

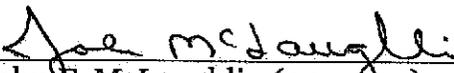
IN THE SUPREME COURT OF OHIO

Kevin R. Flynn : Ohio Supreme Court
and : Case No. 06-1619
Margaret M. Flynn :
 :
Cross-Appellees : On Appeal from the Hamilton County
 : Court of Appeals, First Appellate District
 :
vs. : Court of Appeals
 : Case No. C-050909
Westfield Insurance Company :
 :
Cross-Appellant :

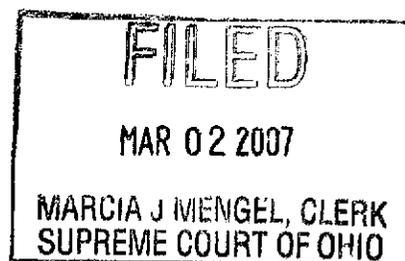
**MOTION OF KEVIN R. FLYNN AND MARGARET M. FLYNN
TO DISMISS THE CROSS-APPEAL**

Kevin R. Flynn and Margaret M. Flynn, by and through counsel, pursuant to S. Ct. Prac. R. XIV(4)(A), request this Court to dismiss Westfield Insurance Company's Cross-Appeal as moot. This Motion is supported by the attached Memorandum of Law.

Respectfully submitted,



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MEMORANDUM

I. Introduction

Kevin R. Flynn and Margaret M. Flynn move to dismiss as moot the Cross-Appeal of Westfield Insurance Company, which this Court recently accepted for consideration. The Cross-Appeal is moot because the Flynnns would be entitled to underinsured motorist coverage from Westfield regardless of how the Court resolves the Proposition of Law accepted for review.

The Court of Appeals ruled that Kevin Flynn qualified as an insured for underinsured motorist coverage under the Westfield policy on two independent grounds. He qualified as an employee of a real estate title company. He also qualified as a partner of a law firm. In its Memorandum in Support of Jurisdiction, Westfield did not challenge, or even address, the Appellate Court's determination that Kevin Flynn was entitled to underinsured motorist coverage as a partner in his law firm. Westfield only challenged the Appellate Court's determination that Kevin Flynn was entitled to underinsured motorist coverage as an employee of the title company. This Court accepted for review Westfield's Proposition of Law No. 1, which proposes that Kevin Flynn is not entitled to coverage as an employee because, at the time of the accident, he was driving his personal auto. Resolution of that issue, however, does not alter the Flynnns' entitlement to underinsured motorist coverage under the Westfield Policy. Even if this Court reverses the Court of Appeals' determination that Kevin Flynn is entitled to underinsured motorist coverage as an employee of the title company, that ruling would not affect the Court of Appeals' decision that Kevin Flynn is entitled to underinsured motorist coverage as a partner of his law firm.

II. Background

The Accident

On the morning of February 22, 2002, Kevin Flynn was traveling on Interstate 74 when his car was forced off the road, across the median, and into oncoming traffic by a vehicle driven by Vincent Story. As a result of the ensuing collision, Kevin was paralyzed.

Kevin is a real estate attorney and a partner in the law firm of Griffin-Fletcher, L.L.P. ("Griffin & Fletcher"). He is also an employee of Lawyers Title of Cincinnati, Inc. ("LTOC"), a real estate title company. Griffin & Fletcher and LTOC are related businesses and share office space, but are separate and distinct legal organizations.

It is undisputed that Kevin was acting within the course and scope of his employment with LTOC, and also acting as a partner of Griffin & Fletcher, at the time of the accident.

Westfield's Policy

Westfield Insurance Company issued a commercial package policy to both Griffin & Fletcher and LTOC for the policy period October 10, 1999 to October 10, 2002. The Policy included an uninsured/underinsured motorist endorsement (Westfield UM/UIM Endorsement) with limits of \$500,000.00.

The Westfield UM/UIM Endorsement defines an insured as follows:

B. Who is an insured

1. You.
2. If you are an individual, any "family member."
3. Anyone else "occupying" a covered "auto" or temporary substitute for a covered "auto." The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.

4. Anyone for damages he or she is entitled to recover because of “bodily injury” sustained by another “insured.”

“You” is defined by the Westfield Policy as a Named Insured. Westfield’s Policy identifies two Named Insureds, Griffin & Fletcher and LTOC. Although their businesses are intertwined, Griffin & Fletcher and LTOC are separate and distinct legal organizations. Griffin & Fletcher is a law partnership. LTOC is a real estate title company.

Proposition of Law No. 1

The Court of Appeals determined that Kevin Flynn qualified as an insured under the Westfield UM/UIM Endorsement both (1) as a partner in the Griffin & Fletcher partnership, and (2) as an employee of LTOC acting within the scope of his employment at the time of the accident.

Westfield filed with this Court a Notice of Cross-Appeal and a Memorandum in Support of Jurisdiction. Westfield raised three Propositions of Law. Neither the Memorandum in Support of Jurisdiction nor the Propositions of Law address the Court of Appeals’ conclusion that Kevin Flynn is entitled to underinsured motorist coverage under the Westfield policy as a partner of the Griffin & Fletcher partnership.

Proposition of Law No. 1: An **employee** driving his personal auto is not covered for injuries when the insured business has purchased uninsured/underinsured coverage only for the company’s “owned autos,” all of which were scheduled in the policy and for which a premium was paid. (emphasis added)

Proposition of Law No. 2: If an insured is considered “you” for purposes of UM/UIM coverage, and is driving a vehicle in which he owns an interest but the vehicle is not scheduled for coverage and no premium was paid for coverage on the vehicle, no coverage is excluded by policy Exclusion C.5.(a).

Proposition of Law No. 3: When a specific individual is named as an additional insured under a “Drive Other Car Coverage” endorsement, the ambiguity found in *Scott-Pontzer* is eliminated.

This Court initially declined jurisdiction, and Westfield filed a Motion for Reconsideration. Upon reconsideration, this Court accepted jurisdiction to review Westfield's Proposition of Law No. 1. The Motion for Reconsideration did not challenge the Court of Appeals' decision that Kevin Flynn qualified as an insured under the Westfield Policy as a partner of Griffin & Fletcher.

It should be noted that Westfield rephrased Proposition of Law No. 1 in its Motion for Reconsideration. In its Memorandum in Support of Jurisdiction, Westfield cites Proposition of Law No. 1 as:

Proposition of Law No. 1: An employee driving his personal auto is not covered for injuries when the insured business has purchased uninsured/underinsured coverage only for the company's "owned autos," all of which were scheduled in the policy and for which a premium was paid.

But, in its Motion for Reconsideration, Westfield rephrases its Proposition of Law No. 1 as:

Proposition of Law No. 1: When a business owns vehicles and selects and purchases UM/UIM coverage for "owned autos only" under a standard ISO business auto policy, that coverage does not extend to those who drive their personal vehicles within the scope of employment.

S.Ct. Prac. R. XI, 2(A), which governs motions for reconsideration, does not permit a party to rephrase its Proposition of Law. S.Ct.Prac. R. III requires a party to identify its Proposition of Law in the Memorandum in Support of Jurisdiction. When referring to the Proposition of Law accepted for review, the Flynn's will refer to the Proposition of Law No. 1 from Westfield's Memorandum in Support of Jurisdiction.

III. Westfield's Cross-Appeal is Moot

It is well settled that this Court will not issue advisory opinions.¹ “A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.”² When an appeal is moot, a motion to dismiss is appropriate.³

This Court's review in this Cross-Appeal is limited to the issue presented by Westfield's Proposition of Law No. 1, namely, whether Kevin Flynn is covered under the Westfield Policy as an employee of LTOC. The Court of Appeals, however, determined that Kevin Flynn was entitled to underinsured motorist coverage as an employee of LTOC **and** as a partner of Griffin & Fletcher.

“Along with the LTOC Corporation, the Griffin-Fletcher partnership was included as a named insured. ‘A partnership is an aggregate of individuals and does not constitute a separate legal entity.’ Accordingly, when a partnership is listed as the named insured, the individual partners are also insured. Flynn was also an insured as a partner of Griffin-Fletcher.”⁴

The analysis employed in determining whether UIM coverage is afforded to a partner is different from the analysis employed in determining whether an employee of a

1 *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, 18; *State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586, 817 N.E.2d 5, ¶ 34; see, also, *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶ 17, quoting *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371

2 Black's Law Dictionary, Fifth Edition, p. 909.

3 See, e.g., *Miner v. Witt* (1910), 82 Ohio St.237, 92 N.E. 21; *State v. Wilson* (1975) 41 Ohio St.2d 236, 325 N.E.2d 236.

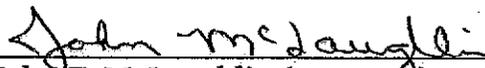
4 *Flynn v. Westfield Ins. Co.*, 168 Ohio App.3d 94, 858 N.E.2d 858, 2006 Ohio 3719, ¶12, quoting *Wedle v. Hayes*, 7th Dist. No. 96-BA-44, 1997 WL 567964.

corporation is afforded UIM coverage.⁵ In its Memorandum in Support of Jurisdiction, Westfield did not challenge the Appellate Court's decision that Kevin Flynn qualified as an insured as a partner of Griffin & Fletcher. Westfield did not petition this Court to review that issue. Instead, its argument in support of Proposition of Law No. 1 focused solely on whether a corporate employee is entitled to UM/UIM coverage while operating a personal vehicle. Since this Court will not review the issue of Kevin Flynn's entitlement to underinsured motorist coverage as a partner of Griffin & Fletcher, that portion of the Court of Appeals' decision is final. Thus, even if this Court reversed the Court of Appeals' decision that Kevin Flynn is entitled to coverage as an employee of LTOC, he still would be entitled to coverage under the Westfield Policy as a partner of Griffin & Fletcher. Thus, any decision this Court may issue on this appeal will not change the judgment in favor of the Flynn's in this case. The issue raised by Westfield's Cross-Appeal is moot, and the appeal should be dismissed.

IV. Conclusion

Based on the above arguments, the Flynn's respectfully requests this Court to dismiss Westfield's Cross-Appeal.

Respectfully submitted,



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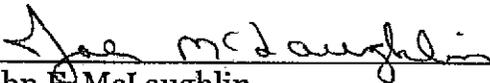
⁵ *Kiggins v. Allstate Ins.*, (Sept. 27, 1994), 10th Dist. No. 94APE02-219, 1994 WL 530291.

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 23rd day of February, 2007:

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