**[Cite as *Erie Ins. Co. v. Paradise*, 2009-Ohio-4005.]**

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ERIE INSURANCE COMPANY

Plaintiff-Appellant

-vs-

KYLIE K. PARADISE, ET AL.

Defendant/Third Party Plaintiff-Appellant

-vs-

ALLSTATE INSURANCE CO.

Third Party Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 2008CA00084

O P I N I O N

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|---|---|
| CHARACTER OF PROCEEDING: | Appeal from the Fairfield County Common Pleas Court, Case No. 05CV397 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | August 10, 2009 |

APPEARANCES:

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*Hoffman, P.J.*

**{¶1}** Appellants Erie Insurance Company and Kylie K. Paradise appeal the November 13, 2008 Judgment Entry of the Fairfield County Court of Common Pleas entering judgment in favor of Appellee Allstate Insurance Company.

STATEMENT OF THE FACTS AND CASE

**{¶2}** On May 29, 2003, Appellant Kylie Paradise was involved in an automobile accident while driving an F-150 pick-up truck owned by Terry Gates. The accident fatally injured Paradise's friend Amanda Thompson, a passenger in the truck. Earlier in the day Paradise had gone to a friend's house for four-wheel riding activities, where she consumed alcohol. Her blood alcohol level later tested at or above .03.

**{¶3}** The truck was owned by Terry Gates, the father of Paradise's boyfriend/fiance, Danny Gates. Terry Gates insured the truck with Appellee Allstate Insurance Company.

**{¶4}** Terry Gates gave his son Danny Gates permission to operate the truck with the understanding Danny Gates would eventually buy the vehicle. Terry Gates specifically told Danny Gates no one else was to drive the truck. However, Danny Gates told Paradise she could use the truck in an emergency, but should not drive the truck to school or to parties. It is undisputed Terry Gates never directly told Paradise she could not use the truck. Terry Gates later learned from other relatives Kylie Paradise was driving the truck, at which point he claims to have called his son to remind him no one else was to drive the truck.

**{¶5}** Paradise and Danny Gates had previously purchased a Dodge Neon, with Paradise providing the down payment. Danny Gates used the Dodge Neon to commute

to Michigan, leaving the truck behind for Paradise to use. When Danny Gates took the Neon to Michigan, Paradise would use the truck to get to school and to work.

**{¶6}** Danny Gates, Danny's sister, Sherry Gates, Danny Gates' step-brother, Jason Matthews and Terry Gates were all aware Paradise had operated the truck.

**{¶7}** The Estate of Amanda Thompson sued Paradise claiming she was liable for the accident. Paradise then joined Allstate as a third party defendant seeking a declaration of coverage under Terry Gates' Allstate policy. Allstate asserted Paradise did not have permission to use the truck; therefore, was not an insured. Erie Insurance Company insured Amanda L. Thompson, and paid the Estate UM/UIM coverage in the amount of $250,000.00.

**{¶8}** Allstate filed a motion for summary judgment, which the trial court subsequently denied. The matter proceeded to bench trial on the issue of permissive use of the motor vehicle being operated by Paradise. Each party submitted proposed findings of fact and conclusions of law. On November 13, 2008, via Judgment Entry, the trial court entered judgment in favor of Allstate finding Paradise did not have permission to operate the vehicle.

**{¶9}** Erie Insurance and Paradise now appeal, assigning as error:

**{¶10}** "I. THE TRIAL COURT'S DETERMINATION THAT COVERAGE IS NOT AFFORDED UNDER THE ALLSTATE POLICY TO KYLIE K. PARADISE IS AGAINST MANIFEST WEIGHT OF THE EVIDENCE, AND CONTRARY TO LAW.

**{¶11}** "II. THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THAT COVERAGE IS NOT AFFORDED UNDER THE ALLSTATE POLICY TO KYLIE K. PARADISE."

I.

**{¶12}** Initially, we note our standard of review in this matter following the bench trial in the lower court. According to the Ohio Supreme Court, an appellate court should be "guided by a presumption" the fact-finder's findings are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80, 461 N.E.2d 1273. Under these guidelines, an appellate court should not reverse the trial court's judgment unless it is against the manifest weight of the evidence. Therefore, an appellate court shall not reverse if the judgment is supported by "'some competent, credible evidence going to all the essential elements of the case * * *." ' Id. at 80, 461 N.E.2d 1273, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at syllabus. "Unlike determinations of fact which are given great deference, questions of law are reviewed by a court *de novo."* (Emphasis sic.) *Ohayon v. Safeco Ins. Co. of Illinois* (Dec. 22, 1999), 9th Dist. No. 19617, at *2, quoting *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684.

**{¶13}** Under the terms of the Allstate Policy in question, an insured person includes, "any other person operating it with permission." Therefore, permission to operate the vehicle must come from the policyholder.

**{¶14}** It is undisputed Terry Gates never expressly granted permission to Paradise to operate the truck. However, implied permission "has the same significant force" as express permission. *United Service Automobile Assn. v. Russon* (5th Cir. 1957), 241 F.2d 296. "Implied permission may be demonstrated by previous use or consent, place of keeping the keys in a car and the like, the relationship of the parties, a course of conduct and circumstantial evidence." Id. At the trial in this matter, Paradise

testified she did not have direct personal knowledge Terry Gates was aware she was using the truck.

**{¶15}** In *West v. McNamara* (1953), 159 Ohio St. 187, the Ohio Supreme Court addressed the issue before this Court,

**{¶16}** "We now consider the relevant parts of the liability insurance policy involved.

**{¶17}** "***

**{¶18}** "Naturally the facts in each case are of great importance and in many instances a decision depends on the particular facts developed in the particular case.

**{¶19}** "The question with which we are here concerned is discussed in an annotation appearing in 160 A.L.R. 1195, and captioned 'Omnibus clause of automobile liability policy as covering accidents caused by third person who is using car with consent of permittee of named insured.' At page 1206, the annotator comments:

**{¶20}** "'It is submitted that as a generalization from all the cases within the scope of this annotation, the following rules may be stated as expressing the basis of the holdings in the great majority of the decisions:

**{¶21}** "'1. The original permittee who has been given permission to use the automobile can delegate this authority to the second permittee so as to bring the use of the automobile by this person within the protection of the policy if permission has been expressly given by the named insured to make such delegation.

**{¶22}** "'2. The original permittee who has been given permission to use the automobile but has been expressly forbidden to delegate this authority cannot do so,

and the use of the car by the second permittee in violation of the named insured's express order is not within the protection of the policy.

**{¶23}** "'3. The original permittee who has been given permission to use the car can not, according to the great weight of authority, delegate this authority to the second permittee so as to bring the use of the car by that person within the protection of the policy where the initial permission is silent as to the question of delegation of authority.

**{¶24}** "'4. The initial permission given by the named assured to the original permittee includes, according to the better view, the use of the automobile by the second permittee where in doing so the second permittee serves some purpose, benefit, or advantage of the first permittee. This is the case if the original permittee is riding in the car * * * or if the car is driven in his interest or for a purpose mutual to him and the second permittee * * *.'

**{¶25}** "In the present case, Mr. Robinson was the first permittee, Mrs. Robinson was the second permittee, and McNamara, who was driving the car at the time of the accident, without either Mr. or Mrs. Robinson in the car, was at best a permittee of a permittee of a permittee. Certainly, McNamara was not driving the car for any purpose mutual to the named insured or the first permittee. There is no claim that the alleged mission on which McNamara had gone was in any manner in the interest of the owner of the car or of Mr. Robinson who was in New York at the time of the accident.

**{¶26}** "***

**{¶27}** "In our opinion, the rule which should be applied here and which was followed by the trial court is that the permittee of a permittee of the named insured, in the absence of express or implied authority of such named insured, can not effectively

permit a fourth person to operate the vehicle so as to bring such person within the protection of the policy.

**{¶28}** "The universal rule that insurance policies are to be construed strictly in favor of the insured operates in favor of such insured persons as are covered by the policy, and, in a case such as the present one, is not applicable to extend the coverage of the policy to absurd lengths so as to provide a right of action under Section 9510-4, General Code."

**{¶29}** In *Security Mut. Cas. Co. v. Hoff* (1978), 54 Ohio St.2d 426, the Supreme Court again addressed the issue raised herein,

**{¶30}** "The only issue before this court may be stated thus: Does the insurance policy of United Ohio afford primary liability coverage to Joan K. Hoff under the facts and circumstances of this case and the applicable law?

**{¶31}** "The answer to this controlling question in the case turns upon whether Mrs. Binau, the insured and owner of the automobile, was made aware prior to the accident, that Kathy was driving the car on some occasions, and being aware of that, did Mrs. Binau instruct Kathy that she was not to drive the car, or did Mrs. Binau admonish her son Daniel J. Binau that his girl friend, Kathy, was not to drive the car and remind him that he had been told by his father that no one other than himself was to drive the car.

**{¶32}** "It is undisputed that Kathy drove the car on different occasions with Daniel's permission.

**{¶33}** "The trial court held: "The owner of the vehicle had never specifically denied the use of the vehicle to Miss Hoff and there was evidence that Mrs. Binau had constructive notice that Joan Katherine Hoff had used the vehicle on prior occasions."

**{¶34}** "The trial court further held:

**{¶35}** "'Joan Katherine Hoff was operating the motor vehicle with the express permission of Daniel Binau. Daniel Binau, from the evidence, was for all practical purposes the constructive owner of the motor vehicle as he paid for its maintenance, gas, oil and insurance. Daniel had full use of the vehicle while a student at Ohio State University.'

**{¶36}** "The Court of Appeals, in its opinion, summarized the case as follows:

**{¶37}** "'Daniel Binau, clearly not a named insured but conceded by all to have actual permission to use the motor vehicle which belonged to his mother Dorothy Binau, gave permission to the driver Joan K. Hoff to operate the vehicle at the time of the accident. * * * The driver Joan K. Hoff testified, after some previous equivocation, that on an occasion previous to the accident, Mrs. Binau knew that Joan was operating the same motor vehicle when picking (up) Daniel Binau at the swimming pool where he worked in Upper Sandusky * * *. No one testified that Joan K. Hoff had ever been told that she was not to operate the automobile.

**{¶38}** "'Thus we have an automobile which, to all intents and purposes to the outside world, was in complete control of Daniel Binau to use as he saw fit. However, the evidence is also clear that Daniel had received instructions from his father not to permit anyone else to operate the motor vehicle, and that Dan disobeyed those instructions. The evidence also supports the trial court's finding that the other named

insured, Dorothy Binau (owner of the vehicle), knew of the disobedience of the instructions and failed to admonish Dan or the driver to whom he gave permission, who was also the driver at the time of the accident. * * *

**{¶39}** " 'The general rule is as follows: 'The original permittee (Dan Binau) who has been given permission to use the automobile but has been expressly forbidden to delegate this authority cannot do so, and the use of the (car by the) second permittee (Joan K. Hoff) in violation of the assured's express order is not within the protection of the policy.' West v. McNamara (1953), 159 Ohio St. 187 (at 193 (111 N.E.2d 909), words in parenthesis added).

**{¶40}** "'The trial court, however, must consider whether the general rule is affected by the two additional factors of this case. The first such factor is that the named insured, Dorothy Binau, was found by the trier of the fact to have been aware that second permittee had used the vehicle on a prior occasion and had remained silent. What then is the effect of an express denial to the first permittee to let a second permittee operate the automobile followed thereafter by knowledge that the instruction was being violated *without any follow-up admonition*. Does silence constitute an implied revocation of the previous express prohibition and constitute permission by the named insured to the second permittee to operate the motor vehicle in the future?

**{¶41}** "'Absent an express prohibition against the first permittee extending permission to use the car by the second permittee, Ohio law is amply summarized as follows: 'Ohio then fits in with the general principle that whether the named insured authorized the permittee to allow others to use the vehicle is to be measured in a realistic way, in which, once established, implied permission has exactly the same

significant force as one expressly made with more elaborate formality.' United Services Automobile Ass'n v. Russom (5th Cir.) (1957), 241 F.2d 296. The burden of proof is on the person injured to establish that the individual operating the automobile comes within the protective provisions of the policy. * * *

**{¶42}** "'In this particular case we start out with an express prohibition against delegation. Had that been the only fact adduced, it is clear that there could be no implied authority to delegate. See Couch on Insurance 2d, Section 45:409, Vol. 12, page 406. However, a refusal of permission to delegate may be revoked. It is a question of fact for the trier of the fact whether the express prohibition has been revoked and implied permission to the second permittee given when, after a previous express prohibition against another driving, *the named insured thereafter remained silent*, knowing that the second permittee was operating the automobile with the permission of the first permittee. See Couch on Insurance 2d, Section 45:365, Vol. 12, page 369; * * * 4 A.L.R.3d 10 (at 65).

**{¶43}** "'Thus, in the case at hand, the trier of the fact properly considered whether the previous express prohibition against delegation of authority to a second permittee to use the automobile was revoked and delegation impliedly consented to by the actions of the named insured, Dorothy Binau.'

**{¶44}** "***

**{¶45}** "The appellant concedes the exception to the rule, but argues that there is no probative evidence to support the finding of both the trier of the facts and the Court of Appeals that prior to the accident Mrs. Binau became aware that Kathy was driving the car contrary to Mr. Binau's instructions to Dan.

**{¶46}** "This court, after a review of the record, agrees with the trier of the facts and the Court of Appeals on this evidentiary question." (Emphasis added.)

**{¶47}** In the case sub judice, the evidence demonstrates Terry Gates never gave express permission to Paradise to operate the truck. Rather, Terry Gates testified he expressly told his son no one was to drive the truck. In contrast to the facts set forth in *Hoff*, supra, and relied upon in the holding of the court, when Terry Gates became aware Paradise had operated the truck, he called his son to remind him no one else was to drive the truck. Terry Gates testified during his deposition:

**{¶48}** "Q. And Danny was permitted to drive the white truck.

**{¶49}** "A. Yes.

**{¶50}** "Q. And what limitations, if any, did you place upon other people driving the white truck?

**{¶51}** "A. I talked with Danny and told him I didn't want anyone else driving the truck because it was in my name.

**{¶52}** "Q. Right. You testified just a second or two ago about your son telling you that he saw Kyley driving - -

**{¶53}** "A. My daughter.

**{¶54}** "Q. I'm sorry, correct. Your daughter saw Kyley driving the truck at school, you called Danny and jumped on his case.

**{¶55}** "A. Yes.

**{¶56}** "Q. What happened as a result of that?

**{¶57}** "A. I told him Kyley was never to drive the truck again and he said okay.

**{¶58}** "Q. Okay. When was that?

**{¶59}** "A. Probably she was still in high school, so I would say right after he went to Michigan. She went back to school. He went to Michigan.

**{¶60}** "Q. That's a couple years before or a year or so before the - -

**{¶61}** "A. Okay. I don't know.

**{¶62}** "Q. Is it shortly before the accident?

**{¶63}** "A. Yes.

**{¶64}** "Q. It's the year of the accident?

**{¶65}** "A. Yes.

**{¶66}** "Q. Would it have been in the winter or in the spring, summer?

**{¶67}** "A. You know, I don't remember when it was. It was like before November, so I guess the week prior to that or two weeks prior to that.

**{¶68}** "Q. The accident is May.

**{¶69}** "A. May, okay then. Why did I say November?

**{¶70}** "Q. May 25.

**{¶71}** "A. Then it must have been that month because right before the accident. He didn't have the truck that long, you know what I mean.

**{¶72}** Tr. at 12-13.

**{¶73}** There is no evidence Terry Gates had knowledge of Paradise's subsequent use of the vehicle, following his second admonition to his son. Based upon the facts and circumstances presented, Terry Gates did not impliedly consent to Paradise's operation of the truck; therefore, Paradise is not an insured under the terms of the Allstate Policy.

**{¶74}** The first assignment of error is overruled.

II.

**{¶75}** In the second assignment of error, Paradise argues she reasonably relied on Terry Gates' implied consent to her detriment. Specifically, she argues she was lead to believe she was permitted to use the truck, and Terry Gates never told her otherwise. Rather, Danny Gates had been granted full use of the vehicle from his father; therefore, was the constructive owner of the truck.

**{¶76}** However, as set forth above in our analysis and disposition of the first assignment of error, at trial Paradise testified she did not have actual knowledge Terry Gates was aware she was driving the vehicle. Without said actual knowledge, Paradise could not reasonably rely on the same in assuming she was an insured under the Allstate Policy.

**{¶77}** Accordingly, the second assignment of error is overruled.

**{¶78}** The judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Wise, J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
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| ERIE INSURANCE COMPANY | : | |
| Plaintiff-Appellant | : | |
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| Defendant/Third Party Plaintiff-Appellant | : | |
| -vs- | : | |
| ALLSTATE INSURANCE CO. | : | Case No. 2008CA00084 |
| Third Party Defendant-Appellee | : | |

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

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Julie A. Edwards
HON. JULIE A. EDWARDS