

IN THE SUPREME COURT OF OHIO

Kevin R. Flynn
and
Margaret M. Flynn

Cross-Appellees

vs.

Westfield Insurance Company

Cross-Appellant

: Ohio Supreme Court
: Case No. 06-1619
:
: On Appeal from the Hamilton County
: Court of Appeals, First Appellate District
:
: Court of Appeals
: Case No. C-050909
:
:
:

**MERIT BRIEF OF CROSS-APPELLEES,
KEVIN R. FLYNN and MARGARET M. FLYNN**

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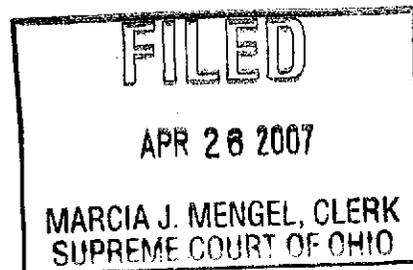


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STATEMENT OF FACTS

On the morning of February 22, 2002, Kevin Flynn was traveling on Interstate 74, outside of Cincinnati, 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 from the chest down.

Kevin is a real estate attorney and partner in the law firm of Griffin-Fletcher, L.L.P. (“Griffin-Fletcher”).¹ He is also an employee of Lawyers Title of Cincinnati, Inc. (“LTOC”), a real estate title company.² Griffin-Fletcher and LTOC are related businesses and share office space.³ Griffin-Fletcher provides legal services related to real estate transactions.⁴ LTOC issues title insurance for real estate transactions.⁵

Winton Savings & Loan is an important client of both Griffin-Fletcher and LTOC.⁶ On the morning of the accident, Kevin discovered that documents for a real estate closing scheduled for Winton Savings later that morning had been mistakenly sent to his downtown office, instead of to Winton Savings.⁷ Kevin was scheduled to attend a meeting near Winton Savings, so he decided to deliver the documents himself rather than send a courier.⁸ The

¹ T.d. 162, ¶ 9, K. Flynn Affidavit (Supp. p. 91).

² T.d. 162, ¶ 10, K. Flynn Affidavit (Supp. p. 91).

³ T.d. 172, ¶¶ 2-5, M. Fletcher Affidavit (Supp. p. 107).

⁴ T.d. 172, ¶ 2, M. Fletcher Affidavit (Supp. p. 107).

⁵ T.d. 172, ¶ 3, M. Fletcher Affidavit (Supp. p. 107).

⁶ T.d. 172, ¶¶ 11, 12, M. Fletcher Affidavit (Supp. p. 107).

⁷ T.d. 162, ¶ 12, K. Flynn Affidavit (Supp. p. 91).

⁸ T.d. 162, ¶ 13, K. Flynn Affidavit (Supp. p. 91).

accident occurred while Kevin was en route to Winton Savings.⁹ Kevin was driving a car that he leased from Huntington National Bank.¹⁰

At the time of the accident, Kevin Flynn was acting within the scope of his duties and responsibilities as a partner of Griffin-Fletcher.¹¹ He also was acting within the scope of his employment with LTOC.¹² Winton Savings retained Griffin-Fletcher to close the real estate transaction.¹³ Griffin-Fletcher borrowed Joe Stahl, an LTOC employee, to attend and run the closing.¹⁴ Griffin-Fletcher reimbursed LTOC for Joe Stahl's attendance at the closing.¹⁵ Kevin Flynn was serving as an LTOC employee by delivering documents to another LTOC employee, Joe Stahl, who was to close the real estate transaction.¹⁶ Kevin Flynn was also serving as a partner of Griffin-Fletcher by delivering documents to a Griffin-Fletcher closing.¹⁷ By delivering the documents to Winton Savings, to ensure that Winton Savings was satisfied with the services provided, Kevin Flynn was benefitting both LTOC and Griffin-Fletcher.¹⁸ Finally, because personal contact with clients is a key marketing tool for both LTOC and Griffin-Fletcher, Kevin Flynn was performing an important marketing function for both LTOC and Griffin-Fletcher by personally delivering the documents to Winton Savings.¹⁹

⁹ T.d. 162, ¶¶ 17, 18, K. Flynn Affidavit (Supp. p. 91).

¹⁰ T.d. 127, p. 27, K. Flynn depo. I (Supp. p. 64).

¹¹ T.d. 172, ¶ 10, M. Fletcher Affidavit (Supp. p. 107).

¹² T.d. 172, ¶ 9, M. Fletcher Affidavit (Supp. p. 107).

¹³ T.d. 172, ¶ 13, M. Fletcher Affidavit (Supp. p. 107).

¹⁴ T.d. 172, ¶ 14, M. Fletcher Affidavit (Supp. p. 108).

¹⁵ Id.

¹⁶ T.d. 172, ¶ 15, M. Fletcher Affidavit (Supp. p. 108).

¹⁷ T.d. 172, ¶ 16, M. Fletcher Affidavit (Supp. p. 108).

¹⁸ T.d. 172, ¶ 17, M. Fletcher Affidavit (Supp. p. 108).

¹⁹ T.d. 172, ¶¶ 18, 19, M. Fletcher Affidavit (Supp. p. 108).

Westfield Insurance Company issued a Commercial Package Policy to Griffin-Fletcher and LTOC for the policy period October 10, 1999 to October 10, 2002.²⁰ The policy included an Uninsured/Underinsured Motorist Endorsement (Westfield UM/UIM Endorsement) with limits of \$500,000.00.²¹ The policy also afforded \$3,000,000.00 in umbrella liability coverage.²²

With the consent of Westfield, the Flynns settled their claims against the tortfeasor, Vincent Story, for \$100,000.00, the limit of Mr. Story's automobile liability coverage. The Flynns' personal automobile insurer, Cincinnati Insurance Company, which afforded \$250,000.00 in UM/UIM coverage, paid its limits, after offsetting the \$100,000.00 paid on behalf of Mr. Story.

Kevin Flynn and his wife, Margaret, asserted claims for UM/UIM benefits under the Westfield UM/UIM Endorsement and the Westfield Umbrella Policy on behalf of themselves and their three young children. Westfield denied the claims. The Flynns filed this suit to recover these benefits. In the Trial Court, the Flynns and Westfield filed Motions for Summary Judgment. The Trial Court granted Westfield's Motion for Summary Judgment and denied the Flynn's Motion for Summary Judgment.²³ The Flynns timely appealed. The First District Court of Appeals reversed the Trial Court, concluding the Flynns were entitled to UM/UIM coverage under the Westfield UM/UIM Endorsement.²⁴

²⁰ Exhibit C of T.d. 121, P. Ney Affidavit (Second Supp. pp. 17, 22).

²¹ Id. (Second Supp. p. 100, 121).

²² Id. (Second Supp. p. 160).

²³ T.d.'s 208, 212 (Westfield's Merit Brief, Appendix p. 24 and p. 29).

²⁴ Westfield's Merit Brief, Appendix p. 6.

The Court of Appeals remanded the case to the Trial Court with respect to the Westfield Umbrella Policy.

Westfield then sought discretionary review in this Court. After initially declining jurisdiction, the Court accepted jurisdiction on Westfield's Proposition of Law No. 1.

ARGUMENT

A. Kevin Flynn And His Family Qualify As Insureds Under Westfield's UM/UIM Endorsement.

Kevin Flynn qualifies as an insured under the Westfield UM/UIM Endorsement (1) as a partner in the Griffin-Fletcher partnership, acting within the scope of his duties and responsibilities as a partner at the time of the accident, and (2) as an employee of LTOC acting within the scope of his employment at the time of the accident. Kevin's wife and children also qualify as insureds under the Westfield Policy because of their consortium claims.

1. "You" as a partner of Griffin-Fletcher.

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."²⁵

²⁵ Exhibit C of T.d. 122, Westfield UM/UIM Endorsement (Second Supp. p. 122).

“You” is defined by the Westfield Policy as a Named Insured.²⁶ Westfield’s Policy identifies two Named Insureds, Griffin-Fletcher and LTOC.²⁷ Although their businesses are intertwined, Griffin-Fletcher and LTOC are separate and distinct legal organizations. Griffin-Fletcher is a law partnership. LTOC is a title company.

In *Arpadi v. First M.S.P. Corp.*,²⁸ this Court held that “[a] partnership is an aggregate of individuals and does not constitute a separate legal entity.” Consequently, where a UM/UIM endorsement identifies a partnership as a Named Insured, the individual partners are entitled to UM/UIM coverage. For example, in *Kiggins v. Allstate Ins. Co.*,²⁹ the UM/UIM endorsement contained the same definition of an “insured” as Westfield’s UM/UIM Endorsement. The *Kiggins* policy also identified the Named Insured as a partnership. Construing Ohio law, the Tenth Appellate District held:

Inasmuch as Ohio law does not recognize a partnership as a separate legal entity, but as an aggregate of individuals, an ambiguity arises when the instant declaration page is read in conjunction with uninsured motorist provisions in the policy which contemplate coverage for individuals. It is not unreasonable to construe the language of this policy as providing uninsured motorist coverage to the individual partners as well as the partnership. Accordingly, we must construe the relevant language in favor of plaintiffs unless another intention clearly appears in the language of the policy.³⁰

Similarly, in *Weddle v. Hayes*,³¹ the Seventh Appellate District held that a commercial policy issued by Westfield to a partnership provided UIM benefits to the

²⁶ Exhibit D of T.d. 122, Westfield Business Auto Coverage Form (Second Supp. p. 104).

²⁷ Exhibit B of T.d. 122, Westfield Auto Declarations (Second Supp. p. 100); T.d. 177, p. 17, P. Wheeler depo (Second Supp. pp. 1-4).

²⁸ (1994), 68 Ohio St.3d 453, 456, 628 N.E.2d, 1335.

²⁹ (Sept. 27, 1994), 10th Dist. No. 94APE02-219, 1994 WL 530291, copy attached in Appendix.

³⁰ Id. at *3.

³¹ (Sept. 5, 1997), 7th Dist. No. 96-BA-44, 1997 WL 567964, copy attached in Appendix.

individual partners. Again, the applicable policy language was identical to the language in the Westfield Policy at issue in this case.

After Westfield lost this very issue in *Weddle*, it co-opted the argument in the case of *Geren v. Westfield Ins. Co.*³² In *Geren*, the injured plaintiff was an employee of Meyer Equipment, a partnership that was identified as the Named Insured in the policy. The operative language at issue in *Geren* was identical to the language of the Westfield Policy in this case. In an attempt to avoid the effects of *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*,³³ Westfield argued that “you” meant the individual partners of the partnership. Unlike a corporate entity, individual partners can sustain bodily injury. Because “you” meant the individual partners of the partnership, “you” did not include employees, so *Geren* was not entitled to UM/UIM coverage. The Sixth Appellate District agreed.

Footnote 7 of Westfield’s Merit Brief disputes that Kevin Flynn was driving to the Griffin-Fletcher closing as a partner of Griffin-Fletcher. Westfield did not make this argument in its Trial Briefs or in its Court of Appeals Brief. Westfield forgets that it already has acknowledged that Kevin Flynn was acting as a Griffin-Fletcher partner at the time of the accident. As a result of the collision, liability claims were asserted against Kevin Flynn. In addition to UM/UIM coverage, Kevin also sought liability coverage under the Westfield Policy. In its response letter of July 9, 2003, after performing its investigation, Mike Ramey, Claim Representative of Westfield, acknowledged, “I do agree that he [Kevin Flynn] would qualify as an insured for liability as a partner with Griffin and Fletcher

³² 6th Dist. No. L-01-1398, 2002-Ohio-1230.

³³ 85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 1116.

since he was acting in connection with his being a partner with Griffin and Fletcher.”³⁴

Westfield’s contention is based on the faulty premise that Kevin Flynn could not be acting within the scope of his employment with LTOC **and** within the scope of his partnership with Griffin-Fletcher. They are not mutually exclusive, however. The undisputed evidence is that Kevin was acting within the scope of his duties and responsibilities for both Griffin-Fletcher and LTOC. By personally delivering the documents to Winton Savings, Kevin was benefitting both.

The Westfield UM/UIM Endorsement affords coverage to "you," the Griffin-Fletcher partnership. As a result, UM/UIM coverage is afforded to all members of the partnership, including Kevin Flynn.

2. “You” as an employee of LTOC.

It is undisputed that Kevin Flynn also was acting within the course and scope of his employment with LTOC at the time of the accident.³⁵ “It is settled law in Ohio that a motor vehicle operated by an employee of a corporation in the course and scope of employment is operated by and for the corporation and that employee, under such circumstances, might reasonably be entitled to uninsured motorist coverage under a motor vehicle insurance policy issued to his employer.”³⁶

³⁴ Exhibit A of T.d. 122, July 9, 2003, Mike Ramey letter (Second Supp. p. 13).

³⁵ T.d. 172, ¶¶ 9, 15, 17, 18, 19, M. Fletcher Affidavit (Supp. p. 107, 108); Westfield Merit Brief pp. 18, 19, footnote 7.

³⁶ *Westfield Ins. Group v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 18, citing *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 211, 519 N.E.2d 1380, and *Selander v. Erie Ins. Group* (1999), 85 Ohio St.3d 541, 1999-Ohio-287, 709 N.E.2d 1161.

In *King v. Nationwide Ins. Co.*,³⁷ Dale Gordon was killed in an automobile accident while in the course of his employment with Ashland-Summit Community Action Agency. He was driving an automobile owned by a co-worker. Gordon's estate sought UM/UIM benefits under a policy issued by Nationwide Insurance Company to Gordon's employer. Nationwide denied coverage claiming that Gordon was not covered because he was not identified as a designated driver and because the vehicle he was occupying at the time of the accident was not a "covered auto." This Court rejected Nationwide's arguments and concluded that Nationwide afforded UM/UIM coverage. The Court held that a motor vehicle operated by an employee in the scope of his employment was operated by and for the corporation, thereby equating the employee to the corporation for the purpose of work related activities and injuries.

In *Westfield Ins. Group v. Galatis*, this Court further clarified the holding in *King*:

The employee in *King* acted on behalf of the corporation while operating the vehicle. This is why we found the employee to be "you." Further analysis was unnecessary. Because the employee qualifies as "you" while operating a motor vehicle *on behalf of* the corporation, he is entitled to uninsured motorists coverage. Accordingly, we follow *Scott-Pontzer* to the extent that it held that an employee in the scope of employment qualifies as "you" as used in CA 2133, and thus, is entitled to uninsured motorists coverage.³⁸

The Westfield Policy in this case utilizes ISO form CA 2133 as its UM/UIM Endorsement, the same ISO form at issue in *Galatis*. Pursuant to *King* and *Galatis*, Kevin Flynn qualifies as "you" under the Westfield UM/UIM Endorsement as an employee of LTOC acting within the scope of his employment at the time of the February 22, 2002 accident.

³⁷ (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380.

³⁸ *Galatis, supra* at fn. 36, 2003-Ohio-5849, ¶ 19.

3. Kevin Flynn's family members are also insureds.

The previous sections demonstrate Kevin Flynn is an insured under the Westfield UM/UIM Endorsement (1) as a partner of Griffin-Fletcher, and (2) as an employee of LTOC acting within the scope of his employment at the time of the accident. The Westfield UM/UIM Endorsement also defines an insured as:

Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured."³⁹

Kevin's wife, Margaret, and Kevin's children are entitled to recover consortium damages as a result of the bodily injury sustained by Kevin Flynn, an insured under the Westfield Policy. Therefore, Margaret Flynn and the Flynn children also qualify as insureds under the Westfield UM/UIM Endorsement.

B. The Westfield Policy Must Be Construed In Favor Of Kevin Flynn And His family.

The Court must now examine the Westfield Policy to address Westfield's contention that its policy restricts UM/UIM coverage to those insureds occupying a "covered auto." In construing Westfield's Policy, the Court is to examine the insurance contract as a whole and presume the intent of parties is reflected in the language used in the policy.⁴⁰ When the language of the policy is clear, the Court may look no further than the writing itself to find the intent of the parties.⁴¹ In the insurance context, where the policy is standardized, any ambiguity in the terms will be interpreted strictly against the insurer in favor of the insured.⁴²

³⁹ Exhibit C of T.d. 122, Westfield UM/UIM Endorsement, page 2 of 4 (Second Supp. p. 122).

⁴⁰ *Galatis, supra* at fn. 36, 2003-Ohio-5849, ¶ 11.

⁴¹ *Id.*

⁴² *Id.*, ¶ 13.

In its Brief, Westfield concedes that its policy is a “standard commercial policy,” containing commonly-used ISO forms.⁴³ Accordingly, the policy must be construed in favor of those identified as insureds under the policy.

Griffin-Fletcher is identified as one of the policy’s Named Insureds. Under Ohio law, a partnership is an aggregate of individuals and does not constitute a separate legal entity.⁴⁴ Therefore, Kevin Flynn is a policyholder as a partner of Griffin-Fletcher. As such, the Westfield Policy must be construed in his favor.

The Westfield Policy also identifies LTOC as a Named Insured. Pursuant to *Galatis*, where a UM/UIM policy identifies a corporation as “you,” an employee operating a motor vehicle in the course and scope of his employment is the corporation for purposes of work-related activities and injuries. Because the accident in this case occurred while Kevin Flynn was within the course and scope of his employment for LTOC, the Westfield Policy must be construed in his favor.

Michael Fletcher is the managing partner of Griffin-Fletcher. He also is a vice president of LTOC. Mr. Fletcher was responsible for procuring insurance for both Griffin-Fletcher and LTOC. Mr. Fletcher testified that Griffin-Fletcher and LTOC expected the Westfield Policy to afford UM/UIM coverage to employees acting within the scope of their employment.⁴⁵ Moreover, he testified that it was in the interest of Griffin-Fletcher and LTOC for the court to construe the Westfield Policy to afford UM/UIM coverage to Kevin Flynn for the February 22, 2002 automobile accident.⁴⁶ Thus, both named policyholders

⁴³ Westfield Merit Brief, p. 3.

⁴⁴ *Arpadi, supra* at fn. 28, 68 Ohio St.3d 453, 456.

⁴⁵ T.d. 172, ¶ 28, M. Fletcher Affidavit (Supp. p. 109).

⁴⁶ T.d. 172, ¶ 29, M. Fletcher Affidavit (Supp. p. 110).

of the Westfield Policy testified that the Westfield Policy should be construed in favor of Kevin Flynn and his family.

Michael Fletcher unequivocally testified that Griffin-Fletcher and LTOC expected the Westfield Policy to provide UM/UIM coverage for those acting within the scope of their employment for Griffin-Fletcher and LTOC. Despite this, Westfield claims Griffin-Fletcher and LTOC did not intend to obtain UM/UIM coverage for its partners and employees injured while working. Westfield refers to deposition testimony of Michael Fletcher and Diane Bedinghaus, the office manager for LTOC. During their depositions, neither Mr. Fletcher nor Ms. Bedinghaus was asked whether Griffin-Fletcher and LTOC intended to secure UM/UIM coverage for those acting within the scope of their duties and employment for Griffin-Fletcher and LTOC. Instead, Mr. Fletcher and Ms. Bedinghaus were asked if Griffin-Fletcher and LTOC purchased insurance for **the vehicles** of its partners or employees. This has nothing to do with whether Griffin-Fletcher and LTOC acquired UM/UIM coverage for partners and employees injured while working. Kevin Flynn is not asking Westfield to provide coverage for his damaged car. He is requesting UM/UIM coverage for himself and his family. UM/UIM coverage protects people, not vehicles.⁴⁷ It is misleading to suggest that because Griffin-Fletcher and LTOC did not obtain coverage for the personal vehicles of its partners and employees that Griffin-Fletcher and LTOC did not intend the Westfield Policy to provide UM/UIM coverage for its partners and employees injured while working. The explicit testimony of Michael Fletcher proves otherwise.

⁴⁷ *Martin v. Midwestern Group Ins. Co.*, 70 Ohio St.3d 478, 1994-Ohio-407, 639 N.E.2d 438.

Accordingly, the Westfield Policy must be construed in favor of Kevin Flynn and his family. Any reasonable interpretation of the policy that results in coverage for the Flynn family must be adopted.⁴⁸ Where a policy is ambiguous, it is not a contest between the insurer and the insured to establish which construction of the policy is more reasonable.⁴⁹ An insurer cannot prevail by demonstrating that its policy interpretation is more reasonable than an insured's.⁵⁰ Any reasonable interpretation of a policy that results in coverage must be adopted. If an insurer and insured both offer reasonable constructions of the policy, the construction that favors the insured must be adopted.⁵¹

C. Westfield's UM/UIM Endorsement Does Not Require "You" To Be Occupying A Covered Auto.

Westfield claims Kevin Flynn is not entitled to UM/UIM coverage under the Westfield UM/UIM Endorsement because Kevin was not occupying a "covered auto" at the time of the accident. The Westfield UM/UIM Endorsement, however, does not require "you" to be occupying a covered auto to recover UM/UIM benefits.

- 1. The plain language of the Westfield UM/UIM Endorsement does not require "you" to be occupying a "covered auto."**

The Westfield UM/UIM Endorsement identifies four categories of insureds:

B. Who Is An Insured

1. You.
2. If you are an individual, any "family member."

⁴⁸ *Univ. Of Cincinnati v. Arkwright Mut. Ins. Co.* (6th Cir., 1995), 51 F.3d 1277, 1280.

⁴⁹ *Anderson v. Highland House Co.*, 93 Ohio St.3d 547, 550, 2001-Ohio-1607, 757 N.E.2d 329.

⁵⁰ *Id.*

⁵¹ *Id.*

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.
4. Anyone for damages he or she is entitled to recover because of “bodily injury” sustained by another “insured.”⁵²

Categories 1, 2 and 4 do not require one to be occupying a “covered auto” to be insured under the Westfield UM/UIM Endorsement. Only category 3 requires a person to be occupying a “covered auto” in order to be covered.

If the Westfield UM/UIM Endorsement intended only to cover individuals occupying a covered auto, categories 1, 2 and 4 would be unnecessary. The policy simply would define an insured as anyone occupying a covered auto. Instead, the Westfield UM/UIM Endorsement (1) covers anyone who qualifies under the definition of “you,” whether or not “you” is occupying a covered vehicle; (2) covers any family member of any individual who qualifies as “you” whether or not the family member is occupying a covered vehicle; (3) covers anyone occupying a “covered auto” or a temporary substitute for a “covered auto”; and (4) covers anyone for derivative claims resulting from bodily injury to an insured under categories 1, 2, or 3, whether or not the derivative claimant is occupying a covered vehicle.

2. Item Two of Westfield’s Business Auto Declarations does not limit UM/UIM coverage to those occupying a “covered auto.”

Westfield points to language from Item Two of its Business Auto Declarations⁵³ - Each of These Coverages Will Apply Only To Those Autos Shown As Covered Autos - and claims this language limits UM/UIM benefits to those occupying covered autos. The language of Item Two says nothing about an insured occupying a covered auto. It simply

⁵² Exhibit C of T.d. 122, Westfield UM/UIM Endorsement, page 2 of 4 (Second Supp. p. 122).

⁵³ Exhibit B of T.d. 122, Westfield Auto Declarations (Second Supp. p. 100).

limits the type of auto that may be considered a “covered auto” for a particular coverage section.

SECTION I - COVERED AUTOS of Westfield’s Business Auto Coverage Form explains the function of Item Two of the Auto Declarations.⁵⁴ Westfield’s Auto Declarations identifies five different Coverage Sections - (1) Liability; (2) Auto Medical Pay; (3) Uninsured Motorists; (4) Physical Damage Comprehensive Coverage; and (5) Physical Damage Collision Coverage. Item Two of the Declarations specifies which autos are “covered autos” for a particular coverage section. Only those autos designated are “covered autos” for that particular coverage. Item Two does not limit coverage to those occupying a covered auto. Whether a **person** is insured under a particular coverage section depends on the definition of insured contained in the particular coverage section.

For example, the automobile liability coverage section of the Westfield policy limits coverage to “ ‘you’ for any covered ‘auto’ .”⁵⁵ In contrast, the Westfield UM/UIM Endorsement affords coverage to just “you” without any restrictive language and without requiring “you” to be occupying a “covered auto.” If Item Two of the Declarations required “you” to be occupying a “covered auto”, it would be redundant for the liability coverage section to define an insured as “ ‘you’ for any covered ‘auto’ .” The fact that the Westfield UM/UIM Endorsement defines an insured as “you”, without any restrictive language, demonstrates “you” need not occupy a covered vehicle to qualify for UM/UIM benefits.

⁵⁴ Exhibit D of T.d. 122, Business Auto Coverage Form, Section I - Covered Autos (Second Supp. p. 104).

⁵⁵ Exhibit C of T.d. 174, Westfield Auto Liability Coverage Form, page 2 of 11 (Second Supp. p. 105).

The fallacy of Westfield's argument is also demonstrated by examining the Auto Medical Payments Coverage Section of the Westfield Policy. The Westfield Auto Declarations designates symbol 2 as "covered autos" for Auto Medical Payments Coverage.⁵⁶ The Business Auto Coverage Form identifies symbol 2 as "Owned 'Autos' Only."⁵⁷ According to Westfield's argument, "you" would be entitled to auto medical pay benefits only while occupying an "owned auto." The definition section of the Auto Medical Payments Coverage, however, demonstrates this is not true. The "Who Is an Insured" provision of the Auto Medical Payments Coverage section provides coverage to "'you' while 'occupying' or, while a pedestrian, and when struck by any 'auto'."

Examining the language of Item Two of the Auto Declarations in context with the different coverage sections, demonstrates that Item Two merely identifies the autos that are "covered autos" for a particular coverage. Item Two does not limit coverage under the coverage sections to those occupying a covered auto. Whether a person must occupy a "covered auto" to qualify for benefits under a particular coverage section depends upon the definition of insured within that specific coverage section.

3. Westfield could have limited UM/UIM coverage to those occupying a covered auto.

This is not to say that Westfield was prevented from limiting UM/UIM coverage to those occupying a covered auto. As mentioned, the liability coverage section of the Westfield Policy does limit coverage to "you" for any "covered auto."

⁵⁶ Exhibit B of T.d. 122, Westfield Auto Declarations (Second Supp. p. 100).

⁵⁷ Exhibit D of T.d. 122, Westfield Business Auto Coverage Form (Second Supp. p. 104).

Additionally, Westfield has employed different policy language that, in fact, limits UM/UIM coverage to those employees occupying covered autos. In *The Westfield Group v. Cramer*⁵⁸, an employee sustained injuries while working. Unlike the Westfield Policy at issue in this case, the Westfield policy in *Cramer* defined an insured as: “An employee of the Named Insured injured while occupying a covered auto the Named Insured owns, hires or borrows.” In *Cramer*, because the employee was not occupying a covered auto, no UM/UIM coverage was available for the employee.

Clearly Westfield could have limited coverage to employees or partners occupying a covered vehicle. Westfield simply chose not to do so in the Westfield UM/UIM Endorsement. Westfield chose to provide UM/UIM coverage to “you” regardless of whether “you” was occupying a “covered auto” at the time of the accident.

4. Ohio courts have repeatedly rejected Westfield’s position.

Westfield’s argument that “you” must occupy a “covered auto” to qualify for UM/UIM coverage has been routinely rejected by Ohio courts.

In *King v. Nationwide Ins. Co.*,⁵⁹ Nationwide argued that its policy did not afford UM/UIM coverage because the employee was not occupying a “covered auto” at the time of the accident. This Court rejected the argument and held that an employee acting within the scope of employment at the time of an accident qualifies as an insured under the definition of “you” and is entitled to UM/UIM coverage regardless of whether the employee occupied a covered auto.

⁵⁸ 9th Dist. No. 04CA008443, 2004-Ohio-6084.

⁵⁹ (1988), 35 Ohio St.3d 208, 211, 519 N.E.2d 1380.

In *Kiggins v. Allstate Ins. Co.*,⁶⁰ the Tenth Appellate District ruled that each individual member of a partnership was entitled to UM/UIM coverage under a policy that identified the partnership as “you.” The Court rejected the argument that a partner was not entitled to UM/UIM coverage under the policy because he was not operating a “covered auto” at the time of the accident. The Court ruled that if the insurer wanted to limit UM/UIM benefits to partnership-owned vehicles, it should have unambiguously included this restriction in the UM/UIM definition of insured.

In *Westfield Ins. Co. v. Ellis*,⁶¹ the Eleventh Appellate District, construing identical policy language, rejected the same argument made by Westfield in this case and held that the Westfield policy did not require “you” to occupy a covered auto to recover UM/UIM benefits.

In *Batteiger v. Allstate Ins. Co.*,⁶² the language in Allstate’s declarations page and UM/UIM endorsement is identical to the language in the Westfield Policy in this case. The Second Appellate District in *Batteiger* also rejected the argument that “you” must occupy a covered auto to recover UM/UIM benefits.

In *Marra v. Nationwide Ins. Co.*,⁶³ the Seventh Appellate District, construing a policy identical to the Westfield UM/UIM Endorsement, concluded that “you” was entitled to UM/UIM coverage whether or not “you” occupied a covered auto at the time of the accident.

⁶⁰ (Sept. 27, 1994), 10th Dist. No. 94 APE 02-219, 1996 WL 530291, at *3.

⁶¹ 11th Dist. No. 2003-T-0093, 2004-Ohio-4393.

⁶² 2nd Dist. No. 2001 CA 37, 2002-Ohio-909.

⁶³ 7th Dist. No. 05-MA-216, 2007-Ohio-356.

In *Turek v. Vaughn*,⁶⁴ the Third Appellate District also rejected the argument that “you” must occupy a covered vehicle to qualify for UM/UIM benefits.

The Westfield UM/UIM Endorsement identifies the same four categories of insureds as the policies in *Ellis* and *Batteiger*. The first category affords coverage to “you” and does not require “you” to occupy a “covered auto” to recover. As explained in *Ellis* and *Batteiger*, identifying four categories of insureds demonstrates that Westfield did not intend to limit UM/UIM coverage to those occupying covered autos. If Westfield intended to limit coverage to those occupying a covered auto, it simply would have described an insured as anyone occupying a covered auto. It would be unnecessary to identify four categories of insureds. Coverage created by identifying “you” as an insured would be illusory.

As in *Ellis* and *Batteiger*, the Westfield UM/UIM Endorsement in this case contains an Other-Owned-Vehicle Exclusion, which excludes coverage for bodily injury sustained by “you” while occupying any vehicle owned by “you” that is not a covered auto. This exclusion would be unnecessary if the policy already required “you” to be occupying a covered auto to qualify for UM/UIM benefits. The Court must construe an insurance policy as a whole, giving effect to every part of the policy, and harmonizing all provisions.⁶⁵ The Westfield UM/UIM Endorsement cannot be construed to require “you” to occupy a covered auto in order to recover UM/UIM benefits because such a construction would render superfluous the Other-Owned-Vehicle Exclusion.

⁶⁴ 154 Ohio App.3d 612, 2003-Ohio-4473, 798 N.E.2d 632.

⁶⁵ See *Hybud Equip. Corp v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 666, 597 N.E.2d 1096; *State Auto Ins. Co. v. Childress* (Jan 15, 1997), 1st Dist. App. No. C-960376, 1997 WL 20936.

D. Westfield's Other-Owned-Vehicle Exclusion Does Not apply.

The Westfield UM/UIM Endorsement includes what is commonly referred to as an Other-Owned-Vehicle Exclusion. In its Memorandum in Support of Jurisdiction, Proposition of Law No. 2, Westfield asked this Court to decide whether its Other-Owned-Vehicle Exclusion excluded coverage for Kevin Flynn and his family. This Court declined to consider this Proposition. Nevertheless, in its Merit Brief, Westfield cites to cases applying Other-Owned-Vehicle exclusions and argues that these cases stand for the proposition that "you" must occupy a covered vehicle to qualify for UIM benefits. Westfield confuses the analysis. First, it must be determined whether a policy's definition of an insured requires a person to occupy a covered auto in order to qualify as an insured. If not, and the policy contains an Other-Owned-Vehicle exclusion, the next step is to determine whether the exclusion applies. Although this Court did not accept for review Westfield's Proposition of Law No. 2, because Westfield refers to cases applying Other-Owned-Vehicle Exclusions, it is important for the Flynn's to explain why the Westfield Other-Owned-Vehicle Exclusion does not apply in this case.

1. The Westfield Other-Owned-Vehicle Exclusion does not apply to leased vehicles.

The rights and duties of the parties to an insurance contract are governed by the statutory law in effect at the time the policy is issued.⁶⁶ The Westfield Policy was issued October 10, 1999. Therefore, the Am. Sub. H.B. No. 261 version of R.C. §3937.18 ("former §3937.18") governs the Westfield Policy.⁶⁷ Former RC 3937.18 states that a policy "may

⁶⁶ See *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St.3d 281, 289, 1998-Ohio-381, 695 N.E.2d 732.

⁶⁷ See *Bowling v. St. Paul Fire and Marine Ins. Co.*, 149 Ohio App.3d 290, 2002-Ohio-4933, 776 N.E.2d 1175, ¶ 6.

include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under any of the following circumstances:

1. While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, spouse, or resident relative of a named insured, if the motor vehicle is not specifically identified in the policy on which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorists coverages are provided.

Westfield's Other-Owned-Vehicle Exclusion, however, is not as broad as permitted by the statute. Rather, the Westfield Other-Owned-Vehicle Exclusion excludes coverage for bodily injury sustained by:

- (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. (emphasis added)⁶⁸

Thus, the exclusion is triggered only if Kevin Flynn occupied a vehicle **owned** by "you." At the time of the accident, however, Kevin Flynn was not occupying a vehicle owned by "you" -- Kevin Flynn, LTOC, or Griffin-Fletcher. At the time of the accident, Kevin was operating a vehicle that Kevin **leased** from Huntington National Bank.⁶⁹ By its plain terms, the exclusion only applies if Kevin, at the time of the accident, occupied a vehicle **owned** by "you", i.e, LTOC, Griffin-Fletcher, or Kevin Flynn. The exclusion does not apply because the vehicle was owned by Huntington National Bank.

Westfield certainly could have extended its Other-Owned-Vehicle Exclusion to include leased vehicles. Indeed, many Other-Owned-Vehicle Exclusions include leased

⁶⁸ Exhibit C of T.d. 122, Westfield UM/UIM Endorsement, Exclusion 5(a), page 2 of 4 (Second Supp. p 122).

⁶⁹ T.d. 127, p. 27, K. Flynn depo. I (Supp. p. 64).

vehicles in the definition. Westfield chose not to. Under the plain definition of an owned vehicle, the Westfield Other-Owned-Vehicle Exclusion does not apply because Kevin Flynn did not own the vehicle he was driving at the time of the accident.

In order to avoid the plain language of the policy at the trial and appellate levels, Westfield argued that Kevin was the “equitable” owner of the vehicle. Every lease shares certain characteristics with ownership. Every lessee selects the vehicle. Every lessee arranges financing for the vehicle. Every lessee is the sole person to drive, use, maintain and service the car. Because of these similarities, Westfield argued a lessee should be considered an “equitable owner.” Under Westfield’s theory of “equitable” ownership, there is no difference between a leased vehicle and an owned vehicle.

In construing insurance policies, however, the court is to look at the plain and ordinary meaning of the language used in the policy.⁷⁰ The exclusion says “owned,” not “leased.” When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.⁷¹ Westfield cannot pretend it does not know the difference between a leased vehicle and an owned vehicle. The Westfield Policy itself distinguishes between leased and owned vehicles. Symbol 2 applies to “Owned ‘Autos’ Only,” while Symbol 8 applies to “Hired ‘Autos’ Only,” which includes leased autos.⁷²

As previously established, Kevin Flynn and his family qualify as insureds under the Westfield Policy. An insurance policy must be construed liberally in favor of an insured and strictly against the insurer when the meaning of the policy language is in question.⁷³ As a

⁷⁰ *Galatis, supra* at fn. 36, 2003-Ohio-5849, ¶ 11.

⁷¹ *Id.*

⁷² Exhibit D of T.d. 122, Westfield Business Auto Coverage Form (Second Supp. p. 104).

⁷³ *Galatis, supra* at fn. 36, 2003-Ohio 5849, ¶ 13.

corollary rule, in applying exclusions from coverage, any exceptions, qualifications, or exemptions from coverage otherwise provided are to be read narrowly, having in mind the presumption that coverage not clearly excluded remains available to an insured.⁷⁴ An Other-Owned-Vehicle Exclusion must be clear and unambiguous to exclude coverage.⁷⁵ In this case, Westfield did not unambiguously exclude coverage for Kevin Flynn while occupying his leased vehicle.

E. Kevin Flynn Was Occupying A Covered Auto.

Westfield has argued that Kevin Flynn and his family are not entitled to UM/UIM coverage because the policy requires “you” to be occupying a covered auto at the time of an accident. Westfield also has argued that its Other-Owned-Vehicle Exclusion bars coverage because Kevin Flynn was occupying a vehicle “you” (Kevin Flynn) owned, which was not a covered auto. In addition to the reasons already discussed, Westfield’s arguments also fail because Kevin Flynn was occupying a covered auto at the time of the accident.

According to *King*, *Galatis*, *Kiggins*, *Weddle* and *Geren*, the term “you” as used in the Westfield UM/UIM Endorsement means Kevin Flynn, as a partner of Griffin-Fletcher and as an employee of LTOC. The term “you” must be interpreted consistently throughout the policy.⁷⁶ Symbol 2 and Symbol 8 define “covered autos” under the Westfield UM/UIM Endorsement. Since Kevin Flynn leased the vehicle involved in the accident, his vehicle was

⁷⁴ *Moorman v. Prudential Ins. Co.* (1983), 4 Ohio St. 3d 20, 22, 4 OBR 17, 445 N.E.2d 1112. “Any reasonable interpretation of an insurance policy that results in coverage for the insured must be adopted.” *Univ. of Cincinnati v. Arkwright Mut. Ins. Co.* (6th Cir., 1995), 51 F.3d 1277,1280.

⁷⁵ *Brunn v. Motorists Mut. Ins. Co.*, 5th Dist. No. 2005 CA0022, 2006-Ohio-33, ¶ 25.

⁷⁶ See *Weyda v. Pacific Employers Ins. Co.*, 151 Ohio App.3d 678, 2003-Ohio-443, 785 N.E.2d 763, ¶ 15; *Dailey v. Travelers Ins. Co.*, 2nd Dist. No. 1589, 2003-Ohio-680, ¶ 20.

covered under Symbol 8 as a vehicle that “you” (Kevin Flynn) leased. Kevin (“you”) did not lease, hire, rent or borrow his vehicle from one of his employees or partners, so the vehicle falls within the Symbol 8 definition of covered auto. Accordingly, Kevin Flynn was occupying a “covered auto” at the time of the accident.⁷⁷

Throughout its Brief, Westfield suggests the Flynns are not entitled to UM/UIM coverage because Kevin’s leased Jaguar was not specifically identified in Item Three of Westfield’s Auto Declarations. The Westfield Policy, however, includes Symbol 7 as an option for describing covered autos. Symbol 7, “Specifically Described ‘Autos,’” defines “covered autos” as only those autos described in Item Three of the Declarations for which a premium charge is shown.⁷⁸ Symbol 7 was not selected to describe covered autos under the Westfield UM/UIM Endorsement. Symbol 2, “Owned ‘Autos’ Only,” and Symbol 8, “Hired ‘Autos’ Only,” were chosen. Symbol 2 and Symbol 8 include vehicles that are not specifically identified in the Westfield Policy. Thus, any suggestion that Kevin Flynn is not entitled to UM/UIM coverage under the Westfield Policy because his leased car was not specifically identified in the policy is wrong. Symbol 2 and Symbol 8 include vehicles that are not specifically identified in the Westfield Policy and for which no premium charge is shown. Any suggestion that Kevin Flynn is not entitled to UM/UIM coverage under the Westfield Policy because his leased car was not listed in Item Three of the Auto Declarations is wrong.

⁷⁷ See *Dailey*, *supra* at fn. 76, 2003-Ohio-680, ¶ 33; *Headley v. Grange Guardian Ins.*, 7th Dist. No. 01-CA-130, 2003-Ohio-8, ¶¶ 26-27; *De Uzhca v. Derham*, 2nd Dist. No. 19106, 2002-Ohio-1814, ¶ 28.

⁷⁸ Exhibit D of T.d. 122, Westfield Business Auto Coverage Form (Second Supp. p. 104).

F. Westfield's Drive-Other-Car Endorsement Does Not Cure The Ambiguous "You."

In its Memorandum in Support of Jurisdiction, Proposition of Law No. 3 requests this Court to conclude that Westfield's "Drive-Other-Car Coverage" Endorsement precludes Kevin Flynn and his family from recovering UM/UIM benefits under the Westfield Policy. This Court declined to consider Westfield's Proposition of Law No. 3. Nevertheless, in its Merit Brief, Westfield refers to the policy's Drive-Other-Car Endorsement and implies that it precludes coverage in this case. Thus, although the Court has declined to consider Westfield's Proposition of Law No. 3, the Flynns are compelled to address the Drive-Other-Car Endorsement to respond to any suggestion that the Drive-Other-Car Endorsement limits UM/UIM coverage for Kevin Flynn and his family.

Westfield has argued that because the Westfield Policy includes a Drive-Other-Car Endorsement, "you" should not be construed to include employees or partners of LTOC and Griffin-Fletcher acting within the scope of their employment. Westfield ignores that the policy at issue in *Galatis* contained a Drive-Other-Car Endorsement, and that this Court specifically rejected this argument.⁷⁹ Here, Westfield charged \$148 in premium for the Drive-Other-Car Endorsement. Under Westfield's theory, by adding the endorsement and paying an additional premium, employees and partners acting within the scope of their employment no longer would be entitled to UM/UIM coverage. As *Galatis* noted, it would defy logic for Griffin-Fletcher and LTOC to pay an additional premium to obtain less UM/UIM coverage.⁸⁰

⁷⁹ *Galatis*, *supra* at fn. 36, 2003-Ohio-5849, ¶ 55.

⁸⁰ *Id.*

The Westfield Drive-Other-Car Endorsement does not cure the ambiguity created by the Westfield UM/UIM Endorsement, which, for purposes of UM/UIM coverage, identifies a corporation and a partnership as “you.” The Westfield Drive-Other-Car Endorsement **adds** coverage for Mike Fletcher and his family members. It does not **remove** “you” as a category of insureds entitled to UM/UIM coverage. It does not supersede *King* or *Galatis*, which hold that the category “you,” when referring to a corporation, includes employees of the corporation acting within the scope of their employment. It also does not supersede *Kiggins*, *Weddle* and *Geren*, which hold that “you,” when referring to a partnership, includes each individual partner.

The Drive-Other-Car Endorsement **enlarges** coverage for Mike Fletcher, as well as his family members. Mike Fletcher already qualifies for UM/UIM coverage as “you” under the Westfield UM/UIM Endorsement, but only while acting within the scope of his employment for LTOC and Griffin-Fletcher. The Drive-Other-Car Endorsement broadens this coverage and entitles him to UM/UIM coverage while occupying any auto or while a pedestrian, whether or not he is acting within the scope of his employment with LTOC or Griffin-Fletcher at the time of the accident. The Endorsement also extends this coverage to his family members. The Westfield Drive-Other-Car Endorsement broadens coverage for Mike Fletcher and his family, it does not modify the definition of “you” under the Westfield UM/UIM Endorsement or eliminate coverage for those employees or partners injured while working for LTOC or Griffin-Fletcher.

G. Westfield’s UM/UIM Coverage Protects People, Not Vehicles.

Westfield claims Kevin Flynn and his family are not entitled to UM/UIM coverage because Westfield did not charge a premium for the vehicle Kevin Flynn was occupying at

the time of the accident. UM/UIM coverage, however, was “designed by the General Assembly to protect people, not vehicles.”⁸¹ Accordingly, Westfield charged and collected a premium from Griffin-Fletcher and LTOC to provide UM/UIM protection to those who qualified as an insured under the policy. The fact that no premium was charged for the vehicle Kevin Flynn was occupying at the time of the accident is irrelevant.⁸²

Griffin-Fletcher and LTOC paid the premium charged by Westfield for the UM/UIM coverage afforded by the Westfield Policy. Kevin Flynn and his family are not responsible for how Westfield establishes its UM/UIM premiums. “It is the responsibility of the insurance company to set a premium in accordance with the risks involved.”⁸³ The Flynnns are entitled to UM/UIM coverage as insureds under the policy regardless of how Westfield establishes it premiums.

H. The Cases Cited By Westfield Do Not Apply.

Westfield cites a number of cases for the proposition that its policy requires “you” to occupy a “covered auto” to qualify for UM/UIM benefits. On the contrary, either these policies employ different policy language that explicitly and unambiguously require an employee to be occupying a covered auto to qualify for UM/UIM benefits, or the policy includes a valid, unambiguous Other-Owned-Vehicle Exclusion, which bars coverage. None of the following cases cited by Westfield support its position.

⁸¹ *Martin v. Midwestern Group Ins. Co.*, 70 Ohio St.3d 478, 1994-Ohio-407, 639 N.E.2d 438 (Syllabus ¶ 1).

⁸² *Id.* at 482.

⁸³ *Id.*

In *Massari v. Motorists Mut. Ins. Co.*,⁸⁴ it is undisputed that Massari qualified as an insured under the policy. Coverage was excluded by a valid Other-Owned-Vehicle Exclusion. At the time of the accident, Massari was occupying a vehicle he owned, but which was not a covered auto under the policy. Massari had chosen “symbol 7” for UM/UIM coverage, which described covered autos as only those vehicles specifically identified in the policy. Massari’s vehicle was not specifically identified in that policy.

In *Weyda v. Pacific Employers Ins. Co.*,⁸⁵ neither party disputed that Weyda was an insured. The issue was whether an Other-Owned-Vehicle Exclusion barred UM/UIM coverage. Unlike the Westfield Policy in this case, covered autos were described as owned autos listed on a schedule provided to the insurer. At the time of the accident, Weyda was operating a vehicle he owned, which not listed in the schedule of owned autos provided to the insurer.

Likewise, in *Dillen v. National Fire*,⁸⁶ an Other-Owned-Vehicle Exclusion barred UM/UIM coverage because the insured was occupying a vehicle he owned, but which was not a covered auto. Again, unlike the Westfield Policy in this case, that policy described covered autos as those vehicles listed on a schedule of covered autos. The vehicle involved in the accident was not listed on the schedule.

In *The Westfield Group v. Cramer*,⁸⁷ an employee was denied UM/UIM coverage because he did not qualify as an insured under his employer’s UM/UIM policy. The policy did not contain an ambiguous definition of “you” for UM/UIM purposes. Instead, it

⁸⁴ 8th Dist. No. 86242, 2006-Ohio-297.

⁸⁵ 151 Ohio App.3d 678, 2003-Ohio-443, 785 N.E.2d 763.

⁸⁶ 9th Dist. No. 21471, 2003-Ohio-5777.

⁸⁷ 9th Dist. No. 04CA008443, 2004-Ohio-6084.

specifically limited coverage with respect to an employee of a named insured. Coverage was afforded to an employee only if the employee was injured while occupying a covered auto the named insured owned, hired or borrowed. The employee did not qualify as an insured because he was not occupying a covered auto at the time of the accident. Not only does this case fail to support Westfield's position, it serves to demonstrate how the Westfield UM/UIM Endorsement could have selected language that limited coverage to employees injured while occupying a covered auto. Westfield chose not to employ such language. Rather, the Westfield UM/UIM Endorsement affords UM/UIM coverage to "you," regardless of whether "you" is occupying a covered vehicle at the time of the accident.

In *Wright v. Small*,⁸⁸ the plaintiff was a passenger in a vehicle. The plaintiff sought UM/UIM coverage from the driver's employer. The definition of insured for UM/UIM purposes was the same as the definition in the Westfield UM/UIM Endorsement. The plaintiff did not qualify as "you" because he was not an employee of the named insured. Rather, plaintiff attempted to recover under category 3, claiming he qualified as an insured because he was occupying a "covered auto" at the time of the accident. The policy, however, defined covered autos for UM/UIM purposes as those vehicles specifically identified on a schedule of covered autos provided to the insurer. At the time of the accident, the Plaintiff was not occupying a vehicle specifically identified as a covered auto and, therefore, was not an insured under the policy.

In *Olmstead v. New Hampshire Ins. Co.*,⁸⁹ plaintiff was injured in a car accident on his way to work. The UM/UIM Endorsement at issue did not identify an insured as "you."

⁸⁸ 3rd Dist. No. 13-02-34, 2003-Ohio-971.

⁸⁹ 159 Ohio App.3d 457, 2005-Ohio-39, 824 N.E.2d 158.

Instead, when a corporation was identified as the named insured, the policy afforded UM/UIM coverage to “anyone occupying a covered auto or temporary substitute for a covered auto.” The policy defined covered autos for UM/UIM purposes as only those autos owned by the corporation. The plaintiff did not qualify as an insured because he was not occupying an auto owned by the corporation at the time of the accident. Again, this case demonstrates how Westfield could have limited coverage to employees occupying a covered auto and could have limited the definition of covered autos to autos owned by LTOC or Griffin-Fletcher. Westfield chose not to do so.

In *Klocinski v. American States Ins. Co.*,⁹⁰ plaintiff attempted to recover UM/UIM benefits under his employer’s policy for damages related to the wrongful death of his wife. The court denied coverage under *Galatis* because his wife’s car accident was unrelated to any aspect of plaintiff’s employment.

In *Nentwick v. Erie Ins. Co.*,⁹¹ the court applied a valid Other-Owned-Vehicle Exclusion to preclude coverage. The accident occurred while plaintiff was operating his own motorcycle and the motorcycle was not a covered auto under the policy. The policy required covered autos to be specifically listed in the policy.

*Progressive Ins. Co. v. Heritage Ins. Co.*⁹² involved liability coverage, not UM/UIM coverage. Unlike the UM/UIM definition of insured in this case, the policy defined an insured as “‘you’ for any covered ‘auto.’” It also excluded autos **owned** by an employee or a member of his or her household. As an aside, such policy language would not apply to

⁹⁰ 6th Dist. No. L-03-1353, 2004-Ohio-6657.

⁹¹ 7th Dist. No. 03 CO 47, 2004-Ohio-3635.

⁹² (1996), 8th Dist. No. 69264, 113 Ohio App.3d 781, 682 N.E.2d 33.

Kevin Flynn in this case because Kevin did not own the vehicle involved in the accident, but rather leased it.

The cases cited by Westfield stand for the propositions that: (1) a UM/UIM policy may define an insured as anyone occupying a covered auto, as long as the policy language is clear and unambiguous; and (2) a policy may preclude UM/UIM coverage by employing an Other-Owned-Vehicle Exclusion, as long as the exclusion is clear and unambiguous. The Westfield Policy, however, did neither.

I. Westfield's Cross-Appeal is Moot.

Westfield raised three Propositions of Law in its Memorandum in Support of Jurisdiction. This Court accepted Proposition of Law No. 1 and rejected the others. Westfield identified its Proposition of Law No. 1 as, "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 schedule in the policy and for which a premium was paid." (emphasis added)

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.

This Court's review and 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.”⁹³

The analysis employed in determining whether UM/UIM coverage is afforded to a partner is different from the analysis employed in determining whether an employee of a corporation is afforded UM/UIM coverage.⁹⁴ Because this Court should 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.

It is well settled that this Court will not issue advisory opinions.⁹⁵ “A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.”⁹⁶ 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 render on this appeal will not change the

⁹³ *Flynn v. Westfield Ins. Co.*, 168 Ohio App.3d 94, 2006-Ohio-3719, 858 N.E.2d 858, ¶ 12, quoting *Weddle v. Hayes*, 7th Dist. No. 96-BA-44, A97 WL 567964.

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

⁹⁵ *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.

⁹⁶ Black’s Law Dictionary, Fifth Edition, p. 909.

judgment in favor of the Flynns in this case. The issue raised by Westfield's Cross-Appeal is moot, and the appeal should be dismissed.

J. This Case Should Be Dismissed as Improvidently Accepted.

This case is not the case described by Westfield in its Memorandum in Support of Jurisdiction and should be dismissed as improvidently accepted.

According to Section 2, Article IV, of the Ohio Constitution, this Court seeks to settle the law, not to settle cases.⁹⁷ Since 1988, When *King v. Nationwide* was decided, it has been established law that when a UM/UIM policy affords coverage to "you" and "you" is identified as a corporate entity, "you" means employees of the corporation acting within the scope of their employment. This law was confirmed in *Galatis*. In fact, the Westfield policy forms in *Galatis* are **the same** Westfield policy forms at issue in this case. If *stare decisis* means anything, this appeal should be dismissed.

Westfield also exaggerates the impact of this case. If an insurance company wishes to limit UM/UIM coverage to partners and employees occupying vehicles owned by the partnership or corporation, all the insurer has to do is say it clearly in its policy. In fact, Westfield has cited to a number of cases where the policies clearly and unambiguously limit UM/UIM coverage in this fashion. In fact, *The Westfield Group v. Cramer*⁹⁸ demonstrates that Westfield itself has created a policy that restricts UM/UIM coverage to employees occupying covered vehicles. Deciding this case will have little to no impact beyond this dispute between the Flynns and Westfield.

⁹⁷ *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 492, 2000-Ohio-397, 727 N.E.2d 1265 (concurring Opinion of J. Cook).

⁹⁸ 9th Dist. No. 04 CA008443, 2004-Ohio-6084.

CONCLUSION

As a partner of Griffin-Fletcher, Kevin Flynn is a Westfield policyholder. He also qualifies as an insured under the Westfield UM/UIM Endorsement as an employee of LTOC acting within the scope of his employment at the time of the accident. Kevin's family members qualify as insureds because of their consortium claims. As insureds, the Westfield Policy must be construed in favor of Kevin and his family. Any reasonable interpretation of the Westfield UM/UIM Endorsement that results in coverage for the Flynnns must be adopted. The plain language of the Westfield UM/UIM Endorsement does not require "you" to occupy a "covered auto" to recover UM/UIM benefits. Not only can the Westfield Policy be reasonably construed to provided UM/UIM benefits to "you", whether or not "you" is occupying a covered auto, it is the only reasonable construction. Because Westfield does not unambiguously require "you" to occupy a covered auto to qualify for UM/UIM benefits, the Westfield UM/UIM Endorsement must be construed to provide UM/UIM coverage to the Flynnns.

Respectfully submitted,

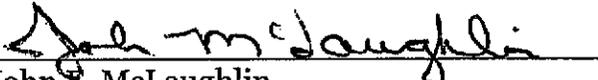


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been delivered by regular U.S. Mail, postage prepaid, this 26th day of April, 2007, to the following:

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C

Kiggins v. Allstate Ins. Co.
Ohio App. 10 Dist., 1994.

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
County.

Alicia K. HIGGINS, Administrator, of the Estate of
Mylon Yoder, deceased,
Marvin and Carol YODER, Plaintiffs-Appellants,
v.

ALLSTATE INSURANCE COMPANY,
Defendant-Appellee.
No. 94APE02-219.

Sept. 27, 1994.

APPEAL from the Franklin County Court of
Common Pleas.

Clark, Perdue, Roberts & Scott Co., L.P.A.,
Douglas S. Roberts and Glen R. Pritchard, for
appellants.
Lane, Alton & Horst, Rick E. Marsh and Robert B.
Graziano, for appellee.

OPINION

PETREE.

*1 Plaintiffs, Marvin Yoder, Carol Yoder and
Alicia K. Kiggins, Administrator of the Estate of
Mylon Yoder, deceased, appeal from a decision of
the Franklin County Court of Common Pleas
entering summary judgment in favor of defendant,
Allstate Insurance Company, and denying plaintiffs'
motion for summary judgment. Plaintiffs set forth
a single assignment of error:

"The trial court committed prejudicial error by
granting defendant's summary judgment and
denying plaintiffs' motion for summary judgment
and holding that defendant's policy was issued to a
partnership and does not insure Marvin D. Yoder

individually."

On November 12, 1991, Mylon D. Yoder ("
decedent") was killed in a motor vehicle collision
proximately caused by the negligence of Ronald
Fudge. Decedent was survived by his wife, Alicia
K. Kiggins; two children, Casey and Kodi Yoder,
and his parents, Marvin and Carol Yoder. On the
date of the fatal accident, a policy of insurance
issued by defendant, being policy number
0484596068-BAP, was in effect. The declaration
page of the policy provides in relevant part:

"NAMED INSURED: M YODER & A KLCO
DBA T & M INTERIOR TRIM

" * * *

"FORM OF NAMED INSURED'S BUSINESS:
Partnership

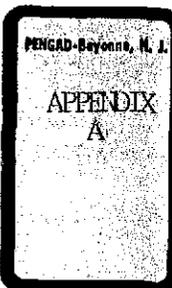
"NAMED INSURED'S BUSINESS: INTERIOR
CARPENTRY

"POLICY PERIOD: Policy covers FROM
MARCH 01, 1991 TO MARCH 01, 1992 * * *."

The parties agree that the individual identified as "
M Yoder" in this declaration page is plaintiff,
Marvin Yoder; that "T & M Interior Trim" is a
general partnership under Ohio law; and, Anthony
Klco and Marvin Yoder are the two general partners
in "T & M Interior Trim." There are no disputed
facts in this case.

Plaintiffs brought the instant declaratory judgment
action in the Franklin County Court of Common
Pleas seeking a declaration that they were entitled
to underinsured motorists benefits under the policy
issued by defendant.^{FN1} Both plaintiffs and
defendant filed motions for summary judgment.
The trial court held that the policy did not provide
uninsured coverage to plaintiff Marvin Yoder in his
individual capacity, as a matter of law; that the
policy clearly and unambiguously provided
uninsured coverage to the partnership only.

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FN1. The policy provides Uninsured/underinsured motorists coverage, as follows:

"A. COVERAGE

"1. We will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or driver of an 'uninsured motor vehicle' because of 'bodily injury' caused by an 'accident.' The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the 'uninsured motor vehicle.'"

In plaintiffs' assignment of error, plaintiffs contend that the trial court erred by granting summary judgment in favor of defendant since the policy contained an ambiguity concerning uninsured motorist coverage. We agree.

The construction and effect of a written contract of insurance is a matter of law to be determined by the court. See *Snedegar v. Midwestern Indemn. Co.* (1989), 64 Ohio App.3d 600, 604. In construing a policy of insurance, the court must adopt a reasonable construction of the policy in conformity with the intention of the parties as gathered from the ordinary commonly understood meaning of the language employed. *Dealers Dairy Products Co. v. Royal Ins. Co., Ltd.* (1960), 170 Ohio St. 336. However, where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, those provisions will be construed strictly against the insurer and liberally in favor of the insured. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208. Indeed, ambiguities within a policy are always resolved in favor of the insured. *Faruque v. Provident Life & Acc. Ins. Co.* (1987), 31 Ohio St.3d 34; *Bobier v. National Casualty Co.* (1944), 143 Ohio St. 215.

*2 The parties herein have not directed this court to any Ohio authority interpreting similar policy provisions, and this court has been unable to uncover any such authority. However, the parties have cited decisions from the Florida courts of appeal in support of their respective positions on coverage.

Defendant relies on the case of *Rosen v. National Union Fire Ins. Co. of Pittsburgh, PA.* (Fla.App.1971), 249 So.2d 701, wherein a Florida court of appeals held that a similar declaration sheet in a "garage policy" provided coverage to the partnership and not the individual partners. In *Rosen*, the declaration page of the policy at issue provided:

" 'Item 1. Named insured and address: Frank Martin and Steve Tokarski d/b/a/ Market Truck Stop, 1205 22 Street, Miami, Florida.

" * * *

" 'The named insured is: X Partnership. Business of the named insured is Auto Service Station.' "

We find *Rosen, supra*, to be distinguishable from the instant case in that the language used in the declaration page in *Rosen, supra*, more clearly identifies the insured as the partnership and not the individual partners. Although "Item 1" of the declaration page in *Rosen, supra*, is virtually identical to the corresponding language in the instant declaration page, the declaration in *Rosen, supra*, goes on in "Item 2" to identify the "name insured" as "X Partnership." The corresponding language of the declaration page in the instant policy states "Form of the named insured's business: partnership * * *." The use of the possessive in the instant policy is consistent with either individual coverage or coverage for the partnership only. Indeed, if Marvin Yoder is the "named insured," the form of his business is a "partnership."

In short, the specific policy language examined by the court in *Rosen, supra*, is materially different from the language employed in defendant's policy. Not only is *Rosen, supra*, factually distinguishable from the instant case, the court in *Rosen, supra*, provided little in the way of legal analysis which might aid this court in resolving the instant coverage dispute.

Plaintiffs rely on a case from Florida's Fourth District Court of Appeals: *Ohio Casualty Insurance Company v. Fike* (Fla.App.1974), 304 So.2d 136. In *Fike*, Russell Fike, a partner in the general partnership known as "Orange State Painting Company," brought a declaratory judgment

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action seeking uninsured motorist coverage under a policy issued by Ohio Casualty Company. The declaration page of the Ohio Casualty policy identified the "named insured" as "Russell C. Fike, Jr. and Robert D. Fike d/b/a Orange State Painting Company." The "partnership" category had been selected from among several choices on the declaration page. *Id.* at 137.

In affirming a summary judgment in favor of Fike, the court of appeals held:

" * * * Where a policy of insurance refers to the partnership entity as the 'named insured' and then proceeds to list the names of the individual partners in describing the 'named insured', the policy must be read to cover 'the partners as individuals as well as partners as an entity' unless a contrary intention clearly appears. * * * " *Id.* at 137.

*3 The holding of the Florida Court of Appeals in *Fike, supra*, was influenced by Florida partnership law which recognizes a partnership as an aggregate of the individual partners rather than a separate entity. *Id.* at 137.^{FN2} The court also noted that its coverage decision was supported by the existence of an ambiguity in the policy declaration whether coverage was provided to the individual partners or the partnership only. *Id.* at fn. 2.

FN2. A similar approach was taken by the Kentucky Court of Appeals in *Hartford Acc. & Indemn. Co. v. Huddleston* (Ky.App.1974), 514 S.W.2d. 676, wherein the court held that uninsured coverage was extended to the resident relatives of a partner since a partnership, for insurance purposes, constitutes an "aggregate of persons" rather than a single legal entity. *Id.* at 678.

Although neither of the cases cited by the parties represents controlling authority herein, in the absence of Ohio law on point, we find the analysis and reasoning of *Fike, supra*, to be more helpful in resolving this particular coverage dispute. Moreover, the principles of Florida partnership law applied in *Fike, supra*, are completely consistent

with Ohio's adoption of the Uniform Partnership Act.

Under Ohio law, "[a] partnership is an association of two or more persons to carry on as co-owners a business for profit." R.C. 1775.05(A). In *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453, the Ohio Supreme Court held at paragraph one of the syllabus:

"A partnership is an aggregate of individuals and does not constitute a separate legal entity. (R.C. 1775.05[A], construed; *Byers v. Schlupe* [1894], 51 Ohio St. 300, 314, 38 N.E. 117, 121, followed.)"

It is also well-settled that insurance contracts incorporate existing law. See, e.g., *Home Indemnity Co. of N.Y. v. Village of Plymouth* (1945), 146 Ohio St. 96; *Knepper v. Insurance Ins. Co.* (1977), 54 Ohio App.2d 9.

Inasmuch as Ohio law does not recognize a partnership as a separate legal entity, but as an aggregate of individuals, an ambiguity arises when the instant declaration page is read in conjunction with uninsured motorist provisions in the policy which contemplate coverage for individuals. It is not unreasonable to construe the language of this policy as providing uninsured motorist coverage to the individual partners as well as the partnership. Accordingly, we must construe the relevant language in favor of plaintiffs unless another intention clearly appears in the language of the policy.

Defendant argues that an intention to provide uninsured motorist coverage to the partnership and not the individual partners is clearly evidenced by the inclusion of only partnership-owned vehicles in the "schedule of covered autos * * *," and the omission of family-owned vehicles from the schedule. We do not believe that the schedule evidences an intention to provide uninsured motorist coverage to the partnership only.

In *Snedegar v. Midwestern Indemn. Co., supra*, the insured sought uninsured motorist coverage under a policy which defined the term "insured person" as follows:

"1. "Insured person" means:

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“a. You or a relative.
“b. Any other person occupying your insured car.
“c. Any person for damages that person is entitled to recover because of bodily injury to you, a relative, or another occupant of your insured car.”
Id. at 603.

*4 The insurer argued that the phrase “occupying your insured car,” was intended to restrict recovery of uninsured benefits by a “relative” of an insured. In rejecting this argument we stated:“ * * * [I]t is apparent that if the insurer wanted to limit coverage only to those insureds who were occupants of the car it would have added the phrase ‘occupying your insured car’ to the phrase ‘[y]ou or a relative’ in paragraph 1a, thus making it consistent with the language that appears in paragraph 1b which states ‘any other person occupying your insured car.’ * * * ”
Id. at 604.

In this case, uninsured motorist coverage is provided 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 a 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.’*” (Emphasis added.)

It is clear that uninsured coverage under sections B.2. or B.4. of the instant policy is available regardless of whether the insured was “occupying a covered auto” at the time of the accident. If defendant wanted to limit recovery of uninsured benefits under these sections it could have done so by simply adding the language appearing in section B.3. of the policy. See *Snedegar, supra*. Accordingly, the fact that the “schedule” lists only partnership-owned vehicles does not evidence of an intent to provide uninsured benefits to the partnership only. While the “schedule of covered autos” may evidence the parties’ intentions to limit other types of coverage under the policy, the

schedule does not clearly evidence an intention to so limit uninsured motorist benefits. See *Huddleston, supra*, at 678.

Defendant next contends that an insurance policy designated as a “business policy,” cannot be reasonably construed as providing coverage to individuals. However, defendant’s contention ignores the following language in the uninsured motorist provisions of the policy:

“B. WHO IS AN INSURED

“1. You.

“2. *If you are an individual, any ‘family member.’*”

This policy clearly contemplates uninsured coverage for “individuals.” In light of the policy language, defendant’s argument becomes one of form over substance.

Finally, we note that defendant has submitted parol evidence allegedly supporting its position regarding the intentions of the parties. However, under the rules of construction adopted in Ohio, the appearance of an ambiguity on the face of an insurance policy compels a liberal construction of that language in favor of the party seeking coverage. *King, supra*. This court will not look beyond the four corners of the policy where a reasonable construction of the policy will provide coverage. See *River Services Co. v. Hartford Acc. & Indem. Co.* (D.C. Ohio 1977), 449 F.Supp. 622 (Ohio courts must adopt any reasonable construction of an insurance policy resulting in coverage); *Sentry Life Ins. Co. v. Lustgarten* (D.C. Ohio 1984), 603 F.Supp. 509 (in order to ascertain the intentions of the parties to an insurance contract, the court will look to the reasonable intendment of the language employed).

*5 Resolving the ambiguity in the policy in favor of plaintiffs, we hold that underinsured motorist coverage is provided under defendant’s policy to plaintiff Marvin Yoder, as a matter of law, for sums he is legally entitled to recover as a result of the death of decedent. Accordingly, plaintiffs’ assignment of error is sustained as it relates to plaintiff Marvin Yoder.

With respect to the remaining plaintiffs, we note

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that uninsured motorist benefits are also available under section B.2. of defendant's policy to "any 'family member' " of Marvin Yoder. The term "family" member is defined in the policy, as follows:
 "F. ADDITIONAL DEFINITIONS

" * * *

"1. 'Family member' means a person related to you by blood, marriage or adoption who is a *resident of your household*, including a ward or foster child."
 (Emphasis added.)

This court is unable to finally determine the entitlement of the remaining plaintiffs to uninsured benefits under defendant's policy, since there has not yet been a factual determination whether any of these individuals were "family member[s]" of Marvin Yoder at the time of decedent's death. It is these individuals who are entitled to coverage under the law of this case.

Similarly, coverage is provided under section B.4. of defendant's policy to "[a]nyone for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured.' " Under this policy language, if decedent, Mylon D. Yoder was a "family member" of Marvin Yoder on the date of his death and thus, an "insured," coverage is available to the remaining plaintiffs under the law of this case. We note that the record contains memoranda from the parties stating their relative positions on the residency of decedent; however, there has been no resolution of this factual dispute at the trial level.

Despite these unresolved factual issues, for purposes of this appeal, we hold that the trial court committed prejudicial error by determining that the remaining plaintiffs were not entitled to uninsured benefits under defendant's policy, as a matter of law. Accordingly, plaintiffs' assignment of error is sustained with respect to the remaining plaintiffs only to the extent that it challenges the trial court's grant of summary judgment in favor of defendant.

Having sustained plaintiffs' assignment of error, we hereby reverse the judgment of the trial court and remand the case for further proceedings consistent herewith.

Judgment reversed; cause remanded.

TYACK and DESHLER, JJ., concur.

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Kiggins v. Allstate Ins. Co.

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Weddle v. Hayes
 Ohio App. 7 Dist., 1997.

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 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Seventh District,
 Belmont County.

Doris H. WEDDLE, et al., Plaintiffs-Appellees,
 v.

Amanda HAYES, et al., Defendants-Appellants.
 No. 96-BA-44.

Sept. 5, 1997.

Civil Appeal from Common Pleas Court, No.
 94CIV270.

Atty. James W. Peters, Woodsfield, Ohio, Atty.
 Blair L. Magaziner, Zanesville, Ohio, for
 plaintiffs-appellees.

Atty. Thomas L. Tribbie, Atty. Josephine E. Hayes,
 Cambridge, Ohio, for defendants-appellants,
 Westfield National Insurance Co. and Ohio Farmers
 Insurance Co.

OPINION

DONOFRIO, Presiding Judge.

*1 This timely appeal arises from a decision of the Belmont County Court of Common Pleas granting summary judgment in favor of Doris H. Weddle, individually and as Executrix of the Estate of William H. Weddle, Jerry Weddle, and Andrea Workman (plaintiffs-appellees), and failing to grant summary judgment in favor of Westfield Insurance Company and Ohio Farmers Insurance Company (appellants) on four separate issues.

On February 24, 1994, Doris H. Weddle (Mrs. Weddle) and her husband, William H. Weddle, were involved in an automobile accident in Belmont County, Ohio. The accident was allegedly caused

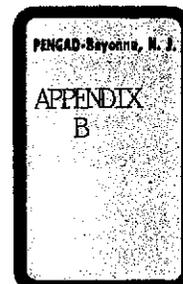
by the negligence of Amanda Hayes. Mr. and Mrs. Weddle were both injured as a result of the accident. Mr. Weddle later died, on May 8, 1994, as a result of the injuries sustained in the February 24, 1994 accident.

On July 22, 1994, Mrs. Weddle, individually and as Executrix of the Estate of William H. Weddle, commenced both a wrongful death and a personal injury action in the court of common pleas, Belmont County, Ohio. Andrea Workman and Jerry Weddle, who are adult children of the deceased, along with Greg Workman, the deceased's grandson, joined as plaintiffs in the wrongful death and personal injury action. Each party then made a separate claim against Westfield National Insurance Company and Ohio Farmers Insurance Company for a declaratory judgment and damages. Westfield was the underinsured motorist carrier of Mrs. Weddle, Jerry Weddle, and Andrea Workman. Ohio Farmers was the underinsured motorist carrier of Jerry Weddle through a separate policy. Ohio Farmers Insurance Company, who had a personal policy with Jerry Weddle, is a wholly owned subsidiary of Westfield.

On July 28, 1995, appellee Doris H. Weddle, through the Monroe County Probate Court, settled with the defendant tortfeasor Amanda Hayes. Around the same time, appellee Doris H. Weddle, as Executrix, settled with Leader National Insurance Company, who insured the deceased's grandson, Greg Workman, leaving only Westfield Insurance Company and Ohio Farmers Insurance Company as insurers. All appellees have made claims to recover damages from appellants on their respective uninsured/underinsured motorist policies.

Appellants have set forth four assignments of error. All four assignments of error pertain to the trial court's decision to grant, or the trial court's failure to grant, summary judgment motions, and all assignments of error involve issues of contract construction.

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As set forth by the Ohio Supreme Court in *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346:

"Under Civ.R. 56, summary judgment is proper when '(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.' *** (Citation omitted). Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. *** (Citation omitted). Nevertheless, summary judgment is appropriate where a plaintiff fails to produce evidence supporting the essentials of its claim. ***" (Citation omitted)

*2 Interpretation of an insurance contract is a question of law to be decided by a judge. *Leber v. Smith* (1994), 70 Ohio St.3d 548. As recently stated in the case of *Hacker v. Dickman* (1996), 75 Ohio St.3d 118, at 119-120:

"It is well-settled law in Ohio that '[w]here provisions of a contract of insurance are *reasonably* susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured.' (Emphasis added.) *** It is axiomatic that this rule cannot be employed to create ambiguity where there is none. It is only when a provision in a policy is susceptible of more than one reasonable interpretation that an ambiguity exists in which the provision must be resolved in favor of the insured." (Citations omitted.)

In their first assignment of error, appellants argue: "THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND IN FAILING TO ENTER SUMMARY JUDGMENT IN FAVOR OF DEFENDANT, WESTFIELD INSURANCE CO., ON THE ISSUE OF WHETHER WESTFIELD MAY PRECLUDE PLAINTIFFS FROM STACKING THE UM/UIM PROVISIONS OF

THE WEDDLE POLICY (APV-6806915) AND THE WORKMAN POLICY (APV-6799039)."

The trial court, in its July 18, 1996 judgment entry, held:

"Four separate claims arise as a result of the accident giving rise to the instant litigation:

"1. The wrongful death claim of Doris Weddle pursuant to Ohio Revised Code Section 2125.01, et seq.

"2. The wrongful death claim of Andrea Workman, daughter of decedent.

"3. The personal injury claim of Doris Weddle.

"4. The survivorship claims of the Administration (*sic.*) of the Estate of William Weddle for the personal injury of William Weddle.

**** As insureds under both policies, the injury claims of Doris Weddle and William Weddle may be assessed under either policy for the per person limits. No single claim need be asserted against more than one policy. ***

**** It is the further ruling of this Court that *** the four claims asserted by plaintiffs are subject to a per person limit of one of the two policies and no single claim may stack per person limits of one policy into another."

The two applicable policies at issue and pertinent provisions thereof are as follows:

(1) POLICY NUMBER APV 6806915

NAME INSURED: WILLIAM H & DORIS H WEDDLE

LIABILITY \$50,000 each person, \$100,000 each accident, \$5,000 med-pay

UIM: \$12,500 each person, \$25,000 each accident

INSURED AUTO(S): 1984 Plymouth Gran Fury 1990 Mercury Marquis LS

(2) Policy No. APV-6799039

NAMED INSURED: ANDREA E. WORKMAN

LIABILITY: \$50,000 each person, \$100,000 each accident, \$1,000 med-pay

UIM: \$12,500 each person, \$25,000 each accident

INSURED AUTO(S): 1985 Chevy Caprice

Both the Weddle and the Workman policy include the following provisions:

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"TWO OR MORE POLICIES

"If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all policies shall not exceed the highest applicable limit of liability under any one policy."

***3 "LIMIT OF LIABILITY**

"B. If the Declarations indicates an 'each person' and 'each accident' limit of liability for Uninsured Motorists Coverage, the limit of liability shown in the Declarations for 'each person' for uninsured motorists is our maximum limit of liability for all damages ***. This is the most we will pay regardless the number of *** [i]nsureds [or] [c]laims made."

Andrea E. Workman, adult daughter of William H. and Doris H. Weddle, resides in the same household as Doris H. Weddle.

Appellants contend that they may preclude the stacking of the William and Doris Weddle insurance policy with that of Andrea Workman's insurance policy because both policies are issued by the same insurer and the insureds are members of the same household. Appellants base this argument on the "clear and unambiguous" language of the policies and on case law. Appellants cite *Dues v. Hodge* (1985), 36 Ohio St.3d 46, and *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St.3d 500. *Savoie, supra*, states:

"Insurers may contractually preclude intra-family stacking-the stacking of uninsured/underinsured limits of policies and coverages purchased by family members living in the same household. ****"

Appellees argue that this is not a case that involves the stacking of more than one insurance policy for any one individual claim. Appellees contend that this case involves multiple insureds who have multiple claims under two policies, and in no way are the claimants attempting to apply anything more than the one per person limit per claim. Appellees

cite *Schaefer v. Allstate Ins. Co.* (1996), 76 Ohio St.3d 553, to support their position, in which the Supreme Court stated:

"Each person who is covered by an uninsured motorist policy and who is asserting a claim for loss of consortium has a separate claim subject to a separate per person policy limit. A provision in an insurance policy which reaches a contrary result is unenforceable."

Appellees argue that Doris Weddle's personal injury claim and the survivorship claim of the Estate of William Weddle are separate claims entitled to separate per person limits, and that both Doris Weddle and Andrea Workman have wrongful death claims which are also entitled to a separate per person policy limit. Appellees are partially correct. The personal injury, survivorship, and each wrongful death claim are all separate claims. Doris Weddle may not, however, claim a per person limit under each policy based on the fact that she has two separate claims (the personal injury claim and the wrongful death claim). Nonetheless, Doris Weddle may still recover up to the per person limit under each policy as an insured.

This court has recently decided a similar issue in *Lovejoy v. Westfield National Ins. Co.* (Dec. 18, 1996), Belmont App. No. 95-B-8, unreported. In *Lovejoy, supra*, the issue was whether the insured would be permitted to stack a family policy purchased from National Insurance Company with a business policy purchased from Westfield Insurance Company. National and Westfield were owned by the same parties (although the companies were separate corporations) and both policies were issued by the same account representative. In *Lovejoy, supra*, this court stated:

*4 "If, as appellants contend, the policies are sufficiently similar to warrant the limiting of liability to the limits of a single policy, this court must question appellants' rationale for the significant difference in UMC premiums between the two policies. It is worth noting that the higher of the two premiums was the second policy issued. Logically, it would reason that if the policies were similar, and if the intent of appellants was to restrict liability coverage, that the premium on the second

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policy would be the lesser of the two. These policies were issued by the same account representative of the same insurance agency. It can only be concluded that the issuing agent was aware of appellees' prior coverage, and issued the UMC provision on the CWP policy for proper business purposes.

"Anti-stacking language must not only be clear, conspicuous and unambiguous within the confines of an individual policy, but also within the context of a foreseeable interaction with other policies, especially where multiple policies are issued by the same agency. Based on appellants' assertions, there was no logical or rational purpose for appellees to have paid an additional premium for UMC on the CWP policy.

"In reviewing anti-stacking language, not only must the language be clear, conspicuous and unambiguous, but the intent and understanding of the parties must also be clear. The ordinary meaning of the language used in these policies clearly does not offer an answer as to the clear intent of both parties. Because appellants failed to set forth any justification for the collection of premiums on a policy which it now contends was a similar policy, *it would be contrary to public policy interests for the court to construe the anti-stacking language in a manner that would serve to provide no benefit to the consumer.* Therefore, it can only be concluded that the trial court properly determined that the separate UMC provisions could not be construed as similar provisions." (Emphasis added.)

In the case *sub judice*, the insurance policies issued to William and Doris Weddle and Andrea Workman were both Westfield Insurance policies and both were issued by the same insurance agency. Andrea Workman was an "insured" under William and Doris Weddles' UIM policy as she was a "family member" as defined by the policy (*i.e.*, the home address listed on Andrea Workman's policy was the same as the address listed on the Weddles' policy). The Weddles' policy was issued on July 26, 1993, while Andrea Workman's policy was issued on July 31, 1993. The Weddles paid a \$16 premium for UM coverage on their first automobile, and a \$13 premium on UM coverage for their second automobile. Andrea Workman paid a \$16 premium

for the uninsured motorist coverage on her policy, which encompassed only a single vehicle.

The insurance policies contained anti-stacking language, and the anti-stacking language was "clear, conspicuous, and unambiguous." However, if the insurer were allowed to enforce the anti-stacking language, then the insurer would be providing no additional coverage for the additional premiums it had received. As this court stated in *Lovejoy, supra*, "**** it would be contrary to public policy interests for the court to construe the anti-stacking language in a manner that would serve to provide no benefit to the consumer."

*5 We recognize the trial court used different reasoning to reach the same result. However, this does not affect the validity of its decision.

Appellants' first assignment of error is found to be without merit.

In their second assignment of error, appellants' assert:

"THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND IN FAILING TO ENTER SUMMARY JUDGMENT IN FAVOR OF DEFENDANT, WESTFIELD INSURANCE CO., ON THE ISSUE OF WHETHER THE REDUCED LIMITS OF UNINSURED/UNDERINSURED MOTORIST COVERAGE IN THE WILLIAM H. AND DORIS H. WEDDLE POLICY (APV-6806915) AND THE ANDREA WORKMAN POLICY (APV-6799039) WERE VALID LIMITS."

R.C. 3937.18, which mandates uninsured and underinsured motorist coverage, reads as follows:

"(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

"(C) The named insured may only reject or accept both coverages offered under division (A) of this section. The named insured may require the issuance of such coverages for bodily injury or

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death in accordance with a schedule of optional lesser amounts approved by the superintendent, that shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. ***"

William H. Weddle, Doris Weddle, and Andrea Workman, signed immediately under the following printed statement in their insurance applications:

"Uninsured/Underinsured Motorists Limits of Liability are required to be equal to those provided for bodily injury, unless lesser limits are requested. I (We) hereby request Uninsured/Underinsured Motorists Coverage be issued at the Limits of Liability stated in Item 6.c. of this application."

Immediately under this acknowledgment on the part of the insureds, they each signed the following declaration:

"I declare the facts stated herein to be true and request the Company to issue the insurance in reliance thereon."

The page preceding the above mentioned statements and signatures contained a section labeled "COVERAGE & LIMITS OF LIABILITY" (Section 6), which listed liability coverage in subsection (A) as \$50,000 per person \$100,000 per accident and UM/UIM coverage in section "C" as \$12,500 per person and \$25,000 per accident.

Appellant Westfield avers that the aforementioned was a valid offer and rejection of UM/UIM coverage. The trial court found that:

"The record does not provide preponderant evidence of an offer and express rejection of equivalent coverage. Because the insurer must inform the insured of its statutory duty to offer underinsured motorist coverage in an amount equal to liability coverage, and because the record offers only equivocal evidence of offer and rejection, this Court finds that insurer has failed to fulfill the duty set forth at O.R.C. 3937.18."

Appellees state that appellant had the burden of

proving that Andrea Workman and the Weddles made a voluntary and well informed decision to reject the amount of underinsured motorist protection that they were entitled to under the law and that the ruling of the trial court should not be disturbed.

*6 Equivalent amounts of liability and uninsured motorist coverage are provided under an automobile policy by operation of law if uninsured motorist coverage is not expressly rejected by the named insured. *Braden v. State Farm Mut. Auto Ins. Co.* (1994), 92 Ohio App.3d 777. The burden of proving that the insured expressly rejected uninsured or underinsured motorist coverage equivalent to liability coverage falls upon the automobile insurer. *Id.* and *Sachs v. Am. Economy Ins. Co.* (1992), 78 Ohio App.3d 440. The burden is generally met by showing that the insured signed a separate provision rejecting equivalent amounts of uninsured or underinsured motorist coverage, that the language in the provision was clear and conspicuous, and that the signature was not a result of restraint, disability or misunderstanding. *Id.*

The language in the provisions in question are not "clear and conspicuous". The alleged waiver in question does not clearly state that UM/UIM limits are required *by law* to be equal to liability limits unless otherwise requested. Nor does it clearly and conspicuously inform the consumer of what UM/UIM limits are to be equal to. The statement reads that UM/UIM liability limits are to be equal to those provided "for bodily injury". This statement *does not* identify what "bodily injury" coverage UM/UIM is to be equal to, nor where to find such "bodily injury" coverage to make such a comparison.

Consequently, the "alleged waiver" in question is invalid. The trial court's decision to grant appellees' motion for summary judgment was correct.

Appellants' third assignment of error states:

"THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND IN FAILING TO ENTER SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS, WESTFIELD INSURANCE CO.

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AND OHIO FARMERS INSURANCE CO., ON THE ISSUE OF WHETHER THEY MAY PRECLUDE PLAINTIFF, JERRY WEDDLE, FROM STACKING THE UM/UIM PROVISIONS OF THE COMMERCIAL POLICY (CWP-5 032 960) AND HIS PERSONAL POLICY (APV-6206301)."

Foremost, before deciding this issue, it must be determined whether Jerry Weddle is entitled to coverage under the commercial policy. The issue was before this court in *Weddle v. Hayes* (Jan. 14, 1997), Belmont App. No. 96-BA-13, unreported. In Case No. 96-BA-13, this court held that Jerry Weddle was an insured under the commercial policy.

Appellants argue that the situation at bar is an attempt at intra-family stacking. Based on R.C. 3937.18, the language of the policies, and *Savoie, supra*, appellants aver that stacking of the aforementioned policies should be precluded.

Appellees cite *Savoie, supra*, in which the court held that an insurers' anti-stacking language concerning intra-family stacking is valid, while anti-stacking language concerning inter-family stacking is not. Appellees go on to state that because the commercial policy was purchased by a partnership and not a family, and because the address of the partnership differs from the address of any family member, this is not an intra-family situation, and thus, the anti-stacking language is invalid.

*7 The trial court held:

"This Court further finds that Westfield policy APV6206301 was issued to Jerry Weddle at his home address at 305 South Sycamore Street, Woodsfield, Ohio, and that this household does not include Doris Weddle or the Auto Supply.

"Moreover, anti-stacking provisions should be narrowly construed where no attempt to adjust premiums paid for underinsured/uninsured coverage has been made. *Savoie, supra* at p. 507. Finding that Jerry Weddle's claim involves interfamily stacking under the uninsured/underinsured motorists provisions of policy APV6206301 and

CWP5032960, Westfield is precluded from applying anti-stacking language within the policies and the defendant's motion for partial summary judgment is overruled.

"Wherefore, it is hereby ordered that plaintiff, Jerry Weddle may recover uninsured/underinsured benefits under both policies, APV6206301 and CWP5032960; anti-stacking provisions as between policy CWP5032960 and Doris Weddle policy APV6806915 and CWP5032960 and Andrea Workman's policy APV6799039 do not apply as such stacking is interfamily."

Jerry Weddle has a commercial insurance policy with appellant-Westfield, and a personal insurance policy with appellant-Ohio Farmers, which is a wholly owned subsidiary of Westfield. The F.W. Schumacher Agency issued both policies to Jerry Weddle on behalf of appellants. Jerry Weddle purchased UIM coverage under each policy, and there is no indication that he paid anything less than full price for UIM coverage under each policy.

The case *sub judice* mirrors the facts presented to this court in *Lovejoy, supra*: The insurer is attempting to use anti-stacking language to limit the UIM coverage under two separate policies to an insured, when the insured has paid the insurer full premiums for UIM coverage in each policy. As stated in *Lovejoy, supra*:

"**** it would be contrary to public policy interest for the Court to construe the anti-stacking language in a manner that would serve to provide no benefit to the consumer."

Consequently, appellants third assignment of error is found to be without merit.

In their fourth assignment of error, appellants declare:

"THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLEES' MOTION FOR SUMMARY JUDGMENT AND FAILING TO ENTER SUMMARY JUDGMENT IN FAVOR OF DEFENDANT, WESTFIELD INSURANCE CO., FINDING THAT DORIS H. WEDDLE AND ANDREA WORKMAN TO BE INSURED UNDER WESTFIELD'S COMMERCIAL POLICY

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(CWP-5 032 960)."

The following facts are relevant to this issue and are not in dispute: 1) the commercial policy, CWP-5-032-960, was purchased by Jerry Weddle from Westfield Insurance Company in the name of "Jerry Weddle DBA Weddle's Auto Supply"; 2) the "named insured" on the policy is listed as "corporation"; 3) Doris H. Weddle is a partner in Weddle Auto Supply; and 4) Andrea Workman, adult daughter of Doris Weddle, resides in the same household as Doris Weddle.

The critical issue is whether Doris Weddle and/or Andrea Workman, not named insureds themselves, are nevertheless covered by the policy at issue where the policy defines the "insured" as:

*8 "OHIO UNINSURED MOTORISTS COVERAGE

"B. WHO IS AN INSURED

"1. You.

"2. If you are an individual, any 'family member.'

"3. Anyone else 'occupying' 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.' "

A partnership is defined by R.C. 1775.05(A):

"(A) A partnership is an association of two or more persons to carry on as co-owners a business for profit ***."

A partnership is an aggregate of individuals and does not constitute a separate legal entity. *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453. A duty owed to a partnership extends to the individual partners thereof. See generally *Haddon View Investment Co. v. Coopers and Lybrand* (1982), 70 Ohio St.2d 154 and *Arpadi, supra*.

The commercial insurance policy in question was issued to Weddle Auto Supply. Weddle Auto Supply is a partnership. Jerry Weddle and Doris Weddle were the partners. (Appellant concedes as

much in appellants' brief at page 30). A partnership is an aggregate of individuals and does not constitute a separate legal entity. Therefore, Doris Weddle is an insured under the policy as an individual. Consequently, Andrea Workman, a family member and resident of the same household as Doris Weddle, is considered a "family member" and also insured under the commercial policy.

Appellants' fourth assignment of error is without merit.

The decision of the trial court is hereby affirmed.

COX and VUKOVICH, JJ., concurs.

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