

IN THE SUPREME COURT OF OHIO

CASE NO. 2007-0593

LINDA B. WOHL

Plaintiff,

and

TYLER C. SWINNEY & JAMES J. SLATTERY, JR.

Plaintiffs-Appellees

v.

MOTORISTS MUTUAL INSURANCE CO.

Defendant/Third-Party Plaintiff-Appellant

v.

AMERICAN STATES INS. CO. d.b.a. INSURQUEST INS. CO.

Third-Party Defendant-Appellee

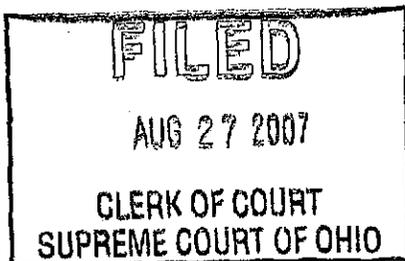
Appeal from Decision Entered on 2-12-07 by the Court of Appeals of
Butler County, Ohio, Twelfth Appellate District, in Case No. CA2006-05-123

MERIT BRIEF OF APPELLANT
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I. STATEMENT OF FACTS

The case involves a claim for uninsured/undersinsured motorists (UM/UIM) insurance coverage for personal injury resulting from an automobile accident that took place on July 12, 2002, when Appellee, James Slattery, was driving a BMW Z3 owned by Linda Wohl.¹ The accident took place when Tyler Swinney turned his car left and into the path of the car operated by James Slattery.² A collision resulted, and both James Slattery and Linda Wohl were injured.

At the time of the accident, Progressive covered Tyler Swinney with a single limit policy with \$500,000.00 in liability coverage.³ Linda Wohl had insurance with Appellant, Motorists Mutual Insurance Company (Motorists), with UM/UIM limits of \$250,000.00 per person and \$500,000.00 per accident.⁴ James Slattery had his personal automobile coverage with Appellee, American States, with UM/UIM limits of \$12,500.00 per person and \$25,000.00 per accident.⁵

In May of 2005, on behalf of Tyler Swinney, Progressive offered the limit of liability coverage to James Slattery and Linda Wohl, but Progressive did not allocate its offer between Linda Wohl and James Slattery.⁶ After receiving Progressive's offer, James Slattery asked Motorists to consent to a settlement with and release of Swinney, based on an allocation in which James Slattery

¹See Mr. Slattery's Complaint, Supp. Page 5.

²See Supp. Pages 1 and 5 (Slattery Complaint and Wohl Amended Complaint).

³Motorists' Motion for Summary Judgment, (MSJ), 6Exhibit D, Supp. page 94.

⁴Motorists' MSJ Exhibit A, Supp. Page 43.

⁵Motorists' MSJ, Exhibit B, Supp. Page 64.

⁶Motorists' MSJ, Exhibit D, Supp. Page 94.

would receive \$1.00 of Progressive's offer and Linda Wohl would receive the remaining \$499,999.00 of the offer.⁷

Before Mr. Slattery or Linda Wohl released Tyler Swinney, Motorists informed Mr. Slattery that Mr. Slattery was not "an insured" for UM/UIM coverage under the Motorists' policy with Linda Wohl.⁸ Motorists then consented to the proposed settlement. Because Linda Wohl had \$250,000.00 in UM/UIM coverage with Motorists, Linda Wohl had no UIM claim under the proposed settlement. After Motorists informed Mr. Slattery of its coverage position and gave consent to settle, Linda Wohl and Mr. Slattery accepted Progressive's settlement offer and released Tyler Swinney under the terms outlined above, with \$499,000.00 going to Linda Wohl and \$1.00 going to James Slattery.⁹

The language in Motorists' insurance contract with Linda Wohl defining "insured" for UM/UIM coverage reads as follows:

Insured as used in this endorsement means:

1. You or any **family member**.
2. Any other person **occupying your covered auto** who is not a named insured or an insured **family member** for uninsured motorists coverage under another policy. (See Supp. Page 47.)

Throughout Motorists' policy, Motorists uses the terms "you" and "your" to refer to Motorists' named insured, which in this case is Linda Wohl.¹⁰ Therefore, in the language quoted above, the terms "you" and "your" refer to Linda Wohl. Ultimately, American States admitted that

⁷Motorists' MSJ, Exhibit E, Supp. Page 95.

⁸See Slattery MSJ, Exhibit E, Supp. 127.

⁹See Motorists' MSJ, Exhibit E, Supp. 95.

¹⁰Motorists' MSJ, Exhibit A, Supp, 43.

James Slattery was the named insured for UM/UIM coverage under an insurance contract between American States and James Slattery.¹¹

On cross motions for summary judgment, the Trial Court ruled that Senate Bill 97, R.C. 3937.18, amended October 31, 2001, required Motorists to cover Mr. Slattery for UM/UIM coverage because Mr. Slattery was an insured for liability coverage under Linda Wohl's policy with Motorists.¹² On appeal, the Court of Appeals for Butler County did not address the statute. Rather, the Court of Appeals ruled in conflict with the 8th Appellate District, and held that Motorists' policy language was ambiguous, and that this ambiguity, when read in favor of Linda Wohl, required Motorists to cover James Slattery. Upon Motorists' motion, the Court of Appeals for Butler County acknowledged the conflict between its decision and the decision from the 8th Appellate District and certified the following question to this Court:

Whether the definition of 'insured' as 'any other person occupying your covered auto who is not a named insured or insured family member for uninsured motorists coverage under another policy' is ambiguous and should be construed against the insurer to provide coverage for a permissive operator of a covered vehicle who is not a named insured or insured family member.¹³

¹¹Motorists' MSJ, Exhibit B, Supp 64.

¹²See Trial Court Decision, Pages 8-9, Appendix Page 30.

¹³This Court rejected jurisdiction of Motorists' discretionary appeal in Supreme Court Case no. 2007-0551. An issue in that appeal was whether R.C. 3937.18(C) imposed coverage by operation of law because Motorists insured Mr. Slattery for liability coverage but not UM/UIM coverage. Because this Court denied the discretionary appeal, Motorists does not address that issue in this brief. (See Appendix Page 55).

Motorists urges this Court to answer this certified question in the negative, thereby stating that Motorists' definition of insured for UM/UIM is not ambiguous, and that any alleged ambiguity should not have been read in favor of a stranger to the insurance contract.

II. ARGUMENT

Proposition of Law No. 1

A definition of "insured" for UM/UIM is not ambiguous, when the definition has a definite legal meaning.

This Court should give effect to Motorists' policy language so as to implement the plain intent to exclude those occupants of an insured vehicle who bought coverage from one of Motorists' competitors. In *Westfield Ins. Co. v. Galatis*, this Court stated:

When confronted with an issue of contractual interpretation, the role of a court is to give effect of the intent of the parties to the agreement . . . we examined the insurance contract as a whole and presumed that the intent of the parties is reflected in the language used in the policy . . . we look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy . . . 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 . . . as a matter of law, a contract is unambiguous if it can be given a definite legal meaning.¹⁴

In the case presently before this Court, the 12th District Court of Appeals carved up the policy to find alternative meanings and alleged ambiguities, despite the fact that other Courts of Appeals found Motorists' contract to have a definite legal meaning. The Court of Appeals applied the so-called "last antecedent rule," but the Court disregarded policy language to find a meaning not apparent from the policy language. The Court of Appeals' decision in this case does not follow the instruction of this Court in *Galatis* quoted above.

¹⁴*Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003 Ohio 5849. (Citations omitted).

The Court of Appeals used the so called “last antecedent rule” to find an ambiguity in Motorists’ definition of insured. The last antecedent rule states, “Referential and qualifying words and phrases, **where no contrary intention appears**, refer solely to the last antecedent.”¹⁵ (Bold and underline added for emphasis.)

Despite the fact that three other courts of appeals found Motorists’ language defining insured for UM/UIM coverage to have a definite legal meaning, the 12th District Court of Appeals did not follow legal precedent, and the Court ignored the obvious intent behind Motorists’ language.¹⁶ The so-called last antecedent rule has no application to Motorists’ policy because Motorists’ intent is apparent from the language of the policy. The policy obviously intends to exclude those occupants of an insured vehicle who have bought UM/UIM coverage from another company.

Thus, the last antecedent rule does not apply to Motorists’ policy because the contract’s intent is clear from the words of the policy itself. The last antecedent rule is a rule of construction used to interpret an ambiguous contract or statute, when the meaning is not apparent from the language of the text.¹⁷ When Motorists’ policy is read in a reasonable manner, the contract is free from any ambiguity, and it has a definite legal meaning. Three separate courts of appeals found Motorists’ definition of insured to have a definite legal meaning. That definite legal meaning should be adopted over any strained interpretation used to find an ambiguity.

¹⁵*Safeco Ins. Co. of Illinois v. Motorists Mut. Ins. Co.*, 2006-Ohio-2063, citing, *Indep. Ins. Agents v. Fabe* (1992), 63 Ohio St.3d 310, 314, and *Carter v. Youngstown* (1946), 146 Ohio St. 203, 209.

¹⁶*Shepherd v. Scott*, Hancock App. No. 5-02-22, 2002-Ohio-4417; *Mitchell v. Motorists Mutual Ins. Co.* (10th Dist.) 2005 Ohio 3988; *Safeco v. Motorists*, supra, 2006-Ohio-2063.

¹⁷See *Safeco v. Motorists*, supra.

Further, the application of the last antecedent rule actually causes the definition of insured to become confusing and contradictory. If the last antecedent rule is applied in the manner suggested by the 12th District Court of Appeals, the definition of “insured” would exclude the named insured from the definition of insured. Broken down, and applying numbers to each sub part for illustration purposes, the absurdity of the application of the last antecedent rule can be seen. Upon application of the last antecedent rule, the definition would read as follows:

Insured as used in this endorsement means: (1) **You**; (2) any **family member**; (3) Any other person **occupying your covered auto** who is not a named insured; or (4) Any other person **occupying your covered auto** who is not an insured **family member** for uninsured motorists coverage under another policy.¹⁸

The last antecedent rule’s application to the policy does not make sense. Definition no. 3 above would not make sense when the last antecedent rule is applied in the manner proscribed by Motorists’ opponents and the Court of Appeals. Under the above scenario, the phrase in definition number 3, “who is not a named insured,” standing alone, without the modifying phrase “for uninsured motorists coverage under another policy,” excludes Motorists’ named insured from the class of vehicle occupants who are insured.

Applying the last antecedent rule in the manner proscribed by Motorists’ opponents, the definition of “Insured” would include any occupant of the insured vehicle except a named insured. If the intent of the policy was to cover any occupant of an insured vehicle, why would the policy exclude “a named insured” from the class of insureds? The only logical interpretation of this definition is to have the words, “for uninsured motorists coverage under another policy,” modify

¹⁸See 12th District Court of Appeals decision at paragraphs 18-25.

the words, “a named insured.” The application of last antecedent rule simply causes the definition to become illogical and confounding.

The prepositional phrase, “for uninsured motorists coverage,” must modify both the phrase, “a named insured” and the phrase, “an insured family member.” This is the only logical interpretation because Motorists’ named insured is referred to as “you” throughout the policy. The words “a named insured” clearly refer to a named insured on another company’s policy, and not Motorists’ named insured. Considering that “you” refers to Motorists’ named insured throughout the policy, the definition cannot have the alternative meaning argued for by Motorists’ opponents. In order to have that alternative meaning erroneously found by the Court of Appeals, the words of the policy would have to be changed, because “you” is the term in the policy that refers to Motorists’ named insured. The Court of Appeals found the words underlined below refer to Motorists’ named insured:

Insured as used in this endorsement means: **(1) You; (2) any family member;**
(3) Any other person occupying your covered auto who is not a named insured.

However, “You” refers to Motorists’ named insured throughout the policy. So, to actually have the meaning found by the Court of Appeals, the words of the definition have to change, in relevant part, to read as follows:

“Insured” as used in this endorsement means... **(3) Any other person occupying your covered auto** who is not you.

In discussing the very same definition of insured at issue here, the Third District Court of Appeals, in *Shepherd*, stated the following:

Insurance coverage is determined by reasonably construing the contract in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed... Where 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... The operative term in this matter is "reasonably susceptible." We do not find the term "family member" to be reasonably susceptible to the meaning that Appellant suggests.¹⁹ (Underline added for emphasis.)

In finding an alleged ambiguity in the case presently before this Court, the 12th District Court of Appeals simply failed to read the policy as a whole, and thus, the Court of Appeals found an alternative meaning that is not a reasonable interpretation of Motorists' policy. Considering the entire policy, specifically the portion of the policy stating that the terms "you" and "your" are used to refer to Motorists' named insured, the definition of "insured" in the UM/UIM endorsement cannot have the alternative meaning suggested by the Court of Appeals. The reference to "a named insured" can only refer to an insured on another policy, considering that "you" and "your" refer to Motorists' insured throughout Motorists' policy. Thus, the term "a named insured," as used in this definition, cannot refer to Motorists' named insured, because the policy uses the term "you" to reference Motorists' named insured throughout the policy.

A court is required to review a policy as a whole, and attempt to harmonize all provisions, rather than find conflict.²⁰ But, the Court of Appeals ignored the fact that the policy uses the terms "you" and "your" to refer to Motorists' insured, and rather than attempting to harmonize the policy, the Court strained to find ambiguity where none exists. The definition can only take on the Court

¹⁹*Shepherd*, 2002-Ohio-4417, Citations omitted.

²⁰*Mitchell*, *supra*, citing *State Auto. Ins. Co. v. Childress* (Jan. 15, 1997), Hamilton App. No. C-960376, and *Stith v. Milwaukee Guardian Ins., Inc.* (1988), 44 Ohio App.3d 147, 148.

of Appeals' interpretation when the term "a named insured," instead of the term "you," refers to Motorists' named insured. The definition, as actually stated in the policy, reads as follows:

Insured as used in this endorsement means:

1. You or any **family member**.
2. Any other person **occupying your covered auto** who is not a named insured or an insured **family member** for uninsured motorists coverage under another policy. (Underline added for emphasis.)

The words, "a named insured," as underlined above, can not refer to Motorists' named insured, and therefore, reference a named insured on another policy. Thus, applying the last antecedent rule renders the definition meaningless.

This Court has consistently ruled that construction of an insurance policy is a matter of law for a court to decide.²¹ In elaborating on this rule of law, this Court stated:

Where the provisions of an insurance policy are clear and unambiguous courts may not indulge themselves in enlarging the contract by implication in order to embrace an object distinct from that contemplated by the parties, nor read into the contract a meaning not placed there by an act of the parties, nor make a new contract for the parties where their unequivocal acts demonstrate an intention to the contrary.²²

In this case, the Court of Appeals extended coverage based on the fact that at the time of the accident, the claimant, James Slattery, occupied a Motorists insured vehicle. But, the policy was never intended to cover those occupants who are the named insureds for UM/UIM coverage on another policy of insurance. Thus, the Court of Appeals enlarged the coverage in a way not

²¹*Latina v. Woodpath Development Co.* (1991), 57 Ohio St.3d 212.

²²*Gomolka v. State Auto Mut. Ins. Co.* (1982), 70 Ohio St.2d 166 (citing *Stickel v. Excess Ins. Co.*(1939), 163 Ohio St. 49; *Motorists Ins. Co. v. Tomanski* (1970), 27 Ohio St.2d 222; *Olmstead v. Lumbermens Mut. Ins. Co.* (1970), 22 Ohio St.2d 212; *Jackson v. Metropolitan Life Ins. Co.* (1973), 34 Ohio St.2d 138; *Fidelity & Cas. Co. v. Hartzell Bros. Co.*(1924), 109 Ohio St. 566).

contemplated by Motorists, and the Court gave the policy an interpretation not apparent from the language of the contract.

Motorists' intended purpose of covering specific persons, as opposed to automobiles, is consistent with the public policy behind UM/UIM coverage. Ohio courts have consistently found that underinsured motorists coverage is intended to cover persons, not automobiles. "The UM motorist provision is intended to protect persons, not specific vehicles, but only 'for persons insured thereunder' and when 'the claimant is an insured.'"²³ Motorists' policy does not automatically provide UM/UIM for any occupant of an insured vehicle. Thus, Motorists' UM/UIM coverage is for people, and not the automobiles insured by Motorists. Accordingly, Motorists' policy conforms with the law stating that UM/UIM coverage is for people, not automobiles.

Proposition of Law No. 2:

Alleged ambiguities in an insurance contract should not be read in favor of a claimant who is not a party to the insurance contract.

In the case before this Court, the 12th District Court of Appeals read the alleged ambiguity in Motorists' contract in favor of James Slattery, a stranger to the insurance contract. The Court of Appeals made findings of fact that coverage for Mr. Slattery benefitted Motorists' named insured, Linda Wohl, but the Court of Appeals findings of fact were not supported by the record. There is no fact in the record that Linda Wohl would have received any more money from the tortfeasor depending on whether Motorists covered Mr. Slattery. In fact, to the contrary, at the time Linda Wohl and James Slattery signed the settlement paperwork allocating the settlement, Motorists had

²³*Critelli v. TIG Insurance Co.*, (1997), 123 Ohio App.3d 436, 704 N.E.2d 331, citing *Martin v. Midwestern Group Ins. Co.* (1994), 70 Ohio St.3d 478, 639 N.E.2d 438.

advised Mr. Slattery of Motorists' position that Mr. Slattery was not an insured. Despite having this knowledge, Linda Wohl and James Slattery agreed to allocate virtually all of the tortfeasor's \$500,000 liability coverage to Linda Wohl. Thus, there is no evidence Linda Wohl would have received less money if Motorists did not cover James Slattery.

In *Galatis*, supra, this Court considered whether a claimant was an insured under a policy, and determined that despite alleged ambiguities in the definition of "insured" recognized by other courts, the claimant did not qualify as an insured under the Westfield policy. The history leading up to the *Galatis* decision is relevant to this Court's decision in this case.

Previously, in *Scott-Pontzer v. Liberty Mutual*²⁴, the Supreme Court of Ohio determined that the exact same definition of "insured" at issue in *Galatis* was ambiguous. Therefore, according to the *Scott-Pontzer* decision, the claimant, who was an employee of Superior Dairy acting outside the scope of employment at the time of an automobile accident, was covered by Superior Dairy's policy. The *Scott-Pontzer* court determined the term "you" was ambiguous, because the term referred to the named insured, Superior Dairy, Inc., a corporation. The *Scott-Pontzer* Court stated:

It would be nonsensical to limit protection solely to the corporate entity, since a corporation, itself cannot occupy an automobile, suffer bodily injury..., or operate a motor vehicle. Here, naming the corporation as the insured is meaningless unless the coverage extends to some person or persons-including the corporation's employees.²⁵

The *Scott-Pontzer* court read the alleged ambiguity described above in favor of the claimant and against Liberty Mutual, even though the claimant was not a party to Superior Dairy's insurance contract with Liberty Mutual.

²⁴*Scott-Pontzer v. Liberty Mutual Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116.

²⁵*Id.* at 664.

In *Galatis*, this Court overturned *Scott-Pontzer*, in part, and criticized the rationale behind the *Scott-Pontzer* decision. This Court stated:

Thus, an ambiguity in an insurance contract is ordinarily interpreted against the insurer and in favor of the insured...

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

Whether someone is insured under an insurance policy should not be interpreted in favor of one who was not a party to the contract. This was the law in Ohio long before *Scott-Pontzer*. (the Plaintiff who is not a party to the insurance contract is not in a position to urge a construction of the contract that would be detrimental to both parties to the contract); We should have followed this well-settled and intrinsically sound precedent, which is verified by experience. Instead, we ventured to a point where the definition of "you" became immaterial to its meaning and the intention of the parties was ignored.²⁶

Like the *Galatis* and *Scott-Pontzer* cases, this case involves a question of whether the claimant qualifies as an insured under the contract. Like the claimants in both *Galatis* and *Scott Pontzer*, James Slattery is a stranger to the contract. Thus, according to the rule of law established in *Galatis*, James Slattery is not entitled to have any alleged ambiguity read in his favor. Moreover, as in *Galatis*, expanding the coverage here does not satisfy any need of the policy holder, who made no claim to Motorists for UM/UIM coverage from this accident.

²⁶*Galatis*, supra, 100 Ohio St.3d 16, 2003-Ohio-5849.

The Court of Appeals speculated that Motorists' named insured, Linda Wohl, benefitted by Motorists covering Mr. Slattery for UM/UIM coverage, and that Linda Wohl received more money from the tortfeasor if Motorists provided UM/UIM to James Slattery. The 12th District's opinion states, in relevant part:

[T]he question becomes whether ruling that a permissive operator of a covered auto is entitled to UIM coverage favors the policyholder, Wohl. We find that it does.

As stated, Wohl's policy with Motorists affords UM/UIM coverage of \$250,000 per person and \$500,000 per accident. Thus, the maximum amount Wohl could have recovered under her own policy is \$250,000 in UIM benefits. Wohl obtained a higher payout in receiving the majority of the settlement money. She collected \$499,999 instead of \$250,000. Slattery then was able to pursue \$250,000 in UIM benefits under Wohl's policy. In addition, if Wohl and Slattery were to have evenly split the \$500,000 settlement, neither would have been able to pursue a UIM claim under the Motorists policy because the \$250,000 figure matches the amount of UIM coverage available per person under the Motorists policy.

Our ruling benefits Wohl in an additional respect. As the policyholder, Wohl pays premiums for UM/UIM coverage to protect permissive users and passengers in her insured automobile. Contractually, then, Wohl benefits when such users and passengers are eligible for the UM/UIM coverage for which she pays premiums. (See Appendix pages 26-27.)

These conclusions were mere conjecture by the Court of Appeals. The Court seems to suggest that Linda Wohl's settlement with the tortfeasor was somehow based on Motorists covering James Slattery for UM/UIM. In fact, at the time Linda Wohl and James Slattery made their settlement with the tortfeasor, Motorists had already notified James Slattery of Motorists' position that Mr. Slattery did not qualify as an insured. That information did not affect Mr. Slattery's and Ms. Wohl's allocation of the tortfeasor's insurance limits. Thus, there is no evidence Linda Wohl would have received more or less of a settlement depending on Mr. Slattery's status under the Motorists' policy, or that she received some monetary benefit in this case from Motorists covering Mr. Slattery.

Further, the Court of Appeals stated that Linda Wohl paid premiums to have occupants of her car covered, but that finding was also speculation. In fact, nowhere in this record is there any evidence of the premium breakdown, nor is there evidence of Linda Wohl's beliefs of what her premium payments were for. These findings by the Court of Appeals only further illustrate the lengths to which the Court of Appeals was willing to go to find coverage.

In *Galatis*, this court criticized the *Scott-Pontzer* decision as follows: "The *Scott-Pontzer* court construed the contract in favor of neither party to the contract, preferring instead to favor an unintended third party."²⁷ The 12th District Court of Appeals' decision in the case presently before this Court is subject to the same criticism, because the Court of Appeals ignored the intent of the contract and found a meaning not contemplated by the contract's language in order to favor a non-party. Further, the Court of Appeals speculated that its interpretation of Motorists' contract benefitted Motorists' named insured, even though there were no facts before the Court of Appeals to justify that conclusion. To the contrary, despite knowing Motorists' position that James Slattery was not insured, James Slattery and Linda Wohl elected to settle the case against the tortfeasor with \$499,999.00 going to Linda Wohl and only \$1.00 going to James Slattery. Thus, there is no evidence the Court of Appeal's interpretation of Motorists' contract favored Motorists' named insured, Linda Wohl.

III. Conclusion

This Court should answer the certified conflict question in the negative, overturn the decision of 12th District Court of Appeals and rule that Motorists' definition of "insured" in the UM/UIM endorsement is unambiguous, because that definition has a definite legal meaning. Every court

²⁷*Galatis*, supra, 2003-Ohio-5849.

reviewing Motorists' contract, except the 12th District Court of Appeals, found Motorists' policy to have a definite legal meaning. That definite legal meaning should be favored over any other strained interpretation of Motorists' policy.

Moreover, the policy should not be interpreted to favor a claimant who is not a party to the contract. The Court of Appeals did not follow the rule of law mandated by this Court's decision in *Galatis*. Instead, the Court of Appeals made finding of facts not supported by the record, in an attempt to find coverage not contemplated by the language of the contract or the parties to the contract. Thus, the decision of the 12th District Court of Appeals should be overturned, and this Court should rule that as a matter of law, James Slattery is not covered by Motorists' policy with Linda Wohl.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following, via ordinary mail on this 27 day of August, 2007:

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Cincinnati, Ohio 45202
Counter Defendant and Attorney pro se

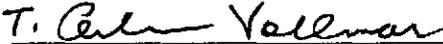
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T. Andrew Vollmar

IN THE SUPREME COURT OF OHIO

07-0593

LINDA B. WOHL

Plaintiff,

and

JAMES J. SLATTERY, JR.

Plaintiff-Appellee

v.

TYLER C. SWINNEY

Defendant

MOTORISTS MUTUAL INSURANCE CO.

Defendant/Third-Party Plaintiff-Appellant

v.

AMERICAN STATES INS. CO. d.b.a. INSURQUEST INS. CO.

Third-Party Defendant-Appellee

On appeal from the Butler County Court of Appeals, Twelfth Appellate

Court of Appeals

Case No. CA2006-05-123

MOTORISTS MUTUAL INSURANCE COMPANY'S NOTICE OF CERTIFIED CONFLICT OF DECISIONS FROM THE 8th AND 12th APPELLATE DISTRICTS

FILED
APR 03 2007
MARCIA J. MENGEL CLERK
SUPREME COURT OF OHIO

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Plaintiff-Attorney pro se - Appellee

Appellant, Motorists Mutual Insurance Company, hereby gives notice of a certified conflict. Attached to this notice is a copy of the 12th District Court of Appeals decision certifying a conflict and copies of the conflicting decisions from the 12th District and the 8th District Courts of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following, via ordinary mail on this 28 day of March, 2007:

James J. Slattery, Jr.
119 East Court Street
Cincinnati, Ohio 45202
Plaintiff-Attorney pro se - Appellee

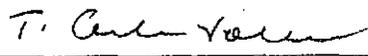
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T. Andrew Vollmar

Vollmar

IN THE COURT OF APPEALS FOR BUTLER COUNTY, OHIO

LINDA B. WOHL,

Appellee,

vs.

TYLER C. SWINNEY, et al

Appellants.

FILED BUTLER CO.
COURT OF APPEALS

MAR 22 2007

GINDY CARPENTER
CLERK OF COURTS

CASE NO: CA2006-05-123

ENTRY GRANTING MOTION TO
CERTIFY CONFLICT

The above cause is before the court pursuant to a motion to certify a conflict to the Supreme Court of Ohio filed by counsel for appellant, Motorists Mutual Insurance Company, on February 21, 2007, a memorandum in opposition filed by third-party defendant/appellee, American States Insurance Company dba InsurQuest Insurance Company, on February 28, 2007, and a memorandum in opposition filed by counsel for appellee, James J. Slattery, Jr., on February 28, 2007.

Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. For a conflict to warrant certification, it is not enough that the reasoning expressed by the opinions of the two courts of appeal is inconsistent, the judgments of the two courts must be in conflict. *State v. Hankerson* (1989), 52 Ohio App.3d 73.

In its motion for certification, Motorists asserts that this court's opinion is in conflict with an Eighth District Court of Appeals decision, *Safeco Ins. v. Motorists Mut. Ins. Co.*, Cuyahoga App. No. 86124, 2006-Ohio-2063.

Resolution of the present case turned upon the following policy language defining an "insured" for purposes of UM/UIM motorist coverage as:

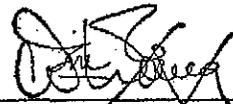
1. You or a family member.
2. Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorist coverage under another policy.

This court found subsection two of the above-quoted policy language ambiguous because it is reasonably susceptible to two interpretations. Subsection two could be interpreted to provide coverage to anyone occupying the named insured's covered vehicle who is not (a) a named insured or (b) an insured family member with UM coverage under another policy. Subsection two could also be interpreted to provide coverage to anyone occupying named insured's covered vehicle who is not (a) a named insured who has UM coverage under another policy, or (b) an insured family member who has UM coverage under another policy. We construed this ambiguity in favor of the appellant and affirmed the trial court's decision. In its opinion, this court acknowledged a conflict with the *Safeco* decision, which construed identical policy language and reached a different result.

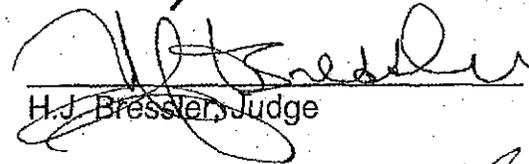
Based upon the foregoing, the motion for certification is GRANTED. The issue for certification is as follows:

Whether the definition of "insured" as "any other person occupying your covered auto who is not a named insured or insured family member for uninsured motorist's coverage under another policy" is ambiguous and should be construed against the insurer to provide coverage for a permissive operator of a covered vehicle who is not a named insured or insured family member.

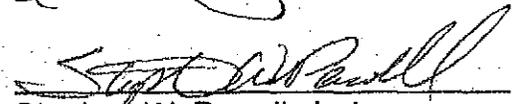
IT IS SO ORDERED.



William W. Young, Presiding Judge



H.J. Bressler, Judge



Stephen W. Powell, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

FILED
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CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

LINDA B. WOHL,

Plaintiff,

CASE NO. CA2006-05-123

JUDGMENT ENTRY

- vs -

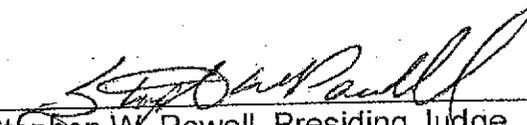
TYLER C. SWINNEY, et al.,

Defendants-Appellants.

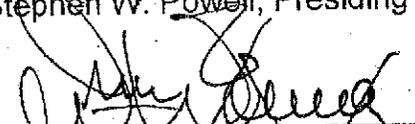
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

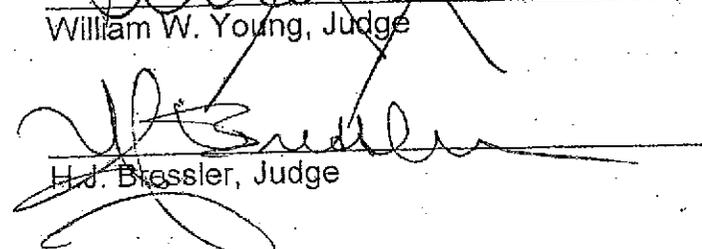
Costs to be taxed in compliance with App.R. 24.



Stephen W. Powell, Presiding Judge



William W. Young, Judge



H.J. Brassler, Judge

APPENDIX 7

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

LINDA B. WOHL,

Plaintiff,

- vs -

TYLER C. SWINNEY,

Defendants-Appellants.

CASE NO. CA2006-05-123

OPINION
2/12/2007

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV04-05-1423

T. Andrew Vollmar, 1 South Main Street, Suite 1800, Dayton, Ohio 45402-2017 and Steven Zeehandler, P.O. Box 15069, Columbus, Ohio 43215, for defendant-appellant, Motorists Mutual Insurance Co.

James L. Slattery, Jr., 506 East Fourth Street, #503, Cincinnati, Ohio 45202, defendant-appellee, pro se

Scott G. Oxley, P. Christian Nordstrom, 901 Courthouse Plaza S.W., 10 North Ludlow Street, Dayton, Ohio 45402, for third party defendant-appellee, American States Insurance Co.

BRESSLER, J.

{¶1} Defendant-appellant, Motorists Mutual Insurance Company ("Motorists"), appeals a decision of the Butler County Court of Common Pleas denying its motion for summary judgment and granting summary judgment in favor of third party defendant-appellee, American States Insurance Company ("American States"), in a dispute involving

underinsured motorist coverage. Motorists also appeals a judgment entry finding in favor of James J. Slattery, Jr. on Slattery's complaint against Motorists and on Motorists' counterclaim against him. We affirm.

{12} On the evening of June 16, 2002, a vehicle driven by Tyler Swinney collided with a BMW roadster driven by appellee James Slattery at a West Chester intersection. The BMW was owned by Linda Wohl, who occupied the passenger seat. The accident occurred when Swinney negligently turned left into the path of the car operated by Slattery. Both Wohl and Slattery suffered extensive injuries as a result of the collision.

{13} At the time of the accident, Wohl had an automobile insurance policy with Motorists, which covered her 1996 BMW. The coverage provided uninsured/underinsured ("UM/UIM") limits of \$250,000 per person and \$500,000 per accident. Slattery had an automobile policy with American States d.b.a. InsurQuest. Slattery's policy provided UM/UIM limits of \$12,500 per person and \$25,000 per accident. Swinney was insured under an automobile policy issued by Progressive Insurance Company ("Progressive"), with a single limit coverage of \$500,000.

{14} Wohl and Slattery filed separate suits against Swinney, which were consolidated by agreement of the parties.¹ Slattery's case against Swinney included a claim for UIM coverage from Motorists. The parties agreed to a settlement releasing Swinney whereby Progressive would pay the full \$500,000 coverage amount to Wohl and Slattery, allowing them to allocate the funds amongst themselves. Slattery requested that Motorists agree to the settlement, based upon a proposed allocation of \$499,999 to Wohl and \$1 to Slattery. Motorists assented, but informed Slattery that he did not qualify as an "insured" under the UM/UIM portion of its policy with Wohl.

1. Linda Wohl did not sue Motorists for UM/UIM coverage, and is not a party to this appeal.

{15} Motorists filed a counterclaim against Slattery and a third party complaint against American States. Motorists sought a declaratory judgment that Slattery was not an insured for UM/UIM coverage under Motorists' policy with Wohl. Motorists stipulated that Slattery's damages were at least \$250,000, thus making the insurance coverage the central issue in this case.

{16} The parties filed cross motions for summary judgment. The trial court issued a decision on April 11, 2006 overruling Motorists' motion and granting American States' motion.² The following month, in accordance with its April 11 decision and the stipulated damages, the court issued an entry granting judgment in favor of Slattery on his complaint and on Motorists' counterclaim against him. The entry stated that Slattery was to receive \$249,999 in UIM benefits from Motorists. Motorists timely appealed, raising one assignment of error.

{17} This court conducts a de novo review of the trial court's summary judgment decision. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper where there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in the that party's favor. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the initial burden of informing the court of the basis for the motion, and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party meets its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing a genuine issue for trial. *Id.* We

2. As the party against whom American States' summary judgment motion was made, we construe the facts in favor of Motorists on appeal. See Civ.R. 56(C). See, e.g., *Bell v. Berryman* (2004), Franklin App. No. 03AP-500, 2004-Ohio-4708.

are mindful of these burdens in reviewing Motorists' sole assignment of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN RULING THAT SENATE BILL 97, R.C. SECTION 3937.18, AS AMENDED OCTOBER 31, 2001, REQUIRED MOTORISTS TO COVER JAMES SLATTERY FOR UM/UIM COVERAGE WHEN THE MOTORISTS POLICY LANGUAGES EXCLUDES MR. SLATTERY FROM THE DEFINITION OF 'INSURED' FOR UM/UIM COVERAGE."

{¶10} Both Slattery and American States maintain that Slattery should be afforded UIM coverage because the definition of "insured" under the UIM section of Motorists' policy with Wohl is ambiguous and should be construed in favor of coverage for Slattery.

{¶11} Motorists argues that Slattery and American States are foreclosed from addressing the issue of ambiguity on appeal because that issue was not discussed in the trial court's decision. It is axiomatic that a party cannot raise new issues or legal theories for the first time on appeal. *Lay v. Chamberlain* (Dec. 11, 2000), Madison App. No. CA99-11-030, at 21. Failure to raise an issue before the trial court results in waiver of that issue for appellate purposes. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. However, the record shows that American States' motion for summary judgment raised the issue of ambiguity in the insurance policy. Because we conduct a de novo review of the trial court's ruling on summary judgment, we are not confined to those issues disposed of by the trial court's decision. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296.

{¶12} The Motorists policy issued to Wohl that was in effect at the time of the accident included an endorsement defining an "insured" for UM/UIM coverage as:

{¶13} "1. You or any family member.

{¶14} "2. Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorist coverage under another policy."

(Emphasis omitted.)

{¶15} Motorists maintains that the language in subsection two of the above "insured" definition narrows the definition of "insured" for UIM coverage and plainly excludes Slattery due to the fact that he had UIM coverage under his policy with American States at the time of the accident.

{¶16} The issue of contractual ambiguity is a question of law for the court. *Westfield Ins. Co. v. HULS Am., Inc.* (1998), 128 Ohio App.3d 270, 291. Any ambiguities are to be construed strictly against the insurer and liberally in favor of the insured. *Towne v. Progressive Ins. Co.*, Butler App. No. CA2005-02-031, 2005-Ohio-7030, ¶8. Ambiguity exists where contract language is susceptible to two or more reasonable interpretations. *Id.* at ¶9.

{¶17} A review of Motorists' insurance policy with Wohl reveals the following ambiguity. Subsection two of the definition attempts to limit coverage by excluding "[a]ny other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorist coverage under another policy." This provision, which Motorists maintains excludes Slattery from UIM coverage, is reasonably susceptible to two interpretations. See *Towne*, 2005-Ohio-7030 at ¶9. To what does the phrase "for uninsured motorist coverage under the policy" refer? As reasoned by the dissenting opinion construing the same provision in *Safeco v. Motorists Mut. Ins. Co.*, Cuyahoga App. No. 86124, 2006-Ohio-2063:

{¶18} "In the case at bar, the majority has ignored the fundamental ambiguity of the key provision in the policy. The policy language at issue is as follows: 'Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorists coverage under another policy.'

{¶19} "In understanding this sentence, the question is what the tail prepositional phrase, 'for uninsured motorists coverage under another policy,' modifies. More specifically,

the question is whether that qualifying tail modifies only 'an insured family member,' or whether the tail also modifies 'a named insured.'

{¶20} " * * * It is quite clear that the qualifying prepositional phrase at the end of the policy sentence above modifies what immediately precedes it. It is not clear, however, that the qualifying tail reaches over and modifies what is on the other side of 'or.'

{¶21} "Thus the clause can be read to mean that UM/UIM coverage will be provided for '[a]ny other person occupying your covered auto who is not a named insured * * * for uninsured motorists coverage under another policy.' But the clause can also be read to mean that coverage will be available to '[a]ny other person occupying your covered auto who is not a named insured * * *.'" *Id.* at ¶29-32 (Karpinski, J., dissenting).

{¶22} The fact that the UIM definition is susceptible to two or more reasonable interpretations regarding who qualifies as an "insured" under that portion of the policy results in an ambiguity in the language. Subsection two can be interpreted to provide coverage to anyone occupying the named insured's covered vehicle who is not (a) a named insured, or (b) an insured family member for UM coverage under another policy. However, subsection two can also be interpreted to provide coverage to anyone occupying the named insured's covered vehicle who is not (a) a named insured who has UM coverage under another policy, or (b) an insured family member who has UM coverage under another policy.

{¶23} Ambiguities are typically construed in favor of the insured. See *Towne* at ¶18. However, where the claimant's status as an "insured" under an insurance policy is at issue in the case, ambiguities are to be construed in favor of the policyholder, not the claimant. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶35. Thus, the question becomes whether ruling that a permissive operator of a covered auto is entitled to UIM coverage favors the policyholder, Wohl. See *id.* We find that it does.

{¶24} As stated, Wohl's policy with Motorists affords UM/UIM coverage of \$250,000

per person and \$500,000 per accident. Thus, the maximum amount Wohl could have recovered under her own policy is \$250,000 in UIM benefits. Wohl obtained a higher payout in receiving the majority of the settlement money. She collected \$499,999 instead of \$250,000. Slattery then was able to pursue \$250,000 in UIM benefits under Wohl's policy. In addition, if Wohl and Slattery were to have evenly split the \$500,000 settlement, neither would have been able to pursue a UIM claim under the Motorists policy because the \$250,000 figure matches the amount of UIM coverage available per person under the Motorists policy.

{¶25} Our ruling benefits Wohl in an additional respect. As the policyholder, Wohl pays premiums for UM/UIM coverage to protect permissive users and passengers in her insured automobile. Contractually, then, Wohl benefits when such users and passengers are eligible for the UM/UIM coverage for which she pays premiums.

{¶26} We observe that our decision conflicts with the majority opinion in the Eighth Appellate District's treatment of this issue in *Safeco*, 2006-Ohio-2063. However, we conclude that, because of the ambiguities in the Motorists insurance policy, Slattery is not excluded from UIM coverage, as the permissive operator of a covered vehicle. The trial court thus did not err in awarding summary judgment to American States and in awarding UIM coverage to Slattery under the Motorists policy.

{¶27} Motorists' assignment of error is overruled.

{¶28} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

LEXSEE 2006 OHIO 2063

Caution

As of: Mar 28, 2007

**SAFECO INSURANCE COMPANY OF ILLINOIS, Plaintiff-Appellee vs.
MOTORISTS MUTUAL INSURANCE COMPANY, Defendant-Appellant**

No. 86124

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY**

2006 Ohio 2063; 2006 Ohio App. LEXIS 1891

April 27, 2006, Date of Announcement of Decision

PRIOR HISTORY: **[**1]** CHARACTER OF PROCEEDINGS: Civil appeal from Common Pleas Court. Case No. CV-468752.

DISPOSITION: REVERSED.

COUNSEL: For plaintiff-appellee: WILLIAM R. DOSLAK, ESQ., Middleburg Heights, Ohio; LISA L. PAN, ESQ., Pleasant Hill, California.

For defendant-appellant: RICHARD M. GARNER, ESQ., Davis & Young, Cleveland, Ohio.

JUDGES: SEAN C. GALLAGHER, JUDGE. COLLEEN CONWAY COONEY, P.J., CONCURS; DIANE KARPINSKI, J., DISSENTS.

OPINION BY: SEAN C. GALLAGHER

OPINION:

JOURNAL ENTRY AND OPINION

SEAN C. GALLAGHER, J.:

[*P1] Appellant Motorists Mutual Insurance Company ("Motorists") appeals from the judgment of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of appellee Safeco Insurance Company of Illinois ("Safeco"), finding coverage was to be afforded under Motorists' policy of insurance. Safeco has filed a cross-appeal from the trial court's determination that liability was to be apportioned on a "pro rata" basis. For the reasons stated below, we reverse

the decision of the trial court, enter judgment in favor of Motorists, and find the cross-appeal moot.

[*P2] The following facts give rise to this appeal. On June 26, 1999, Elizabeth Heil was a passenger in a 1994 Toyota **[**2]** Camry that was owned and operated by Diane Sielski. The vehicle was struck by an underinsured motorist whose carrier, Allstate, tendered its policy limits of \$ 25,000. Heil sought permission to accept the settlement without prejudicing the rights of any other insurance carrier and to pursue an underinsured motorist ("UIM") claim.

[*P3] At the time of the accident, Heil was a named insured under an automobile insurance policy issued by Safeco. Safeco paid Heil \$ 225,000 under the policy's uninsured/underinsured motorists ("UM/UIM") coverage. The amount included \$ 25,000 that was covered by the underinsured driver's policy with Allstate, as well as \$ 200,000 in UIM benefits under Heil's Safeco policy.

[*P4] Also in effect at the time of the accident was an automobile liability policy issued to Diane Sielski, the named insured, by Motorists that specifically identified the Toyota Camry on the declarations page of the policy. The policy included UM/UIM coverage with a policy limit of \$ 100,000 per person and \$ 300,000 per accident. Motorists denied a claim made by Heil for UIM benefits under this policy on the basis that Heil was not an insured under the policy. We shall address **[**3]** the relevant policy language in our analysis below.

[*P5] Safeco filed the instant action against Motorists for reimbursement of moneys paid in settlement of Heil's UIM claim. Safeco and Motorists stipulated to all pertinent facts and damages. The parties

filed cross-motions for summary judgment. The trial court granted Safeco's motion and found that Heil was entitled to UIM benefits under the Motorists policy. The trial court also ruled that the policies were co-primary, and Motorists was to reimburse Safeco with its pro-rata share of the \$ 200,000 plus interest at a statutory rate from July 29, 1999.

[*P6] Both parties have appealed the trial court's ruling. This court reviews a trial court's grant of summary judgment de novo. *Ekstrom v. Cuyahoga County Comm. College*, 150 Ohio App.3d 169, 2002 Ohio 6228, 779 N.E.2d 1067. Before summary judgment may be granted, a court must determine that "(1) no 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 the evidence most strongly in favor of the nonmoving [**4] party, that conclusion is adverse to the nonmoving party." *State ex rel. Dussell v. Lakewood Police Department*, 99 Ohio St.3d 299, 300-301, 2003 Ohio 3652, 791 N.E.2d 456, citing *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St. 3d 190, 191, 1996 Ohio 326, 672 N.E.2d 654.

[*P7] We also recognize that the interpretation of an automobile liability insurance policy presents a question of law that an appellate court reviews without deference to the trial court. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995 Ohio 214, 652 N.E.2d 684. When interpreting an automobile liability insurance policy, if the language used is clear and unambiguous, a court must enforce the contract as written, giving words used in the contract their plain and ordinary meaning. *Cincinnati Indemn. Co. v. Martin*, 85 Ohio St. 3d 604, 607, 1999 Ohio 322, 710 N.E.2d 677. A clear, unambiguous underinsured motorist coverage provision is valid and enforceable as long as the provision is not " * * * contrary to the coverage mandated by R.C. 3937.18(A)." *Moore v. State Auto Ins. Co.*, 88 Ohio St.3d 27, 28-29, 2000 Ohio 264, 723 N.E.2d 97.

[*P8] [**5] We shall begin by considering Motorists' assignment of error, which provides:

[*P9] "The trial court committed reversible error by granting summary judgment in favor of plaintiff-appellee/cross-appellant Safeco Insurance Company of Illinois."

[*P10] Motorists argues that Heil was not an insured entitled to UM/UIM coverage under its policy and therefore the trial court erred in granting summary judgment to Safeco. We agree.

[*P11] The named insured under the Motorists

policy is Diane Sielski, who was the driver and owner of the vehicle in which Heil was a passenger. The liability section of the policy defines an "insured" to include "any person while using your covered auto." However, the UM/UIM endorsement limits the definition of an insured to "any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorists coverage under another policy."

[*P12] Safeco makes a rather unpersuasive argument that because Heil was defined as an insured under the liability portion of the policy, she qualifies for UM/UIM coverage by operation of law in the absence of a valid written rejection by the named insured. This argument [**6] is meritless.

[*P13] There is no dispute that the policy includes UM/UIM coverage with limits of \$ 100,000 per person and \$ 300,000 per accident, which is equal to the amount of liability coverage. Under the applicable version of R.C. 3937.18(C), a named insured's proper selection of UM/UIM coverage is "binding on all other named insureds, insureds, or applicants." Further, pursuant to the Supreme Court of Ohio holding in *Holliman v. Allstate Ins. Co.*, 86 Ohio St.3d 414, 416-417, 1999 Ohio 116, 715 N.E.2d 532, "Nothing in R.C. 3937.18 * * * prohibits the parties to an insurance contract from defining who is an insured under the policy."

[*P14] In rejecting a similar argument to the one made here, the court in *Mitchell v. Motorists Mutual Ins. Co.*, Franklin App. No. 04AP-589, 2005 Ohio 3988, held that to apply the appellant's logic "would limit the parties' ability to define who is an insured for underinsured motorists coverage. * * * Nothing in R.C. 3937.18, which governs permissible terms for underinsured/uninsured motorists coverage, restricts the parties' freedom to define [**7] who is and who is not an insured."

[*P15] Indeed, R.C. 3937.18 does not mandate who must be an insured for purposes of UM/UIM coverage, and the parties to the insurance contract are free to draft and negotiate their own restrictions regarding who is and is not an insured for various coverage. *Id.* No public policy or statute prohibits this form of policy restriction. *Id.* To hold that UM/UIM coverage must be specifically offered and rejected with respect to passengers or other unnamed parties would contravene basic contract principles allowing parties to the contract to define the terms of the policy and to place restrictions on coverage. As stated in *Shepherd v. Scott*, Hancock App. No. 5-02-22, 2002 Ohio 4417: "This interpretation would require that Motorists anticipate all the potential users of [the] vehicle and to then offer UM/UIM insurance accordingly. Such an interpretation * * * is unreasonable and unsupported by law."

[*P16] Here, Diane Sielski's selection of UM/UIM coverage was binding on all insureds, and the contracting parties were free to limit the terms of the coverage and to whom the coverage would apply. See *Holliman*, 86 Ohio St.3d at 416-417. [**8]

[*P17] Safeco also contends that the policy's definition of an "insured" for UM/UIM coverage is ambiguous and should be construed in favor of coverage. The policy definition of a UM/UIM insured includes: "2. Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorists coverage under another policy."

[*P18] Safeco argues that this should be read to define an insured as any other person occupying your covered auto who (1) is not a named insured, or (2) is an insured family member for uninsured motorists coverage under another policy. In support of this argument, Safeco refers to the "last antecedent" grammatical rule that provides "Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent * * *." *Indep. Ins. Agents v. Fabe* (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814, quoting *Carter v. Youngstown* (1946), 146 Ohio St. 203, 209, 65 N.E.2d 63. In considering the intention of the parties, we are mindful that insurance coverage is "determined by a * * * reasonable construction [of the contract] in conformity with the intention of the parties as [**9] gathered from the ordinary and commonly understood meaning of the language employed." *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 211, 519 N.E.2d 1380, quoting *Dealers Dairy Products Co. v. Royal Ins. Co.* (1960), 170 Ohio St. 336, 164 N.E.2d 745, paragraph one of the syllabus.

[*P19] We find that the interpretation suggested by Safeco is not a reasonable construction of the contract and appears contrary to the intention of the parties. As recognized in *Mitchell*, supra: "Generally, insurance policies contain 'other insurance' provisions that attempt to either vitiate or limit an insurer's liability for covering an insured's loss when another insurance policy also covers the insured." We find that a reasonable construction of the contract here is that the parties intended to exclude coverage for persons who had UM/UIM coverage under another insurance policy and were neither a named insured nor an insured family member under the Motorists policy.

[*P20] Safeco also argues that to read the above limitation to exclude coverage to a passenger who has separate UM/UIM insurance would be to enforce a de facto "escape clause" and thwart public policy. An "escape [**10] clause" declares that the insurer is not

liable to cover an insured if there is other valid and collectible insurance covering the risk. 15 Couch, Insurance (3 Ed. 2004), Section 219:36.

[*P21] "Other insurance" clauses, including "escape" clauses, are not prohibited under Ohio law. They are a valid attempt to allocate liability between insurers. However, such a clause may be invalidated when, as applied, the clause operates to reduce the amount of UM/UIM coverage to which the insured is otherwise entitled. See *Midwestern Indem. Co. v. Nationwide Mut. Ins. Cos.* (Nov. 7, 1994), *Clermont App. No. CA94-05-032*, 1994 Ohio App. LEXIS 5021; *Curran v. Hardware Dealers Mut. Fire Ins. Co.* (1971), 25 Ohio St.2d 33, 266 N.E.2d 566.

[*P22] The public policy behind the uninsured motorist statute is to protect an injured motorist from losses suffered at the hands of an uninsured motorist that would otherwise go uncompensated. See *Midwestern Indem. Co.*, supra; *Clark v. Scarpelli*, 91 Ohio St.3d 271, 276, 2001 Ohio 39, 744 N.E.2d 719; *Martin v. Midwestern Group Ins. Co.*, 70 Ohio St.3d 478, 1994 Ohio 407, 639 N.E.2d 438, paragraph one of the syllabus. n1 Thus, in determining the validity of an [**11] exclusion of uninsured motorist coverage, a court must determine whether the exclusion conforms with R.C. 3937.18. *Martin*, 70 Ohio St.3d 478, 1994 Ohio 407, 639 N.E.2d 438, at paragraph two of the syllabus. If the exclusion is in conflict with the statute's purpose, it is invalid and unenforceable. *Id.* at 480.

n1 *Martin* was superseded by amendments to R.C. 3937.18, but the basic premises from *Martin* cited herein remain unchanged. See *Roberts v. Wausau Business Ins. Co.*, 149 Ohio App.3d 612, 2002 Ohio 4734, 778 N.E.2d 594.

[*P23] R.C. 3937.18 mandates uninsured motorist coverage where "(1) the claimant is an insured under a policy which provides uninsured motorist coverage; (2) the claimant was injured by an uninsured motorist; and (3) the claim is recognized by Ohio tort law." *Holliman*, 86 Ohio St.3d 414, 1999 Ohio 116, 715 N.E.2d 532, citing *Martin*, 70 Ohio St.3d at 481. As we previously indicated, nothing in R.C. 3937.18 [**12] prohibits the parties to an insurance contract from defining who is an insured under the policy. *Holliman*, 86 Ohio St.3d at 416-417. The courts in two similar cases, *Sheperd*, supra, and *Mitchell*, supra, found that a passenger was not insured under a driver's policy because the passenger was excluded from the definition of an "insured."

[*P24] Common sense would indicate that, in

accordance with *R.C. 3937.18*, a person may obtain UM/UIM coverage under his own automobile policy for protection in the event he is hit by an uninsured or underinsured motorist. In addition, there is nothing that would prohibit that person from excluding as an insured any passengers in his vehicle who have their own policies of insurance containing UM/UIM coverage.

[*P25] In the instant matter, the Motorists policy excludes Heil from the definition of an insured for UM/UIM coverage because she had UM/UIM coverage under another policy. Heil was the named insured under the Safeco policy. In compliance with *R.C. 3937.18*, Safeco provided its insured with UM/UIM coverage. We find that the Motorists policy neither violates the [**13] purpose nor the language of *R.C. 3937.18* and that Heil is not an insured for purposes of UM/UIM coverage under the Motorists policy.

[*P26] Safeco's assignment of error is overruled. We reverse the decision of the trial court, enter judgment in favor of Motorists, and find the cross-appeal is moot.

Judgment reversed.

This cause is reversed.

It is, therefore, considered that said appellant recover of said appellee costs herein.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

COLLEEN CONWAY COONEY, P.J., CONCURS;

DIANE KARPINSKI, J., DISSENTS.
(SEE SEPARATE DISSENTING OPINION.)

SEAN C. GALLAGHER

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant [**14] to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S.Ct.Prac.R. II, Section 2(A)(1)*.

DISSENT BY: DIANE KARPINSKI

DISSENT:

DISSENTING OPINION

KARPINSKI, J., DISSENTING:

[*P27] Respectfully, I dissent because I disagree with the majority in its reading of Motorists' Policy for uninsured motorist coverage.

[*P28] When the plain and ordinary meaning of the language of an insurance policy is clear and unambiguous, a court cannot engage in interpretation of that language. *Holliman v. Allstate Ins. Co.*, 86 Ohio St.3d 414, 418, 1999 Ohio 116, 715 N.E.2d 532. However, when "the language in an insurance policy is ambiguous and [reasonably] susceptible of more than one meaning, the policy will be liberally construed in favor of the insured and strictly against the insurer who drafted the [**15] policy." *Id.*, citing *Derr v. Westfield Cos.* (1992), 63 Ohio St.3d 537, 542, 589 N.E.2d 1278.

[*P29] In the case at bar, the majority has ignored the fundamental ambiguity of the key provision in the policy. The policy language at issue is as follows:

Any other person occupying your covered auto who is not a named insured or an insured family member **for uninsured motorists coverage under another policy.** (Emphasis added.)

[*P30] In understanding this sentence, the question is what the tail prepositional phrase, "for uninsured motorists coverage under another policy," modifies. More specifically, the question is whether that qualifying tail modifies only "an insured family member," or whether the tail also modifies "a named insured."

[*P31] The English language has a fairly rigid syntax. As a result, modifiers must be near what they modify. Because of the rigid word order of English, college composition books in this country often designate an entire chapter to the problem of the dangling or misplaced modifier. It is quite clear that the qualifying prepositional phrase at the end of the policy sentence above modifies what immediately [**16] precedes it. It is not clear, however, that the qualifying tail reaches over and modifies what is on the other side of "or."

[*P32] Thus the clause can be read to mean that UM/UIM coverage will be provided for "any other person occupying your covered auto who is not a named insured *** for uninsured motorists coverage under

another policy." But the clause can also be read to mean that coverage will be available to "any other person occupying your covered auto who is not a named insured ***." The policy's plain language can be read in more than one way. Being subject to more than one interpretation, the language is ambiguous.

[*P33] The majority never provides any syntactic analysis of the disputed provision, but any construction of the provision must begin with that kind of analysis. And once the syntax is interpreted as ambiguous, the policy must be construed in favor of providing coverage to the insured.

[*P34] The majority acknowledges Safeco's argument based on the "last antecedent" grammatical rule and even quotes the rule: ""Referential and qualifying words and phrases, where no contrary intention appears,

refer solely to the last antecedent ***." *Indep. Ins. Agents v. Fabe* (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814, [*17] quoting *Carter v. Youngstown* 1946, 146 Ohio St. 203, 209, 65 N.E.2d 63." Ante. The majority ignores, however, this established rule of construction. Moreover, finding no "contrary intention" in the policy itself, the majority proceeds to construe the intention of the parties by turning to what "generally, insurance policies contain." The issue for this court to decide, however, is what this policy says, not what policies "generally" say. In skipping over the necessary first stage, "the ordinary and commonly understood meaning" from the grammar of the sentence, the majority has provided an analysis that is fundamentally flawed.

[*P35] Because the policy's language is ambiguous, I would affirm the judgment of the trial court.

Vollman

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CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

LINDA B. WOHL,

Plaintiff,

CASE NO. CA2006-05-123

JUDGMENT ENTRY

- vs -

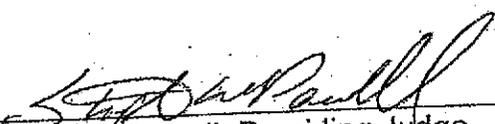
TYLER C. SWINNEY, et al.,

Defendants-Appellants.

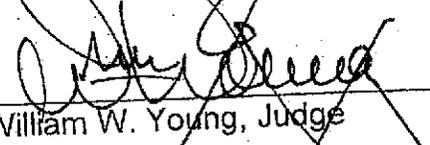
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

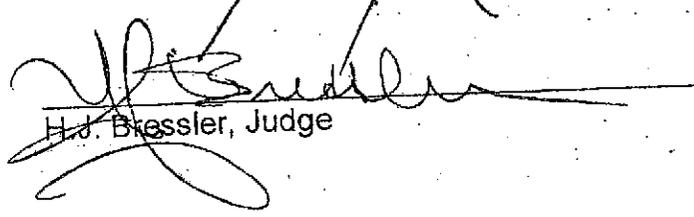
Costs to be taxed in compliance with App.R. 24.



Stephen W. Powell, Presiding Judge



William W. Young, Judge



H.J. Bressler, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

LINDA B. WOHL,

Plaintiff,

CASE NO. CA2006-05-123

- vs -

OPINION
2/12/2007

TYLER C. SWINNEY,

Defendants-Appellants.

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV04-05-1423

T. Andrew Vollmar, 1 South Main Street, Suite 1800, Dayton, Ohio 45402-2017 and Steven Zeehandler, P.O. Box 15069, Columbus, Ohio 43215, for defendant-appellant, Motorists Mutual Insurance Co.

James L. Slattery, Jr., 506 East Fourth Street, #503, Cincinnati, Ohio 45202, defendant-appellee, pro se

Scott G. Oxley, P. Christian Nordstrom, 901 Courthouse Plaza S.W., 10 North Ludlow Street, Dayton, Ohio 45402, for third party defendant-appellee, American States Insurance Co.

BRESSLER, J.

{1} Defendant-appellant, Motorists Mutual Insurance Company ("Motorists"), appeals a decision of the Butler County Court of Common Pleas denying its motion for summary judgment and granting summary judgment in favor of third party defendant-appellee, American States Insurance Company ("American States"), in a dispute involving

underinsured motorist coverage. Motorists also appeals a judgment entry finding in favor of James J. Slattery, Jr. on Slattery's complaint against Motorists and on Motorists' counterclaim against him. We affirm.

{¶12} On the evening of June 16, 2002, a vehicle driven by Tyler Swinney collided with a BMW roadster driven by appellee James Slattery at a West Chester intersection. The BMW was owned by Linda Wohl, who occupied the passenger seat. The accident occurred when Swinney negligently turned left into the path of the car operated by Slattery. Both Wohl and Slattery suffered extensive injuries as a result of the collision.

{¶13} At the time of the accident, Wohl had an automobile insurance policy with Motorists, which covered her 1996 BMW. The coverage provided uninsured/underinsured ("UM/UIM") limits of \$250,000 per person and \$500,000 per accident. Slattery had an automobile policy with American States d.b.a. InsurQuest. Slattery's policy provided UM/UIM limits of \$12,500 per person and \$25,000 per accident. Swinney was insured under an automobile policy issued by Progressive Insurance Company ("Progressive"), with a single limit coverage of \$500,000.

{¶14} Wohl and Slattery filed separate suits against Swinney, which were consolidated by agreement of the parties.¹ Slattery's case against Swinney included a claim for UIM coverage from Motorists. The parties agreed to a settlement releasing Swinney whereby Progressive would pay the full \$500,000 coverage amount to Wohl and Slattery, allowing them to allocate the funds amongst themselves. Slattery requested that Motorists agree to the settlement, based upon a proposed allocation of \$499,999 to Wohl and \$1 to Slattery. Motorists assented, but informed Slattery that he did not qualify as an "insured" under the UM/UIM portion of its policy with Wohl.

1. Linda Wohl did not sue Motorists for UM/UIM coverage, and is not a party to this appeal.

{¶5} Motorists filed a counterclaim against Slattery and a third party complaint against American States. Motorists sought a declaratory judgment that Slattery was not an insured for UM/UIM coverage under Motorists' policy with Wohl. Motorists stipulated that Slattery's damages were at least \$250,000, thus making the insurance coverage the central issue in this case.

{¶6} The parties filed cross motions for summary judgment. The trial court issued a decision on April 11, 2006 overruling Motorists' motion and granting American States' motion.² The following month, in accordance with its April 11 decision and the stipulated damages, the court issued an entry granting judgment in favor of Slattery on his complaint and on Motorists' counterclaim against him. The entry stated that Slattery was to receive \$249,999 in UIM benefits from Motorists. Motorists timely appealed, raising one assignment of error.

{¶7} This court conducts a de novo review of the trial court's summary judgment decision. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper where there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in the that party's favor. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the initial burden of informing the court of the basis for the motion, and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party meets its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing a genuine issue for trial. *Id.* We

2: As the party against whom American States' summary judgment motion was made, we construe the facts in favor of Motorists on appeal. See Civ.R. 56(C). See, e.g., *Bell v. Berryman* (2004), Franklin App. No. 03AP-500, 2004-Ohio-4708.

are mindful of these burdens in reviewing Motorists' sole assignment of error.

{¶18} Assignment of Error No. 1:

{¶19} "THE TRIAL COURT ERRED IN RULING THAT SENATE BILL 97, R.C. SECTION 3937.18, AS AMENDED OCTOBER 31, 2001, REQUIRED MOTORISTS TO COVER JAMES SLATTERY FOR UM/UIM COVERAGE WHEN THE MOTORISTS POLICY LANGUAGES EXCLUDES MR. SLATTERY FROM THE DEFINITION OF 'INSURED' FOR UM/UIM COVERAGE."

{¶10} Both Slattery and American States maintain that Slattery should be afforded UIM coverage because the definition of "insured" under the UIM section of Motorists' policy with Wohl is ambiguous and should be construed in favor of coverage for Slattery.

{¶11} Motorists argues that Slattery and American States are foreclosed from addressing the issue of ambiguity on appeal because that issue was not discussed in the trial court's decision. It is axiomatic that a party cannot raise new issues or legal theories for the first time on appeal. *Lay v. Chamberlain* (Dec. 11, 2000), Madison App. No. CA99-11-030, at 21. Failure to raise an issue before the trial court results in waiver of that issue for appellate purposes. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. However, the record shows that American States' motion for summary judgment raised the issue of ambiguity in the insurance policy. Because we conduct a de novo review of the trial court's ruling on summary judgment, we are not confined to those issues disposed of by the trial court's decision. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296.

{¶12} The Motorists policy issued to Wohl that was in effect at the time of the accident included an endorsement defining an "insured" for UM/UIM coverage as:

{¶13} "1. You or any family member.

{¶14} "2. Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorist coverage under another policy."

(Emphasis omitted.)

{¶15} Motorists maintains that the language in subsection two of the above "insured" definition narrows the definition of "insured" for UIM coverage and plainly excludes Slattery due to the fact that he had UIM coverage under his policy with American States at the time of the accident.

{¶16} The issue of contractual ambiguity is a question of law for the court. *Westfield Ins. Co. v. HULS Am., Inc.* (1998), 128 Ohio App.3d 270, 291. Any ambiguities are to be construed strictly against the insurer and liberally in favor of the insured. *Towne v. Progressive Ins. Co.*, Butler App. No. CA2005-02-031, 2005-Ohio-7030, ¶8. Ambiguity exists where contract language is susceptible to two or more reasonable interpretations. *Id.* at ¶9.

{¶17} A review of Motorists' insurance policy with Wohl reveals the following ambiguity. Subsection two of the definition attempts to limit coverage by excluding "[a]ny other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorist coverage under another policy." This provision, which Motorists maintains excludes Slattery from UIM coverage, is reasonably susceptible to two interpretations. See *Towne*, 2005-Ohio-7030 at ¶9. To what does the phrase "for uninsured motorist coverage under the policy" refer? As reasoned by the dissenting opinion construing the same provision in *Safeco v. Motorists Mut. Ins. Co.*, Cuyahoga App. No. 86124, 2006-Ohio-2063:

{¶18} "In the case at bar, the majority has ignored the fundamental ambiguity of the key provision in the policy. The policy language at issue is as follows: 'Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorists coverage under another policy.'

{¶19} "In understanding this sentence, the question is what the tail prepositional phrase, 'for uninsured motorists coverage under another policy,' modifies. More specifically,

the question is whether that qualifying tail modifies only 'an insured family member,' or whether the tail also modifies 'a named insured.'

{¶20} " * * * It is quite clear that the qualifying prepositional phrase at the end of the policy sentence above modifies what immediately precedes it. It is not clear, however, that the qualifying tail reaches over and modifies what is on the other side of 'or.'

{¶21} "Thus the clause can be read to mean that UM/UIM coverage will be provided for '[a]ny other person occupying your covered auto who is not a named insured * * * for uninsured motorists coverage under another policy.' But the clause can also be read to mean that coverage will be available to '[a]ny other person occupying your covered auto who is not a named insured * * *.'" Id. at ¶¶29-32 (Karpinski, J., dissenting).

{¶22} The fact that the UIM definition is susceptible to two or more reasonable interpretations regarding who qualifies as an "insured" under that portion of the policy results in an ambiguity in the language. Subsection two can be interpreted to provide coverage to anyone occupying the named insured's covered vehicle who is not (a) a named insured, or (b) an insured family member for UM coverage under another policy. However, subsection two can also be interpreted to provide coverage to anyone occupying the named insured's covered vehicle who is not (a) a named insured who has UM coverage under another policy, or (b) an insured family member who has UM coverage under another policy.

{¶23} Ambiguities are typically construed in favor of the insured. See *Towne* at ¶8. However, where the claimant's status as an "insured" under an insurance policy is at issue in the case, ambiguities are to be construed in favor of the policyholder, not the claimant. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶35. Thus, the question becomes whether ruling that a permissive operator of a covered auto is entitled to UIM coverage favors the policyholder, Wohl. See id. We find that it does.

{¶24} As stated, Wohl's policy with Motorists affords UM/UIM coverage of \$250,000

per person and \$500,000 per accident. Thus, the maximum amount Wohl could have recovered under her own policy is \$250,000 in UIM benefits. Wohl obtained a higher payout in receiving the majority of the settlement money. She collected \$499,999 instead of \$250,000. Slattery then was able to pursue \$250,000 in UIM benefits under Wohl's policy. In addition, if Wohl and Slattery were to have evenly split the \$500,000 settlement, neither would have been able to pursue a UIM claim under the Motorists policy because the \$250,000 figure matches the amount of UIM coverage available per person under the Motorists policy.

{¶25} Our ruling benefits Wohl in an additional respect. As the policyholder, Wohl pays premiums for UM/UIM coverage to protect permissive users and passengers in her insured automobile. Contractually, then, Wohl benefits when such users and passengers are eligible for the UM/UIM coverage for which she pays premiums.

{¶26} We observe that our decision conflicts with the majority opinion in the Eighth Appellate District's treatment of this issue in *Safeco*, 2006-Ohio-2063. However, we conclude that, because of the ambiguities in the Motorists insurance policy, Slattery is not excluded from UIM coverage, as the permissive operator of a covered vehicle. The trial court thus did not err in awarding summary judgment to American States and in awarding UIM coverage to Slattery under the Motorists policy.

{¶27} Motorists' assignment of error is overruled.

{¶28} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

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JAMES CARPENTER
BUTLER COUNTY
CLERK OF COURTS

IN THE COMMON PLEAS COURT OF BUTLER COUNTY, OHIO
CIVIL DIVISION

Linda B. Wohl,

Case No. CV 04 05 1423

Plaintiff

Judge Michael J. Sage

v.

Tyler C. Swinney, et al.

Defendants

v.

American States Ins. Co. dba
InsurQuest Ins. Co.

Final Appealable Order ✓

Third-Party Defendant

JUDGMENT ENTRY

This matter came before the Court pursuant to a Motion for Summary Judgment filed by Motorists Mutual Insurance Company on January 13, 2006 and a Cross-Motion for Summary Judgment filed February 23, 2006 by Third-Party Defendant American States Insurance Company dba InsurQuest Insurance Company. After reviewing the competing Motions for Summary Judgment including supporting and opposing Memoranda filed by Motorists Mutual,

American States, and James J. Slattery, Jr. on April 11, 2006, this Court issued a decision granting the Motion for Summary Judgment of Third-Party Defendant American States and denying the Motion for Summary Judgment of Motorist. Consistent with this decision as well as the previously filed stipulation of the parties with respect to the damages sustained by Defendant James J. Slattery, Jr., this Court determines that James J. Slattery, Jr. is entitled to underinsured motorist benefits from Defendant Motorist Mutual Insurance Company in the amount of \$249,999.00. The Court hereby grants judgment in favor of James J. Slattery, Jr. on his Complaint against Motorists and on Motorists counterclaim against James J. Slattery, Jr. All other claims remain pending. This is a final appealable order and there is no just reason for delay.



Judge Michael Sage

Copies to: Counsel of Record.

States") filed its cross motion for summary judgment on February 23, 2006. All parties ask this Court to find that the standard for summary judgment has been met.

STATEMENT OF FACTS

This case arises out of a motor vehicle accident, which occurred on June 16, 2002. On that date, Tyler C. Swinney negligently operated a motor vehicle causing it to collide with a vehicle being operated by James J. Slattery, Jr. At the time of the accident, Mr. Slattery was driving a 1996 BMW Z-3 automobile owned by Linda Wohl. Ms. Wohl was a passenger in the vehicle at the time of the accident. Mr. Slattery and Ms. Wohl received extensive injuries in the accident.

At the time of the accident, Ms. Wohl had in effect an automobile liability insurance policy issued to her by Motorists. The policy covered the 1996 BMW Z-3 involved in the accident. The uninsured/underinsured motorist provisions of Ms. Wohl's policy through Motorists provided coverage of \$250,000 per person. Mr. Swinney had a \$500,000 combined single limit of coverage issued by Progressive Insurance Company.

Furthermore, Mr. Slattery was also the named insured on an insurance contract issued by American States. The American States policy had uninsured/underinsured motorist limit of \$12,250 per person. Following the accident, Ms. Wohl and Mr. Slattery both filed suit against the tortfeasor, Mr. Swinney. Those cases have been consolidated into the instant case.

On May 26, 2005, Progressive Insurance Company offered its policy limits to settle the claims of Ms. Wohl and Mr. Slattery. Ms. Wohl and Mr. Slattery agreed that \$499,999 of the tortfeasor's insurance went to Ms. Wohl and \$1 went to Mr. Slattery.

Mr. Slattery's lawsuit against Mr. Swinney also included a claim for underinsured motorist coverage from Motorists. Mr. Slattery claimed that he was entitled to recover underinsured motorist benefits from Motorists because he received only \$1 of the \$500,000 combined single limit of the tortfeasor. In addition, Mr. Slattery claimed he was a permissive operator of Ms. Wohl's 1996 BMW Z-3 and therefore an "insured" under the Motorist policy. Mr. Slattery never pursued underinsured motorist benefits pursuant to the policy issued by American States.

Motorists filed a Third-Party Complaint for declaratory judgment against American States asking this Court to determine as a matter of law that "James Slattery does not meet the definition of an insured under the Motorists Mutual Insurance Contract and James Slattery is not entitled to any uninsured or underinsured motorist coverage." American States filed an Answer to the Complaint on October 13, 2005 denying the claim that Mr. Slattery was not an insured under the Motorists policy.

On January 13, 2005, Motorists filed its motion for summary judgment asking this Court to determine that Mr. Slattery is not an insured under its insurance contract, and that he is not entitled to recover underinsured motorist benefits from

Motorists. On February 23, 2006, American States filed its memorandum contra Motorists' motion for summary judgment and cross motion for summary judgment associated with the declaratory relief requested by Motorists. This Court has read the relevant motions and memoranda and is now ready to render a decision.

LEGAL STANDARD FOR A MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment shall only be granted when there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. Summary judgment shall not be granted unless it appears from the evidence that reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion is made. In reviewing a Motion for summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the Motion. Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317. On a Motion for summary judgment, the non-movant is entitled to have any conflicting evidence construed in its favor. *Bowen v. Kil Kare, Inc.* (1992), 63 Ohio St.3d 84.

Summary judgment is a procedural device to terminate litigation and to avoid formal trial when there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion. *Norris v. Ohio STD Oil Co.*

(1982), 70 Ohio St.2d 1. Because summary judgment is a procedural device to terminate litigation, it must be awarded with caution. Doubts must be resolved in favor of the non-moving party. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326.

A court may be warranted in holding that a genuine issue of material fact exists where competing reasonable inferences may be drawn from undisputed underlying evidence or when facts presented are uncertain or indefinite. *Duke v. Sanymetal Products Co.* (1972), 31 Ohio App.2d 78.

The Supreme Court of Ohio has set forth the burden that each party must meet with regard to summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, at 293. The Court stated in *Dresher* the following:

“[T]he moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent’s case... [I]f the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ. R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.”

For the purposes of this summary judgment motion, this Court has carefully reviewed all of the evidence, including the pleadings and any stipulations, filed in this case. *Murphy v. Reynoldsburg* (1993), 65 Ohio St.3d 356.

APPLICATION OF SUMMARY JUDGMENT STANDARD

For summary judgment to be granted, there can be no genuine issue of material fact, and the moving party must be entitled to judgment as a matter of law.

Motorists argues that Mr. Slattery is not an "insured" under the insurance contract between Motorists and Ms. Wohl. American States argues that Mr. Slattery, as the permissive operator of Ms. Wohl's 1996 BMW Z-3, would indisputably qualify as an insured with respect to the liability coverage of the Motorists policy. The definition of an "insured" under the liability coverage of Motorists' insurance contract reads as follows:

Insured as used in this endorsement means:

1. You or any **family member** for the ownership may enter use of any auto or trailer.
2. Any person using **your covered auto * * ***

However, Motorists argues that it narrowed the definition of "insured" for the purposes of underinsured/uninsured motorists coverage through Endorsement PP 70 07 0101. Endorsement PP 70 07 0101, entitled "**UNINSURED MOTORIST COVERAGE – OHIO,**" states in relevant part:

Part C – Uninsured Motorist Coverage is replaced by the following:

INSURING AGREEMENT

- A. We will pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of:
 1. An **uninsured motor vehicle** as defined in Section 1, 2, and 4 of the definition of **uninsured insured motor vehicle** because of **bodily injury**:
 - a. Sustained by an **insured**; and
 - b. Caused by the accident

2. An **uninsured motor vehicle** as defined in Section 3 of the definition of **uninsured motor vehicle** because of **bodily injury** sustained by an insured. * * *

B. **Insured** as used in the endorsement means:

1. You or any **family member**.
2. Any other person **occupying your covered auto** who is not a named insured or an insured **family member** for uninsured motorist coverage under another policy.

Therefore, the liability coverage of insureds includes occupants of covered vehicles, but Motorists has attempted to exclude a portion of these occupants from its definition pursuant to the uninsured/underinsured motorist coverage.

American States argues that when the scope of coverage in an underinsured motorist claim is determined, the statutory law in effect at the time the contract for automobile liability insurance was entered into controls the rights and duties of the contracting parties. *Ross v. Farmers Ins. Group of Companies* (1998), 82 Ohio St.3d 281, syllabus, 692 N.E.2d 732. In the instant case, the Motorists policy was issued on February 7, 2002. At that time, Ohio Revised Code §3937.18 provided in relevant part:

(C) If underinsured motorist coverage is included in a policy of insurance, the underinsured motorist coverage shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the underinsured motorist coverage.

American States argues that this language specifically requires coverage for an underinsured motorist claim brought by Mr. Slattery since Mr. Slattery is an insured under the policy. Since Mr. Slattery was a permissive user of Ms. Wohl's covered auto and an insured under liability coverage, Motorists' definitional limitation of an insured is unenforceable because it is contrary to the law.

Motorists argues that the definition of insured utilized in the insurance contract language clearly excludes any occupant of an insured vehicle who was the named insured on another policy for uninsured/underinsured coverage. In support of their position, Motorists relies on *Shepherd v. Scott* (Ohio App. 3rd Dist.), 2002-Ohio-4417. The Court finds Motorists' reliance on this case misguided as *Shepherd* involves an older version of R.C. §3937.18, which does not apply in the instant case.

In addition, Motorists also relies on *Mitchell v. Motorists Mutual Ins. Co.* (Ohio App. 10th Dist.), 2005-Ohio-3988. In *Mitchell*, the court found that the claimant did not qualify as an insured under the uninsured/underinsured coverage because the claimant was a named insured or an insured family member under another policy. However, even though the Court in *Mitchell* discussed the same version of R.C. §3937.18 that applies in the instant case; it did not examine the relevant subsection (C), *supra*.

The applicable version of R.C. §3937.18 is the version that was in effect on February 7, 2002, when Ms. Wohl entered into the contract for insurance with

1 J. Sage
18 Court
y, Ohio

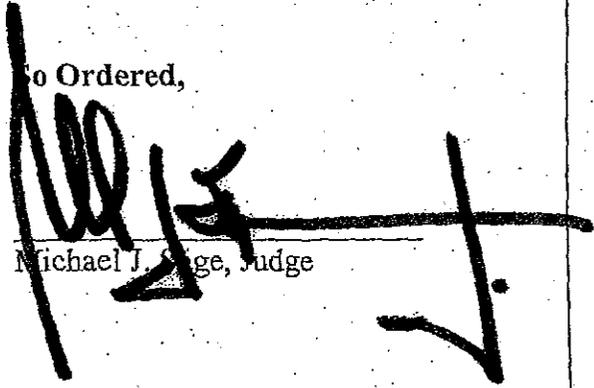
Motorists. Therefore, Mr. Slattery is an insured under the Motorists policy of insurance.

This Court is now addressing Motorists' motion for summary judgment. When viewing the evidence in a light most favorable to American States, this Court does not find the arguments of the Motorists well-taken. Motorists' motion for summary judgment is hereby DENIED. Accordingly, American States also filed a motion for summary judgment. All evidence must be construed in a light most favorable to Motorists. American States' motion for summary judgment against Motorists is well-taken and hereby GRANTED.

CONCLUSION

This matter came before the Court on the motions for summary judgment filed by both American States and Motorists. This Court finds the arguments of Motorists not well-taken, and its motion for summary judgment is hereby DENIED. This Court finds the arguments of American States well-taken, and its motion for summary judgment is hereby GRANTED.

So Ordered,


Michael J. Sage, Judge

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As Passed by the House

124th General Assembly

Regular Session

2001-2002

Am. Sub. S. B. No. 97

SENATORS Nein, Wachtmann, Mumper, White, DiDonato, Austria, Amstutz,
Coughlin, Finan, Harris, Hottinger, Spada, Armbruster, Randy Gardner,
Robert Gardner, Carnes, Johnson

REPRESENTATIVES Calvert, Goodman, G. Smith, Schaffer, Faber, Olman,
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Webster, Schneider, Kilbane, Metelsky, Gilb, Core, Carey, Rhine,
Womer Benjamin, Sferra, Widowfield, Coates, Carmichael, Metzger, White,
Flannery, Key, Distel, Salerno

A BILL

To amend sections 3937.18, 3937.181, and 3937.182 of 1
the Revised Code to revise the Uninsured and 2
Underinsured Motorist Coverages Law. 3

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 3937.18, 3937.181, and 3937.182 of 4
the Revised Code be amended to read as follows: 5

Sec. 3937.18. (A) ~~No automobile liability or motor vehicle~~ 6
~~liability~~ Any policy of insurance insuring delivered or issued for 7
delivery in this state with respect to any motor vehicle 8
registered or principally garaged in this state that insures 9
against loss resulting from liability imposed by law for bodily 10

injury or death suffered by any person arising out of the 11
ownership, maintenance, or use of a motor vehicle shall be 12
~~delivered or issued for delivery in this state with respect to any~~ 13
~~motor vehicle registered or principally garaged in this state~~ 14
~~unless both of the following coverages are offered to persons~~ 15
~~insured under the policy due to bodily injury or death suffered by~~ 16
~~such insureds.~~ 17

~~(1) Uninsured motorist coverage, which shall be in an amount~~ 18
~~of coverage equivalent to the automobile liability or motor~~ 19
~~vehicle liability coverage and shall provide protection for bodily~~ 20
~~injury, sickness, or disease, including death under provisions~~ 21
~~approved by the superintendent of insurance, for the protection of~~ 22
~~insureds thereunder who are legally entitled to recover from~~ 23
~~owners or operators of uninsured motor vehicles because of bodily~~ 24
~~injury, sickness, or disease, including death, suffered by any~~ 25
~~person insured under the policy.~~ 26

~~For purposes of division (A) (1) of this section, an insured~~ 27
~~is legally entitled to recover if the insured is able to prove the~~ 28
~~elements of the insured's claim that are necessary to recover from~~ 29
~~the owner or operator of the uninsured motor vehicle. The fact~~ 30
~~that the owner or operator of the uninsured motor vehicle has an~~ 31
~~immunity under Chapter 2744. of the Revised Code or a diplomatic~~ 32
~~immunity that could be raised as a defense in an action brought~~ 33
~~against the owner or operator by the insured does not affect the~~ 34
~~insured's right to recover under uninsured motorist coverage.~~ 35
~~However, any other type of statutory or common law immunity that~~ 36
~~may be a defense for the owner or operator of an uninsured motor~~ 37
~~vehicle shall also be a defense to an action brought by the~~ 38
~~insured to recover under, may, but is not required to, include~~ 39
~~uninsured motorist coverage, underinsured motorist coverage, or~~ 40
~~both uninsured and underinsured motorist coverages.~~ 41

Unless otherwise defined in the policy or any endorsement to 42

the policy, "motor vehicle," for purposes of the uninsured 43
motorist coverage, underinsured motorist coverage, or both 44
uninsured and underinsured motorist coverages, means a 45
self-propelled vehicle designed for use and principally used on 46
public roads, including an automobile, truck, semi-tractor, 47
motorcycle, and bus. "Motor vehicle" also includes a motor home, 48
provided the motor home is not stationary and is not being used as 49
a temporary or permanent residence or office. "Motor vehicle" does 50
not include a trolley, streetcar, trailer, railroad engine, 51
railroad car, motorized bicycle, golf cart, off-road recreational 52
vehicle, snowmobile, fork lift, aircraft, watercraft, construction 53
equipment, farm tractor or other vehicle designed and principally 54
used for agricultural purposes, mobile home, vehicle traveling on 55
treads or rails, or any similar vehicle. 56

(B) For purposes of any uninsured motorist coverage included 57
in a policy of insurance, an "uninsured motorist" is the owner or 58
operator of a motor vehicle if any of the following conditions 59
applies: 60

(1) There exists no bodily injury liability bond or insurance 61
policy covering the owner's or operator's liability to the 62
insured. 63

(2) The liability insurer denies coverage to the owner or 64
operator, or is or becomes the subject of insolvency proceedings 65
in any state. 66

(3) The identity of the owner or operator cannot be 67
determined, but independent corroborative evidence exists to prove 68
that the bodily injury, sickness, disease, or death of the insured 69
was proximately caused by the negligence or intentional actions of 70
the unidentified operator of the motor vehicle. For purposes of 71
division (B)(3) of this section, the testimony of any insured 72
seeking recovery from the insurer shall not constitute independent 73
corroborative evidence, unless the testimony is supported by 74

additional evidence.

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(4) The owner or operator has diplomatic immunity.

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(5) The owner or operator has immunity under Chapter 2744. of
the Revised Code.

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An "uninsured motorist" does not include the owner or
operator of a motor vehicle that is self-insured within the
meaning of the financial responsibility law of the state in which
the motor vehicle is registered.

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~~(2) Underinsured (C) If underinsured motorist coverage, which
shall be in an amount of coverage equivalent to is included in a
policy of insurance, the automobile liability or motor vehicle
liability underinsured motorist coverage and shall provide
protection for insureds thereunder for bodily injury, sickness, or
disease, including death, suffered by any person insured under the
policy, where the limits of coverage available for payment to the
insured under all bodily injury liability bonds and insurance
policies covering persons liable to the insured are less than the
limits for the insured's uninsured underinsured motorist coverage.
Underinsured motorist coverage in this state is not and shall not
be excess insurance coverage to other applicable liability
coverages, and shall be provided only to afford provide the
insured an amount of protection not greater than that which would
be available under the insured's uninsured motorist coverage if
the person or persons liable to the insured were uninsured at the
time of the accident. The policy limits of the underinsured
motorist coverage shall be reduced by those amounts available for
payment under all applicable bodily injury liability bonds and
insurance policies covering persons liable to the insured.~~

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~~(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~~

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~~equivalent change in the limits of the other coverage.~~ 106

~~(C) A named insured or applicant may reject or accept both coverages as offered under division (A) of this section, or may alternatively select both such coverages in accordance with a schedule of limits approved by the superintendent. The schedule of limits approved by the superintendent may permit a named insured or applicant to select uninsured and underinsured motorists coverages with limits on such coverages that are less than the limit of liability coverage provided by the automobile liability or motor vehicle liability policy of insurance under which the coverages are provided, but the limits shall be no less than the limits set forth in section 4509.26 of the Revised Code for bodily injury or death. A named insured's or applicant's rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be in writing and shall be signed by the named insured or applicant. A named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's written, signed selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be effective on the day signed, shall create a presumption of an offer of coverages consistent with division (A) of this section, and shall be binding on all other named insureds, insureds, or applicants.~~ 107
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~~Unless a named insured or applicant requests such coverages in writing, such coverages need not be provided in or made supplemental to a policy renewal or a new or replacement policy that provides continuing coverage to the named insured or applicant where a named insured or applicant has rejected such coverages in connection with a policy previously issued to the~~ 132
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~~named insured or applicant by the same insurer or affiliate of~~ 138
~~that insurer. If a named insured or applicant has selected such~~ 139
~~coverages in connection with a policy previously issued to the~~ 140
~~named insured or applicant by the same insurer or affiliate of~~ 141
~~that insurer, with limits in accordance with the schedule of~~ 142
~~limits approved by the superintendent, such coverages need not be~~ 143
~~provided with limits in excess of the limits of liability~~ 144
~~previously issued for such coverages, unless a named insured or~~ 145
~~applicant requests in writing higher limits of liability for such~~ 146
~~coverages~~ 147
For purposes of underinsured motorist coverage, an
"underinsured motorist" does not include the owner or operator of 148
a motor vehicle that has applicable liability coverage in the 149
policy under which the underinsured motorist coverage is provided. 150

~~(D) For the purpose of this section, a motor vehicle shall be~~ 151
~~deemed uninsured in either of the following circumstances.~~ 152

~~(1) The liability insurer denies coverage or is or becomes~~ 153
~~the subject of insolvency proceedings in any jurisdiction;~~ 154

~~(2) The identity of the owner and operator of the motor~~ 155
~~vehicle cannot be determined, but independent corroborative~~ 156
~~evidence exists to prove that the bodily injury, sickness,~~ 157
~~disease, or death of the insured was proximately caused by the~~ 158
~~negligence or intentional actions of the unidentified operator of~~ 159
~~the motor vehicle. For purposes of this division, the testimony of~~ 160
~~any insured seeking recovery from the insurer shall not constitute~~ 161
~~independent corroborative evidence, unless the testimony is~~ 162
~~supported by additional evidence~~ 163
With respect to the uninsured
motorist coverage, underinsured motorist coverage, or both 164
uninsured and underinsured motorist coverages included in a policy 165
of insurance, an insured shall be required to prove all elements 166
of the insured's claim that are necessary to recover from the 167
owner or operator of the uninsured or underinsured motor vehicle. 168

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~~(E) In the event of payment to any person under the coverages offered under this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer which is or becomes the subject of insolvency proceedings, to the extent of those rights against such insurer which such insured assigns to the paying insurer.~~

~~(F) The uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages offered under this section included in a policy of insurance shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.~~

~~(G)(F) Any automobile liability or motor vehicle liability policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages offered under division (A) of this section or selected in accordance with division (C) of this section may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:~~

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the 202
limits of such coverages purchased by the same person or two or 203
more family members of the same household. 204

~~(H)(G) Any automobile liability or motor vehicle liability 205
policy of insurance that includes uninsured motorist coverage, 206
underinsured motorist coverage, or both uninsured and underinsured 207
motorist coverages offered under division (A) of this section or 208
selected in accordance with division (C) of this section and that 209
provides a limit of coverage for payment ~~for~~ of damages for bodily 210
injury, including death, sustained by any one person in any one 211
automobile accident, may, notwithstanding Chapter 2125. of the 212
Revised Code, include terms and conditions to the effect that all 213
claims resulting from or arising out of any one person's bodily 214
injury, including death, shall collectively be subject to the 215
limit of the policy applicable to bodily injury, including death, 216
sustained by one person, and, for the purpose of such policy limit 217
shall constitute a single claim. Any such policy limit shall be 218
enforceable regardless of the number of insureds, claims made, 219
vehicles or premiums shown in the declarations or policy, or 220
vehicles involved in the accident. 221~~

(H) Any policy of insurance that includes uninsured motorist 222
coverage, underinsured motorist coverage, or both uninsured and 223
underinsured motorist coverages may include terms and conditions 224
requiring that, so long as the insured has not prejudiced the 225
insurer's subrogation rights, each claim or suit for uninsured 226
motorist coverage, underinsured motorist coverage, or both 227
uninsured and underinsured motorist coverages be made or brought 228
within three years after the date of the accident causing the 229
bodily injury, sickness, disease, or death, or within one year 230
after the liability insurer for the owner or operator of the motor 231
vehicle liable to the insured has become the subject of insolvency 232
proceedings in any state, whichever is later. 233

(I) Nothing in this section shall prohibit the inclusion	234
<u>Any policy of insurance that includes uninsured motorist coverage,</u>	235
<u>underinsured motorist coverage in any, or both uninsured and</u>	236
<u>underinsured motorist coverage provided in compliance with this</u>	237
<u>section.</u>	238
(J) The coverages offered under division (A) of this section	239
or selected in accordance with division (C) of this section may	240
include terms and conditions that preclude coverage for bodily	241
injury or death suffered by an insured under <u>specified</u>	242
<u>circumstances, including but not limited to any of the following</u>	243
<u>circumstances:</u>	244
(1) While the insured is operating or occupying a motor	245
vehicle owned by, furnished to, or available for the regular use	246
of a named insured, a spouse, or a resident relative of a named	247
insured, if the motor vehicle is not specifically identified in	248
the policy under which a claim is made, or is not a newly acquired	249
or replacement motor vehicle covered under the terms of the policy	250
under which the <u>uninsured motorist coverage, underinsured motorist</u>	251
<u>coverage, or both uninsured and underinsured motorist coverages</u>	252
are provided;	253
(2) While the insured is operating or occupying a motor	254
vehicle without a reasonable belief that the insured is entitled	255
to do so, provided that under no circumstances will an insured	256
whose license has been suspended, revoked, or never issued, be	257
held to have a reasonable belief that the insured is entitled to	258
operate a motor vehicle;	259
(3) When the bodily injury or death is caused by a motor	260
vehicle operated by any person who is specifically excluded from	261
coverage for bodily injury liability in the policy under which the	262
<u>uninsured motorist coverage, underinsured motorist coverage, or</u>	263
<u>both uninsured and underinsured motorist coverages are provided;</u>	264

<u>(4) While any employee, officer, director, partner, trustee,</u>	265
<u>member, executor, administrator, or beneficiary of the named</u>	266
<u>insured, or any relative of any such person, is operating or</u>	267
<u>occupying a motor vehicle, unless the employee, officer, director,</u>	268
<u>partner, trustee, member, executor, administrator, beneficiary, or</u>	269
<u>relative is operating or occupying a motor vehicle for which</u>	270
<u>uninsured motorist coverage, underinsured motorist coverage, or</u>	271
<u>both uninsured and underinsured motorist coverages are provided in</u>	272
<u>the policy:</u>	273
<u>(5) When the person actually suffering the bodily injury,</u>	274
<u>sickness, disease, or death is not an insured under the policy.</u>	275
<u>(J) In the event of payment to any person under the uninsured</u>	276
<u>motorist coverage, underinsured motorist coverage, or both</u>	277
<u>uninsured and underinsured motorist coverages, and subject to the</u>	278
<u>terms and conditions of that coverage, the insurer making such</u>	279
<u>payment is entitled, to the extent of the payment, to the proceeds</u>	280
<u>of any settlement or judgment resulting from the exercise of any</u>	281
<u>rights of recovery of that person against any person or</u>	282
<u>organization legally responsible for the bodily injury or death</u>	283
<u>for which the payment is made, including any amount recoverable</u>	284
<u>from an insurer that is or becomes the subject of insolvency</u>	285
<u>proceedings, through such proceedings or in any other lawful</u>	286
<u>manner. No insurer shall attempt to recover any amount against the</u>	287
<u>insured of an insurer that is or becomes the subject of insolvency</u>	288
<u>proceedings, to the extent of those rights against the insurer</u>	289
<u>that the insured assigns to the paying insurer.</u>	290
<u>(K) As used Nothing in this section, "uninsured motor</u>	291
<u>vehicle" and "underinsured motor vehicle" do not include any of</u>	292
<u>the following motor vehicles:</u>	293
<u>(1) A motor vehicle that has applicable liability coverage in</u>	294
<u>the policy under which shall prohibit the uninsured and inclusion</u>	295
<u>of underinsured motorist coverages are provided,</u>	296

(2) A motor vehicle owned by a political subdivision, unless	297
the operator of the motor vehicle has an immunity under Chapter	298
2744, of the Revised Code that could be raised as a defense in an	299
action brought against the operator by the insured,	300
(3) A motor vehicle self-insured within the meaning of the	301
financial responsibility law of the state in which the motor	302
vehicle is registered <u>coverage in any uninsured motorist coverage</u>	303
<u>included in a policy of insurance.</u>	304
(L) As used in this section, "automobile liability or motor	305
vehicle liability policy of insurance" means either of the	306
following:	307
(1) Any policy of insurance that serves as proof of financial	308
responsibility, as proof of financial responsibility is defined by	309
division (K) of section 4509.01 of the Revised Code, for owners or	310
operators of the motor vehicles specifically identified in the	311
policy of insurance;	312
(2) Any umbrella liability policy of insurance written as	313
excess over one or more policies described in division (L)(1) of	314
this section <u>The superintendent of insurance shall study the</u>	315
<u>market availability of, and competition for, uninsured and</u>	316
<u>underinsured motorist coverages in this state and shall, from time</u>	317
<u>to time, prepare status reports containing the superintendent's</u>	318
<u>findings and any recommendations. The first status report shall be</u>	319
<u>prepared not later than two years after the effective date of this</u>	320
<u>amendment. To assist in preparing these status reports, the</u>	321
<u>superintendent may require insurers and rating organizations</u>	322
<u>operating in this state to collect pertinent data and to submit</u>	323
<u>that data to the superintendent.</u>	324
<u>The superintendent shall submit a copy of each status report</u>	325
<u>to the governor, the speaker of the house of representatives, the</u>	326
<u>president of the senate, and the chairpersons of the committees of</u>	327

the general assembly having primary jurisdiction over issues 328
relating to automobile insurance. 329

Sec. 3937.181. (A) No ~~automobile liability or motor vehicle~~ 330
~~liability~~ policy of insurance ~~offering uninsured and underinsured~~ 331
~~motorist coverages under~~ described in division (A) of section 332
3937.18 of the Revised Code that includes uninsured motorist 333
coverage, underinsured motorist coverage, or both uninsured and 334
underinsured motorist coverages shall be delivered or issued for 335
delivery unless coverage is also made available for damage to, or 336
the destruction of, any ~~automobile or~~ motor vehicle specifically 337
identified in the policy, for the protection of those persons 338
insured under the policy who are legally entitled to recover for 339
the damage to or destruction of any ~~automobile or~~ motor vehicle 340
specifically identified in the policy from the owner or operator 341
of an uninsured motor vehicle. 342

(B) The coverage made available under this section need not 343
exceed the lesser of seventy-five hundred dollars or the amount 344
otherwise available from the policy for damages to, or the 345
destruction of, the ~~automobile or~~ motor vehicle. The coverage 346
shall be subject to a maximum two-hundred-fifty-dollar deductible. 347
The losses recoverable under this section shall be limited to 348
recovery for that destruction of or damage to the ~~automobile or~~ 349
motor vehicle specifically identified in the policy directly 350
caused by an uninsured ~~automobile or~~ motor vehicle whose owner or 351
operator has been identified. 352

(C) If an insured has a policy containing collision coverage 353
covering damages caused by an uninsured ~~automobile or~~ motor 354
vehicle, the insured's insurer need not make coverage available 355
under this section. 356

(D) An insurer making payments to an insured under the 357
coverage offered under division (A) of this section shall be 358

entitled, to the extent of those payments and subject to the terms 359
and conditions of the coverage, to the proceeds of any settlement 360
or judgment resulting from the exercise of any rights of recovery 361
by the insured against the person or organization legally 362
responsible for the injury or destruction of the property, 363
including any amounts recoverable from an insurer that is or 364
becomes the subject of insolvency proceedings, through such 365
proceedings or in any other lawful manner. No insurer shall 366
attempt to recover any amount ~~against~~ from the insured of an 367
insurer that is or becomes the subject of insolvency proceedings, 368
to the extent of ~~his~~ those rights against ~~such~~ the insurer which 369
~~such that the~~ insured assigns to the paying insurer. 370

Sec. 3937.182. (A) As used in this section, "policy" includes 371
an endorsement. 372

(B) No policy of automobile or motor vehicle insurance that 373
is covered by sections 3937.01 to 3937.17 of the Revised Code, 374
including, but not limited to, the uninsured motorist coverage, 375
underinsured motorist coverage, or both uninsured and underinsured 376
~~motorists~~ motorist coverages included in such a policy as required 377
authorized by section 3937.18 of the Revised Code, and that is 378
issued by an insurance company licensed to do business in this 379
state, and no other policy of casualty or liability insurance that 380
is covered by sections 3937.01 to 3937.17 of the Revised Code and 381
that is so issued, shall provide coverage for judgments or claims 382
against an insured for punitive or exemplary damages. 383

(C) This section applies only to policies of automobile, 384
motor vehicle, or other casualty or liability insurance as 385
described in division (B) of this section that are issued or 386
renewed on or after the effective date of this section. 387

Section 2. That existing sections 3937.18, 3937.181, and 388

3937.182 of the Revised Code are hereby repealed.	389
Section 3. In enacting this act, it is the intent of the	390
General Assembly to do all of the following:	391
(A) Protect and preserve stable markets and reasonable rates	392
for automobile insurance for Ohio consumers;	393
(B) Express the public policy of the state to:	394
(1) Eliminate any requirement of the mandatory offer of	395
uninsured motorist coverage, underinsured motorist coverage, or	396
both uninsured and underinsured motorist coverages;	397
(2) Eliminate the possibility of uninsured motorist coverage,	398
underinsured motorist coverage, or both uninsured and underinsured	399
motorist coverages being implied as a matter of law in any	400
insurance policy;	401
(3) Provide statutory authority for the inclusion of	402
exclusionary or limiting provisions in uninsured motorist	403
coverage, underinsured motorist coverage, or both uninsured and	404
underinsured motorist coverages;	405
(4) Eliminate any requirement of a written offer, selection,	406
or rejection form for uninsured motorist coverage, underinsured	407
motorist coverage, or both uninsured and underinsured motorist	408
coverages from any transaction for an insurance policy;	409
(5) Ensure that a mandatory offer of uninsured motorist	410
coverage, underinsured motorist coverage, or both uninsured and	411
underinsured motorist coverages not be construed to be required by	412
the provisions of section 3937.181 of the Revised Code, as amended	413
by this act, that make uninsured motorist property damage coverage	414
available under limited conditions.	415
(C) Provide statutory authority for provisions limiting the	416
time period within which an insured may make a claim under	417
uninsured motorist coverage, underinsured motorist coverage, or	418

both uninsured and underinsured motorist coverages to three years 419
after the date of the accident causing the injury; 420

(D) To supersede the holdings of the Ohio Supreme Court in 421
those cases previously superseded by Am. Sub. S.B. 20 of the 120th 422
General Assembly, Am. Sub. H.B. 261 of the 122nd General Assembly, 423
S.B. 57 of the 123rd General Assembly, and Sub. S.B. 267 of the 424
123rd General Assembly; 425

(E) To supersede the holdings of the Ohio Supreme Court in 426
Linko v. Indemnity Ins. Co. of N. America (2000), 90 Ohio St. 3d 427
445, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio 428
St. 3d 660, *Schumacher v. Kreiner* (2000), 88 Ohio St. 3d 358, 429
Sexton v. State Farm Mut. Auto. Ins. Co. (1982), 69 Ohio St. 2d 430
431, *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 431
Ohio St. 3d 565, and their progeny. 432

IN THE SUPREME COURT OF OHIO

CASE NO. 2007-0551

LINDA B. WOHL
Plaintiff,
and

TYLER C. SWINNEY & JAMES J. SLATTERY, JR.
Plaintiffs-Appellees

v.

MOTORISTS MUTUAL INSURANCE CO.
Defendant/Third-Party Plaintiff-Appellant

v.

AMERICAN STATES INS. CO. d.b.a. INSURQUEST INS. CO.
Third-Party Defendant-Appellee

Appeal from Decision Entered on 2-12-07 by the Court of Appeals of
Butler County, Ohio, Twelfth Appellate District, in Case No. CA2006-05-123

**MOTION FOR RECONSIDERATION OF JURISDICTION
OVER DISCRETIONARY APPEAL**

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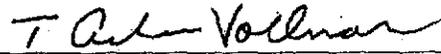
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TRIAL COURT DECISION Appendix A

COURT OF APPEALS DECISION Appendix B

Motorists Mutual Insurance Company (Motorists) moves the Court for reconsideration of its decision denying Motorists' discretionary appeal. A supporting memorandum is attached.

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MEMORANDUM

Motorists respectfully moves this Court to reconsider its decision denying Motorists' request for discretionary appeal. This Court has determined a certified conflict exists on whether Motorists' policy language is ambiguous. But, the answer to the certified question is meaningless unless this Court accepts the discretionary appeal on whether R.C. 3937.19 (C) actually permits the insurance policy language involved with the certified conflict question.

This Court may intend to address the statute in the course of answering the question to the certified conflict. But, such an intention is not apparent from the entries issued to date, and for this reason, Motorists is filing this motion. If this Court intends to address the statute in answering the certified conflict, then Motorists would agree that the discretionary appeal is not necessary. But, if this Court does not address whether R.C. 3937.18(C) permits Motorists' UM/UIM endorsement language, then this Court should reconsider Motorists' discretionary appeal and accept jurisdiction of that appeal.

The trial court ruled R.C. 3937.18 prohibits the very language this court will review in determining the answer to the certified conflict question. The 12th District Court of Appeals affirmed the trial court's decision without commenting on whether R.C. 3937.18 prohibits the subject language. Thus, unless the statute is addressed, the law of this case will be that R.C. 3937.18(C) prohibits Motorists from defining "insured" to exclude occupants of insured vehicle who bought UM/UIM coverage from another company.

a. **A court must first determine whether insurance language is permissible under R.C. 3937.18.**

Unless this Court addresses whether R.C. 3937.18(C) permits the subject language, the answer to the certified question is an academic exercise that will not affect the outcome of the case. Recently, in *Engler v. Stafford*, the 6th District Court of Appeals addressed a similar issue, except the policy involved was a Grange Mutual Casualty Company policy.¹ In *Engler*, before the court examined the various arguments about Grange's policy language, and whether Grange's policy amounted to an escape clause, the court first examined whether R.C. 3937.18 even permitted Grange to define "insured" differently in the liability and UM/UIM portions of the policy. The 6th District Court of Appeals stated:

Both statutory law, as set forth at R.C. 3937.18, and recent case law support Grange's position. R.C. 3937.18 mandates uninsured motorist coverage where: "1) the claimant is an insured under a policy which provides uninsured motorist coverage; (2) the claimant was injured by an uninsured motorist; and (3) the claim is recognized by Ohio tort law." *Holliman v. Allstate Ins. Co.* (1999), 86 Ohio St.3d 414, 416, quoting *Martin v. Midwestern Group Ins. Co.* (1994), 70 Ohio St.3d 478, at 481. The applicable version of R.C. 3937.18 allows insurers to deny coverage for bodily injury or death "[w]hen the person actually suffering the bodily injury, sickness, disease, or death is not an insured under the policy." R.C. 3937.18(I)(5). In addition, "[n]othing in R.C. 3937.18 * * * prohibits the parties to an insurance contract from defining who is an insured person under the policy." *Holliman*, at 416-417; see, also, *Lightning Rod Mut. Ins. Co. v. Grange Mut. Ins. Co.*, 168 Ohio App.3d 505, 2006-Ohio-4411, ¶12; *Safeco Ins. Co. of Illinois v. Motorists Mut. Ins. Co.*, 8th Dist.

¹*Engler v. Stafford*, 2007-Ohio-2256.

No. 86124, 2006-Ohio-2063, ¶13; *Mitchell v. Motorists Mut. Ins. Co.*, 10th Dist. No. 04AP-589, 2005-Ohio-3988, ¶21. ("[A]s R.C. 3937.18 does not mandate who must be an insured for purposes of underinsured motorist coverage, the parties to an insurance policy are free to draft their own restrictions regarding who is and is not an insured.").

In the case before this Court, the issue involved with the certified conflict is whether Motorists' UM/UIIM endorsement's definition of insured is ambiguous; however, if R.C. 3937.18 prohibits Motorists' definition, then this Court need not resolve the certified conflict. If R.C. 3937.18 prohibits Motorists' definition of insured, then whether the language is clear or ambiguous makes no difference in the case's outcome.

The trial court interpreted R.C. 3937.18(C) to mandate coverage. The trial court granted judgment against Motorists based on R. C. 3937.18(C), but the trial court did not address Motorists' policy language in terms of whether that language included any ambiguities. Motorists appealed the trial court's ruling on R.C. 3937.18(C), but the Court of Appeals did not address Motorists' assignment of error relating to trial court's interpretation of the statute.

Instead, the Court of Appeals ruled that Motorists' policy language was ambiguous. The 12th District Court of Appeals affirmed the trial Court's decision, without discussing whether R.C. 3937.18 permits or prohibits Motorists' policy language. Thus, if this Court only answers the question posed by the certified conflict, and only addresses whether Motorists' policy language is ambiguous, then regardless of how this court rules, the trial court's interpretation of R.C. 3937.18 will stand.

b. The trial court's interpretation of R.C. 3937.18 affects the entire insurance industry.

Even if this court rules against Motorists on the certified conflict question, the trial court's ruling that R.C. 3937.18 prohibits a definition of insured for UM/UIIM that is different than the liability coverage's definition will affect insurance companies other than Motorists. Companies

other than Motorists define “insured” for UM/UIM coverage to exclude certain occupants of an insured vehicle.²

Whether R.C. 3937.18 requires insurance companies to cover for UM/UIM all occupants of an insured vehicle is an industry wide issue. The insurance industry has a strong interest in knowing whether the trial court’s interpretation of R.C. 3937.18 is correct. The Court of Appeals affirmed the trial court’s decision without comment. Because of the manner in which the 12th District Court of Appeals affirmed the trial court’s application of R.C. 3937.18, the lower courts’ decisions in this case will affect every policy that defines “insured” for UM/UIM, so that the definition of “insured” in the UM/UIM coverage is different than the definition of “insured” in the liability coverage. This Court now has the opportunity to resolve this issue by accepting jurisdiction to review the trial court’s interpretation of R.C. 3937.18.

If this Court does not address the trial court's interpretation of 3937.18(C), and the Court of Appeals’ affirmation of that decision, then any insurance company attempting to define “insured” in this manner would run afoul of the statute, at least according to the trial court and the 12th District Court of Appeals’ tacit approval of the trial court’s rationale.³ At least two Ohio insurance companies have similar provisions in their UM/UIM endorsements that violate R.C. 3937.18, by defining “insured” differently in the UM/UIM endorsement, at least according to the trial court’s decision in this case. Because the 12th District Court of Appeals affirmed the Trial Court’s decision,

²For two examples of another company’s (Grange Mutual’s) definition of insured, see *Engler*, 2007-Ohio-2256; *Lightning Rod Mut. Ins. Co. v. Grange Mut. Ins. Co.*, 168 Ohio App.3d 505, 2006-Ohio-4411.

³Several courts of appeals have addressed whether the Motorists’ or Grange Mutual’s definitions of insured are enforceable. See, *Engler v. Stafford*, 2007-Ohio-2256, Lucas County; *Lightning Rod Mut. Ins. Co. v. Grange Mut. Ins. Co.*, 168 Ohio App.3d 505, 2006-Ohio-4411; *Safeco Ins. Co. of Illinois v. Motorists Mut. Ins. Co.*, 8th Dist. No. 86124, 2006-Ohio-2063; *Mitchell v. Motorists Mut. Ins. Co.*, 10th Dist. No. 04AP-589, 2005-Ohio-3988.

the trial court's decision is the law in the 12th District Court of Appeals. But, as seen by the above quote from the *Engler* decision, the 6th District Court of Appeals does not interpret R.C. 3937.18 to restrict an insurance company's freedom to define "insured" in its UM/UIM endorsement. According to the trial court's reasoning, and the Court of Appeals' approval of that reasoning, R.C. 3937.18 restricts Grange Mutual's and Motorists' ability to define insured in their UM/UIM endorsements. But, according to *Engler* and other decisions from around this state, including this Court's decision in *Holliman*, nothing in R.C. 3937.18 restricts insurance companies ability to define insured in their UM/UIM policies.⁴ By ruling that the statute mandates coverage, the trial court invalidated every personal lines policy defining "insured" to exclude those occupants of an insured vehicle who are not the named insured or an insured family member, but who are covered for UM/UIM on another policy.

c. Rejecting jurisdiction will result in Motorists losing the case, regardless of this court's decision on the certified conflict.

This Court could rule that Motorists' language has a plain and definite meaning, but under that scenario, if this Court does not accept the discretionary appeal, and if this Court does not address 3937.18(C), Motorists will lose the case based on the trial court's ruling that R.C. 3937.18 (C) prohibits the very same policy language that this Court found to be free from ambiguity. In essence, this Court must address the trial court's interpretation of R.C. 3937.18(C), as a prerequisite to answering the question presented by the certified conflict. Regardless of whether Motorists' language is ambiguous, if the statute prohibits Motorists from defining "insured" differently for UM/UIM and liability coverage, then the answer to the question posed by the certified conflict does not make a difference in the outcome of this case. Conceivably, if this Court were to rule in

⁴*Holliman v. Allstate Ins. Co.* (1999) 86 Ohio St.3d 414, 416-417; see also, *Mitchell, supra*, 2005-Ohio-3988.

Motorists' favor without accepting the discretionary appeal, the Supreme Court's decision in this case would be trumped by a trial court ruling that R.C. 3937.18 does not permit the clear language of Motorists' policy.

Regardless of how this Court determines the certified conflict, if this court does not accept jurisdiction over the discretionary appeal, Motorists owes coverage based on the trial court's decision. This is the end result of rejecting the discretionary appeal.

The Court of Appeals affirmed the trial court, without addressing Motorists' assignment of error. The Court of Appeals' approval of the trial court's decision allows the trial court's interpretation to stand as a decision affirmed and approved by the 12th District Court of Appeals. Motorists believes that the trial court's reasoning is flawed, because the trial court misinterpreted R.C. 3937.18. The 12th District Court of Appeals did not discuss the trial court's interpretation of R.C. 3937.18. Regardless of whether the trial court is correct, for the sake of fairness and due process of law, Motorists urges this Court to accept jurisdiction to review the trial court's interpretation of R.C. 3937.18, because the 12th District Court of Appeals failed to do so.

Most importantly for Motorists, Motorists will lose this case if this Court does not address the trial court's ruling on 3937.18 (C). The Court of Appeals did not address the trial court's ruling or Motorists' assignment of error on appeal, but instead, the Court of Appeals affirmed the trial court's decision on other grounds, without commenting on whether the trial court's reasoning was correct. Therefore, even if this Court were to agree with Motorists on the certified question, the trial court's decision stands, and Motorists has no recourse. Motorists already appealed the trial court's ruling to the 12th District Court of Appeals and asked that court to review the trial court's decision, but the 12th District Court of Appeals did not address Motorists' assignment of error on appeal. Motorists urges this Court to reconsider its decision denying the discretionary appeal and rejecting discretionary jurisdiction of this case.

Attached in support of this motion is a copy of the trial court's decision and a copy of the Court of Appeal's decision. Motorists urges the Court to further review this matter and consider the injustice that would occur if Motorists were to prevail on the certified conflict question without this Court addressing the trial court's ruling on 3937.18 (C). Under that scenario, the law of this case would be that R.C. 3937.18 restricts an insurance company's ability to define insured for UM/UIM coverage, and R.C. 3937.18(C) requires Motorists to provide UM/UIM coverage to Mr. Slattery, even though Motorists' policy language has a clear and definite meaning that excluded Mr. Slattery from the definition of "insured" for UM/UIM coverage.

Further, Motorists asks this court to reconsider its decision rejecting jurisdiction because the 12th District Court of Appeals simply affirmed the trial court's decision to impose coverage under R.C. 3937.18, without discussion or comment on the statute. The trial court's decision is contrary to the stated legislative intent written in R.C. 3938.182. If this Court does not accept jurisdiction, and if this Court does not address the statute, then the trial court's decision, affirmed by 12th District court of Appeals, is the law of this case and the law in the 12th Appellate District.

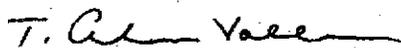
Conclusion

If this Court does not accept the discretionary appeal, the law of the 12th Appellate District will be that R.C. 3937.18 prohibits insurance companies from defining "insured" for UM/UIM coverage any differently from the definition of "insured" in other parts of the policy. Historically, this Court has never read R.C. 3937.18 to restrict an insurance company's freedom to define "insured" for purposes of UM/UIM coverage, even under more restrictive versions of R.C. 3937.18 than what applies in this case.⁵ Insurance companies writing coverage in this state have written their policies in reliance on that freedom, recognized by this Court and other Ohio court's. "Nothing in

⁵Holliman, 86 Ohio St.3d 414, 416-417, 1999 Ohio 116;

R.C. 3937.18 * * * prohibits the parties to an insurance contract from defining who is an insured person under the policy," and "as R.C. 3937.18 does not mandate who must be an insured for purposes of underinsured motorist coverage, the parties to an insurance policy are free to draft their own restrictions regarding who is and is not an insured."⁶ But, the trial court and the 12th District court of appeals ruled R.C. 3937.18 does restrict an insurance company's freedom to define insured. In light of this Court's decision in *Holliman*, and the recent 6th District Court of Appeals decision in *Engler*, this Court should accept jurisdiction to review the trial court's ruling that R.C. 3937.18 restricts an insurer's freedom to define "insured" for UM/UIM coverage. This case will affect the insurance industry and it is a matter of great public interest. Most important for Motorists, regardless of how this Court decides the certified conflict, if this Court does not accept jurisdiction over Motorists discretionary appeal, Motorists will lose this case, and every personal line policy defining "insured" differently for UM/UIM coverage will be invalid, due to the trial court's interpretation of R.C. 3937.18. Therefore, Motorists urges this Court to reconsider its decision denying jurisdiction over Motorists' discretionary appeal or acknowledge through an entry, that the Court will address the statute in answering the certified conflict.

Respectfully submitted,



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⁶*Engler*, 2007-Ohio-2256., citing *Holliman*, at 416-417; *Lightning Rod Mut. Ins. Co. v. Grange Mut. Ins. Co.*, 2006-Ohio-4411, ¶12; *Safeco Ins. Co. of Illinois v. Motorists Mut. Ins. Co.*, 2006-Ohio-2063, ¶13; *Mitchell v. Motorists Mut. Ins. Co.*, 2005-Ohio-3988, ¶21;

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following, via ordinary mail on this 13 day of June, 2007:

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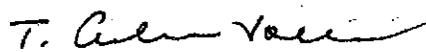
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