

IN THE SUPREME COURT OF OHIO

KEVIN R. FLYNN, *et al.*,

Plaintiffs/Appellants/Cross-Appellees,

-vs-

WESTFIELD INSURANCE
COMPANY, *et al.*,

Defendants/Appellees/Cross-Appellants.

CASE NO. 2006-1619

On Appeal from the Hamilton County Court
of Appeals, First Appellate District
Court of Appeals Case No. C-050909

MERIT BRIEF OF CROSS-APPELLANT WESTFIELD INSURANCE COMPANY

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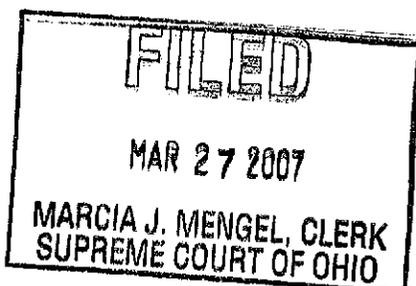


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STATEMENT OF FACTS

This case arises from an automobile accident on February 22, 2002. Plaintiff/Cross-Appellee Kevin Flynn (hereinafter “Flynn”) was seriously hurt while driving his personal Jaguar. Mr. Flynn was driving between 65 and 70 m.p.h. in the passing lane of the highway. (Flynn Depo., Vol. I, p. 60, 62; Supp. pp. 66, 67)¹. When Defendant Storey began edging over into that lane, Mr. Flynn decided to accelerate and try to pass Mr. Storey on the berm. (Flynn Depo., Vol. I, p. 73; Supp. p. 68). Flynn lost control, left the roadway, drove across a grass median, went airborne and struck an oncoming car head-on. (Clauss Depo., p. 37, 40; Supp. pp. 88, 89).

Flynn settled with Mr. Storey for his \$100,000 liability insurance limits. (Flynn Depo., Vol. I, p. 100; Supp. p. 69). Flynn had insured his leased Jaguar with Cincinnati Insurance, and he then settled with Cincinnati for another \$150,000 (\$250,000 UIM limits minus the \$100,000 from Mr. Storey). (Flynn Depo., Vol. I, p. 100; Supp. p. 69). Flynn also settled with the general liability carrier for his wife’s housepainting business for \$25,000 (this was at a time when UM/UIM coverage was being implied by some courts into even general liability policies).

Flynn then demanded coverage from Westfield Insurance Company, the insurer of Flynn’s employer.² He also demanded coverage from the insurers of the Catholic Diocese.

¹ In accordance with Sup. Ct. Prac. R. VII, a Supplement is being filed concurrently with the Court. Portions of the record will be cited herein by both their location in the Record and their page within the Supplement, as “Supp. p. ____.”

² The Westfield policy was initially purchased in 1990 only in the name of Lawyers Title of Cincinnati, Inc. (“LTOC”), and that policy included property coverage, general liability, auto, inland marine, crime and umbrella coverage. (Wheeler Affidavit, ¶4; Supp. p. 12). Prior to the accident, the name of the insured was changed at LTOC’s request to “Lawyer’s Title of Cincinnati, Inc. dba Griffin-Fletcher.” (Wheeler Affidavit, ¶5; Supp. p. 12). Griffin-Fletcher (“G-F”) was an affiliated lawfirm where Flynn also worked. Because LTOC and G-F operated out of the same building, LTOC requested that the name on the policy be changed to “LTOC dba G-F” in order to be sure that all personal property, which was located at the office they shared, was covered. (Id.). Obviously, a title company cannot “do business as” a lawfirm, and therefore,

Westfield denied UIM coverage to Flynn. Flynn's employer had purchased a standard commercial policy covering all autos for its liability exposure (Symbol 1), but covering for UM/UIM only those vehicles owned or hired by the corporation, but specifically excluding vehicles borrowed from any employees or partners (Symbols 2 and 8). (See Declarations Page and Business Auto Coverage Form, Supp. p. 1 and 4, respectively)³. LTOC chose not to purchase coverage offered for vehicles of employees or partners (Symbol 9). (See Declarations Page, Supp. p. 1). As Mr. Flynn's vehicle was not owned or hired by the corporation (it was his personal vehicle), his auto was not a "covered auto" under the policy.

The trial court agreed with Westfield, granting it summary judgment and denying coverage to Flynn. (Trial Court Opinion appended hereto at Appx. p. 24). The Court of Appeals reversed the trial court and found coverage for Flynn. (Appeals Opinion appended hereto at Appx. p. 8).

Both parties appealed, and this Court accepted the cross-appeal by Westfield on the issue of whether the standard business auto policy can limit UM/UIM coverage to owned autos only or must also cover other autos used in the scope of employment.

neither side intended or expected this name change to alter or broaden auto coverage to include vehicles which the parties expressly agreed were not covered.

³ The portions of the Westfield policy referenced herein are a part of the Record and were attached to Westfield's Motion for Summary Judgment, filed in the Hamilton County Court of Common Pleas on February 25, 2005.

I. ARGUMENT

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.

A. THE STANDARD COMMERCIAL AUTO POLICY

The policy issued in this case is a standard commercial policy containing commonly-used ISO forms, as such policies are generally written to provide for the insurance needs of a wide range of policyholders. *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 15. (Windt Affidavit, ¶5, 7; Supp. pp. 42, 43). Combinations of various standardized forms are used to create a customized policy for each policyholder, supplemented by state-specific endorsements. *Id.* Otherwise stated, "Insurance policies are no longer written in manuscript for each policyholder, but rather are standard forms designed to insure a variety of entities including individuals. 'There is nothing sinister about an insurer's use of a "one size fits all" policy form.'" *Galatis* at ¶ 40.

B. INTENT OF THE PARTIES

When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties. *Galatis* at ¶ 11. If the contract is clear, the court may look no further than the writing itself to find the intent of the parties. *Galatis* at ¶ 11. Where a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent. *Galatis* at ¶ 12. It is the intent of the parties which should be, and is, controlling.

Here, the intent of the parties is demonstrated in three ways:

1. The language of the policy;
2. The intent of the insured, and;
3. The intent of the insurer.

1. The policy clearly limits UM/UIM coverage to company-owned vehicles.

The coverages selected and purchased by an insured are typically set forth in the declarations pages. With respect to the Standard Business Auto Declarations, the insured gets to select which coverages he wants, and also picks the vehicles for which he wants that coverage. This is done using "Symbols" describing the Covered Autos. The Declaration Page applicable in this case is located at Supp. p. 1.

The declaration page here states clearly what coverages are provided and for which autos, and specifically limits coverage only to those autos shown as covered autos. It states as follows:

ITEM TWO SCHEDULE OF COVERAGES AND COVERED AUTOS			
Each Of These Coverages Will Apply Only To Those Autos Shown As Covered Autos. Autos Are Shown As Covered Autos For A Particular Coverage By The Entry Of One Or More Of The Symbols From The Covered Auto Section Of The Business Auto Coverage Form Next To The Name Of The Coverage.			
COVERAGES	COVERED AUTO SYMBOLS	LIMIT THE MOST WE WILL PAY FOR ANY ONE ACCIDENT OR LOSS	PREMIUM
Liability	01	Bodily Injury and \$500,000 Each Accident Property Damage	\$6,918
Auto Medical Pay.	02	\$1,000	\$199
Uninsured Motorists	02 08	Bodily Injury \$500,000 Each Accident	\$2,426
Physical Damage Comprehensive Coverage	07 08	Actual Cash Value or Cost of Repair Whichever is Less Minus the Ded. for Each Covered Auto as Indicated in the Schedule for Covered Autos. No Deductible Applies to loss Caused by Fire or Lightning.	\$1,030
Physical Damage Collision Coverage	07 08	Actual Cash Value or Cost of Repair Whichever is Less Minus the Deductible for Each Covered Auto as Indicated in the Schedule for Covered Autos.	\$3,297
		Premium for Auto Endorsements	\$148
		TOTAL AUTO RATING PERIOD PREMIUM	\$14,018

[Underlining added]. The Business Auto Coverage Form, the next page of the declaration, describes the Symbols from which the insured can select which vehicles to cover. (Supp. p. 4).

Those Symbols relevant to this case are as follows:

SECTION I – COVERED AUTOS

Item Two of the Declarations shows the “autos” that are covered “autos” for each of your coverages. The following numerical symbols describe the “autos” that may be covered “autos.” The symbols entered next to a coverage on the Declarations designate the only “autos” that are covered “autos.”

A. Description Of Covered Auto Designation Symbols

Symbol	Description Of Covered Auto Designation Symbols	
1	Any “Auto”	
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. 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.
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9	Nonowned “Autos” Only	Only those “autos” you do not own, lease, hire, rent or borrow that are used in connection with your business. 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 but only while used in your business or your personal affairs.
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The Symbols and coverages ultimately selected and purchased by LTOC in this case make sense. LTOC purchased liability coverage for Symbol 1, which is “Any Auto.” That is very typical since companies want to protect company assets from liability claims regardless of what vehicle is being driven by an employee, since the company can be liable vicariously for that employee regardless of the car he or she is using, and can also be held liable for its own

negligence in hiring employees, maintenance of vehicles, or entrustment of vehicles to particular persons. (Allan Windt Affidavit, ¶ 8, Supp. p. 43).

Uninsured motorist coverage, on the other hand, is not needed by a company to “protect” itself from exposure. This is because an employee who is injured in an auto accident generally has no claim against the employer, but rather has a right to obtain workers compensation benefits. Thus, most companies intentionally limit UM coverage (as LTOC did here) to only Symbol 2 (autos owned by the company) and Symbol 8 (autos, which are autos leased, hired, rented or borrowed by the company, but excluding those leased, hired, rented or borrowed from partners or employees). This allows UM benefits for those using company cars (because the employee’s personal auto policies may exclude UM coverage for company-owned vehicles if those vehicles are furnished for the employees’ regular use), and employees and partners typically are expected to have their own UM coverage on their own cars, as Mr. Flynn did here.⁴

The policy identifies and lists the company vehicles which are covered for UM/UIM (Symbol 2 and Symbol 8), and simply allows the employees to purchase UM/UIM benefits as they choose for their own vehicles. That is exactly what happened here, and that is exactly what the parties admit they intended.

2. The Intent Of The Insured.

The insured (LTOC dba G-F) admits it never intended to cover the personal vehicles of its employees or vehicles of partners. This admission came from both the office manager for the title company and from the senior partner of the lawfirm.

⁴ Symbol 9 provides for the insured to include for coverage “autos owned by your employees, partners.” LTOC did not select or purchase such coverage here.

Diane Bedinghaus was the office manager for the title company and she was responsible for all insurance matters. She testified that all employees and partners knew that they needed to acquire and purchase insurance for their own vehicles. (Bedinghaus Depo., p.42; Supp. p. 82).

Similarly, Michael Fletcher, a principal in the title company and senior partner of the lawfirm, admitted that all employees and partners knew that they needed to acquire and insure their own vehicles. (Fletcher Depo., p.43; Supp. p. 75). In fact, LTOC paid no premium to Westfield to insure Kevin Flynn's vehicle or, for that matter, the personal vehicles of any LTOC employee or G-F partner, except for certain vehicles titled to LTOC and driven by members of the Griffin and Fletcher families. (Wheeler Affidavit, ¶9, 18; Supp. p. 13). This was described by Mr. Fletcher as one of the "perks of ownership." (Fletcher Depo., p.42; Supp. p. 74). Kevin Flynn was not an owner of LTOC, and therefore he did not enjoy these "perks."

In fact, the LTOC vehicles covered for UM/UIM were all specifically listed in the LTOC policy as part of the declarations.⁵ (See Schedule of Covered Autos You Own, Supp. p. 2). This listing changed over time as vehicles were purchased or sold, and changed markedly in 2001 when several of the vehicles were transferred from the company policy to Mr. Fletcher's personal policy in order to save premiums. (Affidavit of Phil Wheeler, ¶ 13 and Exhibits 7, 8, and 9 thereto; Supp. pp. 13-14, 32-36, 37, and 38).

⁵ The vehicles specifically listed in the declarations page at the beginning of the policy period in 1999 were as follows:

1948	Chevy Firetruck	
1996	Olds Bravada	
1998	Lincoln Navigator	
2000	Ford F-150	
1995	CM Horse Trailer	
2000	Cadillac Escalade	
1999	Nissan Pathfinder	
2001	Jeep Wrangler	
2002	Cadillac Escalade	("Schedule of Covered Autos You Own," Supp. p. 2):

However, at no time was Mr. Flynn's Jaguar or his other personal family cars ever listed on the LTOC business policy. Mr. Flynn admits that no one ever discussed insurance for him or for his personal car with him after he joined the firm or became employed by LTOC, and Flynn admits he was never told or led to believe he would be added or covered under the policy. (Flynn Depo. Vol. II, p.194; Supp. p. 72). At no time did LTOC seek to provide coverage for Flynn's Jaguar and Flynn continued to keep his car insured through his personal carrier, Cincinnati, through the date of the accident. (Flynn Depo. Vol. I, p.37; Supp. p. 65).

3. The Intent Of The Insurer.

While Westfield had no direct contact with Mr. Flynn (in fact, the Westfield policy was initially issued 10 years before Mr. Flynn even became employed at LTOC), the agent who placed the coverage with Westfield testified by affidavit that whenever LTOC would purchase or sell a vehicle, they would call the agency to add or delete vehicles from the policy, and at no time before the accident was he ever told that Kevin Flynn was to be added as a driver or that LTOC wanted Flynn's personal Jaguar listed in the policy for coverage. (See Affidavit of Wheeler, ¶ 18; Supp. pp. 14-15).

The agent further noted that if the customer wanted to cover Flynn's personal Jaguar, it could easily have done so by:

- a. Scheduling the vehicle as it did the ones owned by LTOC, but at an additional premium cost; or
- b. Purchasing "Drive Other Car" coverage as it had done for Mike Fletcher (thereby covering the individual for any car he happens to be driving), also at an additional premium cost.

(Wheeler Affidavit, ¶ 19; Supp. p. 15).

However, the UM coverage in the policy at issue was expressly limited to Symbol 2 and Symbol 8 in order to keep the premium costs down, as desired by the insured. (Wheeler Affidavit, ¶ 19; Supp. p. 15).⁶

C. **THERE IS NO SCOTT-PONTZER COVERAGE AVAILABLE UNDER THIS POLICY**

In *Galatis*, this Court held that it was contrary to the intent of the parties to interpret the standard UM/UIM endorsement to extend coverage to non-employees or to employees not in the course and scope of employment. This Court did not hold that the reverse was true: that is, that every employee injured in the course and scope of employment would automatically get UM/UIM coverage *ipso facto*, regardless of what the policy said or what the parties intended. In fact, *Galatis* states, at Syllabus 2, that:

“Absent specific language to the contrary, a policy of insurance that names a corporation as an insured for uninsured or underinsured coverage covers a loss sustained by an employee of the corporation only if the loss occurs within the course and scope of employment. (Citation admitted.)

Galatis, Syllabus 2.

In this case, the policy does provide to the contrary, (i.e., personal vehicles that are not “covered autos” under the policy are not covered for UM/UIM coverage), and the parties to the policy have admitted that was their intent when the contract was entered into.

In *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999) 85 Ohio St. 3d 660, 710 N.E. 2d 1116 this Court extended coverage to all employees by reasoning that “naming the corporation as the insured is meaningless unless the coverage extends to some person or persons.” *Galatis* at ¶ 18. That rationale does not apply here for a number of reasons. First, this policy provides for

⁶ LTOC had the option of purchasing coverage for autos of employees, partners or members of their families while used in business affairs under Symbol 9, but this coverage was neither selected nor purchased.

UM coverage for anyone while operating a scheduled vehicle for which coverage is purchased. Second, in this case coverage is not provided solely to a corporation; it was provided to both the corporation and to an individual, Mike Fletcher, through a Drive Other Car Coverage (DOCC) Endorsement. (See DOCC Endorsement, Supp. pp. 3, 5). Therefore, since coverage is afforded to an individual (as well as a corporation), the ambiguity found in *Scott-Pontzer* does not exist. Third, coverage is expressly excluded for a vehicle that is owned by “you” but is not a covered auto. (See Endorsement 2133, Exclusion C.5.a.; Supp. p. 8). Thus, even if Mr. Flynn was “you” for purposes of UM/UIM coverage (as he argues), he clearly owns an interest in his personal leased Jaguar and therefore is not entitled to coverage for a vehicle which he owned, but which he did not list or schedule or pay a premium for under the policy.

The approach Flynn has used in this case to seek coverage using the four categories of insureds under Form CA 2133 (the same UM/UIM form at issue here) was rejected in *Galatis* by means of the following rationale:

The second class of insureds applies when the policy holder is an individual. It is simply inapposite when the policyholder is a corporation, just as it is inapposite where an individual policyholder resides alone, and as the fourth class is inapposite where no one is entitled to recover for another’s bodily injury. One who argues a contorted use of an inapposite section of a standard form “confuses superfluity with inapplicability.” *Id.* It is unnecessary for each of the four classifications to apply to every insurance policy as long as the parties to the insurance policy agree upon whether a particular claimant is intended to be insured.

Westfield v. Galatis, supra at ¶ 41. (Emphasis added.)

Plaintiff Flynn argued below that the Court should extend UM/UIM coverage to his personal Jaguar, despite the clear intent of the parties to the contrary, and despite the fact that:

-Mr. Flynn was not driving a car owned by LTOC or G-F (Symbol 2), nor was his personal Jaguar ever scheduled, nor was a premium paid for it.

-Mr. Flynn was not driving a vehicle hired, leased, rented or borrowed by LTOC or G-F from someone other than an employee or partner (Symbol 8).

-Other vehicles that were used personally by partners and their family members were scheduled and a premium was paid for that coverage.

-There would be no reason to “broaden” coverage through a DOCC endorsement to include partner Michael Fletcher as an insured if the parties had intended that he was already covered solely by his status as a partner or employee.

-The insured admitted that all employees and partners knew that they needed to acquire and purchase their own vehicles; and

-Mr. Flynn never inquired about getting coverage under LTOC’s policy for his personal Jaguar, nor did anyone ever tell him he had such coverage. He, in fact, secured his own coverage through Cincinnati Insurance Company.

D. DIVERGENCE IN THE CASELAW

Numerous courts have limited UM/UIM benefits where an employee is not driving a covered auto, or where the employee is driving his own unscheduled vehicle.

For example, in *Weyda v. Pacific Employer’s Insurance Company* (2003), 1st Dist. No. C-020410, 2003-Ohio-443, 151 Ohio App.3d 678, 785 N.E.2d 763, the First Appellate District refused to extend UM/UIM coverage to an insured who was not operating a covered vehicle. *Weyda* was decided before *Galatis* and at a time when scope of employment was irrelevant with respect to availability of UM/UIM coverage. Thus, even though Mr. Weyda was an insured under *Scott-Pontzer*, the First Appellate District denied coverage because Mr. Weyda was not operating a “covered auto.” The Court stated:

“Into the abyss created by *Scott-Pontzer* we wade. We rely on the plain language of the insurance policy in question and find no coverage...”

Weyda, at ¶ 1.

The First Appellate District went on to note that the insured purchased UM/UIM coverage for “Symbol 2 Owned Autos,” and that since plaintiff’s personal vehicle was not scheduled for coverage under the policy, and since the insurance company was not provided with information concerning plaintiff’s personal vehicle, it was not a covered auto and plaintiff could not recover UM/UIM benefits. *Weyda*, at ¶ 10, 16. That same rationale applies here.

Similarly, the Ninth District in *The Westfield Group v. Cramer*, Lorain App. No. 04CA008443, 2004-Ohio-6084, 2004 WL 2600450, ruled that an employee injured in the scope of employment could not obtain coverage for UM/UIM benefits where that employee was not occupying a covered auto. The same result was also reached in a Third District case, *Wright v. Small*, Seneca App. No. 13-02-34, 2003-Ohio-971, 2003 Ohio App. LEXIS 923, where an employee (who would have been entitled to UM/UIM coverage under *Scott-Pontzer*) was denied benefits because:

Although a corporation cannot occupy a motor vehicle or suffer bodily injury or death, a corporation clearly can hold lawful title to motor vehicles and can acquire insurance restricted to those vehicles which it, itself, owns.

Wright, at ¶ 21. The same is true in the instant lawsuit filed by Mr. Flynn. Both a corporation (LTOC) and a partnership (G-F) are clearly entitled to hold lawful title to motor vehicles, and both can acquire insurance restricted to those vehicles which either insured entity owns, discloses and pays for.

The Sixth District’s recent decision in *Olmstead v. New Hampshire Insurance Company*, Erie County App. No. 3-04-017, 2005-Ohio-39, 2005 Ohio App. LEXIS 31, holds that:

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, at ¶ 17. The same is true here. It is irrelevant whether Mr. Flynn was working for Lawyers Title of Cincinnati, Inc., working for Griffin & Fletcher, or working for both; and it is equally irrelevant whether he was in the scope of employment when he was injured. The policy provided UM/UIM benefits only for covered autos, and the premiums were based on that risk. No one ever contemplated that coverage would somehow extend to all employees and all partners driving any vehicle, based solely on “scope of employment” issues. In fact, “scope of employment” is not even mentioned anywhere in the auto portions of the policy.

The Sixth District similarly limited UM/UIM coverage in *Klocinski v. American States Ins. Co.*, Lucas App. No. L-03-1353, 2004-Ohio-6657, 2004 WL 2849054; the Ninth District so held in *Desmit v. Westfield Ins. Co.*, 9th Dist. No. 04CA008419, 2004-Ohio-5167, 2004 Ohio App. LEXIS 4697; and the Seventh District so held in *Nentwick v. Erie*, 7th Dist. No. 03 CO 47, 2004-Ohio-3635, 2004 Ohio App. LEXIS 3289.

Mr. Flynn argues that since he is covered for liability while driving his own vehicle in the scope of employment, he must therefore be covered for UM/UIM in that same vehicle. This is wrong. This argument ignores the policy language, plainly set forth in the policy’s Declaration, that limits UM/UIM coverage only to vehicles owned or hired by the named insured. (See Declarations Page; Supp. p. 1).

Further, standard business policies like this do not provide liability coverage for employees involved in accidents while driving their own cars on company business. *Olmstead* and *Progressive v. Heritage*, cited below, both so held in Ohio. Numerous other states analyzing the same policy language and same issue have reached the same conclusion. What the policy covers in this situation is the vicarious liability of the employer, the named insured.

Thus, in *Progressive Insurance Co. v. Heritage Insurance Co.* (1996), 8th Dist. No. 69264, 113 Ohio App.3d 781, 682 N.E.2d 33, a florist's employee driving a family car on company business was involved in an "at fault" accident. The car was insured under a personal auto policy issued by Progressive; the florist was insured under a business auto policy issued by Heritage. Each insurer defended its own insured. They settled the underlying case and, by agreement, litigated coverage issues separately. The trial court found that Progressive's policy provided no coverage and ordered Heritage to reimburse Progressive. The Court of Appeals disagreed. After finding that Progressive's policy did provide coverage, the Court of Appeals reviewed coverage under the employer's Heritage policy, which provided liability coverage for Symbol 9, i.e., non-owned autos, and had exactly the same "Who Is An Insured" provision in its liability coverage as is in LTOC's Westfield policy. The Court of Appeals stated:

Although the Heritage policy does not cover the employee Jason Dawson, the policy does cover Merhaut Florist for liability arising out of the use of a covered auto under the policy. Merhaut's liability derives from the doctrine of respondeat superior. Merhaut, therefore, is vicariously liable for any negligence of its employee, Jason Dawson.

* * *

Therefore, because Merhaut [the employer] was named as a defendant, and the car driven by its employee was a covered auto, Merhaut is covered to the extent Jason Dawson is found to be negligent. Accordingly, Heritage is responsible for any damages attributed to the claim against Merhaut Florist. (Emphasis added.)

Progressive Insurance Co. v. Heritage Insurance Co., 682 N.E.2d at 37. (emphasis added).

In other words, the typical business auto policy does not cover employees' liability for damages they cause in their own vehicle, but does cover the employer's vicarious liability when the accident occurs while the employee is driving a car owned by himself or a member of his household. Indeed, where Symbol 1 is used for liability coverage, it does not matter who owns

the vehicle or what the driver's relationship to the employer is. If the company is liable, the policy covers its liability.

Other cases making this same holding include:

Marshall v. Providence Washington Ins. Co. (N.M. App. 1997), 124 N.M. 381, 951 P.2d 76. Employee driving own car on company business is not covered under employer's business auto policy, with liability exclusion as follows:

"None of the following is an insured:

* * *

- (ii) The owner...of a hired automobile or the owner of a non-owned automobile, or any agent or employee of any such owner..."

The court noted that the owner of a hired automobile is generally excluded from coverage as an insured, "because such owner normally is expected to carry his or her own insurance on the vehicles." It also stated:

"Nothing precludes an insurer from excluding employee-owners from the policy, so long as the policy does not mislead the policyholder into thinking otherwise.

City of Rainsville v. State Farm Mut. Automobile Ins. Co. (Ala. App. 1998), 716 So.2d 710. Volunteer firefighter who was involved in at fault accident while driving his own vehicle responding to a fire call is not covered under the City's liability policy. The court stated:

"According to the policy, a City employee is not covered under the policy when he is driving a 'non-owned car.' To construe the insurance contract differently would contradict the language intentionally used by State Farm to limit coverage for non-owned cars."

Unigard Mutual Ins. Co. v. Mission Ins. Co. (Colo. App. 1994), 907 P.2d 94, Employee/tortfeasor was not insured under employer's primary business auto policy for at fault accident while driving his personal auto on company business. It stated:

"An employee of Pet Shoppes and its subsidiaries is an insured under the Unigard policy only while using an automobile that any of those insureds 'owns, hires or borrows.' However, if the vehicle is hired or borrowed from an employee or any member of that

employee's household, the person using such a vehicle is not insured under the Unigard policy during the time of such use."

Richardson v. Ludwig (MN App. 1993), 495 N.W.2d 869. Pizza delivery driver was not insured under employer's policy for an at fault accident while he was driving his stepmother's car to deliver pizza, as corporation did not own, hire or borrow the car. The definition of insured for liability purposes was the same as in Westfield's policy, i.e., anyone else using with your permission a covered "auto" you own, hire or borrow except:

- (2) Your employee if the covered "auto" is owned by that employee or a member of his or her household.

Morris v. Weiss (MN App. 1987), 414 N.W.2d 485. Employee who owned all the vehicles used by his employer Safeway Company, Inc. was not an insured for an at fault accident under the company's business auto policy which provided liability coverage for Symbol 1, i.e., "Any 'auto'." The court stated:

"Respondents claim that the provisions of the policy conflict because the policy excludes Weiss, but covers Weiss' car. Respondents fail to account for the fact that the question of who is an insured is entirely different from the question of what is covered. The fact that Weiss' car is covered has no effect on who is an insured. Similarly, the fact that Weiss is not an insured has no effect on which cars are covered."

Cutter v. Main Bonding & Cas. Co. (Supreme Court of NH, 1990), 133 N.H. 569, 579 A.2d 804 bears considerable similarity to the case at bar. An employee who was vice-president and secretary of the corporate-named insured was injured by an underinsured motorist while operating her own car in the course of her employment. UM/UIM coverage was provided only for Symbol 6 autos, which, like Symbol 2, requires that the auto be owned by the named insured to be a covered auto. The court stated, succinctly and correctly:

"Neither is Ms. Cutter a person insured under section 2 of the WHO IS AN INSURED definitions. To qualify there, an individual must occupy a 'covered auto' or a 'temporary substitute for a covered auto'Ransco, Inc. did not own the 1980 Cadillac, it belonged to Ms. Cutter; thus Ms. Cutter was not occupying a 'covered auto' on the date of the accident...Ms. Cutter could not, therefore, qualify as an 'insured' under Section 2."

The Court went on to reject her argument that she was entitled to UIM coverage because her car was a covered auto for liability coverage. That Court stated:

“The liability coverage afforded to negligent employees operating non-owned automobiles was purchased to protect Ransco against potential liability from a suit in which a plaintiff alleged respondeat superior as a theory of recovery. Furthermore, liability coverage is still contingent upon qualifying as a person insured. As with the underinsured motorist coverage, we find Ms. Cutter quite clearly fails to meet the definitional requirements set out for liability coverage.

“A person insured for liability coverage is defined as follows:

1. You, your executives and partners are insured. However, executives or partners are not insureds for their own autos.
2. Anyone else is an insured while using with your permission a covered auto you own, hire or borrow except:
 - a. The owner of a covered auto you hire or borrow from one of your employees or a member of his or her household.

* * *

“Under section two, a person is an insured while operating a covered auto, which for liability coverage is ‘any auto’ that Ransco owns, hires or borrows. Ransco clearly did not own Ms. Cutter’s auto, but we again assume, arguendo, that Ransco hired or borrowed it. Ms. Cutter is nevertheless subject to exception (a), which expressly excludes the owner of an auto hired or borrowed from an employee. Ms. Cutter, who does not qualify under section one or two, cannot qualify under section three, and is simply not a person insured for liability.

Other cases reaching a similar holding regarding UM/UIM coverage include:

Seaco Ins. Co. v. Davis-Irish (D. ME 2002), 180 F.Supp.2d 235. Employee injured while a passenger in a non-company-owned vehicle was not insured under the company’s business auto policy for purposes of UM/UIM coverage while acting in the course of her employment since the non-company-owned auto was not the “covered auto” identified in the business auto policy.

Dunn v. St. Paul Fire & Marine Ins. Co. (LA App. 2000), 768 So.2d 720. Employee was not insured under employer’s business auto policy for liability purposes when operating her personally owned vehicle in the

course and scope of her employment. The definition of insured for liability purposes was the same as in LTOC's policy, i.e., anyone else using with your permission a covered "auto" you own, hire or borrow except:

2. Your employee if the covered "auto" is owned by that employee or a member of his or her household.

Employee was also not insured under UM/UIM endorsement to the policy when UM/UIM coverage for Symbol 2, i.e. "Owned 'Autos' Only." The Court held that since the vehicle was not one of the vehicles delineated as owned by the employer on the declarations page, there was no UM/UIM coverage for employee operating her personally owned vehicle that was not a covered auto.

Chastain v. United States Fid. & Guar. Co. (GA App. 1991), 403 S.E.2d 889. An employee of a corporation in which he owned 50% of the stock was not an insured for UM/UIM purposes when operating his personally owned vehicle in the course and scope of his employment, when the corporation's business auto policy provided UM/UIM coverage for Symbol 2, i.e. "Owned Autos Only."

As can plainly be seen from these cases, whether an employee was in the course and scope of his employment at the time of the accident is immaterial when the employee is not driving a covered auto. His status as an insured for purposes of both liability and UM/UIM coverage is solely dependent upon who owned the vehicle. Here, for liability coverage, the insured (LTOC, but not Mr. Flynn) is covered for "any auto." For UM/UIM, Mr. Flynn is covered if he was occupying a covered vehicle owned or hired by Lawyers Title of Cincinnati, Inc. dba Griffin & Fletcher. He was not. Therefore he is not entitled to UM/UIM coverage.⁷

⁷ If the Court were to accept Mr. Flynn's argument that he is entitled to coverage if he was driving as a partner of G-F, Westfield denies that Flynn was driving as a partner of G-F and a material factual issue exists as to this claim. Mr. Flynn claims to have been delivering documents to a real estate closing. The person supposed to take these documents was an LTOC employee, not a G-F employee (Stahl Depo., p.5, Supp. p. 85; Fletcher Depo. pp.67-68, Supp. p. 78-79). It was this LTOC employee, Mr. Stahl, who failed to get this done (Bedinghaus Depo. p.19, Supp. p. 81; Stahl Depo. p.8, Supp. p. 86). The three delivery persons at the time of Mr. Flynn's accident, for whom Mr. Flynn was substituting, were all LTOC employees, not G-F employees (Fletcher Depo. pp.64-65, Supp. pp. 76-77; Bedinghaus Depo. p.70, Supp. p. 83). Thus, Mr. Flynn was delivering documents that an LTOC employee was to take, and was

Thus, LTOC purchased the coverages it wanted, selected the vehicles it wanted that coverage for, and admits (along with its insurance agent and Mr. Flynn) that there was no intent to purchase UM/UIM coverage for Flynn's car or the cars of other employees.

Where there is an ambiguity and the parties disagree as to what is intended, the ambiguity is and should be construed against the drafter. That rule however does not apply here.

There are limitations to the preceding rule. "Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy." Likewise, where "the plaintiff is not a party to [the] contract of insurance***, [the plaintiff] is not in a position to urge, as one of the parties, that the contract be construed strictly against the other party."...This rings especially true where expanding coverage beyond a policyholder's needs will increase the policyholder's premiums.

Westfield v. Galatis, supra at ¶ 14. (All citations omitted, and emphasis added.)

Plaintiff has never said he bought coverage from Westfield; Plaintiff has never said he thought he was covered with Westfield; the insured has never claimed it bought or wanted to buy UM/UIM coverage for Mr. Flynn's Jaguar; and the agent has testified this coverage was never requested of him or intended.

To insert coverage under these circumstances is to find an ambiguity where none exists, and further creates a coverage never requested or purchased.

II. CONCLUSION

Cross-Appellant Westfield Insurance Company requests that the decision of the Appellate Court below be reversed, that the decision of the trial court be reinstated, and that UIM coverage be found not to exist under Westfield's policy for this unfortunate accident.

therefore driving as an LTOC employee. The trial court never determined that Flynn was driving for G-F, nor did the appellate court below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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APPENDIX

IN THE SUPREME COURT OF OHIO

KEVIN R. FLYNN, *et al.*,

Plaintiffs-Appellants-Cross-Appellees

-vs-

WESTFIELD INSURANCE
COMPANY

Defendant-Cross-Appellant

UNITED NATIONAL INS. COMP.

Defendant-Appellee

THE NATIONAL CATHOLIC RISK
RETENTION GROUP, INC.

Defendant-Appellee

And

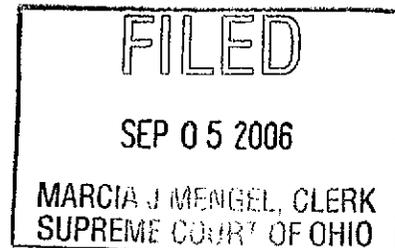
ST. PAUL FIRE AND MARINE
INSURANCE COMPANY

Defendant-Appellee.

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

Court of Appeals Case No. C-050909

06-1619



NOTICE OF CROSS-APPEAL OF WESTFIELD INSURANCE COMPANY

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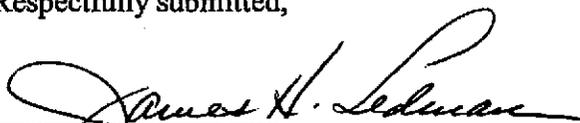
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Defendant Westfield Insurance Company hereby gives Notice of its Cross-Appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-050909 on July 21, 2006. The case is one of public or great general interest.

Respectfully submitted,



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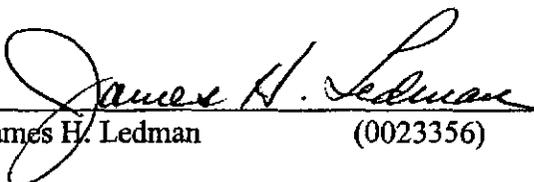
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James H. Ledman (0023356)

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

KEVIN R. FLYNN :
and :
MARGARET M. FLYNN, Individually :
and as Parent and Natural Guardian of :
Kevin P. Flynn, Shannon Flynn, and :
Colleen Flynn, minors, :
Plaintiffs-Appellants, :
vs. :
WESTFIELD INSURANCE COMPANY, :
UNITED NATIONAL INSURANCE :
COMPANY, :
THE NATIONAL CATHOLIC RISK :
RETENTION GROUP, INC., :
and :
ST. PAUL FIRE & MARINE :
INSURANCE COMPANY, :
Defendants-Appellees, :
and :
VINCENT STOREY, :
NICHOLAS STOREY, :
WILLIAM STOREY, :
and :
SUE STOREY, :
Defendants. :

APPEAL NO. C-050909
TRIAL NO. A-0301146

JUDGMENT ENTRY.



§



This cause having been heard upon the appeal, the record and the briefs filed herein and arguments, and

Upon consideration thereof, this Court Orders that the judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed herein and made a part hereof.

Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and Orders that costs are taxed in compliance with App. R. 24.

The Court further Orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution pursuant to App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on July 21, 2006 per Order of the Court.

By:


Presiding Judge

OHIO FIRST DISTRICT COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: July 21, 2006

Peter L. Ney, John F. McLaughlin, and Rendigs, Fry, Kiely & Dennis, L.L.P., and Douglas M. Morehart and Haverkamp, Brinker, Rebold & Riehl Co., for Plaintiffs-Appellants,

J. Stephen Teetor, Jessica K. Walls, and Isaac, Brant, Ledman & Teetor, L.L.P., for Defendant-Appellee Westfield Insurance Company,

Bradley L. Snyder and Roetzel & Andress, and Sarah H. Dearing and Lord, Bissell & Brook, for Defendant-Appellee United National Insurance Company,

Jay D. Patton and Schroeder, Maundrell, Barbieri & Powers, for Defendant-Appellee National Catholic Risk Retention Group, Inc., and

James F. Brockman, David E. Williamson, and Lindhorst & Dreidame Co., L.P.A., for Defendant-Appellee St. Paul Fire & Marine Insurance Company.

SYLVIA S. HENDON, Judge.

{¶1} Plaintiffs-appellants Kevin Flynn (“Flynn”) and Margaret Flynn have appealed from the trial court’s entry of summary judgment in favor of defendants-appellees Westfield Insurance Company (“Westfield”), United National Insurance Company (“United National”), The National Catholic Risk Retention Group (“National Catholic”), and St. Paul Fire and Marine Insurance Company (“St. Paul”). For the following reasons, we reverse the trial court’s judgment in part.

I. Factual Background

{¶2} This case arose after Flynn was severely injured in an automobile accident. At the time of the accident, Flynn was a partner in the law firm of Griffin-Fletcher. He specialized in real estate law and was also employed by Lawyers Title of Cincinnati (“LTOC”), a real estate title company. Griffin-Fletcher and LTOC shared office space and were closely intertwined. Flynn additionally served as a volunteer for LaSalle High School, which was operated by the Roman Catholic Archdiocese of Cincinnati.

{¶3} Flynn’s accident occurred on the morning of February 22, 2002, along Interstate 74 in Cincinnati, while he was driving a Jaguar that he had leased from Huntington National Bank. At the time of the accident, Flynn had been traveling from the office shared by Griffin-Fletcher and LTOC. His ultimate destination was LaSalle High School, where he was going to attend his first meeting as a member of its development board. But before Flynn left his office, he discovered documents necessary for a real estate closing that was to take place that same morning. The documents had been delivered to Flynn’s office by mistake and should have been

OHIO FIRST DISTRICT COURT OF APPEALS

delivered to Winton Savings, where the real estate closing was to occur. Winton Savings was located near LaSalle High School. Because Flynn was already planning on traveling to LaSalle, he decided to deliver the documents to Winton Savings himself, rather than to use a courier. The accident occurred before Flynn reached Winton Savings.

{¶4} After the accident, Flynn was able to recover under his own insurance policy, as well as under the policy covering the vehicle that had forced his car off the road. He sought further recovery under several other insurance policies. The first of these policies was issued to Griffin-Fletcher and LTOC by Westfield; Flynn sought benefits under this policy based upon his status as a partner of Griffin-Fletcher and as an employee of LTOC. Flynn also sought to recover under policies issued to the Archdiocese by United National, National Catholic, and St. Paul. Flynn sought recovery under these policies based upon his status as a board member and volunteer for LaSalle High School.

{¶5} After determining that Flynn was not covered under the respective policies, the trial court granted summary judgment to Westfield, United National, National Catholic, and St. Paul. This appeal followed.

II. Standard of Review

{¶6} This court reviews grants of summary judgment de novo, without any deference to the trial court's decision.¹ Summary judgment may appropriately be granted only when there exists no genuine issue of material fact, the movant is entitled to judgment as a matter of law, and the evidence, when viewed in favor of

¹ *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241.

the non-moving party, permits only one reasonable conclusion that is adverse to the non-moving party.²

III. Westfield

{¶7} Westfield issued both an automobile insurance policy and an umbrella insurance policy to Griffin-Fletcher and LTOC. Flynn sought to recover under both policies. The underlying automobile policy contained an uninsured-motorist-coverage limit of \$500,000. The umbrella policy afforded \$3,000,000 in coverage.

{¶8} We must determine whether Flynn qualified as an insured person under Westfield's automobile policy, and if he was an insured, whether the policy covered the particular automobile that Flynn was driving at the time of the accident.

{¶9} As we interpret the policy, we are mindful that our role is to give effect to the intent of the parties.³ We examine the policy as a whole, and if "the language of a written contract is clear, [we] may look no further than the writing itself to find the intent of the parties."⁴ We must give contractual terms their plain and ordinary meaning.⁵ But when a contract is ambiguous, we may consider extrinsic evidence to aid in determining intent.⁶ An ambiguous insurance policy will ordinarily be strictly construed against the insurer and in favor of the insured.⁷

A. Flynn was an "Insured" Under Westfield's Automobile Policy

{¶10} The named insured in Westfield's automobile policy was "Lawyers Title of Cincinnati, Inc. DBA Griffin and Fletcher." The policy specified that, for

² *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589, 639 N.E.2d 1189.

³ *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶11.

⁴ *Id.*

⁵ *Sharonville v. Am. Empls. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶6.

⁶ *Galatis*, *supra*, at ¶12.

⁷ *Id.* at ¶13.

OHIO FIRST DISTRICT COURT OF APPEALS

purposes of uninsured-motorist coverage, insured persons included "(1) you." "You" referred to the named insured, LTOC DBA Griffin-Fletcher. Flynn must have qualified as "you" to have been covered under the policy.

{¶11} In *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, the Ohio Supreme Court held that language in an insurance policy listing a corporation as a named insured was ambiguous.⁸ It further held that when a corporation was listed as the named insured, the corporation's employees were also insured under the policy.⁹ The court reasoned that "a corporation can act only by and through real live persons * * * [and] [i]t would be nonsensical to limit protection solely to the corporate entity."¹⁰ But the court later modified its decision and determined that only employees acting within the scope of their employment are covered when a policy lists a corporation as a named insured.¹¹ Here, it is undisputed that Flynn was acting within the scope of his employment for LTOC at the time of his accident. As an employee of the named insured corporation, he was insured as "you" under the policy.

{¶12} 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."¹² Accordingly, when a partnership is listed as the named insured, the individual partners are also insured.¹³ Flynn was also an insured as a partner of Griffin-Fletcher.

⁸ 85 Ohio St.3d 660, 665, 1999-Ohio-292, 710 N.E.2d 1116, limited by *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

⁹ *Id.* at 664.

¹⁰ *Id.*

¹¹ *Galatis*, *supra*, at ¶62.

¹² See *Weddle v. Hayes* (Sept. 5, 1997), 7th Dist. No. 96-BA-44.

¹³ *Id.*

{¶13} Thus, under the Westfield policy, Flynn was a “you” as a result of his status as an employee of LTOC and as a partner of Griffin-Fletcher. Consequently, Flynn qualified as an insured under the policy.

{¶14} But Westfield argues that the policy’s broadened-coverage endorsement removed any ambiguity that resulted from listing the corporation and the partnership as the named insureds. As a result, Westfield asserts, Flynn did not qualify as an insured under the policy.

B. Broadened-Coverage Endorsement

{¶15} The broadened-coverage endorsement extended the policy’s coverage to a single individual, Mike Fletcher, a partner of Griffin-Fletcher, and his family members when they used vehicles not otherwise covered under the policy.

{¶16} Westfield argues that this endorsement removed any ambiguity with respect to the policy’s named insureds. Westfield contends that naming Fletcher individually demonstrated the intent not to include any other employees or partners of LTOC or Griffin-Fletcher as insureds.

{¶17} The Ohio Supreme Court recognized the shortcomings of a similar argument in *Westfield Ins. Co. v. Galatis*.¹⁴ The court acknowledged the importance of the parties’ intention to expand uninsured-motorist coverage through the broadened-coverage endorsement.¹⁵ But the court also stated, “[R]uling that including individuals on a broadened-coverage endorsement prevents ‘you’ from being ambiguous would not be without its problems. That ruling would require that

¹⁴ *Galatis*, supra, at ¶¶53-55.

¹⁵ *Id.* at ¶55.

paying an additional premium actually reduces the coverage available under the policy. This is neither a just result nor a logical consistency.”¹⁶

{¶18} Our reading of the broadened-coverage endorsement in this case convinces us that the parties intended to broaden coverage to Fletcher and his family when they operated vehicles not otherwise covered under the policy. Our conclusion is buttressed by the specific language of the endorsement: “the following is *added* to who is an insured” (emphasis added). We decline to adopt Westfield’s coverage-limiting reading of the endorsement, which would result in a policyholder paying an additional premium only to receive reduced coverage.

{¶19} We conclude that the broadened-coverage endorsement simply expanded the coverage under the policy and had no effect on the ambiguity created by listing as the named insured a corporation and a partnership.

{¶20} Westfield next argues that even if Flynn was a “you” under the policy, he was not entitled to coverage because he was not driving a covered auto at the time of the accident.

C. Westfield’s Policy is Ambiguous

{¶21} The declarations page of Westfield’s policy contained a “Schedule of Coverages and Covered Autos.” This schedule listed the policy limits for various types of coverage, including uninsured-motorist coverage, and it stated that “each of these coverages will apply only to those autos shown as covered autos.” Thus, according to the declarations page, an insured must have been in a covered auto to be entitled to uninsured-motorist coverage.

¹⁶ Id.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶22} But the uninsured-motorist endorsement did not explicitly require that an insured be in a covered auto. This endorsement defined who was an insured for purposes of uninsured-motorist coverage:

{¶23} “1. You

{¶24} “2. If you are an individual, any ‘family member’

{¶25} “3. Anyone else ‘occupying’ a covered ‘auto’ or a temporary substitute for a covered auto. The covered ‘auto’ must be out of service because of its breakdown, repair, servicing, loss or destruction

{¶26} “4. Anyone for damages he or she is entitled to recover because of ‘bodily injury’ sustained by another ‘insured.’”

{¶27} The endorsement specifically required those who were insured as “anyone else” to be in a covered auto. But it did not impose such a requirement upon the other categories of insureds, including “you.” It is a reasonable conclusion that the absence of such a requirement indicated that the endorsement did not require “you” to be in a covered auto.

{¶28} The uninsured-motorist endorsement additionally contained an “Other-Owned-Vehicle” exclusion. This exclusion stated the following:

{¶29} “This insurance does not apply to * * *

{¶30} “5. ‘Bodily Injury’ sustained by

{¶31} “a. You while ‘occupying’ or when struck by any vehicle owned by you that is not a covered ‘auto’ for Uninsured Motorists Coverage under this Coverage Form.”

{¶32} This exclusion supports an interpretation that the endorsement did not require “you” to be in a covered auto. Had the definition of “you” contained

such a requirement, the “other-owned-vehicle” exclusion would have been redundant.¹⁷ It would have been needless to exclude non-covered autos from coverage if the definition of “you” required an insured to be in a covered auto.

{¶33} We conclude that Westfield’s automobile policy was ambiguous and open to different interpretations regarding whether an insured defined as “you” must have been in a covered auto. In determining how to construe the ambiguous policy, we are guided by the Ohio Supreme Court’s analysis in *Galatis*.¹⁸ The court stated, “While an ambiguity is construed in favor of one who has been determined to be insured, an ambiguity in the preliminary question of whether a claimant is insured is construed in favor of the policyholder.”¹⁹

{¶34} Because we have determined that Flynn was insured as “you” under the policy, we construe the policy in his favor.²⁰ We hold that Flynn was entitled to coverage under Westfield’s automobile policy.

{¶35} The trial court erred in granting summary judgment to Westfield. Summary judgment should instead have been entered in favor of Flynn.

D. Umbrella Policy

{¶36} Flynn additionally argues that he was entitled to uninsured-motorist coverage under the umbrella policy issued by Westfield. But Westfield argues that this excess coverage was rejected by LTOC and hence was unavailable.

{¶37} The trial court determined that because Flynn was not covered under the underlying automobile policy, he was not entitled to coverage under the

¹⁷ See *Westfield Ins. Co. v. Ellis*, 11th Dist. No. 2003-T-0093, 2004-Ohio-4393, ¶34.

¹⁸ See *Galatis*, supra, at ¶35.

¹⁹ *Id.*

²⁰ Flynn would still be entitled to coverage if the policy were construed in favor of the policyholder. “[I]t arguably benefits the policyholder to insure against losses sustained by those operating vehicles on its behalf.” *Id.* at ¶38.

umbrella policy. The trial court was correct in its conclusion that Westfield had no liability under the umbrella policy until coverage had been exhausted under the underlying automobile policy. But because the trial court found no underlying coverage, it did not consider whether coverage under the umbrella policy had been validly waived.

{¶38} Because we have concluded that Flynn was entitled to uninsured-motorist coverage under the automobile policy, we remand this cause for the trial court to determine whether umbrella coverage had been waived, and if it had not been waived, whether it provided coverage for Flynn.

IV. United National, National Catholic, and St. Paul

{¶39} The Archdiocese was protected by several tiers of insurance coverage. United National issued the Archdiocese's primary liability insurance policy. National Catholic and St. Paul issued excess liability policies to the Archdiocese. But these excess policies were subject to the provisions of United National's underlying policy and only provided coverage if coverage was afforded under United National's policy.

{¶40} United National's policy provided coverage for, among others, Archdiocesan volunteers and board members acting within the scope of their duties. It is undisputed that Flynn was a volunteer and board member for the Archdiocese. But borrowing a course-and-scope-of-employment analysis from workers'-compensation case law, the parties disagree as to whether Flynn was acting within the scope of his duties as a volunteer and board member at the time of his accident.

{¶41} The trial court applied the "coming and going" rule and concluded that Flynn could not recover under any of the Archdiocese's policies. The trial court

determined that because Flynn was driving to LaSalle at the time of his accident, he was not in the course and scope of his duties as a volunteer and board member.

{¶42} Flynn argues that because volunteers are distinguishable from employees, the coming-and-going rule was inapplicable and, therefore, that he was in the course and scope of his duties while traveling.

A. The Coming-and-Going Rule

{¶43} It is well-settled Ohio law that employees are not within the scope of their employment when they travel to and from work. The Ohio Supreme Court has stated, “As a matter of law, a master is not liable for the negligence of his servant while driving to work at a fixed place of employment, where such driving involves no special benefit to the master other than the making of the servant’s services available to the master at the place where they are needed.”²¹ Expounding on this proposition, the court stated that “an employer is usually not concerned with the means of transportation used or the route taken by his employee in getting to work * * * [and] [the employee] is usually not subject to the direction or control of his employer as to any details of any transportation enterprise that may be involved in getting him there.”²²

{¶44} The Fifth Appellate District has stated that “a commute to a fixed site does not fall under a ‘within course and scope’ definition” because “[h]ow an employee commutes to work is the employee’s choice or option, not a duty imposed by the employer.”²³ The Eighth Appellate District has elaborated on the rationale for this rule of law: “[E]mployees should be compensated only for those duties and

²¹ *Boch v. New York Life Ins. Co.* (1964), 175 Ohio St. 458, 196 N.E.2d 90, paragraph two of the syllabus.

²² *Id.* at 463.

²³ *Troiano v. Steitz*, 5th Dist. No. 04CAE02013, 2004-Ohio-4811, ¶22 and ¶29.

injuries arising out of the discharge of their duties and not risks and hazards such as those of travel to and from work over streets and highways, which are similarly encountered by the public generally.”²⁴ The court contrasted employees driving to a fixed place of employment with employees who drive as a job function. The latter group of employees is “continuously in the discharge of his or her duties.”²⁵

{¶45} In this case, Flynn’s ultimate destination on the day of the accident was LaSalle High School, a fixed location. The Archdiocese derived no benefit from Flynn’s actions while he traveled to LaSalle. Flynn was not performing any duties for the Archdiocese during his travel, and the Archdiocese was neither concerned with nor controlled Flynn’s commute. Applying the coming-and-going rule, we conclude that because Flynn was driving to LaSalle at the time of his accident, rather than actively engaging in his duties as a volunteer, he was not entitled to coverage under any of the Archdiocese’s policies.

B. Volunteers v. Employees

{¶46} Flynn argues that the “coming and going” rule used in an employment context does not apply because he was not employed by the Archdiocese, but was instead serving as a volunteer. Flynn argues that, as a volunteer, he sacrificed his personal time for the Archdiocese’s benefit while both commuting and volunteering.

{¶47} Flynn relies on decisions from two other appellate districts to support his argument that he qualified for coverage during his travel to the site of his volunteer activity. He first relies on the Third Appellate District’s decision in *Zirger v. Ferkel*.²⁶ In that case, Zirger was employed by a local school district and was

²⁴ *Bodzin v. Martin*, 8th Dist. No. 84066, 2004-Ohio-5390, ¶15 (internal quotations omitted).

²⁵ *Id.*

²⁶ 3rd Dist. No. 13-02-05, 2002-Ohio-2822, overruled on other grounds in *Finn v. Nationwide Agribusiness Ins. Co.*, 3rd Dist. No. 1-02-80, 2003-Ohio-4233, ¶21.

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injured in a car accident while traveling home from a meeting that she had attended as a volunteer at the request of her employer. Zirger sought to recover under an automobile insurance policy issued to the school district. The Third Appellate District held that Zirger was an insured under the policy because the policy specifically covered employees “while performing duties related to the [district’s] business.”²⁷

{¶48} Flynn also relies on the Second Appellate District’s decision in *Commercial Union Ins. Co. v. Scavo*.²⁸ *Scavo* involved a volunteer for the Toledo Shrine Club who was in an automobile accident while traveling on behalf of the Shrine Club. The Shrine Club was covered under an insurance policy that contained an endorsement stating, “Anyone volunteering services to you is an ‘insured’ while using a covered ‘auto’ you don’t own, hire or borrow to transport your clients or other persons in activities necessary to your business.”²⁹ The *Scavo* court concluded that the Shrine Club volunteer was covered under this endorsement because he was transporting volunteers to participate in an activity that would further the Shrine Club’s business.³⁰

{¶49} Both *Ferkel* and *Scavo* are distinguishable from the case before us. Unlike United National’s policy, the policy at issue in *Ferkel* did not require the insured to be in the course and scope of employment. In fact, it was undisputed in *Ferkel* that Zirger was not in the scope of her employment when the accident occurred.³¹ United National’s policy did not contain the alternate definition of

²⁷ Id. at ¶13 and ¶18.

²⁸ (Mar. 4, 1992) 2nd Dist. No. 1297.

²⁹ Id.

³⁰ Id.

³¹ *Ferkel*, 2002-Ohio-2822, at ¶13.

insured that allowed Zirger to recover if injured while performing duties related to her employer's business.

{¶50} And the insurance policy at issue in *Scavo* contained an endorsement that specifically covered volunteers driving automobiles in furtherance of the Shrine Club's activities. This endorsement was an exception to the general rule that an employee is not acting in the scope of employment while commuting. No such endorsement was contained in United National's policy. Because Flynn was injured while traveling to LaSalle, he was not in the scope of his duties as a volunteer.

{¶51} Flynn further relies on federal tax code provisions to distinguish between employees and volunteers. He argues that the coming-and-going rule is inapplicable to volunteers because volunteers are able to deduct travel expenses to and from a volunteer activity, whereas an employee cannot deduct travel expenses to and from work.

{¶52} We are not persuaded by Flynn's argument. These deductions serve as an incentive to encourage people to donate their time to volunteer activities. Such deductions in no way affect a determination whether a volunteer was within the scope of his volunteer duties while traveling to a fixed site.

{¶53} For the purposes of the coming-and-going rule, we conclude that a volunteer is indistinguishable from an employee. Just as an employer derives no benefit from an employee traveling to or from work, a particular organization, in this case the Archdiocese, derives no benefit while its volunteers are traveling to or from the location where they will volunteer. A volunteer performs no duty while traveling, nor does the volunteer organization control a volunteer's commute.

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{¶54} Because Flynn was injured while traveling to LaSalle, he was not in the scope of his duties as a volunteer or board member. Under these circumstances, he was not covered under United National's policy, and he was not entitled to recovery from United National, National Catholic, or St. Paul.

V. Conclusion

{¶55} Consequently, we affirm the trial court's grant of summary judgment to United National, National Catholic, and St. Paul. But because Flynn was entitled to coverage under Westfield's automobile insurance policy, and may be entitled as well to coverage under the umbrella policy, we reverse the trial court's entry of summary judgment in favor of Westfield. We remand for further proceedings consistent with this opinion.

Judgment affirmed in part and reversed in part, and cause remanded.

DOAN, P.J., and SUNDERMANN, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



KEVIN R. FLYNN, et al. : Case No. A0301146

Plaintiffs : (Judge Niehaus)

vs. :

VINCENT STOREY, et al. :

Defendants :

OPINION GRANTING MOTION OF
DEFENDANT WESTFIELD
INSURANCE CO. AND OVERRULING
MOTION OF PLAINTIFF FLYNN FOR
SUMMARY JUDGMENT

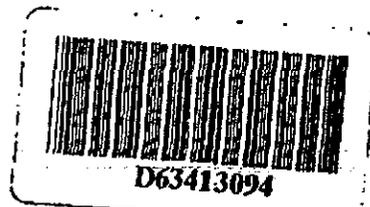
This cause came before the Court on cross motions for summary judgment by plaintiff Kevin Flynn and defendant Westfield Insurance Company.

After considering the motions, the evidence in support and the briefs and arguments of counsel, the Court issues this opinion.

Plaintiff Kevin Flynn asserts in his motion that he is entitled to UM/UIM insurance coverage under the policies of insurance issued by Westfield to Lawyers Title of Cincinnati, dba Griffin and Fletcher.

Mr. Flynn was injured in an auto accident which occurred on February 22, 2002. At the time of the accident he was driving a car leased by him. He was on his way to do volunteer work for LaSalle High School but had offered to drop off real estate closing papers prepared by Lawyers Title of Cincinnati at a building and loan which was on his route to LaSalle.

Mr. Flynn argues he was an employee of Griffin and Fletcher at the time of the accident acting within the scope of his employment when the accident occurred. He was thus a "you"



under the terms of the Lawyers Title of Cincinnati dba Griffin and Fletcher auto and umbrella policies issued by Westfield and therefore is entitled to UM/UIM coverage.

Westfield counters that even if Kevin Flynn was a "you" and thus a named insured under the policy, he was not driving a covered auto under the policy. The policy in question specifically states, "Each of These Coverages Will Apply Only To Those Autos Shown As Covered Autos. Autos Are Shown As Covered Autos For A particular Coverage By The Entry Of One Or More Of The Symbols From The Covered Auto Section Of The Business Auto Coverage Form Next To The Name Of The Coverage." Under the policy UM/UIM coverage is provided to vehicles designated by Symbols 2 and 8. Symbol 2 means only private passenger autos "you" own. Symbol 8 is only those autos you lease, hire, rent or borrow. This does not include any auto you lease, hire, rent or borrow from any of your employees, or partners if a partnership. Therefore, Mr. Flynn's auto was not covered by Symbol 8.

The only autos listed as covered autos under the policy were in fact owned by Lawyers Title of Cincinnati. The policy was first issued in 1990 and continued until 2002. From October 10, 1999 to 2001 nine cars were listed as covered autos. Mr. Flynn's Jaguar was not a covered auto. After 2001 five vehicles were deleted from the policy because the premiums were too high, twice as expensive as personal insurance coverage.

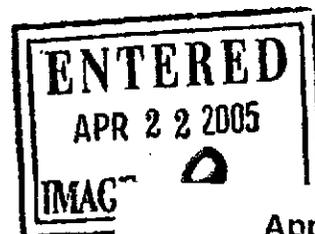
In Westfield Insurance Company v. Galatis, 100 Ohio St.3d 216, the Supreme Court returned to the prior long standing rules of contract interpretation. Contracts, even insurance contracts, once again had bargained for consideration and terms.

In this case it is clear from the written insurance contract and the actions of the parties that UM/UIM coverage extended only to covered autos owned by Lawyers Title of Cincinnati. No autos other than those owned by Lawyers Title were even listed as covered autos under the



Westfield policy. Lawyers Title expected their employees to carry their own UM/UIM coverage on their own cars and did not undertake to provide insurance for autos other than the listed autos owned by Lawyers Title because of the premium expense. In fact, in 2001 Lawyers Title removed five vehicles from the list of nine to reduce the insurance costs to the company. The company had never added a non-owned auto to the list of covered autos during the period of the policy.

Thus the "covered" autos list never contained any employee owned or leased vehicle. If the policy in question was vague in its terms of coverage, which it is not, the actions of the parties demonstrates the intent of Westfield and Lawyers Title of Cincinnati dba as Griffin and Fletcher to provide UM/UIM coverage for the autos listed as covered on the insurance policy schedule of "covered" autos. Setting the terms of a policy by defining covered autos is permissible under UM/UIM coverage. See, Martin v. Midwestern Group Ins. Co., 70 Ohio St.3d 478. Limiting UM coverage to autos owned or hired by symbols 2 and 8, as was done in this case, has been upheld by other courts. (See, Weyda v. Pacific Employers Insurance Co., 151 Ohio App.3d 678, 785 N.E.2d 763, First District and The Westfield Group v. Cramer 2004 Ohio 6084 Lorain App. No. 04CA 008443, Wright v. Small 2003-Ohio-971, 2003 Ohio App. LEXIS 923, Seneca App. 13-02-34.) Finally Olmstead v. New Hampshire Ins. Co. 2005 Ohio 39 2005 Ohio App. LEXIS 31, Erie County App. No. E-04-017, held that for the purposes of UM/UIM coverage a corporation could choose to purchase UM/UIM coverage for "owned" covered autos only. And thus even though an employee was driving a covered auto for the purpose of liability coverage under a policy, the declaration page afforded UM/UIM coverage for "owned" autos only. Thus no UM/UIM coverage was available to the employee even though he was injured in an auto accident during the course and scope of his employment.



The claim for UM/UIM coverage under the umbrella policy issued by Westfield fails because there is no UM/UIM coverage under the underlying policy. An umbrella policy provides coverage when the coverage of the listed underlying general insurance policies are exhausted. Liability under the umbrella policy does not arise until the condition precedent, the exhaustion of the underlying coverage amount occurs. (See, Hionis v. Nationwide Ins. Co. Eighth App. District, App. No. 80516, 2003 Ohio 1333, 2003 App. LEXIS 1268, Wertz v. Indiana Ins. Co. Ninth App. CA 21571, 2003 Ohio 5905, 2003 Ohio App. LEXIS 5247, Wright v. Small Third App. Dist. No. 3-02-34, 2003 Ohio App. LEXIS 923, Misseldine v. American Guarantee & Liability Ins. Co. Eighth App. Dist. No. 82029, 2003 Ohio 2315, 2003 Ohio App. LEXIS 2130, Rosenberry v. Morris Fifth App. Dist. No. 2002 CA-00399, 2003 Ohio 2743, 2003 Ohio App. LEXIS 2484.

Wherefore the Court finds the Westfield policies at issue do not provide UM/UIM coverage for the February 22, 2002 accident to Mr. Flynn. Counsel to present an entry in conformity with this opinion on or before the 9th day of May, 2005 at 11:00 a.m.

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IN THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO

KEVIN R. FLYNN, et al.,

Plaintiffs,

v.

VINCENT STOREY, et al.,

Defendants.

Case No. A0301146
(Consolidated with Case Nos. A034670
and A0301574)

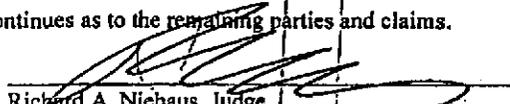
Judge Niehaus

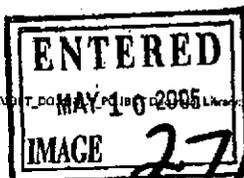
JOURNAL ENTRY

This cause came on to be heard upon plaintiffs' Motion for Summary Judgment against Westfield Insurance Company, filed herein on October 22, 2004, and upon Westfield's Motion for Summary Judgment, filed herein on February 24, 2005, upon the memoranda of counsel in support of and in opposition to such motions, and upon the oral arguments presented to the Court on April 15, 2005. The Court, being fully advised in the premises, hereby sustains Westfield's Motion for Summary Judgment and overrules plaintiffs' Motion for Summary Judgment for the reasons stated in the Court's Opinion Granting Motion of Defendant Westfield Insurance Co. and Overruling Motion of Plaintiff Flynn for Summary Judgment, filed herein on April 22, 2005.

It is therefore ORDERED that Westfield's Motion be, and it hereby is, GRANTED and that plaintiffs' Motion be, and it hereby is, OVERRULED. It is hereby adjudged that plaintiffs are not entitled to recover underinsured motorist benefits under Policy No. CWP 3507308, issued by Westfield Insurance Company to Lawyers Title of Cincinnati, Inc. dba Griffin and Fletcher.

All claims against Westfield Insurance Company in this case are hereby dismissed. This is not a final appealable order, as the case continues as to the remaining parties and claims.


Richard A. Niehaus, Judge



APPROVED:

Submitted, but not approved

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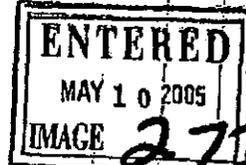
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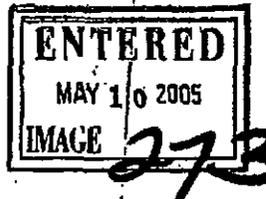
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