[Cite as *Lawrence v. Lawrence*, 2007-Ohio-4634.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LORI LAWRENCE

Plaintiff-Appellant

-vs-

LINDSEY LAWRENCE, ET AL.

Defendant-Appellee

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 06-CA-14

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Coshocton Court of Common Pleas, Civil Case No. 04-CI-587
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 7, 2007

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Gwin, PJ.

{¶1} Plaintiff-appellant Lori Lawrence appeals a judgment of the Coshocton County Court of Common Pleas, which granted summary judgment in favor of defendant-appellee All American Insurance Company. Appellant states the court's decision is incorrect on three propositions of law:

{¶2} "I. THE HOUSEHOLD EXCLUSION IS NOT PROVIDED FOR IN THE CURRENT VERSION OF O.R.C. SECTION 3937.18 AND IS, THEREFORE, INVALID AND UNENFORCEABLE.

{¶3} "II. THE LEGISLATIVE HISTORY OF O.R.C. 3937.18 EVIDENCES THE LEGISLATURE'S INTENT TO ELIMINATE THE HOUSEHOLD EXCLUSION.

{¶4} "III. AMBIGUITIES IN INSURANCE POLICIES SHOULD BE INTERPRETED LIBERALLY IN FAVOR OF COVERAGE."

{¶5} On October 19, 2002, appellant was a passenger in a motor vehicle, operated by defendant Lindsey Lawrence, appellant's 15-year-old daughter, who is not a party to this appeal. Lindsey negligently caused a single car accident in which appellant suffered bodily injuries.

{¶6} Appellant owned the automobile, which was specifically identified as an insured vehicle in the insurance policy issued by appellee to appellant. No bodily injury liability insurance coverage existed for appellant's injuries, and appellant is not disputing

the lack of liability coverage. Appellee denied uninsured motorist coverage based on the policy provision an "uninsured motor vehicle" does not include any vehicle "owned by or furnished or available for the regular use of you or any 'family member'".

{¶7} Appellant filed a complaint against her daughter Lindsey and appellee on October 15, 2004. Appellant partially voluntarily dismissed her claims against appellee on July 12, 2005, but filed an Amended Complaint on April 17, 2006, re-asserting her claim for uninsured motorist coverage benefits. Appellee filed its Motion for Summary Judgment on July 6, 2006, which the trial court granted on September 6, 2006.

{¶8} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212.

{¶9} Civ. R. 56(C) states, in pertinent part:

{¶10} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶11} Pursuant to the above-stated rule, a trial court may not grant summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment, on the ground that the non-moving party cannot prove its case, bears the initial burden of informing the trial court of the basis for its motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the non-moving party's claim. The moving party cannot discharge its initial burden under Civ. R. 56 simply by making a conclusory assertion that the non-moving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates the non-moving party has no evidence to support the non-moving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the non-moving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429 citing *Dresher v. Burt* (1966), 75 Ohio St.3d 280.

I, II, III

{¶12} All of appellant’s propositions of law address the court’s ruling on the summary judgment motion. As such, we will address appellant’s arguments together.

{¶13} Appellant argues resolution of this appeal requires interpreting R.C. 3937.18(I)(1) and its application to what has traditionally been referred to as the

"household exclusion" in uninsured/underinsured motorist coverage policies. Appellant suggest we review the legislative history of the statute.

{¶14} H.B. 261, effective September 3, 1997, mandated the offering of uninsured motorist coverage in conjunction with the issuance of a motor vehicle liability policy. It provided:

{¶15} "(J) The coverages offered under division (A) of this section or selected in accordance with division (C) of this section may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under any of the following circumstances:

{¶16} "(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, <u>if the motor vehicle is not specifically identified in the policy</u> under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided (emphasis added)."

{¶17} ***

{¶18} "(K) As used in this section, 'uninsured motor vehicle' and 'underinsured motor vehicle' do not include any of the following motor vehicles:

{¶19} ***

{¶20} (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 a named insured."

{¶21} R.C. 3937.18 was subsequently amended by S.B. 267. S.B. 267 maintained the mandatory offering requirements of the previous version, and section (J)(1) remained unchanged However S.B. 267 deleted section (K)(2).

{¶22} R.C. 3937.18 was again amended effective October 31, 2001, to the version in effect on the date Appellee issued its policy to Appellant. Like its predecessor, this version of R.C. 3937.18 did not include the (K)(2) "household exclusion" provision, and additionally eliminated the mandatory offering provisions found in the previous two versions of the statute.

{¶23} However, in the third version, section (J)(1) was replaced by section (I)(1) which provides:

{¶24} "(I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

{¶25} "(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided. (Emphasis added.)"

{¶26} Part C of the policy in question pertains to uninsured motorist coverage. It provides: "*** 'uninsured motor vehicle' does not include any vehicle or equipment:

{¶27} "1. Owned by or furnished or available for regular use of you or any 'family member'."

{¶28} Appellant argues while the prior versions of R.C. 3937.18(K)(2) permitted insurance companies to include a household exclusion to UM coverage in their policies, the legislature eliminated that subsection when it enacted the present version of the statute. Accordingly, appellant argues appellee's household exclusion is now unenforceable because it is not permitted by statue and because it attempts to eliminate UM coverage for a recognized cause of action, in violation of the statutory intent, see *State Farm Automobile Insurance Co. v. Alexander* (1992), 62 Ohio St. 3d 397.

{¶29} Appellee cites us to two appellate decisions. In the first, *Green v. Westfield Ins. Co*., 2006-Ohio-5057, the Ninth District Court of Appeals concluded the elimination of the mandatory offering and implied coverage by operation of law provisions, when coupled with the plain language of R.C. 3937.18(I)(1) authorizing exclusionary or limiting coverage under specified circumstances, including but not limited to those listed, evidences a clear intent to recognize the household exclusion.

{¶30} The other appellate case upon which Appellee relies is *Kelly v. Auto-Owners Ins. Co.,* 2006-Ohio-3599. The *Kelly* Court also upheld the household exclusion as it pertains to UM coverage. Like the *Green* Court, the *Kelly* Court noted the amended version of R.C. 3937.18 eliminated the requirement insurers must offer UM coverage and exclusions are not limited to the ones specified in section (I).

{¶31} The *Kelly* Court also found where a policy excludes liability coverage, the exclusion would be rendered meaningless if the policy gave coverage back in the UM portion of the policy.

{¶32} We agree with the *Kelly* and *Green* courts. The current version of the statue permits insurance companies to include the household exclusion. The policy must set out the specific circumstances, but the statute does not enumerate all the circumstances under which exclusion is permissible. We find the exclusion in the instant case is enforceable.

{¶33} Accordingly, we find the court did not err as a matter of law on the propositions set out by appellant. The judgment of the trial court is affirmed.

By: Gwin, P.J.

Wise, J. concurs;

Hoffman, J. dissents

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

WSG:clw 0814

Hoffman, J., dissenting

{¶34} I respectfully dissent from the majority opinion.

{¶35} The majority bases its decision to affirm upon its agreement with the *Kelly* and *Green* Courts.[1] Unlike the majority, I do not find either case persuasive and offer the following analysis.

{¶36} Appellee correctly identifies the issue presented: "Is the provision within the UM/UIM coverage of the All America policy, that prohibits uninsured motorist coverage being applicable to an accident in which the tortfeasor vehicle (uninsured motor vehicle) is one owned by or furnished or available for the regular use of the named insured, a valid and enforceable limitation upon uninsured motorist coverage in a personal automobile insurance policy?"[2] For the reasons that follow, I find it is not.

{¶37} Appellant relies primarily upon *Shay v. Shay*, 2005-Ohio-5874, to support her argument. It is important to note the *Shay* Court was called upon to address the

[1] Majority Opinion at ¶32.
[2] Brief of Appellee at 3.

issue applying the S.B. 267 version of R.C. 3937.18, not the version applicable herein. Appellant quotes the analysis utilized by the *Shay* Court in reaching the conclusion the household exclusion was invalid:

{¶38} "Because R.C. 3937.18(K)(2) permitted insurance companies to permit a household exclusion to UM coverage in their policies, such a restriction in Ohio Mutual's 1998 policy was enforceable. However, on September 21, 2000, Am. Sub. S.B. 267 (SB 267) eliminated R.C. 3937.18(K)(2) as created by HB 261. Without R.C. 3937.18(K)(2) in effect, a provision seeking to deny UM coverage on the basis of a household exclusion would be unenforceable because it is not permitted by statute and because it attempts to eliminate UM coverage for a recognized cause of action in violation of the purposes and mandates of R.C. 3937.18." Id (Citations omitted).

{¶39} Appellant also cites and quotes the decision of the Huron County Common Pleas Court in *Wertz v. Wertz*, Case No. CVC 2005 0493, decided June 27, 2006,[3] wherein the trial court held:

{¶40} "The problem with American Family's position is that the history of the legislation shows that the Legislature has dealt specifically with intra family exclusions: once when it declared the policy of the State to allow the exclusion in 1997 and again when it repealed the exclusion in September, 2000. Its failure to authorize it in 2001 when it again amended R.C. 3937.18, leaves this Court to conclude that it is the legislative policy of this State to not permit insurance policies effective after 2001 to include an intra family exclusion to their definition of an uninsured motor vehicle."

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[3] *Wertz* involved an analysis of the same version of R.C. 3937.18 involved herein.

{¶41} Appellee responds by arguing the Ohio Supreme Court decision in *Kyle v. Buckeye Union Insurance Co.,* 103 Ohio St. 3d 170, 2004-Ohio-4885, makes it clear the household exclusion is valid and enforceable and not against public policy. In *Kyle*, the Ohio Supreme Court was called upon to determine whether sections (K)(2) and (J)(1) were in conflict under the H.B. 261 version of R.C. 3937.18, effective September 3, 1997. It is important to note the *Kyle* Court was not called upon to analyze the effect of the removal of section (K)(2) in subsequent versions of the statute. I agree with Appellant, the *Kyle* Court did not hold the household exclusion is valid and enforceable in the absence of a specific legislative provision for it. It is that absence, more specifically the removal of section (K)(2), which provides the basis for the *Shay* and *Wertz* courts' decisions.

{¶42} Appellee maintains the result of the amendment of the statute eliminating the mandatory offering and implied coverage by operation of law provisions has caused the arguments for a broad interpretation of uninsured/underinsured coverage in favor of the insured to disappear because limitations and restrictions are no longer contrary to public policy.[4] I do not find the amendment ends my analysis or changes the underlying purpose for providing and securing UM/UIM coverage.

{¶43} I find a difference between the public policy considerations which previously mandated the offering and implied UM/UIM coverage, and the underlying purpose of UM/UIM coverage. While the public policy requiring mandatory offering has indeed been changed by the legislature under the third version of R.C. 3937.18, and UM/UIM coverage will no longer be implied by operation of law, I believe the underlying

[4] Brief of Appellee at 10.

purpose of UM/UIM coverage, *once offered and accepted*, remains the same, i.e., to provide protection for insureds against damages caused by uninsured/underinsured drivers.

{¶44} In *State Farm Automobile Insurance Co. v. Alexander* (1992), 62 Ohio St. 3d 397, the Ohio Supreme Court held the household exclusion conflicted with the coverage mandated by R.C. 3937.18.[5] The *Alexander* Court quoted R.C. 3937.18(A)(1) which provided uninsured motorist coverage " * * * shall provide protection for bodily injury * * * for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury * * *" Id at 399.

{¶45} While mandatory offering and implied coverage by operation of law have been removed from the statute as an expression of the legislature's public policy, the statute's purpose as found by the *Alexander* Court remains the same. The version of R.C. 3937.18 applicable sub judice, indirectly reaffirms that purpose in section (B)(1) by including within the definition of an "uninsured motorist" the owner or operator of a motor vehicle if there exists no bodily injury liability bond or insurance policy covering the owner's or operator's liability to the insured.

{¶46} Appellee and the majority cite two appellate decisions which have reached the opposite conclusion I do herein. In the first, *Green v. Westfield Ins. Co*., 2006-Ohio-5057, the Ninth District Court of Appeals concluded the elimination of the mandatory offering and implied coverage by operation of law provisions when coupled with the plain language of R.C. 3937.18(I)(1) authorizing exclusionary or limiting coverage under

[5] I believe H.B. 261 was the version under review in *Alexander*.

specified circumstances, including but not limited to those listed thereafter, evidences a clear intent to recognize the household exclusion.

{¶47} Crucial in my analysis is the first of those listed specified circumstances. R.C. 3937.18(I)(1) provides:

{¶48} "(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse or a resident relative of a named insured [i.e., the "household exclusion"], *if the motor vehicle is not specifically identified in the policy under which a claim is made* * * *" (Emphasis added).

{¶49} It is the inclusion of the "if the motor vehicle is not specifically identified in the policy under which a claim is made" language which caused Judge Carr to dissent in *Green*. I agree with the construction proferred by the appellant in *Green.* The legislature has expressed its intent UM/UIM coverage may not be precluded for household family members if the vehicle is specifically identified in the policy. To conclude otherwise would render the qualifying language superfluous.[6] I find the specific limiting language in section (I)(1) prevails over the more general enabling language in section(I). Because the vehicle Appellant's daughter was operating at the time of the accident is specifically identified in the policy as an insured vehicle on the Automobile Policy Declarations page, I find the household exclusion ineffective in this case.

{¶50} The other appellate case upon which Appellee and the majority rely is *Kelly v. Auto-Owners Ins. Co.,* 2006-Ohio-3599. The *Kelly* Court also upheld the

[6] I recognize as did Judges Whitmore and Boyle in *Green*, our construction of the statute appears to read into the statute the inverse of that which the statute states, i.e., UM/UIM coverage may be precluded under specified circumstances, "including but not limited to" those specifically listed in R.C. 3937.18(I)(1).

household exclusion as it pertains to UM coverage. Like the *Green* Court, the *Kelly* Court noted the amended version of R.C. 3937.18 eliminated the requirement insurers must offer UM coverage and exclusions are not limited to the ones specified in section (I).

{¶51} The primary rationale for the *Kelly* Court's decision seems to be the fact because liability coverage was excluded by the policy, such exclusion would be rendered meaningless if the policy gave coverage back via the UM portion of the policy. The *Kelly* Court speculates family members could plot to recover UM benefits in lieu of bodily injury benefits.

{¶52} While posing an interesting question, the *Kelly* Court fails to address the apparent legislative intent expressed in section (I)(1) regarding specifically identified insured vehicles. Because of this omission, I likewise find *Kelly* unpersuasive. As Judge Carr aptly suggested in *Green,* perhaps the answer lies with more guidance from the legislature.

{¶53} Given the underlying purpose of UM/UIM coverage; the legislative history involving the removal of section (K)(2) as a specifically recognized exclusion from the previous H.B. 261 version of the statute; and considering the legislative intent in adopting the specific language found in section (I)(1) limiting when the household exclusion may be allowed, I conclude Appellee's household exclusion is invalid under the facts of this case.

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HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LORI LAWRENCE	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
LINDSEY LAWRENCE, ET AL.	:	
	:	
Defendant-Appellee	:	Case No. 06-CA-14

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Coshocton County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE