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# IN THE COURT OF APPEALS OF INDIANA

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| RENAE OSBORNE, MARVIN CUSHINGBERRY, MARCUS RAGLAND, JR., GARY EVANS and ESTATE OF ANTONIA FANCHER[1], | ) | |
| Appellants-Defendants, | ) | |
| vs. | ) | No. 49A02-0704-CV-365 |
| ALLSTATE INSURANCE COMPANY, | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kimberly D. Mattingly, Master Commissioner
The Honorable Robyn Moberly, Judge
Cause No. 49D12-0505-PL-017106

**January 30, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

[1] The Estate of Antonia Fancher and Marvin Cushingberry are not seeking relief on appeal and have not filed a brief. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

**VAIDIK, Judge**

## Case Summary

Marcus Ragland, Jr. and Gary Evans (collectively referred to as "Appellants") appeal the trial court's grant of Allstate Insurance Company's motion for summary judgment. Specifically, Appellants argue that Valerie Osborne's ("Daughter") insured status under the Allstate policy provided her with the actual authority to grant permissive use of the vehicle and that public policy favors finding coverage under the Allstate policy. Finding that the designated evidence shows that Renae Osborne ("Mother") clearly restricted all persons other than Daughter from driving the vehicle and that public policy does not favor coverage under the policy, we affirm the judgment of the trial court.

## Facts and Procedural History

Mother purchased a 1996 Honda Civic for Daughter when Daughter turned sixteen years old. The vehicle was titled and registered in Mother's name. Mother added the vehicle to an existing Allstate automobile insurance policy, which provided coverage for the vehicle owned by Mother as well as other "insured persons" operating the vehicle with Mother's permission. The Allstate policy's omnibus clause defines "insured person(s)" as:

> a. you,
> b. any resident,
> c. and any other person using it with your permission.

Appellants' App. p. 30. The policy further explained "'You' or 'Your' means the policyholder named on the Policy Declarations and that policyholder's resident spouse." *Id*. at 26. Daughter reimbursed Mother for the cost of insuring the vehicle. Mother gave

Daughter permission to drive the vehicle and listed Daughter as a driver in the policy. At the time Mother purchased the vehicle, Daughter lived with Mother. Mother specifically instructed Daughter that no person other than Daughter was to drive the vehicle.

Eventually, Daughter moved out of Mother's home and into her own apartment. In January 2003, Daughter moved again and took the vehicle with her. Daughter then began dating Marvin Cushingberry. When Mother became aware that Daughter was dating Cushingberry, she reiterated that no person other than Daughter was permitted to drive the vehicle. On August 14, 2003, Mother renewed her automobile insurance policy with Allstate. The Auto Policy Declarations page of Mother's policy listed Mother as the named insured and listed Daughter as a driver. The vehicle was insured for, among other things, bodily injury liability and automobile medical payments coverage.

In the early morning hours of September 7, 2003, either Cushingberry or Ragland,[2] while operating Mother's vehicle with Evans and Antonia Fancher as passengers, veered off a roadway and collided with a retaining wall. Fancher died from injuries sustained in the collision, and Ragland and Evans were severely injured. Thereafter, Allstate filed a complaint against Mother, Cushingberry, Ragland, Evans, and the Estate of Antonia Fancher requesting a declaratory judgment, claiming:

> [A]n actual controversy exists between the parties as to whether there is liability coverage under the Policy for the claim of Ragland and Evans against Cushingberry and Osborne in the Civil Action as a result of the Collision, and the potential claim of the Estate of Fancher as a result of the

[2] As the trial court noted in its order granting summary judgment in favor of Allstate, an issue of fact exists as to who was driving the vehicle at the time of the collision. Cushingberry claims that Ragland was driving, and Ragland and Evans claim that Cushingberry was driving. Additionally, there is a dispute as to whether Daughter gave Appellants permission to drive the vehicle or whether they took the vehicle without her permission.

> same Collision, which controversy cannot be resolved without intervention of the Court.

*Id*. at 12. Ragland and Evans filed a joint answer to Allstate's complaint, requesting that the trial court deny Allstate's requested relief and enter a judgment requiring Allstate to defend and indemnify Mother and Cushingberry against the claims and separate lawsuit filed by Ragland and Evans. Allstate then filed a motion for summary judgment, which stated, in pertinent part:

> Neither [Cushingberry] nor [Ragland] had permission from the insured, [Mother], to operate the vehicle owned by [Mother] which was involved in the September 7, 2003 crash and, therefore, there is no coverage under the Policy for any of the liability claims at issue in this case arising out of their operation of the vehicle. Neither of them were permissive users of [Mother].

*Id*. at 53. Ragland and Evans filed a cross motion for summary judgment and memorandum of law opposing Allstate's motion in which they argued, "Undisputed facts establish that [Daughter] was an insured under the Allstate Insurance policy, [and] thus had the authority to grant permission for the use of the Honda Civic." *Id*. at 103. Appellants additionally maintained that Allstate was estopped from denying coverage and public policy favored a finding of coverage under the policy. Allstate responded by filing a reply memorandum in support of its motion for summary judgment.

On February 21, 2007, the trial court held a hearing regarding Allstate's motion for summary judgment and Appellants' cross motion for summary judgment. During the hearing, both parties acknowledged the dispute as to whether Ragland or Cushingberry was the person driving the vehicle at the time of the collision and whether Daughter gave permission to either Ragland or Cushingberry to operate the vehicle on the day in

question. At the conclusion of this hearing, the trial court granted summary judgment in favor of Allstate, finding, in pertinent part:

> The court finds that, although a disputed fact exists as to the driver of Allstate's insured's vehicle, neither potential driver had the insured's permission to drive the vehicle. The Court further finds that the mere listing of insured's daughter as a driver in the policy is not sufficient to overcome the undisputed restrictions placed by the insured that no one other than her daughter was to operate the vehicle.

*Id*. at 7-8. This appeal ensues.

**Discussion and Decision**

Appellants raise three issues on appeal, which we restate as the following two: (1) whether Daughter's insured status provided her with the actual authority to grant permissive use of Mother's vehicle and (2) whether public policy favors coverage under the Allstate policy.[3]

When reviewing a ruling on a motion for summary judgment, we conduct the same inquiry as that of the trial court: summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Williams v. Riverside Cmty. Corrections Corp*., 846 N.E.2d 738, 743 (Ind. Ct. App. 2006), *trans. denied*. We construe all facts and reasonable inferences drawn from those facts in favor of the non-moving party. *Id*. On appeal, the trial court's grant or denial of a motion for summary judgment is cloaked with a presumption of validity. *Id*. A party appealing from an order granting summary judgment has the burden of persuading the appellate tribunal that the decision was erroneous. *Id*.

[3] On October 22, 2007, Mother filed a motion requesting to join in Allstate's appellate brief, which we hereby grant.

Initially, we pause to note that the trial court's March 30, 2007, order states, in part, "neither potential driver *had the insured's permission to drive the vehicle*." Appellants' App. p. 7 (emphasis added). Because this order refers to Mother as the "insured," Appellants interpreted this as a denouncement that Daughter was insured under the Allstate policy. As such, Appellants frame the issue in the "Statement of the Issues" section of their appellate brief as "Whether the trial court erred in determining that [Daughter] *was not an insured* under the Allstate policy, and as such did not have the authority to grant permission for use of the insured vehicle." Appellants' Br. p. 1 (emphasis added). Appellants' interpretation misconstrues the trial court's order. The Allstate policy defines an "insured person," in part, as "any . . . person using [the vehicle] with [Mother's] permission." *See* Appellants' App. p. 26, 30. Daughter is clearly an insured person under the policy, and Allstate admits this fact. *See* Appellants' Br. p. 12. However, she is not the insured, or the insured owner, as referenced in the trial court's order and the insurance policy. Rather, Mother is the insured owner under the policy. *See* Appellants' App. p. 161.

**I. The Liberal Rule**

Appellants first maintain that Daughter's insured status and the fact that she paid for the vehicle's maintenance and insurance premiums provided her with the authority to grant permissive use of the vehicle to other persons despite Mother's express restriction that Daughter was the only person permitted to drive the vehicle. We disagree.

The Allstate policy provision at issue in this case defines "insured person(s)" as:

a. you,
b. any resident,

c. and any other person using it *with your permission*.

Id. at 30 (emphasis added). This provision is known as an omnibus clause, and, as required by Indiana law, the policy must, at minimum, insure the owner against liability when others drive her vehicle with her express or implied permission. *See* Ind. Code § 27-1-13-7.

The question is whether the omnibus clause extends insurance coverage to anyone given permission to drive the vehicle by an insured, or whether coverage is limited to only those drivers who were given permission by the insured owner. Indiana follows the "liberal rule" when interpreting the scope of coverage under an omnibus clause. *State Farm Mut. Auto. Ins. Co. v. Gonterman*, 637 N.E.2d 811, 813 (Ind. Ct. App. 1994). The liberal rule has been articulated as follows:

> [O]ne who has permission of an insured owner to use his automobile continues as such a permittee while the car remains in his possession, even though that use may later prove to be for a purpose not contemplated by the insured owner when he entrusted the automobile to the use of such permittee.

*Warner Trucking, Inc., v. Carolina Cas. Ins. Co.*, 686 N.E.2d 102, 107 (Ind. 1997) (citing *Gonterman*, 637 N.E.2d at 813). Generally, "a deviation in use from that intended by the owner will not operate to terminate the initial permission to use the vehicle granted by the owner and to deny coverage under the omnibus clause." *Manor v. Statesman Ins. Co.*, 612 N.E.2d 1109, 1113 (Ind. Ct. App. 1993), *trans. denied*. However,

> [W]hen the owner places restrictions on use of the vehicle, violations of such use restrictions may terminate the initial permission. When the owner of a vehicle places express restrictions on its use by others, the focus is not on whether the operator deviated from the contemplated use; the determinative question is whether *the operator's use of the vehicle was restricted in the first instance*. In a coverage dispute, permissive use cannot

> be implied when an express restriction on the scope of permission prohibits the use at issue.[4]

*Warner Trucking, Inc.*, 686 N.E.2d at 107 (citing *Gonterman*, 637 N.E.2d at 814 (emphasis in original) (internal citations and quotations omitted)). Because Mother, as owner of the vehicle and the named insured, placed express restrictions on the vehicle's use by others, the determinative question is whether Cushingberry or Ragland's use of the vehicle was restricted in the first place. *See id*.

Here, in support of its motion for summary judgment, Allstate deposed Mother, who acknowledged that while she had granted permission to Daughter to drive the vehicle, she had repeatedly informed her that no other person was permitted to drive it. Mother further affirmed that she did not grant Cushingberry or Ragland permission to use her vehicle and that she did not personally know either one of them. *See* Appellants' App. p. 82. Daughter confirmed that she was the only authorized driver of the vehicle and that Mother had expressly prohibited any other person from driving the vehicle. *See id*. at 97. It is uncontroverted from the designated evidence that Cushingberry or

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[4] Three alternative rules of construction have evolved with respect to permissive use cases.

> The most expansive of these, sometimes known as the . . . 'initial permission,' or 'hell or high water' rule holds that 'if the vehicle was originally entrusted by the named insured, or one having proper authority to give permission, to the person operating it at the time of the accident, then despite hell or high water, such operation is considered to be within scope of permission granted. . . .' A second rule, denoted the 'conversion' rule, recognizes that a particular use can so exceed the scope of initial permission as to become non-permissive but requires that the departure be such as would cause the user to be liable to the owner in an action for conversion. The third rule, considered to be 'an intermediate position between the two more extreme rules,' is known as the 'minor deviation' rule. It regards 'minor deviations' as still being within the scope of permissive use.

*Washington Metro. Area Transit Auth. v. Bullock*, 509 A.2d 1217, 1222-23 (Md. Ct. Spec. App. 1986).

Ragland's use of the vehicle was restricted. Additionally, the designated evidence does not support a conclusion that Daughter could have reasonably and justifiably believed that she had the actual authority to give such permission. To the contrary, Daughter was specifically on notice that she did not possess such authority. Therefore, because Mother clearly restricted all persons other than Daughter from driving the vehicle, there is no coverage under the policy, and Allstate is not liable to Appellants.[5]

## II. Public Policy

Last, Appellants argue that public policy favors a finding of coverage under the Allstate policy because

> [t]he result desired by Allstate in this matter would serve the sole purpose of denying benefits to innocent third parties as the result of a negligent party. Allstate's position would result in society as a whole having to bear the costs of an innocent victim's injuries, rather than an insurance company. Principles of allocation of risk are the reason insurance companies are in business, and are some of the largest businesses in the world. Society should not have to bear the responsibility for damages for which premiums have been paid.

Appellants' Br. p. 14-15. We disagree.

Indiana Code § 27-1-13-7 states, in pertinent part:

> No such policy shall be issued or delivered in this State to the owner of a motor vehicle, by any domestic or foreign corporation, insurance underwriters, association or other insurer authorized to do business in this State, unless there shall be contained within such policy a provision insuring such *owner* against liability for damages for death or injury to

[5] Appellants next contend that "[Allstate] is estopped from denying coverage for the subject collision . . . because the principles of equity dictate that Allstate must provide . . . coverage . . . ." Appellants' Br. p. 12. However, Appellants do not offer any authority in support of their estoppel argument and therefore, we find the issue waived. *See* Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, we conclude that the designated evidence in the record clearly sets forth Mother's intention that Daughter be insured under the Allstate policy and that no other person was to drive the vehicle. Thus, Mother intended Daughter to be the only driver of the vehicle. Precluding coverage based on Mother's intentions comports with Indiana law and violates no principles of equity. *See Warner Trucking, Inc.*, 686 N.E.2d at 107.

> person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, *by any other person legally using or operating the same with the permission, expressed or implied, of such owner*.

(Emphasis added). Indiana law requires coverage for the owner when the owner gives either express or implied permission to a third party to use an insured vehicle, but it does not require coverage for permissive users. *See* Ind. Code § 27-1-13-7; *Gonterman*, 637 N.E.2d at 815; *Manor*, 612 N.E.2d at 1115; *Riverside Ins. Co. of Am. v. Smith*, 628 F.2d 1002, 1008 (7th Cir. 1980), *reh'g denied*; *Standard Mut. Ins. Co. v. Pavelka*, 580 F. Supp. 224, 226 (S.D. Ind. 1983). The Allstate policy, by extending coverage to permissive users, provides coverage broader than that required under Indiana law and, thus, does not violate public policy. *See Manor*, 612 N.E.2d at 1115.

"The public represents an anonymous third party to the insurance contract with a clearly definable interest in its interpretation." *Id*. Nonetheless, coverage only applies to protect the public when an insured owner fails to make a reasonable effort to become acquainted with the risks of loaning out automobiles to others. *Id*. We are concerned with protecting the public through omnibus clauses when the owner carelessly entrusts her vehicle to a financially irresponsible person. *Id*.

Here, Mother did not extend permission indiscriminately. Rather, she clearly expressed restrictions prohibiting all persons other than Daughter from driving the vehicle. Indiana public policy does not require that an insurer provide coverage for all individuals who may use an insured vehicle and, thus, public policy is not frustrated and coverage need not apply.

Affirmed.

SHARPNACK, J., and BARNES, J., concur.