

STATE OF OHIO
CUYAHOGA COUNTY

)SS:

IN THE COURT OF COMMON PLEAS
CASE NO. CV 06 588252

JOSHUA DAILY

Plaintiff

vs.

AMERICAN FAMILY INSURANCE CO.

Defendant

OPINION AND ORDER

MICHAEL J. RUSSO, JUDGE:

The undisputed facts are that the Plaintiff, Joshua Daily, was involved in a motor vehicle accident on July 10, 2004. At the time of the accident, Plaintiff was operating a 1992 Geo Storm for which he had obtained legal title two days earlier. Plaintiff did not have motor vehicle insurance at the time. Liability was not disputed, and the tortfeasor's insurer tendered its policy limits to Plaintiff. In this action, Plaintiff seeks a declaration that he is entitled to underinsured motorist benefits under a policy of insurance issued by the Defendant, American Family Insurance Company, to Plaintiff's father, Rick Daily. For the following reasons, Defendant's motion for summary judgment is granted, and Plaintiff's motion for summary judgment is denied.

In determining whether Plaintiff is entitled to coverage, the Court must first consider and apply the language of the policy. Defendant issued policy number 0968-3333-04-93-FPPA-OH to Rick Daily. The policy includes an Underinsured Motorists (UIM) Coverage Endorsement that states:

We will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**. The **bodily injury** must be sustained by an **insured person** and must be caused by accident and arise out of the use of the underinsured motor vehicle.

Thus, in order to qualify for coverage, the Plaintiff must be an “**insured person**.”

The endorsement further defines “**Insured person**” as “**You or a relative**.”

Although, the endorsement does not define “**You or a relative**,” page one of the policy provides “**Definitions Used Throughout This Policy**.” In that context, “**You**” is defined as the policyholder named in the declarations. In this case, “**You**” would be Rick Daily, the named insured. With respect to the issue of a “**Relative**,” that term is defined as follows:

A person living in **your** household, related to **you** by blood, marriage or adoption. This includes a ward or foster child. It excludes any person who, or whose spouse, owns a motor vehicle other than an off-road motor vehicle.

The parties have vigorously contested whether Plaintiff “lived in” the policyholder’s household at the time of the accident. While it is uncontested that Joshua Daily lived with his mother and used her address on applications, it is evident that he spent a significant amount of time residing with his father. (See Deposition of Joshua Daily at pgs. 18 –20, 44 - 50 and affidavits of Rick Daily & Sherry Dalrymple). Case law is clear that a person may have more than one residence or dual residency. A “resident” refers to one who lives in the home of the named insured for a period of some duration or regularity, although not necessarily there permanently, but excludes a temporary or transient visitor. See *Farmers Ins. of Columbus v. Taylor* (1987), 39 Ohio

App.3d 68 and *American Select Ins. Co. v. Payne* (March 23, 1995), Cuyahoga App. No. 67051, 1995 Ohio App. Lexis 1079. As Joshua Daily was more than a transient visitor and lived with his father with some regularity, the Court finds that Joshua Daily lived in the policyholder's household and was related to him by blood for purposes of defining a "relative."

Despite Plaintiff's status as a person related by blood and living in the policyholder's household, the Court nonetheless finds that Joshua Daily is excluded as a "relative" because he owned a motor vehicle. (See Deposition of Joshua Daily at pg. 35.) Accordingly, Plaintiff is not entitled to coverage because he does not meet the definition of a "relative" and is therefore not an "insured person."

In the alternative, even if Plaintiff was considered an "insured person," coverage is specifically excluded in the underinsured motorist coverage endorsement. The exclusion section states: "This coverage does not apply for bodily injury to a person: while occupying, ***, a motor vehicle that is not insured under this policy, if it is owned by **you** or any resident of **your** household." In this instance, Plaintiff was injured while occupying his 1992 Geo Storm, a vehicle that was not insured under the policy issued by Defendant and was owned by Plaintiff, a resident of the policyholder's household.

Additionally, the Court finds that Plaintiff's reliance on O. R. C. 3937.18(I)(1) is misplaced. The statute provides, in pertinent part, as follows:

Any policy of insurance that includes ...
underinsured motorist coverage...may include
terms and conditions that preclude coverage...
including but not limited to any of the following
circumstances: (1) while the insured is operating or
occupying a motor vehicle owned by, furnished to,
or available for the regular use of a named insured,
a spouse, or a resident relative of a named insured,

if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired vehicle or replacement vehicle covered under the terms of the policy.

Plaintiff argues that the statute specifically makes an exception for coverage preclusion of newly acquired vehicles. Nevertheless, any argument by Plaintiff that R.C. 3937.18(I)(1) mandates that the American Family policy must contain specific language excepting “newly acquired autos” from an underinsured motorist exclusion is contradicted by the express language of the statute which provides a list of exclusions an insurer may include, but is not exhaustive or comprehensive. Further, the language of the statute states that coverage may be excluded for a vehicle available for the regular use of a resident relative if not specifically identified in the policy.

Finally, even if the Court were to find an exception for newly acquired autos, the policy does not provide coverage for the newly acquired vehicle at issue. The policy defines “**your insured car**” to mean: “any car described in the declarations and any private passenger car or utility car **you** replace it with.” As noted above “**You**” is defined as the policyholder named in the declarations. Plaintiff as the son of the policyholder/named insured does not qualify as “you” under the policy. Therefore, the newly acquired vehicle provision is not triggered and does not extend coverage under these facts.

Based on the fact that Plaintiff is not an “insured person” under the policy and that coverage is specifically excluded in the underinsured motorist coverage endorsement, the Court finds that Defendant is entitled to judgment as a matter of law. Therefore, the Court hereby determines and declares that Plaintiff is not entitled to

underinsured motorist coverage benefits under policy no. 0968-3333-04-93-FPPA-OH
issued by Defendant to Rick Daily.

IT IS SO ORDERED.

DATE:

MICHAEL J. RUSSO, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opinion and Order has been served
upon the following counsel by regular U. S. mail on this ____ day of July, 2007:

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