

IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO

VICKY M. BACKIE, Admnx., et al., )

Plaintiffs, )

vs. )

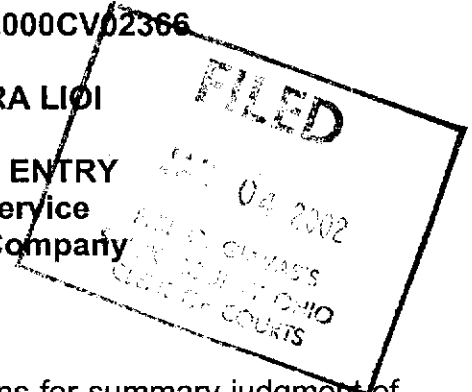
ROBERT CASH, et al., )

Defendants. )

CASE NO. 2000CV02366

JUDGE SARA LIOTI

JUDGMENT ENTRY  
(Personal Service  
Insurance Company  
Policies)



This matter came before the Court upon cross motions for summary judgment of the defendant, Personal Service Insurance Company (hereinafter "Personal Service"), against the claims made by the Backie plaintiffs with respect to coverage on policy nos. 7008532 00 and PES33049-34. A hearing was held on said motions. The Court finds the motion of Personal Service for summary judgment as to policy no. 7008532-00 and the motion of Sharon Backie for summary judgment as to policy no. PES33049-34 well taken for the reasons forth herein.

I.  
Facts

The instant case is an action for the wrongful death of three teenage girls, Teri M. Backie, Jasmine R. Backie and Jamie Marapoa. The three girls were killed when the vehicle in which they were occupying collided with a vehicle driven by Robert D. Cash and owned by Martin Hicklin. Geico Insurance Company insured the vehicle which Mr. Cash was driving, having policy limits of \$50, 000. These policy limits were tendered to the estates of the three girls, amounting to \$16,666.00 per estate.

The instant motions for summary judgment involve claims made by some of the Backie plaintiffs against two policies of insurance issued by Personal Service. The first

policy is a personal auto policy of insurance issued to Sharon Hall, mother of Jasmine Backie, Policy No. 70008532 00. The second is a policy of insurance, Policy No. PES33049-34, was issued to Sharon Hall's employer, Stark County.

**II.**  
**Law and Analysis**

A. Policy No. 70008532-00

Revised Code 3937.18(A)(2) provides, in pertinent part, as follows:

Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for insureds thereunder against loss for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

Under the provision cited above, if the amount of coverage available on behalf of the liable person is in excess of the amount to which the injured person would have been entitled had the liable person had no insurance or underinsurance, UM/UIM coverage is not available.

In both the written briefs and oral argument, counsel for the Backie plaintiffs conceded that summary judgment should be entered in favor of Personal Service Company with regard to this policy, as the policy's limits of \$12,500 are less than the \$16,666 paid to each plaintiff's estate by the tortfeasor's insurer, Geico Insurance

Company. Thus, the Court finds that there is no genuine issue of material fact and that Personal Service is entitled to summary judgment as a matter of law with regard to all claims for coverage under Policy No. 7008532 00.

B. Policy No. PES33049-34

The plaintiff, Sharon Hall, is also making a claim under Personal Service Policy No. PES33049-34, issued to Sharon Hall's employer, Stark County. Although Personal Service has raised the issue in its supplemental pleadings that the policy was intended to cover the three commissioner's individually, the Court finds that the Declarations page to the policy does not identify such three individuals. Rather, the Declarations page indicates that the insured is an "Organization", with a business description of "Municipality". The Declarations page does not contain the name of the insured. The only document within the policy which identifies the insured is the purported rejection of uninsured/underinsured motorist coverage form, which identifies the "Named Insured" as "Stark County". Additionally, in answers to requests for admissions, Personal Service has admitted that Policy No. PES33049-34 was issued to Stark County and that Sharon Hall was an employee of the Named Insured. See, Answers to Requests for Admissions 7 & 8. In the Business Auto Coverage Form, the word "you" as contained in the policy is defined as follows:

[t]he words "you" and "your" refer to the Named Insured shown in the Declarations. \* \* \*

Under the Supreme Court of Ohio's analysis in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, it is reasonable to conclude that the word "you" in the policy, while referring to Stark County, means the employees who work for the county of

Stark, since a county can only operate through its employees. Accordingly, this Court finds that Sharon Hall, as an employee of Stark County, the Named Insured, is an insured under the policy.

The next issue surrounding this policy is whether the rejection of uninsured/underinsured motorists coverage executed by the Stark County Commissioners was an effective rejection under H.B. 261 and *Linko v. Indemnity Ins. Co. of North America* (2000), 90 Ohio St.3d 445.

With regard to the validity of a purported rejection of uninsured/underinsured motorists coverage, the Supreme Court of Ohio has instructed that it is the statutory law and case law on the date of the particular policy and/or the latest two year renewal, whichever occurred just prior to the date of loss which is controlling. *Ross v. Farmer's Ins.* (1998), 82 Ohio St.3d 281; *Wolfe v. Wolfe* (2000), 88 Ohio St.3d 246. R.C. 3937.18 was amended on September 3, 1997, by H.B. 261 which provided:

(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury, sickness, or disease, including death under provisions approved by the superintendent of insurance, for the protection of insureds thereunder who are legally entitled to recover from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

\* \* \*

(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for an insured against loss for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

\* \* \*

(C) A named insured or applicant may reject or accept both coverages as offered under division (A) of this section, or may alternatively select both such coverages in accordance with a schedule of limits approved by the superintendent. The schedule of limits approved by the superintendent may permit a named insured or applicant to select uninsured and underinsured motorists coverages with limits on such coverages that are less than the limit of liability coverage provided by the automobile liability or motor vehicle liability policy of insurance under which the coverages are provided, but the limits shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. A named insured's or applicant's rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be in writing and shall be signed by the named insured or applicant. A named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's written, signed selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be effective on the day signed, **shall create a presumption of an offer of coverages consistent with division (A) of this section**, and shall be binding on all other named insureds, insureds, or applicants.

(Emphasis added.)

The controlling case on the issue of a valid offer or rejection of uninsured/underinsured motorists coverage under the prior version of R.C. 3937.18 is *Linko v. Indemnity Insurance Co. of North America* (2000), 90 Ohio St.3d 445, 449. In interpreting the prior version of R.C. 3937.18, which also required the offer of uninsured/underinsurance coverage, but which did not contain the presumption relative to such offer contained in the new subsection (C), the Supreme Court in *Linko* held:

We agree with the following required elements for written offers imposed by Ohio appellate courts: a brief description of the coverage, the premium for that coverage, and an express statement of the UM/UIM coverage limits. . . . We find that an offer must include those three elements.

Under *Linko*, if the written offer does not contain the *Linko* elements, then it is not a valid offer of UM/UIM coverage and the purported rejection of that coverage is invalid. UM/UIM coverage then attaches to the policy by operation of law. *Abate v. Pioneer Mutual Casualty Co.* (1970), 22 Ohio St.2d 161, paragraph two of the syllabus. With regard to the rejection before it, the Court in *Linko* explained:

Indemnity's alleged offer is complete only in its incompleteness. It does not describe the coverage, does not list the premium cost of UM/UIM coverage and does not expressly state the coverage limits. We find that an offer must include those three elements. The indemnity rejection form, lacking in that required information, thus could not be termed a written offer that would allow an insured to make an express knowing rejection of the coverage.

In the instant case, the rejection fails to include the premium for underinsured motorist coverage in the offer. Thus, the decision before this Court is whether H.B. 261 is subject to the Supreme Court's decision in *Linko* as to what constitutes a valid offer. The Court notes that H. B. 261 could not have been passed as a response to *Linko*, in that the effective date of H.B. 261 precedes *Linko*. Further, the Court notes that, in the

subsequent version of R.C. 3937.18 as amended by Sub. S.B. 97, language specifically overruling *Linko* is present.

The offer and rejection, in the instant case, states, in pertinent part:

REJECTION OR REDUCTION OF UNINSURED/UNDERINSURED MOTORIST COVERAGE

Ohio law requires that we write uninsured and underinsured motorist coverage equal to bodily injury limits of your automobile policy unless you, the insured, state that you want lesser limits or that you do not want this protection.

Uninsured and underinsured motorist coverage, therefore, will be included in your policy equal to your bodily injury liability limits. If you want lesser coverage, or want to reject entirely, it will be necessary for you to complete this form and return it to the company.

Uninsured and underinsured motorist coverage protects you, with the same terms and limits of the policy, if you suffer bodily injury or death for which an uninsured and underinsured motorist is legally liable.

       I (We) do not want Uninsured Underinsured Motorists Coverage equal to the limits on my (our) automobile policy and desire                      Limits.

XXX I (We) reject Uninsured & Underinsured Motorists Coverage in its entirety.

Effective Date December 12, 1998.

Stark County  
Named Insured

PES 0033049  
Policy Number

The purpose of statutory construction is to give effect to the legislature's intent. *Featzka v. Millcraft Paper Co.* (1980), 62 Ohio St.2d 245, 247. Absent clear contrary legislative intent, words in the statute are to be read in their given context and construed according to their plain and ordinary meaning. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137.

H.B. 261 specifically provides for the offer and rejection to be in writing. If these requirements are met, a presumption is raised with regard to the validity of the rejection. This concept of "presumption" is not new to Ohio law. In *Avemco v. Eaves* (1990), 67 Ohio App.3d 563, the Court was interpreting the presumption of mailing that arises from

usual office practice proved and followed with regard to a specific document. In applying the presumption the Court stated:

However, if a presumption is created, once a business practice or custom is shown, the trier of fact must find that the document was mailed *unless* evidence has been submitted which counterbalances the evidence to sustain the presumption.

(Emphasis in original.)

The Supreme Court of Ohio explained further the concept of a rebuttable presumption in *In re Guardianship of Breece* (1962), 173 Ohio St. 542, by quoting from *20 American Jurisprudence*, 163, Evidence, Section 158:

But a presumption will never be construed or defined in such a manner as to extend its application beyond the realm of reasonable probability or certitude. Accordingly, courts will not define presumptions in such manner as to imply superiority over established facts. Where facts appear, presumptions recede. Thus, the necessity for resorting to presumptions disappears when there is direct and positive evidence upon the matter in issue.

Thus, a presumption of law is a procedural device which takes the place of evidence in certain cases until the facts in lieu of which the presumption operates are shown. *Shepherd v. Midland Mutual life Insurance Co.* (1949), 152 Ohio St. 6. It is equivalent to a substantive rule of law that a particular fact must be assumed when another particular fact or group of facts exist, or there is substantial evidence of such particular facts, unless and until the truth of the assumed fact is disproved. *Id.* citing *New York Life Ins. Co. v. Gamer, Ex'rx*, 303 U.S. 161. The presumption imputes to certain facts or group of facts a certain prima facie significance or operation. It casts upon him against whom it operates the duty of meeting this imputation. Should nothing further be adduced it settles the question involved in a certain way. It serves to establish a prima facie case.

The offer in the instant case recites the coverage, the purpose of such coverage, the duty to provide such coverage and the specific means for rejecting such coverage. The insured is given the option of rejecting such coverage in its entirety or opting for the coverage with different limits. The plaintiffs argue that the "offer", in not setting forth the premium for such coverage, did not conform to the requirements set forth by the Supreme Court in *Linko*. This Court agrees. Accordingly, this Court finds that the offer was invalid and uninsured/underinsured coverage arises by operation of law. See, *Pillo v. Stricklin* (Dec. 31, 2001), unreported, Stark County Case No. 2001CA00204.

Finally, Personal Service cites this Court to a policy exclusion contained in the liability portion of the policy, which refers to covered autos and employees acting in the course and scope of employment. Personal Service further argues that where coverage is created due to an ineffective rejection of coverage, that the coverage should not be extended to employees without limitation.

In *Scott-Pontzer, supra.*, the Court specifically addressed the application of the "course and scope of employment" exclusion to uninsured motorists coverage provided by operation of law. In finding that the exclusion was not applicable, the Court held:

Having concluded that Pontzer was an insured under both policies at issue, we must now determine whether appellant is entitled to underinsured motorist benefits. Appellant argues that the court of appeals erred when it determined that underinsured motorist benefits under both the Liberty Fire and Liberty Mutual policies would be available to appellant only if her husband was acting during the scope of his employment when he was killed. We agree with appellant.

In *King v. Nationwide Ins. Co.*, 35 Ohio St.3d at 214, 519 N.E.2d at 1386, we noted that "[i]n the construction of insurance contracts, '[w]here exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof.'" (Quoting *Home Indemn. Co. v. Plymouth* [1945], 146

Ohio St. 96, 32 O.O. 30, 64 N.E.2d 248, paragraph two of the syllabus.) The Liberty Fire policy contains no language requiring that employees must be acting within the scope of their employment in order to receive underinsured motorist coverage. Thus, we find that appellant is entitled to underinsured motorist benefits under the Liberty Fire policy.

On the other hand, Liberty Mutual's umbrella/excess insurance policy did restrict coverage to employees acting within the scope of their employment. However, we have already found that Liberty Mutual had failed to offer underinsured motorist coverage through the umbrella policy issued to Superior Dairy. Thus, any language in the Liberty Mutual umbrella policy restricting insurance coverage was intended to apply solely to excess liability coverage and not for purposes of underinsured motorist coverage. See, e.g., *Demetry v. Kim* (1991), 72 Ohio App.3d 692, 698, 595 N.E.2d 997, 1001. Therefore, there is no requirement in the umbrella policy that Pontzer had to be acting during the scope of his employment to qualify for underinsured motorist coverage. Therefore, appellant is entitled to underinsured motorist benefits under the Liberty Mutual umbrella policy as well.

The Court finds the exclusion in the liability portion of the policy is not applicable to the coverage provided by operation of law, and that Sharon Hall is an insured under Policy PES 33049-34. The Court further finds that since the coverage is provided by operation of law, the limits are the same as those afforded under the liability limits of the policy. The liability limits under the policy are \$1,000,000 and, therefore, the Court finds that the uninsured/underinsured limits available are likewise \$1,000,000.

### III. Conclusion

For all of the forgoing reasons, the Court finds as follows:

- (1) With respect to Personal Service Policy No. 7008532 00, the motion of Personal Service for summary judgment is **SUSTAINED**, and the motion of the Backie plaintiffs is **OVERRULED**, and,

(2) With respect to Personal Service Policy No. PES33049-34, the motion of Sharon Hall for summary judgment is **SUSTAINED**, and the motion of Personal Service for summary judgment is **OVERRULED**.

**IT IS SO ORDERED.**

  
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HON. SARA LIOI

c: All counsel of record