DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STONINGTON INSURANCE COMPANY, a foreign corporation,	No. 1 CA-CV 09-0235
Plaintiff/Counterdefendant/ Appellee,	DEPARTMENT C
v.	**MEMORANDUM DECISION**
JAMES MICHAEL MCWILLIAMS,	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendant/Counterclaimant/ Appellant,	
BROOKE SEIFERT,	
Counterclaimant/Appellant	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-007912

The Honorable Richard J. Trujillo, Judge

REVERSED AND REMANDED

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B R O W N, Judge

¶1 Appellant James McWilliams appeals the trial court's grant of summary judgment in favor of Stonington Insurance Company ("Stonington") regarding an insurance coverage dispute. For the following reasons, we reverse and remand for further proceedings.

BACKGROUND

¶2 Patrick Alexander was employed by Tots Unlimited[1] (the "company") as a maintenance worker, a position which afforded him use of a company vehicle. Late one night in December 2005, Alexander drove the vehicle to downtown Tempe, where he consumed alcoholic beverages with friends. He left in the same vehicle and shortly thereafter was involved in a collision with McWilliams, a pedestrian. McWilliams suffered injuries and sued Alexander for negligence. Alexander defaulted and McWilliams was awarded $486,378 in compensatory and punitive damages and costs. McWilliams and Alexander then entered a *Damron*[2] agreement under which Alexander assigned to McWilliams any rights

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[1] Formally, Borg Holdings GRRO I, L.L.C., GRRO II, L.L.C., Sun Tots, Inc. d/b/a Sunrise Preschool and Tots Unlimited.

[2] *See Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (1969). Under a *Damron* agreement, if the insurer refuses to defend the insured, the latter admits liability and assigns his rights against the insurer to the plaintiff in exchange for a promise not to execute the judgment against the insured. *See Safeway Ins. Co., Inc. v. Guerrero*, 210 Ariz. 5, 7 n.1, ¶ 1, 106 P.3d 1020, 1022 n.1 (2005).

Alexander had against Stonington, the company's insurance carrier. Stonington filed a declaratory action seeking a determination that it had no duty to defend or indemnify Alexander because Alexander had been driving the company vehicle without permission and was therefore uninsured under the company's policy.

¶3 As assignee of Alexander's rights, McWilliams counter-claimed against Stonington for breach of contract and bad faith. The parties filed cross-motions for summary judgment on the issue of whether Alexander had the express or implied permission to drive the company vehicle on the night of the accident and would thus be covered as an insured at that time. The trial court ruled in favor of Stonington, finding as a matter of law that Alexander was not a permissive driver. This timely appeal followed.

DISCUSSION

¶4 Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). A motion for summary judgment should be granted "if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim[.]" *Orme Sch. v. Reeves,* 166 Ariz.

301, 309, 802 P.2d 1000, 1008 (1990). "[W]e view the facts in the light most favorable to the party against whom judgment was entered." *Great Am. Mortgage, Inc. v. Statewide Ins. Co.*, 189 Ariz. 123, 124, 938 P.2d 1124, 1125 (App. 1997) (citation omitted). In determining whether any genuine issues of material fact exist and whether the trial court erred in applying the law, our review is de novo. *Eller Media Co. v. City of Tucson,* 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

¶5 McWilliams argues that the trial court erred in granting summary judgment in favor of Stonington. In urging us to reach that determination, his primary argument is based on his contention that Arizona courts should follow the "initial permission rule," and not the "minor deviation rule," to determine the extent of permission granted to Alexander for use of the vehicle and the resulting liability under the Stonington policy. Alternatively, he asserts that even if this court applies the minor deviation rule, there were sufficient facts in dispute regarding whether Alexander had permission to use the company vehicle on the night of the accident to present the matter to a jury. We address these arguments in turn.

A. Minor Deviation Rule

¶6 Arizona has adopted an omnibus insurance coverage statute, which requires all automobile policies to cover the named insured as well as anyone using the vehicle with express

or implied permission of the insured. Ariz. Rev. Stat. ("A.R.S.") § 28-4009(A)(2) (2004) ("An owner's motor vehicle liability policy shall comply with the following . . . [t]he policy shall insure the person named in the policy as the insured and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured[.]"). The law is well settled that the omnibus statute is to be construed broadly to favor coverage for permissive drivers. *Hille v. Safeco Ins. Co. of Am.*, 25 Ariz. App. 353, 354, 543 P.2d 474, 475 (1975). Whether a person has permission to drive a vehicle is generally a "question of fact to be determined by the trier of fact." *Id*. (citation omitted).

¶7 To make a prima facie showing that Alexander was "insured" under the policy, McWilliams was required to establish that Alexander had either express or implied permission to use the company vehicle as he did on the night of the accident. *See Home Ins. Co. v. Keeley*, 20 Ariz. App. 200, 202, 511 P.2d 213, 215 (1973) (recognizing that the party claiming coverage under an insurance policy has the burden of establishing, under the facts and circumstances, that the driver of the vehicle had the requisite permission). Three rules have evolved in general case law in this regard: (1) the initial permission, or "hell or high water" rule; (2) the "strict construction" rule; and (3)

the minor deviation rule. *See James v. Aetna Life and Cas.*, 26 Ariz. App. 137, 138-39, 546 P.2d 1146, 1147-48 (1976).

¶8 McWilliams urges us to apply the initial permission rule, which provides that liability coverage is available to any driver who is given permission to use an insured vehicle even if the subsequent use is a gross deviation from the scope of the initial grant. *Id*. at 139, 546 P.2d at 1148. In other words, once an owner has relinquished the keys to an authorized driver, that driver is insured for all acts involving the vehicle come "hell or high water." *See Universal Underwriters Ins. Co. v. State Auto. and Cas. Underwriters*, 108 Ariz. 113, 115, 493 P.2d 495, 497 (1972).

¶9 McWilliams argues that the initial permission rule supports the remedial purpose of Arizona's omnibus clause and best reflects our legislature's intent to protect the traveling public from people who are financially irresponsible.[3] *See*, *e.g.*, *Drucker v. Greater Phoenix Transp. Co.*, 197 Ariz. 41, 44,

[3] Noting that the omnibus statute specifically enumerates circumstances under which a motor vehicle liability policy need not provide coverage, A.R.S. § 28-4009(C)(4), McWilliams suggests that had our legislature intended to preclude coverage for employees acting outside the scope of the insured's business, it would have expressly included such an exception as it did for other circumstances. We disagree that a specifically enumerated exception is necessary in the circumstances presented here. The scope of permission intended by the legislature is evident in its requirement that a driver have "express or implied permission of the named insured[.]" A.R.S. § 28-4009 (A)(2).

¶ 15, 3 P.3d 961, 964 (App. 1991) ("The purpose of the financial responsibility laws is the protection of the travelling public from financial hardship resulting from the operation of motor vehicles by financially irresponsible persons." (internal quotations omitted)). Relying on cases from other jurisdictions, he contends that omnibus clauses such as the one adopted in Arizona demand broad application, and only the initial permission rule affords the protection contemplated under the statute. *See, e.g., Commercial Union Ins. Co. v. Johnson*, 745 S.W.2d 589, 594 (Ark. 1988); *Clark v. Hartford Accident & Indem. Co.*, 166 A.2d 713, 715-16 (Conn. 1960); *Mitchell v. Allstate Ins. Co.*, 244 S.W.3d 59, 65 (Ky. 2008); *Horace Mann Ins. v. Hampton*, 767 P.2d 343, 345-46 (Mont. 1989); *Verriest v. INA Underwriters Ins. Co.*, 662 A.2d 967, 973-74 (N.J. 1995); *Universal Underwriters Ins. Co. v. Taylor*, 408 S.E.2d 358, 361-64 (W.Va. 1991).

¶10 Regardless of how we might view the applicability of the initial permission rule to cases such as this one, that rule has been expressly rejected by our supreme court. *Universal*, 108 Ariz. at 115, 493 P.2d at 497. Because we are bound by our supreme court's prior decision on this matter, we do not address McWilliams' argument regarding adoption of the initial permission rule. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) (noting that

court of appeals has "no authority to overrule, modify, or disregard" decisions of the Arizona Supreme Court).[4]

¶11 Instead, we apply the minor deviation rule. *James*, 26 Ariz. App. at 139, 546 P.2d at 1148; *Universal*, 108 Ariz. at 115, 493 P.2d at 497. Under that rule, a permissive driver may extend the scope of use beyond the express or implied grant initially provided, as long as the use remains within the scope of the permission granted. *See James*, 26 Ariz. App. at 139, 546 P.2d at 1148. The minor deviation rule is based on the longstanding notion that the driver of a vehicle is presumptively the agent of the vehicle's owner, but that such presumption may be overcome with evidence the driver was operating outside the scope of the permission granted. *Universal*, 108 Ariz. at 115, 493 P.2d at 497 (citing *Baker v. Maseeh*, 20 Ariz. 201, 179 P. 53 (1919); *Silva v. Traver*, 63 Ariz. 364, 162 P.2d 615 (1945)).

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[4] We reject McWilliams' contention that *Universal* is limited to its facts. In that case, after explaining the initial permission rule, our supreme court stated: "We do not think, however, that the liberal rule has application to permissive users in Arizona." 108 Ariz. at 115, 493 P.2d at 497. The court then noted that proof of ownership of a vehicle is prima facie evidence that the driver is the agent of the owner but that presumption vanishes whenever contradicting evidence is introduced. *Id*. A vanishing presumption is entirely inconsistent with the initial permission rule. *See James*, 26 Ariz. App. at 139, 546 P.2d at 1148 (noting that "hell or high water" rule was "specifically rejected" in *Universal*).

B. Determination of Permissive Use

¶12 McWilliams argues that even under the minor deviation rule, sufficient facts exist from which a jury could conclude that Alexander had express or implied permission to use the company vehicle for personal purposes on the night of the accident. As to express permission, we find no basis in the record to support the existence of any material issue of fact. Not even Alexander's own affidavit contains any information that could reasonably be construed as granting him express permission to drive the company vehicle for personal reasons generally or in particular, on the night of the accident.

¶13 Whether McWilliams had implied permission presents a more difficult question. He asserts that the facts support a reasonable inference that Alexander was not subject to any restrictions governing the use of the company vehicle and that the vehicle was provided to Alexander for his use and enjoyment. He further contends that even if there were general policy restrictions and limitations in place regarding proper vehicle usage for employees, Alexander was excluded from typical company policies.

¶14 Implied permission may arise from "mutual acquiescence in, or lack of objection to, a continued use of a [vehicle], signifying assent. It is usually shown by the practice of the parties over a period of time preceding the day upon which the

insured vehicle was being used." *Universal*, 108 Ariz. at 115, 493 P.2d at 497 (citation and internal quotations omitted). It may also be found if the operator of the vehicle "reasonably believed" he was using the vehicle in accordance with the permission granted by the owner. *See Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 118, 575 P.2d 315, 317 (1978) (recognizing that summary judgment is generally not appropriate if a material issue concerns one of the parties' state of mind; therefore, whether the vehicle operator "reasonably believed" his use was with the permission of the owner must be considered).

¶15 Here, we start with the presumption that Alexander was the agent of his employer. *Universal*, 108 Ariz. at 115, 493 P.2d at 497. Next, we must determine whether Stonington has overcome that presumption by proving that Alexander did not act within the scope of his driving privilege. McWilliams argues that Alexander was given the privilege of unrestricted use of the vehicle, while Stonington contends that Alexander's use was clearly limited to business purposes. Because we find that material issues of fact exist as to the nature of the scope of Alexander's driving privilege, the question of implied permission must be resolved by the trier of fact.

¶16 In support of McWilliams' position, he points to the following: (1) After receiving a promotion, Alexander was

required to be on-call twenty-four hours a day to respond to company calls and had exclusive use of the company vehicle assigned to him; (2) he was exclusively responsible for maintenance and care of the company vehicle which he paid for with a company debit card; (3) he used the company vehicle for personal use without restriction, oversight, warning, or discipline; (4) he provided the company with receipts for gas and maintenance of the vehicle which would have shown that he was using the vehicle for personal purpose; (5) the company knew he had use of no other vehicle; (6) he never received or acknowledged the company's written scope of use restriction for company vehicles; (7) he witnessed his direct supervisor use a company vehicle for personal purposes; (8) Alexander was an "exception" to the company's policy against employing and being supervised by relatives; when he was first employed he both lived with and was supervised by his uncle; and (9) Alexander believed that after his promotion the unrestricted use of his employer's vehicle was a benefit of his employment.

¶17 Stonington counters with the following factual assertions: (1) Tots Unlimited has a written policy expressly prohibiting employees from using company vehicles for anything except company business; (2) all maintenance employees, including Alexander, were allowed to drive company vehicles to and from work; (3) at no time did Tots Unlimited authorize

Alexander to use a company vehicle for personal purposes; and (4) he was present at a meeting when the company vehicle use policy was discussed, which occurred prior to his accident.

¶18 The scope of Alexander's permitted vehicle use depends on which version of facts is true. If the company did give notice to Alexander of its vehicle use policy, as indicated by its affidavits, then Alexander's permitted use was for business purposes only and his use on the night of the accident was clearly more than a minor deviation from that permitted use. *See James*, 26 Ariz. App. at 139, 546 P.2d at 1148 (noting that protection is afforded under the minor deviation rule "if the bailee's use is not a gross, substantial or major violation, even though it may have amounted to a deviation"). However, if Alexander is correct in that he was never advised of a company policy restricting vehicle use, he was not in attendance at the alleged meeting where the restrictions were discussed, or he was treated differently than other employees, then a jury could reasonably conclude that he was given a company vehicle without restrictions as to when and where it could be driven. *See Grain Dealers Mut. Ins. Co.*, 118 Ariz. at 118, 575 P.2d at 317 (recognizing that if a material issue of fact concerns one of the parties' state of mind, summary judgment is generally not appropriate). Other information noted in Alexander's affidavit, such as (1) his exclusive use of the vehicle; (2) his lack of

access to any personal vehicle; and (3) his direct supervisor's use of a company car for personal use, lend further support to his position that the scope of the use of the vehicle he was assigned to drive was undefined. As such, whether Alexander reasonably believed he was using the company vehicle within the permission granted is a question of fact we must leave to the trier of fact.

¶19 Based on these factual discrepancies, we cannot determine on this record the scope of Alexander's driving privilege for the company vehicle. In the absence of a defined scope of use, we are unable to determine whether there was a major deviation from the scope of implied permission. Thus, for the purposes of resisting Stonington's summary judgment motion, McWilliams has satisfied his burden of proving that Alexander is covered by the company's insurance policy. *See Keeley*, 20 Ariz. App. at 202, 511 P.2d at 215 (finding that the party claiming coverage has the burden of establishing, under the facts and circumstances, the requisite permission).

CONCLUSION

¶20 Based on the foregoing, we reverse the trial court's grant of summary judgment in favor of Stonington and remand for further proceedings consistent with this decision.

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge