

IN THE SUPREME COURT OF OHIO

KEVIN R. FLYNN, *et al.*,

Cross-Appellees,

vs.

WESTFIELD INSURANCE COMPANY,

Cross-Appellant.

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Case No.: 2006-1619

[Hamilton County Court of Appeals
Case No. C-050909]

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

MEMORANDUM OF WESTFIELD INSURANCE COMPANY
CONTRA MOTION OF KEVIN R. FLYNN AND MARGARET M. FLYNN
TO DISMISS THE CROSS-APPEAL

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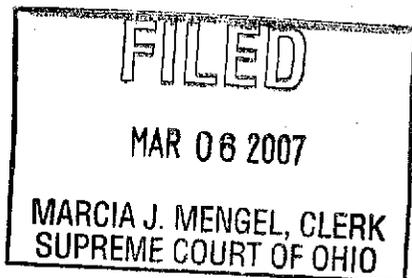
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I. FLYNN'S MOTION IS AN ATTEMPT TO ADDRESS THE MERITS OF THE PARTIES' ARGUMENTS PRIOR TO THE COURT RECEIVING BRIEFS ON THE MERITS.

Cross-Appellee Flynn has basically argued his position on the merits by quoting incomplete facts not cited to the Record. S. Ct. Prac. R. XIV(4)(A), which Flynn relies on for his motion to dismiss, is not intended to allow the appellee an initial chance to try to win the case by motion on the merits; this Rule is intended to allow a motion for an "order or relief" pending a decision on the merits.

Use of this rule to argue alleged facts not cited to a record, but argued in order to attempt to win on the merits, is an improper use of Rule XIV(4)(A).

II. THE STANDARD ISO POLICY AT ISSUE EXPRESSLY EXCLUDES CARS OF EMPLOYEES OR PARTNERS IF THOSE CARS ARE NOT LISTED OR SCHEDULED FOR COVERAGE.

Flynn's characterization of the record below is incomplete and misleading. While Flynn did work for Lawyers' Title of Cincinnati (LTOC) and the lawfirm of Griffin & Fletcher (G-F), that is only a small part of the story. Flynn was not acting as a partner at the time of the accident, and the policy clearly excludes coverage regardless, because Flynn was not driving an insured car.

The standard ISO policy at issue provides Uninsured/Underinsured Coverage for only the following cars:

Symbol	Description Of Covered Auto Designation Symbols	
	* * *	
2	Owned "Autos" Only	Only those "autos" you own (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins:

* * *

8	Hired "Autos" Only	Only those "autos" you lease, hire, rent or borrow. <u>This does not include any "auto" you lease, hire, rent or borrow from any of your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households.</u>
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(Emphasis Added.)

Thus, whether Flynn's employment was with his title company ("LTOC") or his lawfirm ("G-F") is irrelevant.¹ Flynn was driving his personal auto. He was not driving an auto owned, covered or listed by either LTOC or G-F, nor an auto "leased, hired, rented or borrowed" by either LTOC or G-F from someone other than an employee or partner. In fact, the car Flynn was driving was never scheduled for UM coverage, nor was a premium paid for that car. The policy expressly excludes coverage for cars borrowed from Flynn, regardless of whether he was acting as an employee or partner.

III. LTOC DID NOT PURCHASE COVERAGE FOR CARS OF PARTNERS OR EMPLOYEES.

The policy at issue would have allowed an insured to select and purchase coverage for Mr. Flynn's personal Jaguar if the insured wanted that coverage, regardless of whether Flynn is an employee or partner. That coverage is contained in Symbol 9 (not selected for coverage here).

¹ In addition, the record below will be clear that LTOC initially acquired the Westfield policy in 1990, and that policy included property coverage, general liability, auto, inland marine, crime and umbrella coverage. It will also be clear that because LTOC and G-F operated out of the same building, LTOC later requested that the name on the policy be changed to "LTOC dba G-F" in order to be sure that all personal property of both, which was located at the office they shared, was covered. Obviously a title company cannot "do business as" a lawfirm, and therefore, neither side intended or expected this name change to broaden auto coverage to include vehicles which the parties agreed were not covered.

Symbol	Description Of Covered Auto Designation Symbols	
	* * *	
9	Nonowned "Autos" Only	Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. <u>This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company), or members of their households</u> but only while used in your business or your personal affairs.

(Emphasis Added.)

This coverage for employees' or partners' cars was not purchased. Thus, again, regardless of whether Flynn is an employee of LTOC, a partner of G-F, or both, the policy clearly excludes UM/UIM for autos not owned or scheduled by the insured, and for which no premium was paid (unless Symbol 9 coverage is selected, which did not occur here).

IV. THE PARTIES TO THE POLICY AGREE THAT COVERAGE WAS NOT INTENDED.

The record will reflect that the office manager for LTOC (the person in charge of insurance) and the senior partner of G-F both testified that all employees and partners, including Flynn, knew that they had to acquire and insure their own personal cars. The independent agent placing the policy with Westfield also confirmed this by affidavit. Flynn himself admits never being told his Jaguar was or would be covered, and he further admits he never asked that it be covered. That is why Flynn had his Jaguar listed under his own personal auto policy with Cincinnati Insurance Company.

Thus, the record will show that the policy was not ambiguous, but also that any ambiguity (if explained by extrinsic evidence) will support the intent of the parties that only owned and hired company cars were to be covered for UM/UIM.²

² Flynn complains that Proposition Number 1 is phrased somewhat differently in the Memorandum In Support of Jurisdiction and the Motion for Reconsideration. That is true. When the Motion for Reconsideration was prepared, the proposition of law was pulled off the

V. THE RECORD ESTABLISHES THAT FLYNN WAS DRIVING ON BEHALF OF LTOC, NOT G-F.

Flynn argues the appeal is moot because the Appellate Court found he was driving on behalf of both his employer (LTOC) and his partnership (G-F). That is not so.

The record below indicates that, at the time of the accident, Flynn was delivering certain documents to a real estate closing because LTOC's courier had forgotten to deliver them the day before. Thus, the papers were to have been delivered by an LTOC courier in an LTOC car, and Flynn (who was also an employee of LTOC), stepped in to do this job for LTOC. The parties agree that Flynn was driving as an employee of LTOC and the Appellate Court below so held. (Court of Appeals Decision, Appx. pg. 6, *Memorandum In Support of Jurisdiction of Cross-Appellant Westfield Insurance Company*). However, the fact that Flynn may also have insured status as a lawyer for G-F does not change his role at the time of the accident as an LTOC employee. While the Appellate Court below noted that Flynn was insured as a partner of G-F, that Court made no determination that Flynn was acting on behalf of G-F at the time of his accident. (Court of Appeals Decision, Appx. pg. 6, *Memorandum In Support of Jurisdiction of Cross-Appellant Westfield Insurance Company*). Further, Flynn's purpose for the trip becomes irrelevant when the auto he drives is not listed for coverage.

VI. SCOPE OF EMPLOYMENT IS IRRELEVANT.

While Flynn's scope of employment may be relevant for purposes of vicarious liability of his employer, it is irrelevant for purposes of whether or not he gets UM/UIM benefit for a car not

computer from an earlier draft; however, the issue is exactly the same despite the terminology used. In fact, the thrust of the two versions of the issue were so similar that Flynn never raised it in his Memorandum Opposing Westfield's Motion for Reconsideration, and apparently neither party nor the Court even noticed it prior to Flynn's motion. (See affidavits attached.)

owned or insured by his employer. Neither LTOC nor G-F owned or listed Flynn's Jaguar, and neither paid for coverage for Flynn's car.

Thus, while coverage for the vicarious liability of an employer may be affected by scope of employment, eligibility for UM/UIM benefits is not determined by scope of employment, but rather by whether or not the car is covered for UM/UIM.³

"Insofar as only corporation-owned vehicles were "covered autos" for purposes of UM coverage, we find that the issue of whether appellee was within the scope of his employment is irrelevant in determining whether he was entitled to UM coverage. The inquiry ends after determining that appellee was not occupying a corporation-owned vehicle at the time of his accident."

Olmstead v. New Hampshire Ins. Co., 6th Dist No. E-04-017, 2005-Ohio-39, 159 Ohio App.3d 457, 824 N.E.2d 158, ¶17.

Many other states have also so held.

CONCLUSION

The issue in this case needs to be decided and this Court has properly recognized that fact.

Employees and partners regularly drive their own cars on company business. Employers regularly purchase UM/UIM coverage only for company cars because employers want to keep

³ For other cases holding that scope of employment is irrelevant when an insured purchases UM/UIM for listed or scheduled cars only, see: *Weyda v. Pacific Employers Insurance Co.*, 1st Dist. No. C-020410, 2003-Ohio-443, 151 Ohio App. 3d 678, 785 N.E.2d 763; *The Westfield Group v. Cramer*, 9th Dist. No. 04CA008443, 2004-Ohio-6084, 2004 WL 2600450; *Wright v. Small*, 3d Dist. No. 13-02-34, 2003-Ohio-971, 2003 WL 728943; *Klocinski v. American States Ins. Co.*, 6th Dist. No. L-03-1353, 2004-Ohio-6657, 2004 WL 2849054; *Desmit v. Westfield Insurance Company*, 9th Dist. No. 04CA008419, 2004-Ohio-5167, 2004 WL 2244313; *Nentwick v. Erie*, 7th Dist. No. 03 CO 47, 2004-Ohio-3635, 2004 WL 1533251; *Progressive Insurance Co. v. Heritage Insurance Co.* (Sept. 3, 1996), 8th Dist. No. 69264, 113 Ohio App.3d 781, 682 N.E.2d 33.

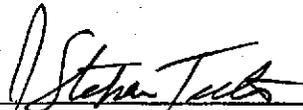
premiums down by excluding cars of employees or partners and requiring those partners and employees to insure their own cars.

Because of the standard forms used for this coverage, and the differing decisions being reached by Ohio Courts addressing this issue, guidance from this Court is needed.

The issue here is whether Flynn gets UM/UIM coverage for a vehicle that was not owned by the insured LTOC dba G-F, not listed for coverage, and for which no premium was paid. The case is not determined by whether Flynn was acting as an employee or partner, as Flynn now attempts to argue by motion. The issue is whether Flynn gets coverage which was not purchased and which the parties agree was not intended.

The Motion to Dismiss should be overruled.

Respectfully submitted,



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Westfield Insurance Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary

U.S. Mail, postage prepaid, on this 6th day of March, 2007, upon the following:

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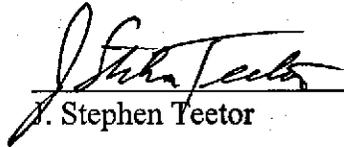
Kevin R. Flynn and Margaret M. Flynn



J. Stephen Teetor

(0023355)

4. Further, affiant sayeth not.


J. Stephen Teetor (0023355)

Sworn to before me and subscribed in my presence this 6th day of March, 2007.



SCYLD D. ANDERSON, ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.


Notary Public

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-vs-

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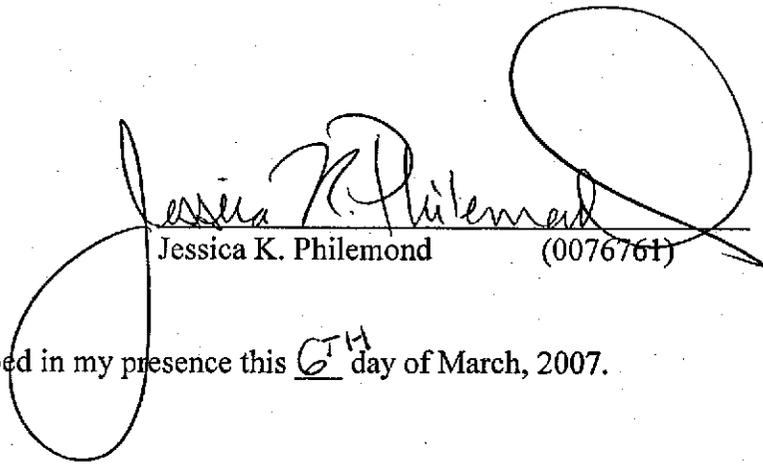
AFFIDAVIT OF JESSICA K. PHILEMOND

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN,)

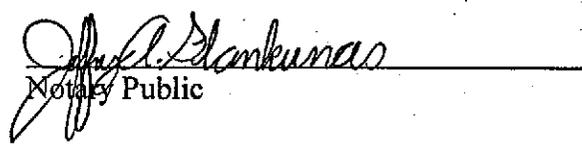
Now comes Jessica K. Philemond, after having been duly cautioned and sworn, deposes and says, based on personal knowledge:

1. I am counsel for cross-appellant Westfield Insurance Company in this case.
2. I created the initial draft of the Motion for Reconsideration which was filed with this Court on December 22, 2006.
3. In preparing that Motion for Reconsideration, I inadvertently added Westfield's "First Proposition of Law" from an earlier draft of Westfield's "Memorandum In Support of Jurisdiction" which had been saved on our computer server.
4. Both propositions of law, as phrased in the Memorandum In Support of Jurisdiction and in the Motion for Reconsideration as "Proposition of Law No. 1," are the same issue of law. The only difference between the two is the terminology which was mistakenly added from a prior draft onto the Motion for Reconsideration.
5. The initial draft language that was added to the Motion for Reconsideration was unintentional. If it had been noticed, it would have been corrected before submitting the pleading to this Court in order to contain the final phrasing of the issue.

Further, affiant sayeth not.


Jessica K. Philemond (0076761)

Sworn to before me and subscribed in my presence this 6TH day of March, 2007.


Notary Public

JEFFREY ALAN STANKUNAS
Attorney At Law
Notary Public, State of Ohio
My Commission Has No Expiration Date
Section 147.03 R.C.