

**IN THE SUPREME COURT OF OHIO**

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CASE NO. 2007-0593  
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**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

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**MERIT BRIEF OF APPELLEE**  
**JAMES J. SLATTERY, JR.**

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**T. Andrew Vollmar (#0064033)**  
FREUND, FREEZE & ARNOLD  
One Dayton Centre, Suite 1800  
1 South Main Street  
Dayton, OH 45402-2017  
Phone: (937) 222-2424/Fax: (937) 222-5369  
E-Mail: avollmar@ffalaw.com  
Attorney for Defendant-Appellant  
Motorists Mutual Insurance Company

**P. Christian Nordstrom**  
JENKS, PYPER & OXLEY CO., L.P.A.  
901 Courthouse Plaza S.W.  
10 North Ludlow Street  
Dayton, Ohio 45402  
Phone: (937) 223-3001/Fax: (937) 223-3103  
E-Mail: soxley@jpolawyers.com  
Attorneys for Third-Party Defendant-Appellee  
American States Insurance Co., dba Insurquest

**James J. Slattery, Jr. (#0005088)**  
119 East Court Street.  
Cincinnati, Ohio 45202  
Phone: (513) 503-5074  
Fax: (513) 721-5824  
Plaintiff-Attorney pro se - Appellee

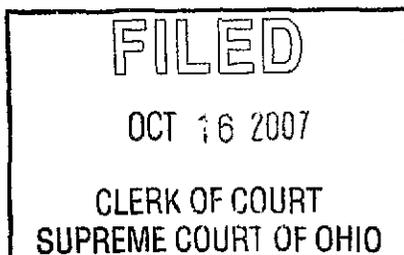


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## STATEMENT OF FACTS

Although I agree for the most part with the Statement of Facts set forth by Appellant Motorists (Motorists), clarity for the purpose of the application of the law to the facts requires amplification.

I am an attorney, admitted to practice by this Court in 1971.<sup>1</sup> During my career, I have had extensive experience dealing with insurance claims and coverage issues.<sup>2</sup>

I was the driver of an automobile owned by Linda Wohl, in which she was a passenger, which was involved in an automobile accident which is the subject matter of this appeal.<sup>3</sup> Both Linda and I sustained serious and permanent injuries.<sup>4</sup> Because of the seriousness of the injuries we both sustained and the limited amount of insurance coverage available to Swinney, the tortfeasor, I referred Linda to attorney James A. Hunt for an independent evaluation of her claim which resulted in an evaluation in the range of \$750,000 to \$1,000,000, an amount in excess of Swinney's coverage.<sup>5</sup>

I then reviewed Linda's policy with Motorists and determined that she had \$250,000/\$500,000 underinsured motorist's coverage and since Swinney had a single limit of \$500,000, Wohl would not have access to coverage under that feature of her policy.<sup>6</sup>

I then reviewed the Motorists policy to determine whether I was covered as a permissive user and came to the following conclusions:

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<sup>1</sup> SLATTERY MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT (SMOMSJ) 5 EXHIBIT 1, Supp Page 109.

<sup>2</sup> SMOMSJ 5 EXHIBIT 1, Supp. Pages 109 and 110

<sup>3</sup> SMOMSJ 5 EXHIBIT 1, Supp. Page 110

<sup>4</sup> SMOMSJ 5 EXHIBIT 1, Supp. Page 110

<sup>5</sup> SMOMSJ 5 EXHIBIT 1, Supp. Page 110

<sup>6</sup> SMOMSJ 5 EXHIBIT 1, Supp. Page 110

1. That I was covered as “any other person occupying your covered auto is not a named insured” since I was occupying the automobile and not a named insured as set forth in Part C, Paragraph B.2.;

2. That I was not excluded from coverage in the exclusion portion of Part C of the policy;

3. That the “family member” portion of Part C, Paragraph B.2. of the policy did not apply to me because I was and am not a member of Linda’s family.<sup>7</sup>

From late July or early August of 2004 through the completion of depositions in January of 2005, there were correspondence and conversations between Motorists’ attorney and me regarding coverage and Motorists was informed by me and Linda’s attorney of our intention to apply all of Swinney’s coverage to satisfy Linda’s claim and I would be looking to the Motorists underinsured motorist’s coverage for compensation; at no time during this period was any issue of my status as an insured for this purpose raised.<sup>8</sup>

Also, during that time period, Motorists’ attorney requested authorizations to obtain medical records and bills relative to my claim as well as a report from my attending physician concerning the causation, nature and extent of my injuries. These were supplied.<sup>9</sup>

Swinney’s \$500,000 was tendered and was allocated \$499,990 to Linda and \$1.00 to me in exchange for release of Swinney which was approved by Motorists, including Motorists’ waiver of all subrogation claims including the \$27,000 it had paid Linda for her property damage claim, her \$5,000 medical payment claim and my \$5,000 medical payment claim.

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<sup>7</sup> SMOMSJ 5 EXHIBIT 1, Supp. Pages 110 and 111

<sup>8</sup> SMOMSJ 5 EXHIBIT 1, Supp. Page 111

<sup>9</sup> SMOMSJ 5 EXHIBIT 1, Supp. Pages 111-112

On July 11, 2005, I appeared at a final pretrial conference on my remaining claim against Motorists and for the first time was advised that my status as an “insured” for the purpose of the underinsured coverage was in actual dispute.<sup>10</sup>

Although I had at all times cooperated with Motorists and concealed no facts from it, on July 20, 2005, just five days before my claim against Motorists was to be tried, I received a reservation of rights letter from Motorists stating that because I had a policy of insurance with another insurance company which provided underinsured motorist’s coverage and that policy had been provided to Motorists some five months earlier, it was now disputing my status as an insured.<sup>11</sup>

I was an insured under the liability portion of the policy under Part A, Paragraph B.2. which defined an “insured” as “any person using your covered auto.”<sup>12</sup> When I was named as a defendant in Linda’s amended complaint,<sup>13</sup> Motorists accepted the tender of my defense and successfully defended me.<sup>14</sup>

### **ARGUMENT BASED UPON THE CERTIFIED QUESTION**

#### **1. COUNTER PROPOSITION OF LAW NO. 1**

**Courts of Appeal can view the same policy language from different perspectives and come to different, but not conflicting, conclusions based upon the factual differences of the cases.**

The question certified by the Twelfth District Court of Appeals 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 MOTORISTS COVERAGE UNDER ANOTHER POLICY “IS AMBIGUOUS AND SHOULD BE CONSTRUED AGAINST THE INSURER TO PROVIDE COVERAGE FOR A PERMISSIVE**

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<sup>10</sup> SMOMSJ 5 EXHIBIT 1, Supp. Page 112

<sup>11</sup> SMOMSJ 5 EXHIBIT 1, Supp. Page 112

<sup>12</sup> SMOMSJ 5 EXHIBIT 1, Supp. Page 112

<sup>13</sup> SLATTERY COMPLAINT 2 EXHIBIT, Supp. Page 13

<sup>14</sup> AMENDED COMPLAINT 1, Supp. Page 1

OPERATOR OF A VEHICLE WHO IS NOT A NAMED INSURED OR INSURED FAMILY MEMBER.

In discussing this issue, I recognize that this Court has already decided to resolve the apparent conflict between the Eighth and Twelfth Districts on this policy language. I am also mindful that S. Ct. Prac. R XII does not specifically apply to appeals allowed under S. Ct. Prac. R. IV. However, I must share with the Court the difficulty I have had in formulating a response to the certified question. I note that the appellant must have had the same problem because it does not address the issue directly. The reason is simple. Although both decisions deal with the same policy language issued by Motorists, the factual basis upon which each court approached its interpretation of that language is totally different.

Prior to 1994, no procedure for filing motions to certify was contained in the Appellate Rules in furtherance of the requirements imposed on Courts of Appeal by Article IV, Section 3(B)(4) of the Ohio Constitution.

In Taylor v. Brocker (7th Dist 1997) 117 Ohio App 3rd 174, that district, in reviewing the Constitutional, as opposed to procedural, standard cited this Court's decision in Whitelock v. Gilbane Bldg. Co. (1993) 66 Ohio St. 3rd 594, wherein this Court state:

“[W]e hold that (1) pursuant to Section 3(B)(4), Article IV of the Ohio Constitution and S. Ct. Prac. R. III, there must be an actual conflict between appellate judicial districts on a rule of law before the certification of a case to the Supreme Court for review and final determination is proper; and (2) when certifying a case as in conflict with the judgment of another court of appeals, either the journal entry or opinion of the court so certifying must clearly set forth the rule of law upon which the alleged conflict exists.” (emphasis supplied)

In so holding, this Court recognized that there could be conflicting results in two cases based upon different facts under the same “rule of law” without rising to the level of a “conflict” envisioned by the Constitution.

Applying the foregoing standard to the facts of the case certified as being in conflict with the case herein, Safeco Ins. Co. of Illinois v. Motorists Mutual Ins. Co. 2006-Ohio-2063, a key element of that decision is missing from the certified question. That element is “permissive operator”; in Safeco, the person seeking coverage was a passenger and therefore not an “insured” under any other portion of the policy.

The Twelfth District held that as a permissive operator, I was an insured under the policy and could correctly view myself as being “you”, the “insured” under the UM/UIM coverage because I was not clearly and unambiguously excluded. It was not disputed that I was an insured under the liability portion of the policy nor that Motorists’ approval was sought and obtained by me prior to the settlement of my third party claim against Swinney. Nor was it disputed that Motorists waived its subrogation claim for the medical payments it had made to me to facilitate that settlement.

Accordingly, based upon the facts before the Eight District in Safeco, it may have been correct in its application of the rule of law regarding the ambiguity of the policy language. Likewise, the Twelfth District was correct in its application of the rule of law because of my status as an “insured” under two other portions of the policy.

I have not found, nor has Motorists identified, any case in which an insured permissive operator was excluded from the subject coverage. This alleged “exclusion” was not even identified by Motorists until two weeks prior to the scheduled trial date notwithstanding my prior full disclosure of all requested information to Motorists.

I respectfully suggest that until another Court of Appeals finds that there is no UM/UIM coverage for a permissive operator, the “rule of law” as to this policy provision as applied by the Twelfth District is not in conflict with the decision of any Courts of Appeal below.

## 2. COUNTER PROPOSITION OF LAW NO. 2

**A person who is an insured because he is covered as a permissive user is not a “stranger” to the policy.**

In its second proposition of law, Motorists argues that I am a stranger to the policy and therefore not entitled to have ambiguities interpreted in my favor. This is an untenable argument. When Motorists issued its policy to Linda, it specifically told her under Coverage A.2. that a permissive user such as I would be a covered insured. When she asked me to drive her car on the date of the accident, she exercised that contractual option to which she and Motorists had agreed and I became an insured. That was Linda’s intention and it was from her perspective, not mine, that the Twelfth District correctly analyzed the ambiguity.

## 3. COUNTER PROPOSITION OF LAW NO. 3

**One who is defined as an “insured” under one portion of a policy of automobile insurance is an “insured” under all portions of the policy unless his coverage under the other portion or portions of the policy is clearly, conspicuously and unambiguously eliminated or restricted.**

In determining the interpretation to be given to policy, language is important. In this case, Motorists says its policy language is clear, unambiguous and does not require this Court’s interpretation. I respectfully disagree.

In order to assess whether an ambiguity is created, the approach from which the policy is analyzed is of paramount importance.

In reaching the decision that I was covered, I started with the fact that as a permissive user of the insured automobile, I was an insured under the Motorists policy. When I was sued in the amended complaint and when I presented my medical payments and underinsured motorist’s coverage to Motorists, it was as an insured under that policy. I was in a first party position, not a third party position with Motorists. As such, from the inception of my claim, Motorists had a

duty to deal with me in good faith. This Court has held that that duty is implied by law. Motorists Mutual Ins. Co. v. Said (1992) 63 Ohio St. 3rd 690.

If, during 2004 and the first half of 2005, while I was an insured being defended by Motorists, it had any reservation as to any of the rights I was claiming under the policy, it was incumbent upon it, under Said, to make that fact known. By failing to review what was in its possession to review, Motorists breached its duty to me by failing, despite my repeated questions relating to coverage, to formulate a position on that issue until after the allocation of the funds available under Swinney's policy had been made.

In looking at the specific policy language here at issue, I came to the conclusion that I was covered. The policy at issue is:

"B. 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 motorist coverage under another policy" (underline added).

Since I was the insured under Part A, paragraph B.2. of the policy, I took the "you..." in paragraph B.1., supra to be me, the insured driver. I then looked to the exclusion section of the form to see if I was excluded. I was not.

Further, looking to subparagraph 2. supra, I was occupying the vehicle. I was not a named insured nor a family member. I therefore concluded that this subparagraph did not exclude me from coverage. When Motorists belatedly informed me of its position regarding coverage, I consulted an English instructor to determine whether Motorists' interpretation was correct. His conclusion was that the modifying phrase "coverage under another policy" did not

relate back to “any other person occupying your covered auto” in paragraph B.2., but only modified “family member.” This opinion was obtained prior to the decision of the Eighth District in Safeco, supra.

This Court has previously held that to be valid, contractual restrictions on coverage must be conspicuous and written in terminology easily understood by a lay person. Sexton v. State Farm Mutual Auto. Ins. Co. (1982) 69 Ohio St. 2d 431.

Here, Motorists attempts to insert an exclusion in a definition of insured resulting in two separate insuring clauses. Motorists points out in its Brief at pages 6 and 7 that the last antecedent rule does not apply because it would lead to a ridiculous result. This conclusion does not clarify the ambiguity, it simply makes it worse.

There is simply nothing in the policy language relative to the UM/UIM coverage to alert one who is reading the policy from the perspective of an insured under the liability portion of the policy that the definition of “insured” is in any way limited or modified. Motorists may assert that that is the only way the policy can make sense. That is not true. The proper use of the English language, including the rules relating to syntax and grammar, will make crystal clear whatever Motorists chooses to express.

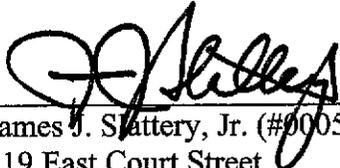
The real test of the ambiguity is the fact that this case is before the Court because two different Courts of Appeal have reached different conclusions regarding the clarity and meaning of the language.

Six appellate judges have specifically reviewed this language. Four have found it ambiguous. Two have found it unambiguous. A psychologist would call this result an operational definition of ambiguity. A lawyer would call it res ipsa loquitor.

**CONCLUSION**

For the foregoing reasons, I respectfully request that this Court answer the certified question in the affirmative and affirm the decision of the Twelfth District and the judgment rendered in my favor in the court below.

Respectfully submitted,



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James J. Slattery, Jr. (#0005088)  
119 East Court Street  
Cincinnati, Ohio 45202  
(513) 503-5074  
(513) 721-5824 (fax)  
Plaintiff-Attorney pro se – Appellee

**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 21st day of September, 2007:

T. Andrew Vollmar, Esq.  
One Dayton Centre, Ste 1800  
One South Main Street  
Dayton, Ohio 45402

James R. Gallagher, Esq.  
471 E. Broad Street, 19th Floor  
Columbus, Ohio 43215-3872

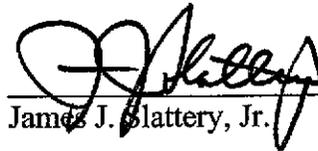
William J. Kathman, Esq.  
226 Main Street  
P.O. Box 6910  
Florence, KY 41022-6910

Philip A. Kaplan, Esq.  
5483 Hyde Park Drive  
Hilliard, Ohio 43026

P. Christian Nordstrom, Esq.  
901 Courthouse Plaza, S.W.  
10 N. Ludlow St.  
Dayton, Ohio 45402

Steven J. Zeehandler, Esq.  
471 Broad Street, 12th Floor  
P.O. Box 15069  
Columbus, Ohio 43215-0069

James A. Hunt, Esq.  
97 Main Street  
Batavia, Ohio 45103

  
James J. Slattery, Jr.