spouse of that active partner, active member, or active executive officer residing in the same household.

{¶22} This sentence divided by a semi-colon is set up as follows: anyone is an insured if they were occupying certain vehicles related to the insured organization; those individuals who fall into a special category "are also insureds while driving any auto" (subject to certain conditions regarding the auto). The second half of the sentence provides a coverage option available to active members (and their spouses) by changing the field of autos to "any auto" with limits ("but only if * * *") and narrows the qualifying behavior to driving.

{¶23} Contrary to the Fellmans' argument, the statement after the semi-colon, "are also insureds while driving any auto * * *," does not merely apply to spouses. There is no grammatical indication before "and their spouses" to set off the subsequent language. We cannot add a semi-colon before "and their spouses" as the Fellmans' argument would necessarily require. Paradoxically, they emphasize the semi-colon prior to the active member portion of the clause and then ignore the lack of one in the middle of the clause they wish to divide.

{¶24} Under the plain language of the clause, Mr. Fellman is not covered under the endorsement merely because he is an active member or active executive officer at the time of an injury at the hands of an underinsured motorist. It is clear the statement, "are also insureds while driving any auto * * *," applies to "active partners, active members, or active executive officers of the organization named in Item 1. on the Declarations and their spouses * * *."

{¶25} The fact that the parties dispute the meaning of a clause does not make it ambiguous. See, e.g., *Kennedy v. Owosso Group*, 134 F.3d 371 (6th Cir.1998) ("The mere fact that the parties dispute the meaning of a contract term does not necessarily mean that the term is ambiguous"); *Wildman v. Mary Black Schroder Home for the Aging, Inc.*, 1st Dist. No. CA74-05-0036 (May 19, 1975) (the parties' disagreement does not necessarily mean the contract is ambiguous.) Accordingly, in order to use the method of coverage occurring after the semi-colon, Mr. Fellman would have to be injured "while driving" (any auto meeting certain criteria). The

parties do not dispute that Mr. Fellman was not driving any vehicle at the time of his injury.

CONCLUSION

{¶26} In summary, Mr. Fellman is an insured and covered by the uninsured/underinsured motorist's endorsement *while occupying* an owned auto, a temporary substitute auto, or a newly acquired auto. As an active member and active executive officer, Mr. Fellman is *also* an insured *while driving* any auto (if that auto is not owned by, furnished to, or available for the regular use of Mr. Fellman or his spouse residing in the same household). These were the two methods of coverage available to Mr. Fellman. In order to be considered an insured, Mr. Fellman must have been "occupying" a specific category of auto or "driving" any auto (that meets certain criteria) at the time of the injury.[2] Mr. Fellman was not defined as an insured at the time of injury merely because he was an active member or active executive officer of the insured organization.

{¶27} The trial court's judgment is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.

[2] At various points, Erie Insurance broadly argues that a person must be occupying a vehicle to be covered. The trial court also stated that an active member must still occupy a vehicle to be considered an insured under the endorsement (without reference to driving). This seems to have led the Fellmans to believe the court applied the language before the semi-colon as an overriding requirement. We note that a person who is driving a vehicle is necessarily occupying a vehicle. If he was not occupying a vehicle, then he necessarily was not driving it. Where the claimant was not "occupying" any vehicle, the aspects of the sub-category of "driving" a vehicle need not be reached. In any event, it is undisputed that Mr. Fellman was not driving or otherwise occupying a vehicle.