

IN THE SUPREME COURT OF OHIO

Kevin R. Flynn
and
Margaret M. Flynn

Appellants

vs.

Westfield Insurance Company
United National Insurance Company

Appellee

The National Catholic Risk
Retention Group, Inc.

Appellee

and

St. Paul Fire and Marine
Insurance Company,

Appellee.

Ohio Supreme Court
Case No. 06-0619

06-1619

On Appeal from the Hamilton County
Court of Appeals, First Appellate District

Court of Appeals
Case No. C-050909

**MEMORANDUM OF APPELLANTS, KEVIN R. FLYNN
AND MARGARET M. FLYNN, IN OPPOSITION TO
WESTFIELD INSURANCE COMPANY'S MOTION FOR RECONSIDERATION**

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MEMORANDUM

Westfield raises no new reason for this Court to accept jurisdiction. It just rehashes portions of its Memorandum in Support of Jurisdiction. For the sake of brevity, the Flynn's refer the Court to their Opposition to Westfield's Memorandum in Support of Jurisdiction.

This Court already covered this matter in *Westfield Insurance Group v. Galatis*.¹ The Westfield policy here, like the Westfield policy in *Galatis*, utilizes ISO Form CA 2133, as its UM/UIM endorsement. This endorsement extends UM/UIM coverage to "You" where "You" is identified as a corporation. *Galatis* held that, "An employee in the scope of employment qualifies as "You" as used in CA 2133, and thus, is entitled to uninsured motorist coverage."² The Court of Appeals in this case just applied *Galatis*. Reconsideration in this case would make a mockery of *stare decisis*. The Westfield policy at issue in this case is the same policy at issue in *Galatis*. There is no principled reason for distinguishing *Galatis* from this case.

The Court of Appeals refused to certify a conflict in this case because the appellate cases cited by Westfield are not in conflict.

In *Olmstead v. New Hampshire Ins. Co.*³, plaintiff was injured in a car accident on his way to work. The UM/UIM endorsement at issue did not identify an insured as "you." Instead, when a corporation was identified as the named insured, the policy afforded UM/UIM coverage to "anyone occupying a covered auto or temporary substitute for a covered auto." The policy defined covered autos for UM/UIM purposes as only those autos

¹ 100 Ohio St.3d 216, 2003 - Ohio - 5849, 977 N.E.2d 1256.

² *Id.* At ¶31.

owned by the corporation. The plaintiff did not qualify as an insured because he was not occupying an auto owned by the corporation at the time of the accident. The policy language in *Olmstead* was different than the policy language in this case. *Olmstead* does not concern whether its policy language required “you” to be occupying a covered auto to qualify for UM/UIM benefits. The differing results between *Olmstead* and this case are not based on conflicting rules of law. The results are based on different policy language.

In *Wright v. Small*⁴, the plaintiff was a passenger in a vehicle. The plaintiff did not seek UM/UIM coverage from his employer’s auto policy. Rather, he sought UM/UIM coverage from the insurer for the employer of the driver. The definition of insured for UM/UIM purposes was the same as the definition in the Westfield UM/UIM Endorsement. The plaintiff, however, could not qualify as “you” because he was not an employee of the named insured. Instead, Plaintiff attempted to recover as an occupant of a “covered auto.” The policy, however, defined covered autos for UM/UIM purposes as those vehicles specifically identified on a schedule of covered autos provided to the insurer. At the time of the accident, the plaintiff was not occupying a vehicle specifically identified as a covered auto and, therefore, was not an insured under the policy. Again, the decision in *Wright* was not based on a rule of law that conflicts with the decision in this case. Rather, the result was based on different facts. The plaintiff in *Wright* did not even claim to qualify as “you” under the policy at issue in that case.

Finally, in *Musser v. Luckey Farmers, Inc.*⁵, plaintiff was injured in an auto accident while working. At the time of the accident, he was driving a vehicle he owned. His employer’s policy contained an “other-owned-vehicle” exclusion, which excluded claims for

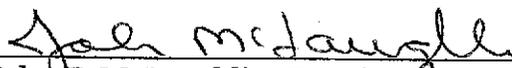
³ (6th Dist.), 159 Ohio App.3d 457, 2005-Ohio-39,824 N.E.2d 158.
⁴ 3rd Dist. No. 13-02-34, 2003-Ohio-971.

bodily injury sustained by “you” while occupying or when struck by any vehicle owned by “you” that was not a covered auto. The *Musser* decision does not refer to the Declarations page of the policy and conclude that the declarations page required “you” to be occupying the covered auto to qualify for UM/UIM benefits. Rather, the court found that there was no UM/UIM coverage because the other-owned-vehicle exclusion barred coverage. Plaintiff was occupying a vehicle he owned, which was not a covered auto as defined by that policy. In this case, Kevin Flynn was occupying a vehicle that he leased from Huntington National Bank. By its plain terms, the Westfield “other-owned-vehicle” exclusion applied only if Kevin was occupying a vehicle owned by “you”, i.e., Lawyers Title, Griffin & Fletcher, or Kevin Flynn. Since the vehicle was owned by Huntington Bank, not by “you”, Westfield’s “other-owned-vehicle” exclusion did not apply. Once again, the *Musser* case was based on different facts, not the application of a conflicting rule of law.

Conclusion

In summary, for the reasons cited in this Opposition and the Flynn’s Memorandum in Opposition to Jurisdiction, Westfield’s Motion for Reconsideration should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered, by ordinary U.S. mail, postage prepaid, to the following counsel this ~~28th~~ day of December, 2006:

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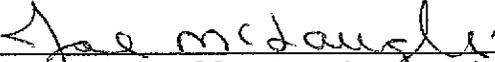
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