[Cite as **_Hoff v. Agricultural Ins. Co._, 2004-Ohio-3983.**]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Barbara Jones Hoff, et al.	Court of Appeals No. L-03-1242
Appellants	Trial Court No. CI-02-5501
v.	
Agricultural Insurance Co., et al.	**DECISION AND JUDGMENT ENTRY**
Appellee	Decided: July 30, 2004

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Joseph D. Weisberg, for appellants.

Alexander M. Andrews and Carl A. Anthony, for appellee.

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SINGER, J.

{¶1} This is an appeal from the judgment of the Lucas County Court of Common Pleas which granted the motion for summary judgment filed by appellee, Agricultural Insurance Company, against appellants, Barbara Jones Hoff, et al. and denied appellants' motion for summary judgment filed against appellee. Finding that appellants are not "insureds" under appellee's policy of insurance, we affirm the judgment of the trial court.

{¶2} The facts giving rise to this appeal are as follows. In September 2000, appellant, James Hoff, worked as a truck driver for Zango Leasing, Ltd. His wife, appellant Barbara Jones Hoff, lived with him in his truck. Zango Leasing, an Ohio

corporation, maintained a policy of insurance with appellee. On September 5, 2000, appellant Barbara Jones Hoff was walking on a sidewalk in Toledo, Ohio, when a motorist lost control of his vehicle, jumped a curb and struck her. On November 1, 2002, appellants filed a complaint for declaratory judgment against appellee. Hoff sought uninsured/ underinsured motorist's coverage for the injuries she sustained on September 5.

{¶3} On April 28, 2003, appellee filed a motion for summary judgment arguing that appellants were not "insureds" under the terms of the policy issued to Zango Leasing. Appellants filed a cross-motion for summary judgment disputing appellee's arguments. On August 12, 2003, the court granted appellee's motion and denied appellants' motion. Appellants now appeal setting forth the following assignment of error:

{¶4} "The trial court erred to the prejudice of the plaintiffs when it granted defendant Agricultural Insurance Company's motion for summary judgment and denied the plaintiffs' cross motion for summary judgment."

{¶5} The policy at issue states in pertinent part:

{¶6} "WHO IS AN INSURED

{¶7} "1. If the Named Insured is designated in the Declarations as:

{¶8} "* * *

{¶9} "b. A partnership, limited liability company, corporation or any other form of organization, then the following are 'insureds.'

{¶10} "(1) Anyone occupying a covered 'auto' * * *

{¶11} "* * *

{¶12} "'Occupying' means in, upon, getting in, on, out or off."

{¶13} In the present case, the named "insured" was Zango Leasing, Ltd. Appellants contend that because they were living in the truck insured under the policy, they were "occupying" a covered auto and thus, for purposes of the policy, they were "insureds" entitled to coverage.

{¶14} Civ.R. 56(C) provides that summary judgment can be granted only if (1) no genuine issue of material fact remains to be litigated; (2) it appears from the evidence that reasonable minds can reach but one conclusion and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to summary judgment as a matter of law. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. The construction of an insurance contract is a matter of law. *Lovewell v. Physicians Ins. Co.* (1997), 79 Ohio St.3d 143, 144.

{¶15} Where an insurance contract is clear and unambiguous, its interpretation is a question of law. *Leber v. Smith* (1994), 70 Ohio St.3d 548, 553; *Red Head Brass, Inc. v. Buckeye Union Ins. Co.* (1999), 135 Ohio App.3d 616, 627. In interpreting insurance policies, as with other written contracts, the court looks to the terms of the policy to determine the intention of the parties concerning coverage. *Minor v. Allstate Ins. Co., Inc.* (1996), 111 Ohio App.3d 16, 20. The court must give the words and phrases in the policy their plain and ordinary meaning. Id., citing *State Farm Auto Ins. Co. v. Rose* (1991), 61 Ohio St.3d 528, overruled on other grounds, *Savoie v. Grange Mut. Ins. Co.*

(1993), 67 Ohio St.3d 500, paragraph one of the syllabus. Where the plain and ordinary meaning of the language used in an insurance policy is clear and unambiguous, a court cannot resort to construction of that language. *Tomlinson v. Skolnik* (1989), 44 Ohio St.3d 11, 12, overruled on other grounds by *Schaefer v. Allstate Ins. Co*. (1996), 76 Ohio St.3d 553.

{¶16} In *McCallum v. American States Ins.* (Nov. 15, 1991), 6th Dist. No. L-90-354, this case addressed a similar issue. McCallum was a truck driver for the Sylvester Trucking Company. One night while working, McCallum parked on the berm and left his truck to check on another driver whose truck had rolled into a ditch. After making sure the other driver was fine, McCallum began to walk back to his truck. Before physically reaching his truck, McCallum was struck and killed by a motorist. McCallum's estate was denied coverage based on the fact that he was not "occupying" the truck as that term was defined in the policy. As in this case, the McCallum policy defined occupying as "in, upon, getting in, on, out or off." The trial court granted summary judgment to the insurer. On appeal, this court reversed the decision of the trial court noting that McCallum was only a short distance from the truck. Interpreting the policy language defining "occupying," this court stated:

{¶17} "* * * it would be absurd to interpret this clause as providing coverage for drivers without requiring some relationship to the truck. This relationship involves not only the driver's reasonable geographic proximity to the vehicle, but also whether the driver's conduct related to the use of the truck."

{¶18} The record in this case shows that at the time of Barbara Hoff's accident, neither James Hoff nor the "covered auto" were in town. Specifically, James Hoff testified in a deposition that on September 5, 2000, he had driven the truck out of town to "wait on a load." Twelve hours later, while still out of town, he learned of his wife's accident. Giving the terms of the policy their plain and ordinary meaning, we can only conclude that Barbara Hoff was not "occupying" a "covered auto" at the time of her accident and therefore, she was not an "insured" as that term is defined in the policy at issue. Appellants' sole assignment of error is found not well-taken.

{¶19} On consideration whereof, the court finds that substantial justice has been done the parties complaining, and the judgment of the Lucas County Common Pleas Court is affirmed. Costs assessed to appellants

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. ____________________
JUDGE

Judith Ann Lanzinger, J.

Arlene Singer, J. ____________________
CONCUR. JUDGE

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JUDGE