An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA03-1268

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2004

LEE EDWIN SHIERTS and
LEE'S PERFORMANCE CENTER, INC.,
Plaintiffs,

v.

Mecklenburg County
No. 02 CVS 14633

ATLANTIC CASUALTY INSURANCE COMPANY,
Defendant.

Appeal by plaintiffs from order entered 2 July 2003 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 June 2004.

Downer, Walters & Mitchener, P.A., by Joseph H. Downer and William B. Holman for plaintiff.

Wishart, Norris, Henninger & Pittman, P.A., by William A. Navarro, for defendant.

LEVINSON, Judge.

Plaintiff (Lee Shierts) appeals from an order of summary judgment entered in favor of defendant (Atlantic Casualty Insurance Company). For the reasons that follow, we affirm the trial court.

Plaintiff owns and operates Lee's Performance Center, Inc., a motorcycle shop specializing in building high-performance street bikes and selling motorcycles and motorcycle parts. As a part of this business, plaintiff will on occasion accept a customer's

motorcycle on consignment and sell the bike on behalf of its owner. In this situation, plaintiff and the customer/owner sign a consignment agreement specifying the minimum sale price that the customer would accept for the bike, and the commission that plaintiff would earn on the sale. However, plaintiff does not buy the motorcycle, which remains the property of the customer until purchased by someone else.

In the summer of 1999, plaintiff took a 1999 Suzuki motorcycle on consignment. Plaintiff took possession of the bike in order to sell it, and ownership remained with the consignee. On 8 August 1999 plaintiff was involved in a serious accident while he was operating the motorcycle. In May, 2000, plaintiff filed suit against the other driver involved in the accident. At the time of the accident, the other driver had liability insurance with Nationwide Insurance Company in the amount of $25,000. Plaintiff had an insurance policy with Kemper Insurance Company, providing up to $100,000 in underinsured motorist (UIM) coverage. Plaintiff also had a "garage policy" with defendant, which does not include UIM coverage. Plaintiff's personal injury claim was submitted to binding arbitration, and on 19 December 2001 the arbitrators awarded plaintiff $375,000. Nationwide tendered the limits of the applicable policy, $25,000. Kemper tendered the remainder of the UIM coverage, $75,000.

On 7 August 2002 plaintiff filed a declaratory judgment action against defendant, seeking a declaration that defendant was obligated to provide UIM coverage under the garage policy.

Plaintiff asserted that, because he had never executed a valid acceptance/rejection form rejecting UIM coverage, the provisions of N.C.G.S. § 20-279.21(b) (2003) should be applied to afford plaintiff UIM coverage up to the amount of his liability insurance. Defendant denied that the policy it issued to plaintiff provided any UIM coverage, and asserted that, because the garage policy was an "operator's policy" rather than an "owner's policy" the provisions of G.S. § 20-279.21(b) were inapplicable. In May 2003 defendant moved for summary judgment, and on 2 July 2003 summary judgment was entered in favor of defendant. Plaintiff appeals the entry of summary judgment.

Standard of Review

Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2003). On appeal:

> It is well established that the standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law."

Livingston v. Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., __ N.C. App. __, __, 594 S.E.2d 44, 48 (2004) (quoting *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000)).

Further, "if the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (citations omitted).

G.S. § 20-279.21(a) provides in relevant part that "[a] 'motor vehicle liability policy' as said term is used in this Article shall mean an owner's or an operator's policy of liability insurance[.]"

> An owner's policy protects the named insured and any person using the designated insured vehicle with the owner's permission. Such policy offers no protection for liability arising from the use of a vehicle not described in the policy. An operator's policy protects the named insured from liability arising out of the use of any vehicle.

Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 91, 194 S.E.2d 834, 837 (1973) (citing *Lofquist v. Allstate Ins. Co.*, 263 N.C. 615, 140 S.E. 2d 12 (1965)). G.S. § 20-279.21(b) governs owner's policies, providing in part that "if the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the higher limit of bodily injury liability coverage for any one vehicle in the policy." In contrast, G.S. § 20-279.21(c), which governs operator's policies of

automobile liability insurance, does **not** provide for statutorily mandated UIM coverage in the absence of a valid rejection.

In the instant case, it is undisputed that plaintiff did not purchase UIM coverage with the subject policy. Plaintiff argues that the garage policy is properly considered an "owner's policy" subject to the terms of G.S. § 20-279.21(b), rather than an "operator's policy" subject to G.S. § 20-279.21(c). We conclude, however, that even assuming *arguendo* that the subject insurance policy is an automobile liability "owner's policy," the policy does not cover the motorcycle involved in plaintiff's accident.

The "garage policy" that plaintiff obtained from defendant offers an insured the opportunity to purchase eleven separate types of automobile liability coverage. Each category of coverage is identified by a number. These include, *e.g.,* No. 21 (Any "Auto"); No. 22 (Owned "Autos" Only); No. 23 (Owned Private Passenger "Autos" Only); No. 24 (Owned "Autos" Other Than Private Passenger "Autos" Only); No. 27 (Specifically Described "Autos"), and No. 28 (Hired "Autos" Only). Plaintiff purchased only one type of coverage: No. 29, "Non-Owned 'Autos' Used in Your Garage Business." The policy states that category No. 29 insures:

> Any "auto" **you do not own**, lease, hire, rent or borrow used in connection with your garage business described in the Declarations. This **includes "autos" owned by your "employees" or partners** (if you are a partnership), members (if you are a limited liability company), or members of their households while used in your garage business.

(emphasis added). Plaintiff argues that he has an equitable ownership interest in the motorcycle, and should be considered its "owner" for purposes of determining defendant's obligations under the policy. However, since category No. 29, the only type of insurance purchased by plaintiff, explicitly applies **only** to autos he does **not own**, this argument does not support plaintiff's position that defendant is obligated to provide him with UIM insurance coverage.

Moreover, we conclude that to obtain insurance coverage of the subject motorcycle, plaintiff was required to purchase a **different** category of insurance: No. 30, "'Autos' Left With You For Service, Repair, Storage Or Safekeeping." The policy states that Category No. 30 insures:

> **Any customer's land motor vehicle** or trailer or semitrailer **while left with you for service, repair, storage or safekeeping**. Customers include your 'employees,' and members of their households who pay for the services performed.

(emphasis added).

"Insurance policies are considered contracts between two parties. The court's main purpose in interpreting contracts is to ascertain the intention of the parties. The plain language of the contract is the clearest indicator of the parties' intentions." *Metro. Prop. & Cas. Ins. Co. v. Lindquist*, 120 N.C. App. 847, 851, 463 S.E.2d 574, 576 (1995) (citations omitted). Further, "it is the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the

parties." *Id.* (quoting *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 346, 152 S.E.2d 436, 440 (1967)). In the instant case, comparison of No. 29 and No. 30 makes it clear that No. 29 covers vehicles used to conduct garage business and owned by **employees**, partners, etc.; while No. 30 covers **customers**' vehicles. It is undisputed that the subject motorcycle was not an employee's or partner's vehicle, but was consigned by a customer in order for plaintiff to resell it. It was a vehicle left with plaintiff by a customer, and fits neatly within category No. 30. Moreover, even if plaintiff's **operation** of the motorcycle was for a valid garage-business purpose, it was not a vehicle plaintiff "**used** in connection with [his] garage business."

We conclude that, even assuming, *arguendo*, that this is an "owner's policy" to which the provisions of G.S. § 20-279.21(b) apply, plaintiff did not purchase insurance to cover his customer's vehicles, and thus did not have any insurance coverage on accidents arising from his operation of a customer's vehicle. Accordingly, the trial court did not err by granting summary judgment in favor of defendant, and the trial court's order is

Affirmed.

Judge CALABRIA concurs.

Judge WYNN concurs in the result with separate opinion.

Report per Rule 30(e).

NO. COA03-1268

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2004

LEE EDWIN SHIERTS and LEE'S
PERFORMANCE CENTER, INC.,

Plaintiffs,

v.

Mecklenburg County
No. 02 CVS 14633

ATLANTIC CASUALTY INSURANCE
COMPANY,

Defendant.

WYNN, Judge, concurring in the result.

I agree with the majority's conclusion that summary judgment was properly granted to Defendant in the instant case. I do so, however, on the ground that the policy at issue was an operator's policy and not an owner's policy. I therefore concur in the result only.

An operator's policy is one which insures "the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle *not owned* by him." N.C. Gen. Stat. § 20-279.21(c) (2003) (emphasis added). As noted in the majority opinion, Plaintiff here purchased coverage entitled "Non-Owned 'Autos' Used in Your Garage Business," which insured "any 'auto' you do not own, lease, hire, rent or borrow." I would hold, under the plain terms of the statute and the insurance policy, that Plaintiff purchased an operator's policy and was therefore not entitled to the statutorily mandated UIM

coverage extended to owner's policies. The trial court properly granted summary judgment to Defendant.