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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WANG-YU LIN,

Plaintiff,

v.

SHIN YI LIN,
ENTERPRISE RENT A CAR OF KENTUCKY,
a Kentucky corporation, and
EMPIRE FIRE AND MARINE INSURANCE COMPANY,
a Nebraska corporation.

Defendants.

CIVIL ACTION NO.: 06-C-2372

Honorable Jennifer Bailey Walker

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ORDER GRANTING SUMMARY JUDGMENT

On March 6, 2008, came the plaintiff, Wang Yu Lin ("Jason Lin"), by counsel, William M Tiano and Shawn Taylor, and the defendants, Enterprise Rent A Car of Kentucky and Empire Fire and Marine Insurance Company by counsel, Kevin S. Burger, on the parties' cross motions for summary judgment, for the Court to determine whether insurance coverage should be provided to Jason Lin for the accident which is the subject of the above-referenced Complaint. Based on the memoranda submitted by the parties and arguments of counsel, this Court makes certain findings of fact and conclusions of law with respect to the parties' motions.

Findings of Fact

In August, 2006, the plaintiff was a student at Salem International University. On August 18, 2006, he and several other students leased a vehicle from Enterprise Rent A Car of Kentucky ("Enterprise") at the company's facility in Clarksburg, West Virginia. At the time of rental, Jason Lin purchased a \$1,000,000.00 supplemental liability policy from the counter agent at Enterprise. The insurance policy was issued by Empire Fire and Marine Insurance Company ("Empire").

During the student's trip, Mr. Lin became tired and allowed a passenger in the vehicle, Shin Yi Lin, to drive. Shortly after Ms. Lin began operating the vehicle, she lost control and an accident occurred ejecting the plaintiff from the vehicle where he sustained a serious head

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injury, and has incurred approximately \$300,000.00 in medical expenses associated with the accident.

The plaintiff presented a claim to Empire for coverage under the supplemental liability policy to compensate him for the injuries he sustained. Enterprise is responsible for the first \$20,000.00 of coverage available for the plaintiff's claims. Empire has denied the plaintiff's claim for coverage under the \$1,000,000.00 supplemental liability policy due to the fact that the defendant, Shin Yi Lin, was not named as an additional driver on the Enterprise rental contract. As a second basis for denial, Empire claims that Jason Lin cannot make a claim on an insurance policy which he purchased based on an insured exclusion.

It is the plaintiff's position that Empire cannot rely on any policy exclusions due to the fact that the terms and conditions of the policy were not made conspicuous, plain and clear to Mr. Lin. By the defendants' own admission, the plaintiff was never provided a copy of Empire's supplemental liability policy. Therefore, the defendants cannot rely on any exclusions relied on in the policy. Moreover, Enterprise and Empire's agent, David Smyer, the individual who sold the insurance policy had not been trained with respect to the solicitation and sale of the Empire policy, a statutory requirement. More importantly, the plaintiff asserts that coverage should be provided under *W.Va. Code* §33-6-31, the mandatory omnibus statute, which provides coverage for permissive users of motor vehicles. It is uncontroverted that the defendant, Shin Yi Lin, was a permissive user of the vehicle. Lastly, the plaintiff also contends that any exclusion seeking to avoid coverage for claims made by an insured is inapplicable because the exclusion does not specifically mention the plaintiff's name and is not attached to the policy as required by statute.

Conclusions of Law

In West Virginia, an injured plaintiff can bring a declaratory judgment proceeding to determine if there is policy coverage before obtaining a judgment against a tortfeasor in a personal injury action where the tortfeasor's insurer denies coverage. *Bowyer ex. rel. v. Thomas*,

188 W.Va. 297 (1992). The construction and interpretation of such an insurance policy, including whether it is ambiguous, is a question of law to be decided by the Court. *Riffe v. Home Finders Associates, Inc.*, 205 W.Va. 216 (1999). It is well settled law in this State that ambiguous terms in insurance contracts are to be construed against the insurance company, in this case, Empire, and in favor of the insured. *Syl. Pt. 4, National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734 (1987); *Riffe v. Homefinders Associates Inc.*, 205 W.Va. 216 (1999).

The question before this Court is essentially whether Empire can avoid liability for payment of Mr. Lin's claim when analyzing the omnibus statute, *W.Va. Code* §33-6-31. This statute provides that no policy or contract of bodily liability insurance arising from the use of a motor vehicle shall be issued unless it shall contain a provision insuring the named insured and any other person, except a bailee for hire and a person specifically excluded by a restrictive endorsement attached to the policy, for the use of the motor vehicle with the consent, express or implied, of the named insured for bodily injury sustained or loss for damage occasion within the coverage of the policy as a result of negligence in the operation or the use of the vehicle. *W.Va. Code* §33-6-31(a). The Court notes that coverage under the omnibus statute is mandatory. *W.Va. Code* §33-6-31.

By adopting a mandatory omnibus requirement set forth in *W.Va. Code* §33-6-31(a), the Legislature has demonstrated a clear intent to afford coverage to any person using a motor vehicle with the owner's permission as a means of giving greater protection to those who are involved in automobile accidents. *Syl. Pt. 3*, in part, *Burr v. Nationwide*, 178 W.Va. 398 (1987). By the defendants' admission, there is no dispute that the defendant, Shin Yi Lin, was a permissive user of the motor vehicle in which Jason Lin was a passenger.

In *Universal Underwriters Ins. v. Taylor*, 185 W.Va. 606 (1991), the West Virginia Supreme Court adopted the "initial permission rule" on the grounds that the mandatory omnibus requirement imposed by the statute governs all automobile policies indicated that the West Virginia Legislature intended to provide coverage to those injured in automobile accidents.

In that case, Carl Taylor entered the premises of a car dealership for the purpose of purchasing an automobile. He requested permission from the sales person to take the vehicle to the residence of a friend to ask if she approved of the vehicle prior to his purchase of it. The salesperson gave Mr. Taylor permission to take the car at approximately 12:20 p.m., but informed Mr. Taylor that it had to be returned no later than 1:00 p.m. that day.

When Mr. Taylor failed to return the vehicle to the dealership at the appointed hour, the salesperson notified the West Virginia State Police that Mr. Taylor had stolen the vehicle. Sixteen days after Mr. Taylor had initially driven away from the car dealership, he was involved in an automobile accident while driving the vehicle he took from the dealership. The automobile accident resulted in the death of another man.

At the time Mr. Taylor stole the vehicle from the car dealership, the company was insured by a policy issued by Universal. The insurance company filed a declaratory judgment action to resolve whether it owed coverage to Mr. Taylor under the policy. On appeal, the West Virginia Supreme Court adopted the "initial permission rule". The initial permission rule provides:

The bailee need only have received permission in the first instance, and any use while it remains in his possession is with the permission though that use is for a purpose not contemplated by the bailor when he parted possession with the vehicle. In other words, if the original taking was with the insured's consent, every act subsequent thereto while the bailee is driving the car is held to be with the insured's permission in order to permit a recovery under the omnibus clause. Under this rule, a deviation from the permitted use is immaterial. The only essential thing being that permission be given for use in the first instance.

Id., quoting 7 Am. Jur.2d Automobile Insurance §248 (1980) (recognizes liberalizing purpose of omnibus clause protecting any person injured . . . by giving him a cause of action against the insurer for injuries deemed to have been caused by the operation of the car).

It is uncontroverted that Jason Lin constitutes an insured, and presumably a named insured under the terms of the Empire policy. *Black's Law Dictionary* defines "named insured"

as the person specifically designated in the policy as the one protected and, commonly, it is the person with whom the contract of insurance has been made. *Black's Law Dictionary* 5th Edition. It is uncontroverted that Mr. Lin gave permission to Shin-Yi Lin to drive the vehicle, and, hence, it was a permissive use.

Enterprise and Empire rely on the terms of the rental contract. However, by Empire's own corporate representative's testimony, that does not constitute a policy of insurance. Moreover, an insurer seeking to rely on the content of an insurance policy must make exclusionary clauses conspicuous, plain and clear placing them in such a fashion as to make their relationship obvious to other terms, and must bring such provisions to the attention of the insured. *Syl. Pt. 5, Bender v. Glendenning*, 219 W.Va. 174 (2006). The policy of insurance issued by Empire was never provided to the plaintiff, Jason Lin. Moreover, the Court does not overlook the fact that David Smyer, the person who was entrusted to sell the insurance policy had not been given a program of instruction with respect to the sale of liability policy as required by *W. Va. Code* §33-12-32, and does not specifically recall the transaction.

Regardless, whether you classify Jason Lin as a named insured or merely an insured, the distinction makes no difference with respect to this Court's ruling. Clearly, a named insured can grant permission to another driver so as to fall within the parameters of the omnibus statute. Even if you assume that Jason Lin was not a named insured for purposes of the insurance policy, he would constitute a custodian of the vehicle at issue so as to fall within the parameters of the omnibus statute. *W. Va. Code* §33-6-31(a) dictates that not only the owner of the vehicle, but its custodian can provide the requisite permission to invoke the coverage under the liability section of an automobile policy. Specifically, that *Code* section provides that if coverage resulting from the use of a non-owned vehicle is conditioned upon consent of the owner of such motor vehicle, the word owner shall be construed to include the custodian of the motor vehicle. *Metropolitan Property & Liability Ins. Co. v. Acord*, 195 W.Va. 444 (1995). In order to be a custodian as contemplated by the omnibus statute, a person must be entrusted either, expressly or

impliedly, by the named insured with possession of the motor vehicle. *Id. Syl. Pt. 3.* By statute, a named insured means the person named as such in the declaration of the policy or contract. *W.Va. Code §33-6-31(c).* As the plaintiff points out, Enterprise Rent-A-Car of Kentucky is listed on the declaration page of the insurance policy at issue, and hence under West Virginia law would also constitute a named insured under our omnibus statute. Clearly, Mr. Lin was entrusted expressly with the vehicle by Enterprise. By definition, the plaintiff would constitute a custodian of the motor vehicle under the omnibus statute. If he allows another individual to drive the motor vehicle with his permission, coverage should be provided.

Although not dispositive as to the Court's ruling, several courts have extended coverage to passengers injured in a rental vehicles when the driver was not named as such on the rental contract. See *Weathers, et al. v. Royal Indemnity, Co.*, 577 S.W.2d 623 (1979) (coverage afforded to person injured by a rental vehicle driven by a non-renter under Missouri omnibus clause); *Continental Ins. Co. v. Body*, 577 F.Supp. 1139 (1983) (liability coverage where the rented vehicle is used for a permitted purpose even though the insured did not expressly authorize the driver to use the rental vehicle).

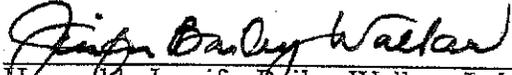
Lastly, the defendants attempt to avoid coverage by relying on an insured exclusion. This is despite the fact that the insurance policy or a summary of coverage was never provided to the plaintiff so as to make this exclusion conspicuous, plain and clear. Moreover, the Court notes that the coverage provided by Empire is separate and distinct from that provided by Enterprise, and that the plaintiff specifically purchased a policy of insurance from Empire.

W.Va. Code §33-6-29 mandates coverage for injuries to guest passengers. *Johnson v. Continental Casualty Co.*, 157 W.Va. 572 (1974). Moreover, an insurer wishing to rely on an exclusion must make such exclusionary clauses conspicuous, plain and clear placing them in such a fashion so as to make obvious their relationship to other policy terms. *Syl. Pt. 10 National Mutual Ins. Co. v. McMahon Sons, Inc.*, 177 W.Va. 734 (1987). *Bender, infra.* Furthermore, the insurer "must bring such provisions to the attention of the insured" *Id.* It is

uncontroverted that this exclusion was never brought to the attention of the insured. Lastly, for an insurance company to deny coverage based on an excluded driver, the exclusion must specifically designate the name of the excluded driver to be effective under *W.Va. Code* §33-6-31(a). *Syl. Pt. 4, Burr v. Nationwide Mut. Ins. Co.*, 178 W.Va. 398 (1987). By statute, this restrictive endorsement must be attached to the policy. *W.Va. Code* §33-6-31(a). Empire did not comply with these statutory requirements, and, accordingly, cannot rely on this exclusion.

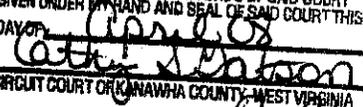
Accordingly, it is hereby **ORDERED, ADJUDGED** and **DECREED** that insurance coverage be provided to the defendant, Shin Yi Lin, as she would constitute an insured under the policy issued by Empire Fire and Marine Insurance Company, in order to cover the injuries sustained by the plaintiff, Wang-Yu Lin.

ENTERED this 19th day of March, 2008.


Honorable Jennifer Bailey Walker, Judge

Presented by:

 "FOR"
Shawn Taylor, Esquire (WV Bar #6141)
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Charleston, WV 25328
(304)345-5959
Counsel for Plaintiff

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
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DAY OF April, 2008

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CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA


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