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No. 67702-1

(King County Superior Court No. 10-2-05277-1 SEA)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ANTHONY VASQUEZ,

Appellant,

vs.

AMERICAN FIRE AND CASUALTY COMPANY, an Ohio
corporation,

Respondent.

RESPONDENT'S APPELLATE BRIEF

R. Scott Fallon, WSBA #2574
Kimberly Reppart, WSBA # 30643
Attorneys for Respondent

FALLON & MCKINLEY, PLLC
1111 Third Avenue, Suite 2400
Seattle, Washington 98101
(206) 682-7580

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I. NATURE OF THE CASE

On September 15, 2008, Plaintiff/Appellant Anthony Vasquez was struck by an underinsured motorist while walking in a crosswalk on personal business. Vasquez subsequently claimed Underinsured Motorist benefits (“UIM”) benefits under the business auto policy Defendant/Respondent American Fire and Casualty Company (“American Fire”) issued to his company, Benchmark Underground Construction, Inc. (“Benchmark”).

Washington Courts distinguish between Named Insureds and Other Insureds for the purpose of UIM coverage. Only Named Insureds are entitled to broad coverage “that applies at all times, whatever may be the insured’s activity at the time of the accident.”¹ Benchmark, not Vasquez, was the Named Insured under the American Fire policy at issue in this case. As a corporate employee, Vasquez was an Other Insured entitled to coverage only while *using* or *occupying* a covered auto. Because Vasquez was

¹ *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 89, 794 P.2d 1259 (1990).

not *using* or *occupying* a covered auto at the time of the accident, American Fire properly denied him UIM coverage.

Vasquez argues that all employees identified as drivers on their employer's business auto policy qualify as Named Insureds entitled to UIM benefits at all times and under any circumstances, including while "sitting in a rocking chair on their front porch"² or walking across the street after work on personal business. Even the liberal policy behind Washington's UIM statute would not condone such a result. Washington Courts adhere to the majority rule around the country, which holds that an injured employee of a corporate Named Insured is not entitled to UIM benefits under his employer's business auto policy when that employee was not using or occupying a covered vehicle at the time of the accident.

The trial court properly determined that Vasquez was not entitled to UIM coverage under the American Fire policy because he was not the Named Insured and he was not using or occupying a covered vehicle at the time of the accident. The UIM provision at issue in this case is not ambiguous and does not conflict with the public policy behind RCW 48.22.030. This court should uphold the

² *Appellant's Opening Brief at p. 1*, citing *Grange Ins. Ass'n v. great American Ins. Co.*, 89 Wn.2d 710, 718, 575 P.2d 235 (1978) (citation and internal quotation omitted).

trial court's summary judgment ruling dismissing Anthony Vasquez' claims against American Fire as a matter of law.

II. ASSIGNMENTS OF ERROR

American Fire does not assign error to the trial court's Order Granting Summary Judgment (CP 316-18), or to its Order Denying Plaintiff's Motion for Reconsideration. (CP 334-35).

III. STATEMENT OF THE ISSUES

American Fire disagrees with Appellant's Issues Related to Assignments of Error, and submits the following Statement of the Issues which more appropriately reflects the questions before this court:

1. Do Washington Courts define employees of a corporation as Named Insureds for the purpose of coverage under a business auto policy?
2. Does American Fire's UIM endorsement limiting coverage for Other Insureds under a business auto policy to those "using or occupying a covered auto" conflict with the public policy behind the UIM statute, RCW 48.22.030?
3. Was the trial court correct in determining there is no UIM coverage for Vasquez under the American Fire policy

issued to Benchmark Underground Construction, Inc., as a matter of law, when Vasquez was not the Named Insured and when he was not using or occupying a covered auto at the time of the accident?

IV. STATEMENT OF THE CASE

A. BACKGROUND OF LITIGATION

On September 15, 2008, Vasquez was struck by an underinsured motorist while walking in a crosswalk on personal business. CP 42. He subsequently claimed UIM benefits under the business auto policy American Fire issued to Benchmark Underground Construction, Inc. under Policy No. BAA 53555462 for the policy period 12/1/2007 – 12/1/2008. CP 111-113.

At the time of the accident Vasquez was the president, majority owner, and an employee of Benchmark, a corporation. CP 42. Benchmark was the Named Insured. CP 45, 193. Vasquez owned a 2007 Ford F-350 pickup (the “F-350”), which was identified in the American Fire policy as a covered vehicle. CP 51, 196. According to Vasquez, the F-350 was purchased and registered under his own name, Anthony Vasquez, rather than under Benchmark’s name. CP 43,112. Vasquez claims he used the F-350 for both business and personal purposes. CP 43,112. He did not have personal insurance on the truck. CP 43.

American Fire denied Vasquez' UIM claim because he was not the Named Insured and because he did not qualify as "an insured" under the policy for purposes of this loss. CP 219-233.

B. A CORPORATE EMPLOYEE DOES NOT BECOME A NAMED INSURED UNDER APPLICABLE POLICY PROVISIONS

Benchmark's business auto policy included a Business Automobile Coverage Form (CA 00 01 10 01), Washington Underinsured Motorist Coverage Form, (CA 87 54 05 05), Auto Medical Payments Coverage (CA 99 03 07 97), and a "Master Pak" for Commercial Automobile Form (CA 85 14 07 04). CP 46, 194.

1. Business Auto Coverage Form

The Business Automobile Coverage Form (CA 00 01 10 01) establishes the nature and extent of "liability insurance" under the policy. CP 301-313. The form states:

Throughout this policy the words "you" and "your" refer to the **Named Insured** shown on the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

CP 301. "You," as the term is used in the policy, therefore refers to the Named Insured: Benchmark.

Who qualifies as an “insured” under the policy is defined as follows:

1. Who Is An Insured

The following are “insureds”:

- a. **You** for any covered “auto.”
- b. Anyone else **while using** with your permission a covered “auto” you own, hire or borrow **except**:

...

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

....

- c. Anyone liable for the conduct of an “insured” described above but only to the extent of that liability.

CP 302-303 (emphasis added). Again, the “you” referenced under section **a.** refers to the Named Insured: Benchmark. “Insured” is further defined under SECTION V – DEFINITIONS:

G. “Insured” means any person or organization qualifying as an insured in the Who is an Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or “suit” is brought.

CP 311. Vasquez was not the “Named Insured” qualifying him under under Section **a** (“**You**” for any covered auto), nor was he **using a “covered auto”** as required under Section **b**. Section **c** applies to claims of vicarious liability not at issue here.

Vasquez relies on language in two other coverage forms in an attempt to expand the definition of “you” under Section **a** of the Business Auto Coverage Form to include employees of the Named Insured. First he references the Hired Auto Endorsement, (CA 99 16 12 93), which states that:

A. Any “auto” described in the Schedule will be considered a covered “auto” you own and not a covered “auto” you hire, borrow or lease under the coverage for which it is a covered auto.

CP 77. The endorsement modifies the Business Auto Coverage Form to specify that vehicles rented or leased by Benchmark and identified in the Schedule will be treated as “owned” vehicles for purposes of coverage. No rented or leased vehicles are identified in the Schedule, however, the endorsement is irrelevant. There is no dispute that the F350 in question was one of many vehicles covered under the policy, and there is no evidence that it was either rented or leased. The Hired Auto Endorsement has no effect on the definition of “you” as the Named Insured, Benchmark.

As a secondary position, Vasquez falls back on the Master Pak Endorsement, which modifies the Business Auto Coverage Form to extend coverage to employees using a “covered ‘auto’ you don’t own, hire or borrow.” CP 69, 215. Vasquez argues that this coverage expands the “Named Insured” to include all employees at all times, however, a plain reading of the endorsement does not support this conclusion. The endorsement clearly states that the “Who Is An Insured” section of the Business Auto Coverage Form is amended to add:

Any employee of yours **while using** a covered “auto” you don’t own, hire or borrow in **your** business or **your** personal affairs.

CP 69, 215 (emphasis added). The operative words Vasquez overlooks throughout his brief are the words “**while using**.” The endorsement explicitly applies to an employee **while using** an auto in furtherance of the affairs of the Named Insured: Benchmark. CP 69, 215. This makes sense, as Benchmark certainly did not agree to insure its employees while using non-owned vehicles on personal business.³

³ The “Employee Hired Auto Coverage” section of the Master Pak underscores this limit on the scope of coverage under the policy. It states:

If this policy provides Liability and/or Physical Damage Coverage for Hired Autos, these coverages will be extended to any employee renting a vehicle in their own named (sic), **but only**

2. Washington Underinsured Motorist Coverage

The policy's Underinsured Motorist Coverage Form, or "UIM endorsement," "modifies insurance provided under" the Business Auto Coverage Form. CP 208-211. It states:

A. Coverage

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

B. Who Is An Insured

1. Anyone "**occupying**" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.
2. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

while used in the business of the named insured. For Employee Hired Auto Coverage, the following conditions apply:

...

2. Coverage will only apply **while the employee is conducting business on behalf of the insured;**

...

CP 71, 217.

CP 208 (emphasis added). UIM coverage is afforded only to those **occupying** a covered vehicle at the time of the loss. Mr. Vasquez was not.

C. AMERICAN FIRE PROPERLY DENIED COVERAGE TO VASQUEZ

American Fire denied Vasquez' UIM claim because he did not qualify as an "insured" under the "Who Is An Insured" section of the liability or UIM portions of the Benchmark policy for purposes of this loss. CP 219-222. Vasquez did not qualify as an "insured" under Section **a** of the Business Automobile Coverage Form's "Who Is An Insured" provision ("**You**" for any covered auto") as he is not the Named Insured, Benchmark. Nor did Vasquez qualify as an "insured" under Section **b**. ("anyone else **while using** with your permission a covered auto...") because as a pedestrian he was not "**using**" a covered auto, or any auto, at the time of the accident. He also did not qualify as an "insured" under Section **c**. ("anyone liable for the conduct of an "insured" described above but only to the extent of that liability") because there is no claim based on vicarious liability. Modifications contained in the Hired Auto Endorsement and Master Pak do not apply because both forms extend coverage to an employee only "**while using**" a non-owned vehicle in furtherance of Benchmark business. Moreover, Vasquez was not "**occupying**" a covered auto, as required under the "Who Is An

Insured” section of the UIM portion of the policy. Because Vasquez was merely a pedestrian crossing the street on personal business, American Fire properly determined his claims were not covered. *Id.*

Vasquez challenged the denial, asserting that he was an “insured” under the policy entitled to UIM benefits without limitation. American Fire again denied Vasquez’ claim. CP 224-230, 232-233.

V. PROCEDURAL HISTORY

Vasquez filed his lawsuit against American Fire on January 10, 2009. CP 1-7. American Fire counterclaimed, asking the court to “declare that there is no coverage for the claim in question under the American Fire & Casualty Company insurance policy in question.” CP 8-9. The parties subsequently filed cross-motions for summary judgment, which were heard by Judge Mary Yu of King County Superior Court. CP 11-28, CP 81-106. After oral argument on August 26, 2011, Judge Yu denied Vasquez’ motion and granted American States’ motion, determining “there is no coverage for Plaintiff under the Underinsured Motorist provision of the American Fire & Casualty Company policy at issue in this case.” CP 315, 317. Judge Yu interlineated into the Order:

The court concludes that Mr. Vasquez is not a Named Insured according to this Business Auto Policy and therefore does not qualify for broad UIM coverage for

injuries suffered as a pedestrian. Under the policy Mr. Vasquez had UIM coverage as an employee **while using** a covered vehicle or as a supervisor in a case of vicarious liability.

CP 317. Judge Yu denied Vasquez' motion for reconsideration without calling for a response brief from American Fire. CP 334-335. This appeal followed. CP 328-329.

VI. ARGUMENT

A. THE STANDARD OF REVIEW IS DE NOVO

An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994). The Court must examine the entire record.

An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted. The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party... and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.

Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

CR 56(c) provides for judgment if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of

any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A cause of action must be dismissed if the defendant can demonstrate that the plaintiff is unable to establish a critical element of its claim. *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1028, 98 L.Ed.2d 992 (1988). All facts and reasonable inferences are considered most favorably to the nonmoving party. *Craig v. Washington Trust Bank*, 94 Wn.App. 820, 824, 976 P.2d 126 (1999). The motion should be granted if, from all the evidence, a reasonable person could reach but one conclusion. *Folsom*, 135 Wn.2d at 663.

Determining insurance coverage is a two step process. The insured must first show the loss falls within the scope of the policy's insured losses. To avoid coverage, an insurer must then show the loss is excluded by specific policy language. *McDonald v. State Farm Fire & Casualty Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992); see also *Truck Ins. Exch. v. BRE Properties*, 119 Wn.App. 582, 81 P.3d 929 (2003). If the plain language of the policy does

not provide coverage, a court will not rewrite the policy to do so. *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 100, 776 P.2d 123 (1989).

The interpretation of insurance policy language presents a question of law. *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990), overruled on other grounds by *Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004); *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998). Washington Courts construe an insurance policy as a whole and endeavor to give it a fair and reasonable construction that would be understood by the average person buying insurance. *Panorama Village Condo. Owners Ass'n Bd. v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910 (2001); *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 434, 545 P.2d 1193 (1976). Terms contained in insurance policy are given their plain, ordinary, and popular meanings. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990); *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). Ambiguous provisions are generally construed against the insurer; however, “[a]n ambiguity will not be read into a contract where it can be reasonably avoided by reading the contract as a whole.”

Universal/Land Const. Co. v. City of Spokane, 49 Wn.App. 634, 637, 745 P.2d 53 (1987).

Vasquez takes the position that because he would be insured under the liability portion of the business auto policy issued to Benchmark **while using a “covered auto,”** he is entitled to UIM benefits under all circumstances, even while “sitting in a rocking chair on the front porch,” by operation of the UIM statute, RCW 4.22.030. Vasquez ignores every Washington and extra-jurisdictional case directly addressing the extension of UIM coverage under *business* automobile policies to employees of a corporate Named Insured. Under Vasquez’ reasoning, any employee who may be covered while driving a vehicle in furtherance of his employer’s business is entitled to UIM benefits under his employer’s policy at all times and under any circumstances, even while walking across the street on personal business.

The policy behind Washington’s UIM statute is liberal, but it would not condone such a result. Washington Courts instead adhere to the majority rule around the country: that an injured employee of a corporate Named Insured is not entitled to UIM

benefits under a business auto policy when the employee was not using or occupying a covered vehicle at the time of the accident.

The critical question before the Court is whether Vasquez is a “Named Insured” or an “Other Insured” under the American Fire policy. Vasquez goes to great lengths to illustrate the various circumstances under which he would be an “insured,” but fails to address unambiguous policy language defining “You” as the “Named Insured shown in the Declarations,” which is **Benchmark**. If employees of corporate policyholders could be considered Named Insureds, like family members under a personal policy, Washington Courts wouldn’t bother distinguishing between Named Insureds and Other Insureds for purposes of determining UIM coverage under business auto policies.

But Washington Courts do make that distinction. Here, Benchmark is the Named Insured and Vasquez is an employee who was injured off the clock while not occupying a covered vehicle. There is no UIM coverage for Vasquez under the American Fire policy in this circumstance, and the trial court’s ruling was correct.

B. VASQUEZ WAS NOT ENTITLED TO UIM COVERAGE BECAUSE HE WAS NOT THE NAMED INSURED AND HE WAS NOT OCCUPYING A COVERED VEHICLE AT THE TIME OF THE ACCIDENT

1. Vasquez was not a Named Insured under the policy.

UIM coverage is specifically mandated by RCW 48.22.030 as one of “many regulatory measures designed to protect the public from the ravages of the negligent and reckless driver.” *Butzberger*, 151 Wn.2d at 401, citing *Touchette v. N.W. Mut. Ins. Co.*, 80 Wn.2d 327, 332, 494 P.2d 479 (1972). The Washington Supreme Court has recognized that the “statutory policy of Washington's UIM statute “vitiates any attempt to make the meaning of **insured** for purposes of uninsured motorist coverage narrower than the meaning of that term under the primary liability section of the policy.” *Butzberger*, 151 Wn.2d at 401-02, citing *Rau v. Liberty Mut. Ins. Co.*, 21 Wn.App. 326, 328-29, 585 P.2d 157 (1978).

...once it is determined that a person is insured under the liability section of the policy, that person is also entitled to be considered as an insured under the underinsured motorist endorsement of the policy.

Rau, 21 Wn.App. at 329, citing *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 443, 563 P.2d 815, (1977).

Vasquez underscores this analysis and then stops, failing to address on-point caselaw specifically analyzing the extension of

UIM coverage to employees of a corporate Named Insured under a business auto policy. In *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 88-89, 794 P.2d 1259 (1990), the Washington Supreme Court acknowledged that UIM endorsements often divide “covered persons” into three classes: (1) “first party insureds,” (or Named Insureds) consisting of the person named in the policy and that person's family members; (2) “Other Insureds,” or any person who is injured while **occupying** a vehicle covered under the policy; and (3) individuals who are entitled to recover damages because of bodily injury sustained by either a first party or “other insured” (i.e., loss of consortium claims). Vasquez focuses on the Court's treatment of the first group, Named Insureds, without reference to the balance of the opinion. In *Blackburn*, Other Insureds were afforded UIM coverage only “while **occupying** a covered motor vehicle.” *Id.* The *Blackburn* Court determined the UIM provision at issue was not ambiguous and did not conflict with the express language of or public policy behind the UIM statute, RCW 48.22.030.

In other words, the fact that someone who is not the Named Insured may be “an insured” under some circumstances does not automatically entitle that person to UIM coverage “that applies at all

times, whatever may be the insured's activity at the time of the accident." *Blackburn*, 115 Wn.2d at 89. Washington Courts allow insurers to limit UIM coverage for Other Insureds, which is what the American Fire policy does in this case.

Vasquez proposed to the trial court that American Fire is impermissibly defining the term "insured" for the purpose of UIM coverage "more narrowly" than it is defining "insured" for the purpose of liability coverage, but that is not the case. Vasquez was not an "insured" under either portion of the American Fire policy for purposes of this accident.

Who qualifies as an "insured" under the liability portion of the American Fire policy is defined as:

- a. **You** for any covered "auto." (In this case, Benchmark)
- b. Anyone else **while using** with your permission a covered "auto" you own, hire or borrow ...
...
- c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

CP 302-303 (emphasis added). The "You" under **Section a** addresses Benchmark, the Named Insured. The Business Auto Coverage Form states that "[t]hroughout this policy the words "you"

and “your” refer to the Named Insured shown in the Declarations.”
CP 301. The Named Insured shown in the Declarations is
Benchmark. CP 193-200.

The question is whether Vasquez qualified as an “insured”
under **Section b**: “[a]nyone else while **using** with your permission a
covered “auto” you own, hire or borrow...” The Master Pak
coverage form expands this Section to include “[a]ny employee of
yours **while using** a covered “auto” you don’t own, hire or borrow in
your business or **your** personal affairs.” Under this provision,
employees have liability coverage while driving a covered vehicle
on Benchmark business. Coverage is not extended to employees
driving vehicles at “any time for any purpose.” Nothing in the
Master Pak turns a company employee into the Named Insured.
Vasquez is not a “You” under the policy.

No coverage is afforded under the UIM portion of policy for
the same reason: Vasquez was not **occupying** a covered auto at
the time of the accident. “Who Is An Insured” under this section
includes:

1. Anyone **“occupying”** a covered “auto” or a
temporary substitute for a covered “auto”. The
covered “auto” must be out of service because of its
breakdown, repair, servicing, loss or destruction.

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

CP 208 (emphasis added). **Section 1** covers anyone “**occupying**” a covered auto. Neither provision applies to pedestrian employees hit while crossing a street on personal business.

Vasquez argues that the Hired Auto Endorsement broadens the definition of “You,” but this makes no sense. The endorsement treats hired or borrowed autos as autos owned by “**You**,” the Named Insured, for purposes of coverage. CP 77. It does not confer “You” status on employees. Moreover, the Master Pak modifies the Hired Auto Endorsement to extend coverage to employees using hired autos only while the vehicle is “**used in the business of the named insured.**” CP 217. There must be some nexus with Benchmark business, otherwise the American Fire policy becomes a personal policy for all employees.

Vasquez references several UIM cases that are irrelevant in the context of this case because they involve personal auto policies addressing coverage for Named Insureds or their family members, including *Tissell By & Through Cayce v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 109, 795 P.2d 126 (1990) (holding that clauses

excluding the policyholder's own car from the definition of underinsured vehicle were void as against public policy when they deny UIM recovery to the Named Insured, i.e., the policyholder and immediate family); *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn.2d 327, 328, 494 P.2d 479 (1972) (son of policyholders was a Named Insured by virtue of being a family member); *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 563 P.2d 815 (1977)⁴ (claimant was the actual Named Insured under the policy); *Kowal v. Grange Ins. Ass'n*, 110 Wn.2d 239, 245, 751 P.2d 306 (1988) (Plaintiff stepdaughter was entitled to UIM coverage under her stepfather's personal auto policy as Named Insured rather than Other Insured because she was a family member); *First Nat'l Ins. Co. of Am. v. Perala*, 32 Wn.App. 527, 648 P.2d 472 (UIM coverage exists for a passenger in a vehicle covered by a personal UIM policy in which passenger, as a family member, was a Named Insured).

Vasquez' reliance on *Grange Ins. Ass'n v. Great Am. Ins. Co.*, 89 Wn.2d 710, 575 P.2d 235 (1978) is similarly misplaced. *Grange* involved a policy excluding from UIM coverage "any automobile furnished for regular use to the named insured."

⁴ Both *Touchette* and *Raynes* invalidated UIM exclusionary clauses that have since been endorsed by the legislature. *Doss v. State Farm Ins. Co.*, 57 Wn. App. 1, 5, 786 P.2d 801 (1990).

Grange, 89 Wn.2d at 717. In *Grange* a police officer was injured while sitting in a police car which was struck by an uninsured motorist. The court held the “regular use” exclusion was repugnant to the then-existing UIM statute. As recognized in *Abbott v. Gen. Acc. Group*, 39 Wn.App. 263, 267, 693 P.2d 130 (1984), however, “*Grange* provides historical background to the UIM statute, but it was decided in 1978 and the statute was amended in 1980 to include, and thus approve, the very exclusion *Grange* held repugnant.” *Id.* *Grange* must be distinguished and disregarded. The facts in *Grange* and in this case have little in common, and *Grange* does nothing to advance Vasquez’ position.

“Whenever the term “named insured” is employed, it refers only to the person specifically designated upon the face of the contract.” *Holthe v. Iskwotiz*, 31 Wn.2d 533, 539, 197 P.2d 999 (1948). Thus, “while...the word ‘insured,’ without further qualification, should apply to any person entitled to protection under the policy, including a ‘named insured,’ the latter term could apply **only to the person designated in the policy as the named insured.**” *Id.* at 543 (emphasis added).

Clear and unambiguous policy language is enforced as written in Washington. The definition of “You” in the American Fire

policy is clearly and unambiguously defined as the “Named Insured” identified in the Declarations: Benchmark. It is not altered by the Hired Auto Endorsement, the Master Pak or any other provision in the policy to include employees of the Named Insured, including Vasquez.

2. Washington Courts do not define employees of a corporation as Named Insureds under a business auto policy.

In denying coverage, American Fire adhered to the practice of distinguishing between a corporate Named Insured and an employee driver, citing *Eldridge v. Columbia Mut. Ins. Co.*, 270 S.W.3d 423, 428 (Mo. Ct. App. 2008); 7A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d § 110:1 (2005) (“one listed on the policy, but only in the status of a driver of a vehicle, is not a named insured despite the fact that such person's name was physically on the policy”); and *Busby v. Simmons*, 103 N.C. App. 592, 406 S.E.2d 628 (N.C. Ct. App. 1991) (corporate insured's majority shareholder, who was injured when her bicycle was struck by automobile, was not Named insured who could recover UIM benefits, despite contention that she was covered pursuant to her status as both majority shareholder and insured driver under policy where corporation was the only named insured). CP 228-229.

American Fire's reliance on these cases was correct. Washington Courts firmly place corporate employees in the Other Insured bucket and not in the Named Insured bucket. The case of *Cont'l Cas. Co. v. Darch*, 27 Wn.App. 726, 730, 620 P.2d 1005 (1980), underscores Washington's distinction between Named Insureds and Other Insureds for the purpose of determining UIM coverage under a business auto policy. Darch was driving one of his employer's 35 commercial vehicles when he was injured by an uninsured motorist. Darch was an "insured" under both the company policy's liability section and UIM section because he was **occupying** an insured vehicle at the time of the accident. He contended that because he was recognized as **an insured**, he must be given the same coverage as the policy's Named Insureds, allowing him to stack coverages for the remaining 34 vehicles.

Division 1 disagreed:

Darch correctly describes the coverage and public policy applicable to "named insureds" and others with multiple coverage under a policy's definition of "insured." Darch, however, is not a "named insured" and does not satisfy any definition of "insured" that would give him more than one coverage. There is no requirement that his single coverage be extended to equal the multiple coverage of the "named insured." **Our uninsured motorist statutes allow (and require) a policy to define two distinct classes of "insured:" (1) The "named insured" and (2) those**

protected only when using certain vehicles. RCW 48.22.030 (amended 1980); RCW 46.29.490(2)(b) (amended 1980); see *General Ins. Co. of America v. Icelandic Builders, Inc.*, 24 Wash.App. 656, 604 P.2d 966 (1979). The policy lawfully defines Darch as an “insured” of the second class covered only when using certain vehicles.

Darch, 27 Wn.App. at 730 (footnote omitted). The Court in *Thompson v. Grange Ins. Ass'n*, 34 Wn.App. 151, 158-59, 660 P.2d 307 (1983), approved *Darch* and added that “the creation of two distinct classes of “insureds” for [UIM] purposes does not conflict with RCW 48.22.030 or case law.”

Darch found roots in the Washington Court of Appeal’s decision in *General Insurance Co. of America v. Icelandic Builders, Inc.*, 24 Wn. App. 656, 604 P.2d 966 (1979), in which a policy was purchased in the name of Icelandic Builders, Inc., a closely held corporation for a family construction business. The patriarch, S.J. Kristjanson, was the sole shareholder. Mr. and Ms. Kristjanson and their son, Timothy, were directors. Timothy was seriously injured in a car accident when his personal car collided with an uninsured motorist. He claimed coverage under the corporate policy as a resident in his father’s household. *Id.* at 657-58.

The *Icelandic* policy defined “insureds” in virtually the same manner as the policy in this case:

- (a) The **named insured** and any designated insured and, while residents of the same household, the spouse and relatives of either;
- (b) any other person while **occupying** an insured highway vehicle; and
- (c) any person, with respect to damages he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) above.

Id. at p. 658. Timothy argued that if the corporation was the only Named Insured there could be no “person” entitled to UIM coverage because a corporation “cannot sustain bodily injury so as to qualify for coverage.” *Id.* at 659. He claimed “this section of the policy is ambiguous because it purports to insure specific persons yet excludes any person if the named insured is a corporation.” *Id.*

The Court disagreed with Timothy. It held that **the Named Insured was the corporation and there was no other Named Insured.** *Id.* at 660. Further, the Court recognized that Timothy *would* have been covered as an Other Insured had he been **occupying** an insured vehicle, as stated in the policy. *Id.* He was not occupying an insured vehicle and the Court consequently determined there was no UIM coverage:

The **named insured** is the corporation and there is no other designated insured. The policy language describes unambiguously who is insured under the

policy. There is no basis for applying rules of construction which Kristjanson seeks to invoke. The courts cannot create an ambiguity when none exists and thereby rewrite a policy. *U.S.F. & G. Ins. Co. v. Brannan*, 22 Wash.App. 341, 589 P.2d 817 (1979).

Icelandic, 24 Wn.App. at 660.

The *Icelandic* Court agreed that UIM coverage for the Named Insured “applies at all times, whatever may be the insured’s activity at the time of the accident.” *Id.* at 89. In contrast, Other Insureds are covered only while **occupying** a covered motor vehicle. *Id.* This precise limitation has been found to be reasonable and consistent with the public policy behind Washington’s UIM statute. *Smith v. Cont’l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995) (Named Insured’s employee was not “insured” for purposes of UIM coverage while driving a vehicle owned by a third party).

Vasquez’ reliance on *Kowal v. Grange Ins. Ass’n*, 110 Wn.2d 239, 245, 751 P.2d 306 (1988), is misplaced. Vasquez argues that under *Kowal*, insurers may not restrict UIM coverage to those **occupying** a covered auto as long as they are covered **in any way** under the liability portion of the policy. As stated above, *Kowal* concerns a personal insurance policy and whether the insured’s stepdaughter, who was identified as Named Insured, was entitled to

UIM coverage. The case does not address the Named Insured/Other Insured distinction and application to corporate employees under a business auto policy. *Darch*, *Icelandic*, and *Smith* clearly endorse policies that restrict UIM coverage for Other Insureds to those **occupying** a covered auto. Vasquez attempts to distinguish these cases by arguing that the policies at issue did not confer Named Insured status to employees, but the American Fire policy doesn't either. In *Darch*, *Icelandic*, and in *Smith*, employees of the Named Insured or additional insureds were "insured" **while using or occupying covered autos**, but they were not Named Insureds entitled to first party coverage.

In *Darch*, the definition of "insured" included "(2) an employee of the named insured or of such lessee or borrower...**while using** an owned automobile or a hired automobile with the permission of the named insured." The Court determined that *Darch*, an employee, was not the Named Insured. *Darch*, 27 Wn.App. at 730. In *Icelandic*, the Court acknowledged "the named insured was the corporation" alone, even though employees were covered "**while occupying** an insured highway vehicle." *Icelandic*, 24 Wn.App. at 658. In *Smith*, anyone besides the Named Insured was covered **while occupying** a covered auto or a temporary

substitute for a covered auto. *Smith*, 128 Wn.2d at 73. For UIM, coverage was limited to “owned autos.” As the *Smith* claimant was not the Named Insured and the auto was not owned by his employer, UIM was denied. In each of these cases, the Court distinguished between the broad coverage available to the Named Insured and the limited coverage available to corporate employees or Other Insureds. The Court must continue to do so in this case.⁵

3. Vasquez was not a Named Insured by virtue of being an employee driver.

The majority rule around the country is that a claimant does not become a Named Insured by mere virtue of being identified as an employee driver under a corporate insurance policy. See, e.g., the Louisiana case of *Kottenbrook v. Shelter Mut. Ins. Co.*, 69 So.

⁵ Vasquez also references the Auto Medical Payments Coverage Form (CP 212-213), but forgets that Courts treat medical payments coverage and UIM coverage *separately*:

Two separate and distinct types of insurance coverage are involved in this case-PIP and UIM. PIP coverage generally provides benefits for the immediate costs of an automobile accident, including medical expenses and loss of income. UIM coverage, **which functions separately from PIP**, covers all damages that the insured would have been entitled to receive from the tortfeasor, including the medical expenses, loss of income, and other damages that are also covered by PIP.

Safeco Ins. Co. v. Woodley, 150 Wn.2d 765, 770, 82 P.3d 660 (2004) (emphasis added). An injured person may receive medical payments coverage but still not be entitled to UIM coverage under a policy. See, e.g., *Stonewall Ins. Co. v. Denman*, 63 Wn.App. 123, 816 P.2d 1252 (1991). Medical payments coverage and UIM coverage protect against two different risks, and payment under one form does not automatically qualify a person for coverage under the other.

3d 561 (La. App. 2 Cir. 5/18/11), *writ denied*, 69 So. 3d 1166 (La. 9/23/11) (injured plaintiff associated with Named Insured corporation not covered because he was not occupying the corporation's vehicle at the time of the accident); *Continental Ins. Co. v. Velez*, 134 A.D.2d 348, 520 N.Y.S.2d 824 (1987) (Officer, director and shareholder of Named Insured corporation struck while riding his bicycle on a personal errand was not entitled to UIM coverage on policy issued to the corporation); *Dixon v. Gunter*, 636 S.W.2d 437 (Tenn.App.1982) (Automobile policy issued to the corporation does not allow UIM coverage to the president and sole shareholder of the corporation when he was not engaged in corporate business and was injured by a third party).

Vasquez leans heavily on the Louisiana Appellate Court case of *Hobbs v. Rhodes*, 667 So. 2d 1112 (La. Ct. App. 1995), but fails to address the later case of *Valentine v. Bonneville Ins. Co.*, 691 So.2d 665 (1997), in which the Louisiana Supreme Court reviewed a business auto policy under which the definition of “insured” is similar to the one at issue in this case.⁶ The Named

⁶ Vasquez acknowledges that Washington has looked to Louisiana for guidance because it employs a similar UIM statute. *Appellant's Opening Brief at p. 24, n. 4, citing Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 688 n. 6, 801 P.2d 207

Insured under the policy at issue in *Valentine* was the Webster Parish Sheriff's Department. The plaintiff was a Webster Parish deputy who was struck by a car while standing and directing traffic. As in this case, the policy extended UIM coverage to "You," a term defined as the Named Insured under the policy, and also to persons "**occupying**" a covered vehicle. The court determined there was no UIM coverage for the deputy because he was not the Named Insured, nor was he "**occupying**" a covered vehicle at the time of the accident. The *Valentine* Court agreed with *Hobbs* that "a named insured is provided UM coverage wherever he is, whatever he is doing, and regardless of whether he is on the job or merely tending to his private affairs." *Id.* at 669. Nevertheless, the court cited numerous cases holding that a commercial auto policy identifying an *entity or corporation* as the Named Insured does not extend that same breadth of UIM coverage to the employees, officers, shareholders or members of the entity or corporation. *Id.*, note 3.⁷

(1990), *overruled on other grounds*, *Butzburger v. Foster*, 151 Wn.2d 396, 401, 80 P.3d 689 (2004).

⁷ *Valentine*, 691 So.2d at 669, n. 3, citing *Busby v. Simmons*, *supra*; *Kottenbrook v. Shelter Mutual Insurance Company*, *supra*; *Davis v. Brock*, 602 So.2d 104 (La.App. 4th Cir.1992); *Barnes v. Thames*, 578 So.2d 1155 (La.App. 1st Cir.1991); *Pridgen v. Jones*, 556 So.2d 945 (La.App. 3d Cir.1990); *Bryant v. Protective Cas. Ins. Co.*, 554 So.2d 177 (La.App. 2d Cir.1989); *Vera v.*

Valentine presents the same issue the Court is presented with in this case. The liability portion of the American Fire policy defines “You,” as the Named Insured: Benchmark. There is no ambiguity. Vasquez was not the Named Insured and he does not become one just because he was an employee driver under the policy.⁸

C. VASQUEZ IS NOT ENTITLED TO UIM COVERAGE BECAUSE HE WAS NOT AN “OTHER INSURED” UNDER THE POLICY “USING” OR “OCCUPYING” A COVERED AUTO AT THE TIME OF THE ACCIDENT

Vasquez was not the Named Insured, nor was he an Other Insured **using or occupying** a covered vehicle at the time of the accident, which would have entitled him to UIM coverage under the American Fire policy. The Court in *Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004), implemented a three-prong test for determining whether a person is “using” a vehicle for purposes of UIM coverage:

Centennial Ins. Co., 483 So.2d 1166 (La.App. 5th Cir.1986); *Saffel v. Bamburg*, 478 So.2d 663 (La.App. 2d Cir.1985); and *Pierron v. Lirette*, 468 So.2d 1305 (La.App. 1st Cir.1985).

⁸ Plaintiff’s reliance on *DeSaga v. W. Bend Mut. Ins. Co.*, 391 Ill. App. 3d 1062, 910 N.E.2d 159 (Ill. App. Ct. 2009) appeal denied, 236 Ill. 2d 552, 932 N.E.2d 1029 (2010), is inapposite because the *DeSaga* court determined the employee driver at issue was “occupying” a vehicle *in the course and scope of his employment* at the time of the accident. The facts are simply not comparable to this case.

1. There must be a causal relation or connection between the injury and the use of the insured vehicle;
2. The person asserting coverage must be in reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it; and
3. The person must also be engaged in a transaction essential to the use of the vehicle at the time.

Butzberger, 151 Wn.2d at 410 (abandoning a fourth requirement that the insured be *vehicle oriented* rather than *highway or sidewalk oriented* as set out in *Rau v. Liberty Mut. Ins. Co.*, supra at 331).

In applying the **first** factor, the *Butzberger* Court determined that for an injury to be covered under a UIM endorsement there must be a sufficient causal relationship or connection between the *injury* and the *use* of the insured vehicle:

Indeed it would defy common sense for an insured vehicle's UIM coverage to extend to an injury wholly unrelated to the use of the vehicle.

Butzberger, 151 Wn.2d at 404.

In applying the **second** factor, the Court stated:

Requiring the injured person be within “reasonably close geographic proximity” to the insured vehicle at the time of his or her injury provides an important physical limitation on the scope of UIM coverage by ensuring coverage extends only to injuries which occur close to the insured vehicle.

Id. at p. 406.

Finally, with regard to the **third** factor, the Court stated:

Limiting UIM coverage to situations where the injury occurred while the injured party was engaged in a transaction essential to the use of the insured vehicle ensures that the injury and the use are not only causally connected but connected in a manner such that common sense dictates the insured vehicle's UIM policy should cover the injury at issue.

Id. Under each factor the Court rejected the notion of extending UIM coverage for Other Insureds to situations “wholly unrelated to the use” of a covered vehicle.

This analysis was also employed in *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990).⁹ In *Roller*, a passenger in an automobile was intentionally rammed by a motorist when he left the automobile to record the ramming vehicle's license plate number and to call the police. The passenger subsequently sought UIM benefits from the insurer of the vehicle in which he had been riding. The *Roller* Court denied UIM benefits because it determined the passenger was not “using” the vehicle he had been riding in when he was rammed, as he had left the car to engage in transactions not essential to the use of the vehicle.

... the claimant must be engaged in a transaction essential to the use of the vehicle at the time the injuries are incurred....we hold that *Roller* was not

⁹ *Roller* was overruled by *Butzberger* to the extent it applied the fourth “vehicle orientation” factor.

“using” the insured automobile at the time the injuries were incurred after exiting the automobile. Therefore, coverage is denied.

Roller, 115 Wn. 2d at 688-89.

Both *Butzburger* and *Roller* found that UIM coverage is rightfully denied to a person who is neither a Named Insured nor “using” a covered vehicle at the time of the accident. Here, Vasquez was a pedestrian in a crosswalk on personal business. He was not using or occupying a “covered auto” in any capacity. Because the American Fire UIM provision properly restricted coverage for Other Insureds to those “occupying” covered vehicles, American Fire correctly denied Vasquez’ UIM claim.

D. REQUEST FOR FEES AND REASONABLE EXPENSES

RAP 14.2 allows for costs and reasonable expenses to be awarded to the prevailing party on appeal. Pursuant to RAP 18.1(b), Respondent respectfully requests that the Court issue an order awarding the reasonable attorneys’ fees, costs, and expenses allowed under RAP 14.3 should Respondent prevail on appeal.

VII. CONCLUSION

“The clear majority of cases from other jurisdictions hold occupancy restrictions in uninsured (and underinsured) motorist

insurance coverage valid where the corporation is the named insured in the policy and the injured employee is a permissive user of the automobile who is injured when not occupying the automobile.” *McMutry v. Aetna Cas. & Sur. Co.*, 845 S.W. 2d 700, 702-03 (1993). Vasquez was not a Named Insured and he was not using or occupying a covered auto at the time of the accident. Consequently, he is not entitled to UIM coverage under the American Fire policy at issue. The trial court’s summary judgment ruling dismissing Vasquez’ lawsuit against American Fire should be upheld.

DATED this 9th day of March, 2012.

Respectfully submitted:

FALLON & McKINLEY

By: 
R. Scott Fallon, WSBA #2574
Kimberly Reppart, WSBA #30643
Attorneys for Respondent/Defendant
American Fire & Casualty Company

APPENDIX

Barnes v. Thames

578 So.2d 1155 (La.App. 1st Cir.1991)

Bryant v. Protective Cas. Ins. Co.

554 So.2d 177 (La. App. 2d Cir. 1989)

Busby v. Simmons

103 N.C. App. 592, 406 S.E.2d 628 (N.C. Ct. App. 1991)

Celotex v. Catrett

477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), *cert. denied*,
484 U.S. 1066, 108 S. Ct. 1028, 98 L.Ed.2d 992 (1988)

Continental Ins. Co. v. Velez

134 A.D.2d 348, 520 N.Y.S.2d 824 (1987)

Davis v. Brock

602 So.2d 104 (La. App. 4th Cir. 1992)

DeSaga v. W. Bend Mut. Ins. Co.

391 Ill App. 3d 1062, 910 N.E. 2d 159 (Ill. App. Ct. 2009), *appeal denied*, 236 Ill
2d 552, 932, N.E. 2d 1029 (2010)

Dixon v. Gunter

636 S.W.2d 437 (Tenn. App. 1982)

Eldridge v. Columbia Mut. Ins. Co.

270 S.W.3d 423, 428, (Mo. Ct. App. 2008); 7A Lee R. Russ & Thomas F.
Segalla, Couch on Insurance 3d § 110:1 (2005)

Hobbs v. Rhodes

667 So. 2d 1112 (La. Ct. App. 1995)

Kottenbrook v. Shelter Mut. Ins. Co.

69 So.3d 561 (La.App. 2 Cir. 5/18/11), *writ denied*, 69 So.3d 1166 (la. 9/23/11)

McMutry v. Aetna Cas. & Sur. Co

845 S.W. 2d 700, 702-03 (1993)

Pierron v. Lirette

468 So. 2d 1305 (La. App 1st Cir 1985)

Pridgen v. Jones

556 So.2d 945 (La. App. 3d Cir 1990)

Saffel v. Bamburg

478 So.2d 663 (La. App. 2d Cir. 1985)

Valentine v. Bonneville Ins. Co.
691 So.2d 665 (1997)

Vera v. Centennial Ins. Co.
483 So.2d 1166 (La. App. 5th Cir. 1986)

578 So.2d 1155
(Cite as: 578 So.2d 1155)

▷

Court of Appeal of Louisiana,
First Circuit.

Mona BARNES, Individually and as the Curator of
the Interdict, Daniel J. White

v.

Charles W. THAMES, Fireman's Fund Insurance
Company, and Reliance Insurance Company.

Consolidated With

Mona BARNES, Individually and as the Curator of
the Interdict, Daniel J. White

v.

Charles W. THAMES, Fireman's Fund Insurance
Company, and Reliance Insurance Company.

Nos. 89 CA 0435, 89 CA 1057.

Feb. 15, 1991.

Writs Denied April 26, 1991.

Appeal was taken from judgment of the 22nd Judicial District Court, St. Tammany Parish, John W. Greene, J., entered in personal injury action arising from pedestrian-motor vehicle accident. The Court of Appeal, Carter, J., held that: (1) pedestrian was not covered under uninsured motorist provisions of automobile policy issued to his employer; (2) evidence was insufficient to establish that Department of Transportation and Development (DOTD) was responsible for injuries sustained by pedestrian; (3) evidence was sufficient to support finding that pedestrian was 49% at fault and motorist was 51% at fault with regard to accident; (4) evidence was sufficient to establish that pedestrian was acting within scope and course of his employment for purposes of excess liability policy issued to employer; (5) evidence was sufficient to support award of statutory penalties and attorney's fees; and (6) insurer could be held liable for legal interest on entire amount of judgment rendered against it, including portion of judgment in excess of policy limits.

Affirmed in part, reversed in part, and remanded.

Lottinger, J., concurred and dissented and assigned reasons.

Watkins, J., concurred in part and dissented in part for reasons assigned.

Crain and Edwards, JJ., concurred in part and dissented in part for reasons assigned by Lottinger, J.

Savoie, J., concurred in result.

Foil, J., concurred in part and dissented in part.

LeBlanc, J., concurred in part and dissented in part and assigned reasons.

Lanier, J., concurred in part and dissented in part for reasons assigned by LeBlanc, J.

West Headnotes

[1] Trial 388 ¶18.33

388 Trial

388III Course and Conduct of Trial in General

388k18.30 Mistrial

388k18.33 k. Grounds in general. Most Cited Cases

(Formerly 388k18)

Generally, mistrials are properly granted because of some fundamental failure in the proceeding.

[2] Trial 388 ¶18.33

388 Trial

388III Course and Conduct of Trial in General

388k18.30 Mistrial

388k18.33 k. Grounds in general. Most Cited Cases

(Formerly 388k18)

Generally, motion for mistrial in civil case

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should be granted under following circumstances: when, before trial ends and judgment is rendered, trial judge determines that it is impossible to reach proper judgment because of some error or irregularity; and where no other remedy would provide relief to moving party.

[3] Trial 388 ↪ 18.33

388 Trial

388III Course and Conduct of Trial in General

388k18.30 Mistrial

388k18.33 k. Grounds in general. Most Cited Cases

(Formerly 388k18)

Motions for mistrial should be granted upon proof of prejudicial misconduct occurring during jury trial, which cannot be cured by admonition or instruction.

[4] Trial 388 ↪ 18.33

388 Trial

388III Course and Conduct of Trial in General

388k18.30 Mistrial

388k18.33 k. Grounds in general. Most Cited Cases

(Formerly 388k18)

Trial judge is vested with broad discretion to grant motion for mistrial where no other remedy would afford relief or where circumstances indicate that justice may not be done if trial continues.

[5] Appeal and Error 30 ↪ 969

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k969 k. Conduct of trial or hearing in general. Most Cited Cases

Court of Appeal should not disturb trial court's determination in ruling on motion for mistrial unless there was abuse of discretion.

[6] Trial 388 ↪ 133.6(8)

388 Trial

388V Arguments and Conduct of Counsel

388k133 Action of Court

388k133.6 Instruction or Admonition to Jury

388k133.6(3) Statements as to Facts, Comments, and Argument

388k133.6(8) k. Reference to insurance or indemnity. Most Cited Cases

Prejudice created by improper reference to settlement with motorist and his insurer in opening statement in action against another insurer was cured by admonition to jury to disregard any reference to other insurance and possible settlements, and did not require mistrial.

[7] Trial 388 ↪ 18.5

388 Trial

388III Course and Conduct of Trial in General

388k18.3 Role and Obligations of Judge

388k18.5 k. Discretion. Most Cited Cases (Formerly 388k18)

Trial 388 ↪ 43

388 Trial

388IV Reception of Evidence

388IV(A) Introduction, Offer, and Admission of Evidence in General

388k43 k. Admission of evidence in general. Most Cited Cases

(Formerly 388k18)

Trial judge is charged with duty of regulating conduct of trial and keeping from jury irrelevant evidence in order that jury may make fair determination of issues between parties.

[8] Trial 388 ↪ 138

388 Trial

388VI Taking Case or Question from Jury

388VI(A) Questions of Law or of Fact in General

388k138 k. Preliminary or introductory questions of fact. Most Cited Cases (Formerly 388k55)

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While jury is required to have all admissible evidence before them and to be instructed as to applicable law involved in order to freely adjudicate rights, liabilities, and obligations of the parties in the suit, determination of admissibility of evidence is function solely within province of trial judge.

[9] Trial 388 ↪ 178

388 Trial

388VI Taking Case or Question from Jury

388VI(D) Direction of Verdict

388k178 k. Hearing and determination.

Most Cited Cases

Trial judge has much discretion in determining whether to grant motion for directed verdict. LSA-C.C.P. art. 1810.

[10] Trial 388 ↪ 139.1(17)

388 Trial

388VI Taking Case or Question from Jury

388VI(A) Questions of Law or of Fact in General

388k139.1 Evidence

388k139.1(5) Submission to or Withdrawal from Jury

388k139.1(17) k. Insufficiency to support other verdict; conclusive evidence. Most Cited Cases

Trial 388 ↪ 178

388 Trial

388VI Taking Case or Question from Jury

388VI(D) Direction of Verdict

388k178 k. Hearing and determination.

Most Cited Cases

Motion for directed verdict is appropriately granted in jury trial when, after considering all evidentiary inferences in light most favorable to movant's opponent, it is clear that facts and inferences are so overwhelmingly in favor of moving party that reasonable men could not arrive at contrary verdict. LSA-C.C.P. art. 1810.

[11] Insurance 217 ↪ 2660.5

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(A) In General

217k2660 Persons Covered

217k2660.5 k. In general. Most Cited

Cases

(Formerly 217k2660, 217k467.51(3))

Person who does not qualify as "insured" under policy of insurance is not entitled to uninsured motorist coverage. LSA-R.S. 22:1406.

[12] Insurance 217 ↪ 2660.5

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(A) In General

217k2660 Persons Covered

217k2660.5 k. In general. Most Cited

Cases

(Formerly 217k2660, 217k467.51(3))

Employee who was provided automobile for personal and business use was not covered under uninsured motorist provisions of policy issued to employer, where employee was not a named insured under the policy, was not related to named insured, and was not occupying covered automobile at time he was injured.

[13] Insurance 217 ↪ 2660.5

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(A) In General

217k2660 Persons Covered

217k2660.5 k. In general. Most Cited

Cases

(Formerly 217k2660, 217k467.51(3))

Business automobile policy issued to corporation was not rendered ambiguous by defining insured as "you or any family member."

[14] Trial 388 ↪ 384

388 Trial

388X Trial by Court

388X(A) Hearing and Determination of

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Cause

388k381 Rulings on Weight and Sufficiency of Evidence

388k384 k. Dismissal or nonsuit. Most Cited Cases

Unlike motion for directed verdict in jury trial, motion for involuntary dismissal requires judge to evaluate all the evidence and render decision based upon preponderance of the evidence without any specific inferences in favor of opponent to motion. LSA-C.C.P. arts. 1672, subd. B, 1810.

[15] Automobiles 48A ⚡306(4)

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(B) Actions

48Ak306 Weight and Sufficiency of Evidence

48Ak306(4) k. Condition of way. Most Cited Cases

(Formerly 200k211)

Evidence was insufficient to establish that Department of Transportation and Development (DOTD) was responsible for injuries sustained by pedestrian when he was struck by car while crossing highway or that highway was unreasonably dangerous at point pedestrian was crossing; although evidence indicated that there was high accident rate on four-mile stretch of highway and that highway was inadequate to handle traffic volume, no evidence was presented concerning prior accidents in proximity to pedestrian's accident, and accident occurred at night, during time of low traffic volume.

[16] Automobiles 48A ⚡256

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak256 k. Care required as to condition of way in general. Most Cited Cases

(Formerly 200k188)

Generally, Department of Transportation and Development (DOTD) has duty to construct and maintain highways in condition reasonably safe for persons exercising ordinary care and reasonable prudence; however, DOTD is not responsible for every accident which may occur on state highways, nor is it guarantor of safety of travelers thereof.

[17] Automobiles 48A ⚡258

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak258 k. Nature of defects. Most Cited Cases

(Formerly 200k191)

Mere fact that highway may not meet current standards does not in itself establish existence of hazardous defect.

[18] Negligence 272 ⚡233

272 Negligence

272III Standard of Care

272k233 k. Reasonable care. Most Cited (Formerly 272k1)

Generally, "negligence" is defined as conduct which falls below standard established by law for protection of others against unreasonable risk of harm. LSA-C.C. art. 2315.

[19] Appeal and Error 30 ⚡999(3)

30 Appeal and Error

30XVI Review

30XVI(1) Questions of Fact, Verdicts, and Findings

30XVI(1)2 Verdicts

30k999 Conclusiveness in General

30k999(3) k. Questions of fraud or negligence. Most Cited Cases

In reviewing jury's apportionment of fault, Court of Appeal must apply manifest error rule. LSA-C.C. art. 2323.

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[20] Automobiles 48A ↪244(50)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak244 Weight and Sufficiency

48Ak244(41) Contributory Negligence

48Ak244(50) k. Persons crossing highway. Most Cited Cases
(Formerly 272k135(9))

Automobiles 48A ↪244(60)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak244 Weight and Sufficiency

48Ak244(41) Contributory Negligence

48Ak244(60) k. Comparative negligence and apportionment of fault. Most Cited Cases

(Formerly 272k135(9))

Evidence was sufficient to support finding that pedestrian was 49% at fault and motorist was 51% at fault with regard to accident in which pedestrian was hit by motorist while crossing highway; evidence indicated that pedestrian was struck while crossing busy highway after consuming numerous alcoholic beverages, and that motorist was proceeding at a reasonable rate of speed, but never actually saw pedestrian step in front of his vehicle. LSA-C.C. art. 2323.

[21] Insurance 217 ↪2321

217 Insurance

217XVII Coverage--Liability Insurance

217XVII(B) Coverage for Particular Liabilities

217k2317 Employers' Liabilities

217k2321 k. Evidence. Most Cited Cases

(Formerly 217k514.21(3))

Evidence was sufficient to establish that insured's employee was acting within scope and course of his employment at time he was struck by automobile while crossing highway for purposes of excess liability policy issued to employer; evidence indicated that, prior to accident, employee had met with contractor to discuss renovation project at request of employer. (En banc opinion of Carter, J., with four Judges concurring and one Judge concurring in result).

[22] Judgment 228 ↪199(3.2)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in General

228k199 Notwithstanding Verdict

228k199(3.2) k. Evidence and inferences that may be considered or drawn. Most Cited Cases

Judgment 228 ↪199(3.5)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in General

228k199 Notwithstanding Verdict

228k199(3.5) k. Propriety of judgment in general. Most Cited Cases

JNOV should only be granted if trial court, after considering all of the evidence in light most favorable to party opposing motion, finds it points so strongly and overwhelmingly in favor of moving party that reasonable persons could not arrive at contrary verdict on the issue. LSA-C.C.P. art. 1811.

[23] Judgment 228 ↪199(3.6)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in

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General

228k199 Notwithstanding Verdict
228k199(3.6) k. Where evidence is conflicting or where different inferences may be reasonably drawn therefrom. Most Cited Cases
If there is substantial evidence of such quality and weight that reasonable persons might have reached different conclusions, motion for JNOV must be denied. LSA-C.C.P. art. 1811.

[24] Judgment 228 ⚡ 199(3.3)

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k199 Notwithstanding Verdict
228k199(3.3) k. Credibility of witnesses and weight of evidence. Most Cited Cases
In ruling on motion for JNOV, court cannot weigh the evidence, pass on credibility of witnesses or substitute its judgment of facts for that of jury. LSA-C.C.P. art. 1811.

[25] Appeal and Error 30 ⚡ 1024.4

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)6 Questions of Fact on Motions or Other Interlocutory or Special Proceedings
30k1024.4 k. Proceedings relating to judgment. Most Cited Cases
In reviewing grant of motion for JNOV on issues of liability and damages, Court of Appeal must examine record to determine whether trial judge's conclusions on liability and quantum were manifestly erroneous. LSA-C.C.P. art. 1811.

[26] Insurance 217 ⚡ 3343

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3341 Prerequisites for Claim of

Breach or Bad Faith

217k3343 k. Notice, proof, and demand by insured. Most Cited Cases
(Formerly 217k602.6)
"Satisfactory proof of loss" within meaning of statute governing award of penalties and attorney's fees against insurer is that which is sufficient to fully apprise insurer of insured's claim. LSA-R.S. 22:658.

[27] Insurance 217 ⚡ 3343

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3341 Prerequisites for Claim of Breach or Bad Faith
217k3343 k. Notice, proof, and demand by insured. Most Cited Cases
(Formerly 217k602.6)
To establish "satisfactory proof of loss" of uninsured/underinsured motorist's claim, for purposes of statute imposing penalties and attorney's fees upon insurer, insured must establish that insurer received sufficient facts which fully apprised insurer that owner or operator of other vehicle involved in accident was uninsured or underinsured; he or she was at fault; such fault gave rise to damages; and extent of those damages. LSA-R.S. 22:658.

[28] Insurance 217 ⚡ 3349

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3346 Settlement by Liability Insurer
217k3349 k. Insurer's settlement duties in general. Most Cited Cases
(Formerly 217k602.2(1))

Insurance 217 ⚡ 3360

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party In-

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surer

217k3360 k. Duty to settle or pay.
Most Cited Cases

(Formerly 217k602.2(1))

If it has been adequately established that insurer is liable for some general damages, but not precisely how much, insurer must unconditionally tender reasonable amount of damages due or it will be liable for penalties and attorneys' fees under penalty statute; in such instances, reasonable amount due is that amount over which reasonable minds could not differ. LSA-R.S. 22:658.

[29] Insurance 217 ↪ 3381(5)

217 Insurance

217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3378 Actions

217k3381 Evidence

217k3381(5) k. Weight and sufficiency. Most Cited Cases
(Formerly 217k602.9)

In action arising when employee was struck by motorist, evidence that employer's excess insurer was aware that motorist was underinsured, faced exposure on employee's claim, yet refused to tender any money to employee without any probable cause for nonpayment was sufficient to support award of statutory penalties and attorney's fees to employee. (En banc opinion of Carter, J., with two Judges concurring and four Judges concurring in result). LSA-R.S. 22:658.

[30] Interest 219 ↪ 31

219 Interest

219II Rate

219k31 k. Computation of rate in general.
Most Cited Cases

Interest 219 ↪ 39(3)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in

General

219k39(3) k. Interest from date of judgment or decree. Most Cited Cases

Liability insurer could be held liable for legal interest on entire amount of judgment rendered against it, including portion of judgment in excess of policy limits, from date of judgment until paid, where policy contained supplementary payments provision, under which insurer agreed to pay all interest on entire amount of any judgment entered.

*1158 Robert H. Schmolke, Edmund J. Schmidt, III, Baton Rouge, La., for plaintiff Mona Barnes Appellant-Second.

Gary M. Hellman, New Orleans, La., for defendant Charles W. Thames Appellee and Defendant-Aetna Cas. & Sur. Co. appellant-First.

Wood Brown, III, New Orleans, La., for defendant-Reliance Ins. Co/United Pacific Ins. Co., appellee.

Stacey Moak, Baton Rouge, La., for defendant-La. State Dept. of Public Safety appellee.

Pamela Jean Legendre, Slidell, La., for defendant-La. Dept. of Public Safety and Corrections, Office of State Police-Appellee.

Before COVINGTON, C.J., and LOTTINGER, EDWARDS, WATKINS, CARTER, SAVOIE, LANIER, CRAIN, ALFORD ^{FN*}, LEBLANC, FOIL, and DOHERTY ^{FN**} (EN BANC).

FN* Judge Steve A. Alford, Jr., although participating in hearing the oral arguments of this case, did not participate in the decision due to his subsequent death.

FN** Judge Lewis S. Doherty, III, retired, is serving as judge *pro tem* by special appointment of the Louisiana Supreme Court to fill the vacancy created by the temporary appointment of Judge Melvin A. Shortess to the Supreme Court.

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CARTER, Judge.

These consolidated appeals arise out of a suit for personal injuries resulting from a pedestrian-motor vehicle accident.

FACTS

On June 17, 1983, plaintiff, Daniel White (Daniel) was employed in a managerial position by Shop In Denmark, Inc. (SID), a retail furniture business, at its store on St. Charles Avenue in New Orleans. SID had only two shareholders, namely, Daniel's mother Mona Barnes, who also served as the corporation's president, and his uncle, James White. As a benefit of his employment, Daniel was assigned a company automobile,^{FN1} which he was authorized to use for business and personal purposes.

During the late afternoon of June 17, 1983, Daniel drove the automobile to Slidell, Louisiana to meet with Thomas Wolfe, a contractor with Acadian Style Homes (ASH), regarding renovations ASH was performing on certain premises located in Metairie, Louisiana. Warren Jack, a subcontractor on the Metairie project, was also present at the ASH office that afternoon.

After Daniel's meeting with Wolfe, Jack invited Daniel to a lounge located across U.S. Highway 11 from the ASH office to discuss the renovation project further. Daniel agreed, leaving his car parked at the ASH office, and walked across Highway 11 to the Quarter Note Lounge. Jack testified that he and Daniel remained at the lounge for several hours discussing problems they were having with completion of the work on the Metairie premises.

Thereafter, Daniel left the lounge to return to his vehicle. As he attempted to walk across Highway 11, he was struck by an automobile driven by Charles W. Thames. As a result of this accident, Daniel suffered numerous and severe personal injuries, including brain damage.^{FN1}

FN1. Daniel was also rendered mentally incompetent by his injuries, and he was

subsequently interdicted. Barnes was appointed as provisional curator.

On January 24, 1984, Barnes filed suit on behalf of Daniel for the injuries he sustained as a result of the automobile-pedestrian accident. Named as defendants were: Charles W. Thames and his liability insurer, Fireman's Fund Insurance Company; Reliance/United Pacific Insurance Company (Reliance), uninsured/underinsured motorist insurer of SID; Aetna Casualty & Surety Company (Aetna), SID's alleged excess insurer; the State of Louisiana through the Department of Public Safety and Corrections; and, the State of Louisiana through the Department of Transportation and Development (the two departments are collectively referred to as the "State").^{FN2}

FN2. Barnes also named numerous other parties as defendants, none of who are relevant to this appeal.

Prior to trial of this matter, plaintiff settled with and released Thames and his insurer, Fireman's Fund, for the policy limits of \$50,000.00. The matter proceeded to trial against the remaining defendants, the judge determining the liability of the State and the jury determining the liability of the other defendants.^{FN3}

FN3. The parties jointly stipulated that Daniel suffered damages of \$3.5 million.

At the conclusion of plaintiff's case, the trial court granted motions for directed verdict by Reliance and the State dismissing plaintiff's suit against them. The matter proceeded to trial against Aetna, the only remaining defendant. After trial, the jury returned a special verdict finding that Thames was 51% and Daniel was 49% at fault, that Daniel was acting in the course and scope of his duties as an employee of SID at the time of the accident, and that Aetna was arbitrary and capricious or acted without probable cause in failing to pay plaintiff's claim. Since Aetna stipulated to quantum of \$3,500,000.00 and the jury had found Daniel 49%

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at fault in causing his own injuries, the trial court determined that plaintiff was entitled to damages of \$1,785,000.00, subject to a credit of \$50,000.00 for the settlement received from Thames and his insurer. Accordingly, judgment was rendered in favor of plaintiff and against Aetna for the \$1,000,000.00 limit of Aetna's policy, together with legal interest from January 27, 1984, until paid and all costs. The judgment also cast Aetna for penalties of 12% pursuant to LSA-R.S. 22:658, attorney's fees to be fixed at a later date, and 12% interest on the penalties and attorney's fees from date of judicial demand until paid. Additionally, Aetna was cast for 12% interest on \$735,000.00 (the amount by which the judgment exceeded the policy limits) from the date of judgment until paid.

Thereafter, Aetna filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial on several grounds. The trial court granted Aetna's *1160 motion on the issue of statutory penalties and attorney's fees finding that Aetna's refusal to pay plaintiff's claim was not arbitrary and capricious. In all other respects, Aetna's motion was denied.

From these adverse judgments, Aetna and plaintiff appeal. Aetna assigns the following errors:

1. The trial court erred in failing to grant defendant's motion for a mistrial as a result of the plaintiff's introduction to the jury of the settlement between the plaintiff and Charles W. Thames.
2. The court erred in allowing the plaintiff to submit evidence which expanded the pleadings.
3. The court erred in denying appellant's motion to strike witness and/or restrict testimony at trial.
4. The verdict rendered by the jury was in error in assigning fifty-one (51%) percent comparative negligence to Charles W. Thames.
5. The jury erred in determining that Daniel

White was in the course and scope of his employment with Shop in Denmark, Inc. at the time of the accident. The trial court erred in denying appellant's motion for directed verdict on the same issue.

6. The court erred in denying the admissibility of extrinsic evidence to impeach the credibility of a witness.

7. The court erred in casting the appellant to pay twelve (12%) percent interest on the amount of the judgment which exceeds its policy limits.

8. The trial court erred in failing to allow defense counsel to question the witness, David Vasterling, immediately after his cross-examination.

9. In the event that this honorable court grants plaintiff's appeal, thereby overturning the trial court's directed verdict in favor of Reliance/United Pacific Insurance Company, the excess umbrella policy issued by Aetna Casualty & Surety Company to Shop in Denmark, Inc. cannot be "stacked" upon the underlying Reliance/United Pacific policy.

Plaintiff assigns the following specifications of error:

1. In support of plaintiff's contention that the Louisiana Department of Transportation and Development was negligent in its maintenance of U.S. 11 and that this negligence contributed to Daniel White's accident, plaintiff established that U.S. 11, as one of the state's oldest intrastate highways, had not been upgraded to facilitate the increased volume of traffic and that this failure produced a hazardous condition; therefore the Trial Court's dismissal of the Louisiana Department of Transportation and Development after plaintiff's case on the merits constituted reversible error.

2. Daniel J. White, as an employee of Shop In Denmark, Inc. and in the course and scope of his

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job at the time of his accident, stands in the shoes of his employer for purposes of uninsured motorist coverage under the policy issued by Reliance/United Pacific Insurance Company to Shop in Denmark, Inc.; and the Trial Court's dismissal of Reliance/United Pacific on the issue of coverage following the close of the plaintiff's case constituted reversible error.

3. Within three months after being brought into the present case, Aetna Casualty and Surety Company acknowledged that Daniel J. White was an insured under the policy issued to Shop in Denmark, Inc., that Charles Thames was at fault in causing the accident, and that Mr. Thames' fault caused Dan White damages in excess of one million dollars; therefore the Trial Court's judgment notwithstanding the jury's verdict which dismissed plaintiff's award of statutory penalties against Aetna Casualty and Surety Company constituted reversible error.

Plaintiff also filed an answer to Aetna's appeal contending that the trial court erred in directing verdicts in favor of Reliance and the State, in finding Daniel 49% at fault in causing the accident, and in granting Aetna's judgment notwithstanding the verdict.

By judgment dated August 18, 1989, this court consolidated the two appeals.

*1161 MOTION FOR MISTRIAL

Aetna contends that the trial court erred in refusing to grant its motion for mistrial. Aetna reasons that an alleged improper statement regarding plaintiff's pre-trial settlement with Thames made during plaintiff's opening statement tainted the jury's verdict.

[1][2] The Louisiana Code of Civil Procedure does not expressly provide for mistrials, and the jurisprudence concerning motions for mistrial in civil cases is limited. Generally, mistrials are properly granted because of some fundamental failure in the proceeding. *Searle v. Travelers Insurance Com-*

pany, 577 So.2d 321, 323 (La.App. 4th Cir.1990). Generally, a motion for mistrial in a civil case should be granted under the following circumstances: (1) when, before the trial ends and the judgment is rendered, the trial judge determines that it is impossible to reach a proper judgment because of some error or irregularity; and (2) where no other remedy would provide relief to the moving party. *Searle v. Travelers Insurance Company*, 577 So.2d at 323. *See Spencer v. Children's Hospital*, 432 So.2d 823, 825-26 (La.1983).

[3][4][5] Motions for mistrial should also be granted upon proof of prejudicial misconduct occurring during a jury trial, which cannot be cured by admonition or instruction. *Searle v. Travelers Insurance Company*, 577 So.2d at 323. Because a mistrial results in the discharge of one jury and the impaneling of another to try the case anew, it is a drastic remedy. *Burks v. McKean*, 559 So.2d 921, 926 (La.App. 2nd Cir.), *writ denied*, 566 So.2d 398 (La.1990). The trial judge is vested with broad discretion to grant a motion for mistrial where no other remedy would afford relief or where circumstances indicate that justice may not be done if the trial continues. *Burks v. McKean*, 559 So.2d at 926; *Streeter v. Sears, Roebuck and Company, Inc.*, 533 So.2d 54, 62 (La.App. 3rd Cir.1988), *writ denied*, 536 So.2d 1255 (La.1989). This court should not disturb the trial court's determination unless there was an abuse of discretion. *See Streeter v. Sears, Roebuck and Company, Inc.*, 533 So.2d at 62.

[6] In the instant case, during plaintiff's opening statement to the jury, counsel for plaintiff made the following remarks:

As a jury, your duty is going to be to determine if Aetna and Reliance Insurance Company have any fault in this matter. You ask yourself as insurance companies, how do they have any fault? They stand in the shoes of Mr. Charles Thames. Mr. Thames was a defendant in this case. He was sued by Dan White. That has since been settled. His insurance company-

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Counsel for Aetna immediately objected. Outside the presence of the jury, counsel for each side presented their argument. Whereupon the trial judge determined that, since the parties stipulated quantum of \$3.5 million, which was clearly in excess of the primary insurance, an admonishment would be sufficient in the instant case. When the jury returned, the trial judge instructed the jury to disregard any reference to other insurance and any possible settlements.

We are of the opinion that the trial court did not abuse its discretion in refusing to grant defendant's motion for mistrial after the judge's admonition to the jury. The admonition requested by defendant was given by the court and was a sufficient remedy to overcome any prejudicial effect on the jury.

EVIDENTIARY MATTERS

Aetna contends that the trial court erred in ruling on numerous evidentiary matters. Specifically, Aetna contends that the trial court erred in permitting plaintiff to elicit factual testimony that did not stringently conform to the allegations pleaded in his petition.^{FN4} In connection therewith, Aetna *1162 contends that the trial court erred in refusing to strike or restrict the trial testimony of plaintiff's accident reconstruction expert, John Ringol, in that Ringol allegedly espoused a different theory of the accident at trial than he had during his deposition. Aetna also contends that the trial court erred in refusing to admit extrinsic evidence of Daniel's prior DWI conviction to impeach the credibility of his brother, Tom. Finally, Aetna contends that the trial court erred in refusing to permit Aetna to question its witness, David Vasterling, immediately after plaintiff's cross-examination of Vasterling in his case in chief.

FN4. Aetna reasons that, in his petition, plaintiff alleged one possible scenario for the accident and that, at trial, plaintiff's evidence supported a different factual scenario, i.e. whether plaintiff was struck from the rear, as alleged in his pleadings,

or from the right, as testified to by the accident reconstruction expert.

[7][8] The trial judge is charged with the duty of regulating the conduct of the trial and keeping from the jury irrelevant evidence in order that the jury may make a fair determination of the issues between the parties. *Wexler v. Occhipinti*, 378 So.2d 1073, 1078 (La.App. 4th Cir.1979), writ denied, 381 So.2d 1232 (La.1980). While the jury is certainly required to have all admissible evidence before them and to be instructed as to the applicable law involved in order to fairly adjudicate the rights, liabilities, and obligations of the parties in the suit, the determination of the admissibility of evidence is a function solely within the province of the trial judge. *Hawthorne v. Southeastern Fidelity Insurance Co.*, 387 So.2d 26, 30-31 (La.App. 3rd Cir.1980). Further, whether evidence is relevant or not is within the discretion of the trial court, and its ruling will not be disturbed absent a clear abuse of discretion. *Citizens Bank & Trust Co. v. Consolidated Terminal Warehouse, Inc.*, 460 So.2d 663, 670 (La.App. 1st Cir.1984).

Our review of the record in the instant case reveals that the trial judge carried out his duties and that he did not abuse his discretion in so doing.

DIRECTED VERDICT AND INVOLUNTARY DISMISSAL

Plaintiff contends that the trial court erred in granting Reliance's motion for directed verdict and the State's motion for involuntary dismissal.

Motion for Directed Verdict

LSA-C.C.P. art. 1810 provides that:

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury even though all parties to the action have moved for

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directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

[9][10] A trial judge has much discretion in determining whether or not to grant a motion for a directed verdict. A motion for directed verdict is appropriately granted in a jury trial when, after considering all evidentiary inferences in the light most favorable to the movant's opponent, it is clear that the facts and inferences are so overwhelmingly in favor of the moving party that reasonable men could not arrive at a contrary verdict. *Lucas v. St. Frances Cabrini Hospital*, 562 So.2d 999, 1006 (La.App. 3rd Cir.), writs denied, 567 So.2d 101, 103 (La.1990); *Purvis v. American Motors Corporation*, 538 So.2d 1015, 1019 (La.App. 1st Cir.1988), writ denied, 541 So.2d 900 (La.1989); *Pritchard v. Safeco Insurance Company*, 529 So.2d 449, 452-53 (La.App. 1st Cir.), writ denied, 532 So.2d 159 (La.1988).

[11] The Louisiana Uninsured Motorist Statute LSA-R.S. 22:1406, in effect at the time of the accident, required that insurance policies provide uninsured motorist coverage for a person qualified as an "insured" under the policy. However, a person who does not qualify as an "insured" under the policy of insurance is not entitled to uninsured motorist coverage. *Seaton v. Kelly*, 339 So.2d 731, 734 (La.1976); *1163 *Pierron v. Lirette*, 468 So.2d 1305, 1307 (La.App. 1st Cir.1985).

[12] In the instant case, the Reliance policy was issued to SID, the "named insured" under the policy. Daniel was an employee of SID and was provided an automobile for personal and business use which was insured by the Reliance policy with both liability and uninsured motorist coverage.

Plaintiff contends that the trial court erred in granting Reliance's motion for directed verdict. Plaintiff reasons that, under the clear and unambiguous language of the Reliance policy, Daniel, as an employee of SID, stands in the shoes of SID and

is covered under the uninsured motorist provisions.

The uninsured motorist provisions of the Reliance policy defines an insured as follows:

1. **You or any family member.**

2. Anyone else **occupying** a covered **auto** or a temporary substitute for a covered **auto**. The covered **auto** must be out of service because of its breakdown, repair, servicing, loss or destruction.

3. Anyone for damages he is entitled to recover because of **bodily injury** sustained by another **insured**.

"You" is defined in the policy as "the person or organization shown as the named insured in ITEM ONE of the declarations."

Daniel was not a named insured under the policy. The named insured is SID. See *Bryant v. Protective Casualty Insurance Company*, 554 So.2d 177, 178-79 (La.App. 2nd Cir.1989), writ denied, 558 So.2d 1129 (La.1990); *Rodriguez v. Continental Casualty Company*, 551 So.2d 45, 47 (La.App. 1st Cir.1989); *Pierron v. Lirette*, 468 So.2d at 1308; *Morris v. Mitchell*, 451 So.2d 192, 193 (La.App. 1st Cir.1984). But see *Employers Insurance Company of Wausau v. Dryden*, 422 So.2d 1243, 1245 (La.App. 1st Cir.1982), wherein a policy issued to the "Terrebonne Parish Sheriff's Office" was determined to include the sheriff and all of the deputies of the named insured. (Emphasis added). Daniel is not a "family member" under the policy. The policy defines "family member" as a "person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child." Since the named is a corporation, Daniel can not be related by blood, adoption, or marriage to the named insured. See *Bryant v. Protective Casualty Insurance Company*, 554 So.2d at 178; *Rodriguez v. Continental Casualty Company*, 551 So.2d at 47. Finally, Daniel was not occupying a covered automobile. See *Bryant v. Protective*

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Casualty Insurance Company, 554 So.2d at 179; *Rodriguez v. Continental Casualty Company*, 551 So.2d at 47; *Pierron v. Lirette*, 468 So.2d at 1308; *Morris v. Mitchell*, 451 So.2d at 194. *But see Employers Insurance Company of Wausau v. Dryden*, 422 So.2d at 1245, wherein the deputy was determined to have been occupying an insured vehicle.

Because Daniel is not a named insured, is not related to the named insured, and was not occupying a covered automobile, he did not fit within the definition of an "insured" and was not covered by the uninsured motorist provisions of the Reliance policy.

[13] We find no merit in plaintiff's contention that since the policy in question is a business automobile policy issued to a corporation, the definition of an insured as "you or any family member" renders the policy ambiguous. *Bryant, Rodriguez*, and *Pierron* involved policies issued to a municipality or corporations and contained policy language similar, if not identical, to the language in the instant case. These provisions were found to have a clear meaning and were not considered ambiguous in those cases. Nor do we find it to be ambiguous herein.

A motion for directed verdict may be granted under LSA-C.C.P. art. 1810 when the facts and inferences, considered in the light most favorable to the opposing party, point so strongly in favor of granting a directed verdict that reasonable persons could not reach a contrary conclusion. *Pritchard v. Safeco Insurance Company*, 529 So.2d at 452-53. This standard was met herein. Under the clear and unambiguous*1164 terms of the Reliance policy, Daniel was not an insured and reasonable persons could not have concluded otherwise. The trial judge did not err in granting Reliance's motion for directed verdict.

Motion for Involuntary Dismissal

LSA-C.C.P. art. 1672 B provides as follows:

In an action tried by the court without a jury,

after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

[14] Unlike a motion for directed verdict in a jury trial, LSA-C.C.P. art. 1672 B requires a judge to evaluate all the evidence and render a decision based upon a preponderance of the evidence without any special inferences in favor of the opponent to the motion. *Fuller v. Wal-Mart Stores, Inc.*, 519 So.2d 366, 369 (La.App. 2nd Cir.1988). Proof by a preponderance of the evidence simply means that taking the evidence as a whole, such proof shows that the fact or cause sought to be proved is more probable than not. *Fuller v. Wal-Mart Stores, Inc.*, 519 So.2d at 369.

[15] In the instant case, plaintiff contends that the State is liable because it "failed to improve and maintain U.S. 11, and as a result U.S. 11 was unreasonably dangerous to the traveling public." He further maintains that this alleged failure was a contributing cause of the accident. In support of this position, plaintiff relies on the testimony of Dr. Olin Dart, an expert in highway design. Dr. Dart opined that, although Highway 11 met all Louisiana Department of Transportation and Development (DOTD) minimum standards for a two-lane highway, considering the volume of traffic it carried, it should have been upgraded according to current standards to at least a four-lane highway. He indicated that the safety of Highway 11 could have also been enhanced by better lighting, a lower speed limit, and the stricter enforcement of a prohibition against cars parking on the shoulders of the highway in the area of Quarter Note Lounge.

[16] Generally, DOTD has a duty to construct and maintain highways in a condition reasonably

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safe for persons exercising ordinary care and reasonable prudence. *Robinson v. Estate of Haynes*, 509 So.2d 128, 131 (La.App. 1st Cir.1987). However, the law is well-settled that DOTD is not responsible for every accident which may occur on the state highways, nor is it a guarantor of the safety of travelers thereof. *Robinson v. Estate of Haynes*, 509 So.2d at 131.

In an attempt to substantiate his contention that Highway 11 was unreasonably dangerous, plaintiff introduced accident statistics to show a high accident rate. However, on cross-examination Dr. Dart admitted that these statistics applied to a section of Highway 11 four miles in length. He admitted that he could not say that any of the accidents included in these statistics occurred in the proximity of Daniel's accident.

[17] Additionally, Dr. Dart stressed that according to the volume of traffic, Highway 11 should have been enlarged to at least a four-lane highway under current standards. The instant accident, however, occurred at night when the flow of traffic was very light and the purported volume deficiency had no causative effect on this accident. Further, the mere fact that a highway may not meet current standards does not in itself establish the existence of a hazardous defect. *Jones v. State, Department of Transportation and Development*, 536 So.2d 446, 448 (La.App. 1st Cir.1988), writ denied, 537 So.2d 212 (La.1989); *Robinson v. Estate of Haynes*, 509 So.2d at 134. Moreover, even though Dr. Dart felt the highway was inadequate for the volume of traffic it handled and that certain improvements would make it safer, he did not state an opinion that Highway 11 was *1165 unreasonably dangerous. Nor does the evidence support such a conclusion.

After carefully reviewing the entire record, we cannot say the trial judge erred in his conclusion that plaintiff failed to establish, by a preponderance of the evidence, that the State was guilty of any negligence causing injury to Daniel or that at the point of this accident Highway 11 was unreason-

ably dangerous. It clearly was not shown by a preponderance of the evidence that any of the factors of which plaintiff complained created an unreasonably dangerous condition or that these factors were a cause-in-fact of plaintiff's injuries.

Accordingly, we find that the trial judge did not err in granting the State's motion for involuntary dismissal.

COMPARATIVE FAULT

In his answer to Aetna's appeal, plaintiff contends that the jury erred in assessing him with 49% of the fault.

[18] Under the Civil Code, every act of a person that causes damage to another obliges the one by whose fault it happened to repair it. LSA-C.C. art. 2315. Generally negligence is defined as conduct which falls below the standard established by law for the protection of others against an unreasonable risk of harm. *Dobson v. Louisiana Power and Light Company*, 567 So.2d 569, 574 (La.1990); Restatement (Second) of Torts, § 282 (1965); Harper, James & Gray, *The Law of Torts*, § 16.1 at 381-382 (1986); Prosser & Keeton on Torts, § 31 (5th ed. 1984).

When contributory negligence is applicable to a claim for damages and a person suffers injury, death or loss partly as a result of his own negligence and partly as a result of the fault of another person, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss. LSA-C.C. art. 2323; *Dobson v. Louisiana Power and Light Company*, 567 So.2d at 574; *Williams v. Stevenson*, 558 So.2d 1204, 1207 (La.App. 1st Cir.), writ denied, 564 So.2d 324 (La.1990).

Previously, in *Watson v. State Farm Fire and Casualty Insurance Co.*, 469 So.2d 967 (La.1985), the Louisiana Supreme Court set forth guidelines for applying the mandate of LSA-C.C. art. 2323 as

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follows:

We recognize that a standard for determining percentages of fault has not been provided by the Legislature, and we are therefore presented with an opportunity to offer guidelines as we apportion fault in this instance. In so doing we have looked to the Uniform Comparative Fault Act, 2(b) and Comment (as revised in 1979), which incorporates direction for the trier of fact. Section 2(b) provides:

In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. And, of course, as evidenced by concepts such as last clear chance, the relationship between the fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties. (Footnotes omitted).

469 So.2d at 973-974.

In *Dobson v. Louisiana Power and Light Company*, 567 So.2d at 574-75, the Louisiana Supreme Court held that the test for determining whether a risk is unreasonable is supplied by the "Hand formula," which is also appropriate to measure and compare the negligence or fault of one person with that of another and provides a *1166 methodology for accommodating and weighing all of these factors, including the factors previously espoused

in *Watson v. State Farm Fire and Casualty Insurance Co.*

The Hand formula helps to "center attention upon which one of the factors may be determinative in any given situation" and provides as follows:

The amount of caution "demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice, or the cost of the precaution he must take, to avoid the risk." If the product of the likelihood of injury multiplied times the seriousness of the injury exceeds the burden of the precautions, the risk is unreasonable and the failure to take precautions or sacrifice the interest is negligence. (citations omitted).

567 So.2d at 574-575.

[19] When reviewing a jury's apportionment of fault, this court must apply the manifest error rule. See *Lirette v. State Farm Insurance Company*, 563 So.2d 850, 852 (La.1990); *Williams v. Stevenson*, 558 So.2d at 1207.

[20] In the instant case, Daniel, after spending several hours in a local lounge consuming numerous alcoholic beverages, left the lounge, crossed a busy highway, and was struck by a passing motorist. Thames was proceeding along the highway at a reasonable rate of speed, but never actually saw Daniel step in front of his vehicle. After carefully weighing their conduct in light of the Hand formula and the *Watson* factors, we find that the jury, in apportioning the parties' relative degree of fault, was not clearly wrong in finding Daniel 49% at fault and Thames 51% at fault. We have reviewed the evidence and conclude that this court has no basis for substituting a different view of the evidence and reallocating the percentages of fault and that the jury made reasonable inferences of fact, which were not clearly wrong.

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COURSE AND SCOPE OF EMPLOYMENT

[21] Aetna contends Daniel's injuries are not covered under the excess indemnity policy because Daniel was not an insured under the policy at the time of his injury.^{FN5}

FN5. We note that the Aetna policy did not specifically provide for uninsured motorist coverage. However, since there was no valid waiver of such coverage, the policy must be construed under the dictates of *Southern American Insurance Company v. Dobson*, 441 So.2d 1185 (La.1983) as providing uninsured motorist protection. Additionally, Aetna did not appeal the trial court determination that its policy provided such coverage. Therefore, this issue is not before us on appeal.

Section 3.1(d) of the Aetna policy provides that an insured under the policy includes any "employee ... of the *named insured* [SID] **while acting within the scope of his duties as such** ..." (bolding added). There is no question that Daniel was an employee of SID, however, the dispositive issue is whether Daniel was "acting within the scope of his duties as such" at the time of his injury.

It is undisputed that the subject of the meeting Daniel attended on the afternoon of the accident concerned renovations being performed on the Metairie premises preparatory to its opening as a retail furniture store. It is also undisputed that the lease for these premises and the contract for renovations were executed by Barnes on behalf of Monasco International, Inc. (Monasco). The uncontradicted testimony of Jack reveals that Daniel discussed the renovation project the entire time they were together in the Quarter Note Lounge. Nevertheless, Aetna contends that, on the day of the accident, the business Daniel and Jack undertook was on behalf of Monasco and not SID. Aetna reasons that, as a result, Daniel was not within the scope of his duties for SID.

Usually, course and scope of employment

questions arise in worker's compensation cases. However, regardless of the context in which such questions arise, the legal *1167 principles applied in making such determinations are the same. *Castille v. All American Insurance Company*, 550 So.2d 334, 336 (La.App. 3rd Cir.1989), *writ denied*, 556 So.2d 1261 (La.1990); *Hebert v. Witherington*, 520 So.2d 1075, 1077 (La.App. 3rd Cir.1987), *writ denied*, 522 So.2d 566 (La.1988).

In *Johnson v. Dufrene*, 433 So.2d 1109 (La.App. 4th Cir.1983), the court correctly and succinctly set forth the guidelines to determine whether an employee is within the course and scope of his employment as follows:

The specific inquiry is whether the employee's tortious conduct "was so closely connected in time, place and causation to his employment duties as to be regarded a risk of harm fairly attributable to the employer's business, as compared with conduct motivated by purely personal considerations entirely extraneous to the employer's interest." *Daniels v. Conn*, 382 So.2d 945 (La.1980); *LeBrane v. Lewis*, 292 So.2d 216 (La.1974). In those instances where the injury is caused by an employee's negligence while driving a vehicle owned by his employer, our jurisprudence has repeatedly stated that every case must be decided on its own facts. The important considerations which bear on the result are whether the vehicle was being used in such a manner as to *benefit* the employer. *Taylor v. Lumpkin*, 391 So.2d 74 (La.App. 4th Cir.1980); whether the employee was subject to the employer's *control* at the time of the accident, *Keen v. Pel State Oil Co., Inc.*, 332 So.2d 286 (La.App. 2d Cir.1976); whether the employee's use of the vehicle was *authorized* by the employer, *Harding v. Christiana*, 103 So.2d 301 (La.App. Orleans 1958); *Futch v. W. Horace Williams Co.*, 26 So.2d 776 (La.App. 1st Cir.1946); *reh. den.*, 27 So.2d 184 (La.App.1946); and whether the employee's *motive* arose from personal objectives or, instead, from his employer's concerns, *Keen*,

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supra, *Johns v. Hunt Lumber Company, Inc.*, 250 So.2d 543 (La.App. 2d Cir.1971).

433 So.2d at 1112. *See also Mattingly v. State, Department of Health and Human Resources*, 509 So.2d 82, 84 (La.App. 1st Cir.), *writ denied*, 512 So.2d 461 (La.1987).

In *McGee v. State Farm Mutual Automobile Insurance Company*, 428 So.2d 1287 (La.App. 3rd Cir.1983), our brethren of the Third Circuit discussed the difference between the phrases “scope of” and “in the course of” as follows:

We also place emphasis on the use of the phrase “scope of their duties” in the policy rather than the worker's compensation phrases, “arising out of” (scope) and “in the course of”. These two worker's compensation terms have been held to not be synonymous. The former deals with whether the employee was engaged in his employer's business or his own and the latter concerns the time and place relationship between the risk and the employment. *Renfroe v. City of New Orleans*, 394 So.2d 787 (La.App. 4th Cir.1981), *writ denied*, 399 So.2d 621 (La.1981). Similarly, the Supreme Court in *LeBrane v. Lewis*, 292 So.2d 216 (La.1974), pointed out the difference between “scope” and “course” of employment in this fashion:

“However, technically, ‘course of’ may refer more to the time and place of employment, while ‘scope of’ refers more to while being engaged in the functions for which employed.”

428 So.2d at 1289.

In the instant case, an examination of the record reveals that SID originally began business in 1973 as a partnership between White and Barnes. White provided the capital for the venture, and Barnes operated the business. Their ownership interests were 40% and 60%, respectively. The business was subsequently incorporated in 1975, with the parties retaining their respective interests in the

corporation's stock. Barnes served as the corporation's president, and White served as its vice-president and secretary, although White had no function in the daily operation of the corporation.

On July 9, 1982, Barnes incorporated Monasco with herself as the sole shareholder. The name “Monasco” was an acronym for *1168 “Mona's company.” Although this corporation was initially formed with no specific purpose in mind, Barnes subsequently intended to operate the corporation for the sale of furniture. Barnes testified Monasco was merely a paper corporation with no assets, employees, bank accounts, or insurance, but Monasco had a separate tax identification number and apparently filed separate tax returns.

At some point, Barnes became interested in opening a second furniture store. She testified that a corporate resolution was necessary for SID to open a second location, but that White was initially disinterested in the proposition. Although a corporate resolution was not signed, formally authorizing the venture, on July 19, 1982, Barnes on behalf of Monasco, executed a lease for certain premises in Metairie for the operation of a “retail furniture store.” The lease was to commence on March 1, 1983. ^{FN6} Barnes was listed as guarantor on this lease and her personal address was listed as the tenant's address.

FN6. The tenant was listed at one space on the lease as “Monasco International, Inc. d/b/a Shop in Denmark,” although elsewhere on the lease it was referred to as Monasco International, Inc.

Thereafter, in August of 1982, a problem arose regarding the renewal of the lease of the SID store on St. Charles Avenue. Barnes testified that the lessor did not wish to conduct any business with White, and, as a result, the St. Charles Avenue store was eventually leased to Monasco, which then subleased it to SID.

On May 11, 1983, Monasco, through Barnes,

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entered into a contract with ASH to perform renovations to the interior of the Metairie furniture store. Although no payments were made on this work prior to the accident, Barnes testified that, after the accident, payments were made with SID proceeds. The store in Metairie was eventually opened on November 2, 1983, as the "Denmark Shop" as a branch store of SID.

While a question may exist as to whether Barnes, as president and majority shareholder of SID, was expressly authorized by SID's board of directors to complete the Metairie branch venture, this issue is not pertinent as to whether Daniel was acting within the scope of his employment with SID at the time of the accident.

The evidence, mostly established through the un rebutted testimony of Barnes, reveals that at the time of the accident, Daniel was an employee and manager of SID. Barnes testified that SID paid Daniel's salary and provided him with transportation and that at no time was Daniel employed by Monasco. In describing Daniel's duties, Barnes testified that Daniel handled deliveries, advertising, sales, and purchasing and oversaw the warehouse and displays. On the day of the accident, Daniel informed Barnes of his planned meeting with Wolfe. Although Barnes acknowledged that she would have preferred that Daniel remain at the store, she testified that, after Daniel assured her he would take care of everything before he left, she assented to his meeting in Slidell.

The record is devoid of any evidence that Daniel was in Slidell or was meeting with Wolfe or Jack for any personal reasons. Rather, the record amply supports the jury's finding that Daniel was in Slidell in furtherance of his employer's interest and at the request of his employer. Accordingly, we conclude that, the jury correctly determined that at the time of his accident Daniel was acting within the scope of his duties as an employee of SID.

JUDGMENT NOV

[22][23][24] In ruling on a motion for JNOV

under LSA-C.C.P. art. 1811, the trial court is required to employ the following legal standard: A JNOV should only be granted if the trial court, after considering all of the evidence in the light most favorable to the party opposed to the motion, finds it points so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict on the issue. *Adams v. Security Insurance Company of Hartford*, 543 So.2d 480, 486 (La.1989); *Bergeron v. Main Iron Works, Inc.*, 563 So.2d 954, 956 (La.App. 1st Cir.), writs denied, *1169569 So.2d 960, 965 (La.1990); *Cosie v. Aetna Casualty & Surety Insurance Co.*, 527 So.2d 1105, 1107 (La.App. 1st Cir.1988). However, if there is substantial evidence of such quality and weight that reasonable persons might have reached different conclusions, the motion must be denied. *Bergeron v. Main Iron Works, Inc.*, 563 So.2d at 956. In applying this standard, the court cannot weigh the evidence, pass on the credibility of the witnesses, or substitute its judgment of the facts for that of the jury. *Pitts v. Bailes*, 551 So.2d 1363, 1373 (La.App. 3rd Cir.1989), writs denied, 553 So.2d 860 (La.1989) and 556 So.2d 1262 (La.1990).

[25] In reviewing the grant of a motion for JNOV on the issues of liability and damages, the Court of Appeal must examine the record to determine whether the trial judge's conclusions on liability and quantum were manifestly erroneous. *Pitts v. Bailes*, 551 So.2d at 1373; *Cosie v. Aetna Casualty & Surety Insurance Co.*, 527 So.2d at 1107.

[26] A claimant for penalties and attorney's fees under the statute has the burden of proving that the insurer failed to pay the claim within 60 days after receiving "satisfactory proof of loss" of the claim and that the insurer was arbitrary or capricious in failing to pay. LSA-R.S. 22:658.^{FN7} A "satisfactory proof of loss" within the meaning of LSA-R.S. 22:658 is that which is sufficient to fully apprise the insurer of the insured's claim. *McDill v. Utica Mutual Insurance Company*, 475 So.2d 1085,

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1089 (La.1985); *Hart v. Allstate Insurance Company*, 437 So.2d 823, 828 (La.1983).

FN7. By Acts 1989, No. 638, § 1, the Legislature amended LSA-R.S. 22:658 reducing the time limit within which the insurer must pay the claim from 60 to 30 days.

[27] To establish “satisfactory proof of loss” of an uninsured/underinsured motorist's claim, the insured must establish that the insurer received sufficient facts which fully apprise the insurer that (1) the owner or operator of the other vehicle involved in the accident was uninsured or underinsured; (2) he was at fault; (3) such fault gave rise to damages; and (4) the extent of those damages. *McDill v. Utica Mutual Insurance Company*, 475 So.2d at 1089; *Hart v. Allstate Insurance Company*, 437 So.2d at 828.

[28] If it has been adequately established that an insurer is liable for some general damages, but not precisely how much, the insurer must unconditionally tender the reasonable amount of damages due or it will be liable for penalties and attorney's fees under LSA-R.S. 22:658. *McDill v. Utica Mutual Insurance Company*, 475 So.2d at 1091; *Hardy v. Cumis Insurance Company*, 558 So.2d 625, 628 (La.App. 1st Cir.), writ denied, 559 So.2d 1385 (La.1990). In such instances, the reasonable amount due is that amount over which “reasonable minds could not differ.” *McDill v. Utica Mutual Insurance Company*, 475 So.2d at 1092; *Hardy v. Cumis Insurance Company*, 558 So.2d at 628.

Therefore, in order to prevail on the claim for penalties and attorney's fees in the instant case, Daniel was required to establish that Aetna received “satisfactory proof of loss,” that Aetna failed to pay his claim within 60 days of receipt of such proof of loss, and that Aetna was arbitrary and capricious in failing to pay his claim.

Satisfactory proof of loss

[29] The testimony of David Vasterling and Aetna's internal documents establish that by

September of 1984, Aetna was aware that Thames was underinsured in that his policy provided only \$50,000.00 in coverage. Aetna also determined that Thames was at least partially at fault in causing the accident in that Aetna estimated their liability at approximately 25%. Aetna based this estimation on the great burden placed upon a driver of a vehicle to observe pedestrians. Further, as early as August of 1984, Aetna was aware of the irreversible brain damage Daniel suffered. Later estimates show that Aetna acknowledged that the claim was valued at \$1.3 million. Additionally, Aetna's internal documents also reveal that it realized Daniel was insured under its policy.

*1170 Considering the foregoing, we find that by September of 1984, Aetna was fully apprised of Daniel's claim.

Failure to pay within 60 days

The evidence is uncontradicted that Aetna failed to pay Daniel any sum for the damages he sustained. Vasterling acknowledged that despite his evaluation of Aetna's exposure on the claim at approximately \$325,000.00, Aetna had, as of the date of trial, failed to tender *any* amount to its insured. Clearly, Aetna failed to pay the claim within 60 days.

Arbitrary and capricious

In the present case, there is little question that Aetna should have tendered some amount to Daniel. However, it consistently and steadfastly refused to tender any sum whatsoever. The facts do not support any probable cause for non-payment.

Based upon the evidence, we find that the trial court erred in granting Aetna's motion for JNOV. ^{FN8} Considering all of the evidence in the light most favorable to Daniel, the evidence does *not* point so strongly and overwhelmingly in favor of Aetna that reasonable persons could not arrive at a contrary verdict.

FN8. Prior to the trial court's granting of the JNOV, the judgment awarded plaintiff

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attorney's fees, but specifically provided that the amount of such fees would be determined at a later date. The parties and the trial court obviously contemplated an evidentiary hearing to determine the amount of such fees. In reversing the JNOV, the original judgment on the issue of amount of attorney's fees is, in effect, reinstated. Accordingly, we will not determine the amount of fees to which plaintiff is entitled because an evidentiary hearing will be held by the trial court subsequent to this court's decision to fix attorney's fees.

LIABILITY FOR INTEREST WHICH EXCEEDS POLICY LIMITS

[30] Aetna contends that the trial court erred in casting it for interest on the \$735,000.00, the amount by which the judgment exceeded Aetna's policy limits. Aetna reasons that its policy does not contain a supplementary payments provision and that it should not be liable for interest on the amount by which the judgment exceeded the policy limits.

Although Aetna and Daniel refer to various provisions of the policy in support of their respective positions, we note that the Aetna policy provides the following supplementary payments provision:

The **company** will pay, in addition to the applicable limit of liability;

(a) all expenses incurred by the **company**, all costs taxed against the **insured** in any suit defended by the **company** and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon: (underscore added).

The jurisprudence has interpreted identical supplementary payment clauses on numerous occa-

sions. The courts have consistently held that the insurer intended to provide its insured with supplementary protection for all interest and costs on the entire judgment which accrues after entry of judgment. *Remedies v. Lopez*, 560 So.2d 118, 120 (La.App. 3rd Cir.), *writ denied*, 563 So.2d 1155 (La.1990); *Moon v. City of Baton Rouge*, 522 So.2d 117, 127 (La.App. 1st Cir.1987), *writ denied*, 523 So.2d 1319, 1320, 1327 (La.1988); *Fletcher v. Leader National Insurance Company*, 513 So.2d 1226, 1228 (La.App. 4th Cir.1987).

Accordingly, we find that the trial court did not err in finding Aetna liable for legal interest on the entire amount of the judgment (including the portion in excess of their policy limits) from date of judgment until paid.

CONCLUSION

For the above reasons, that portion of the trial court judgment granting Aetna's motion for JNOV is reversed. The case is remanded to the trial court for the limited purpose of conducting an evidentiary hearing on the amount of attorney's fees. In all other respects, the judgment of the trial court is affirmed. Aetna is cast for all costs on appeal.

***1171 AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

LOTTINGER, J., concurs and dissents, and assigns reasons.

WATKINS, J., concurs in part and dissents in part for reasons assigned.

CRAIN, and EDWARDS, JJ., concur in part and dissent in part for reasons assigned by LOTTINGER, J.

SAVOIE, J., concurs in result.

FOIL, J., concurs in part and dissents in part. I would not award penalties and attorney fees.

LeBLANC, J., concurs in part and dissents in part and will assign reasons.

LANIER, J., concurs in part and dissents in part for the reasons assigned by LeBLANC, J.

LOTTINGER, Judge, concurring in part and dissenting in part.

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I concur in the result reached by the majority, however, I dissent from that portion of the majority opinion denying uninsured motorist coverage under the Reliance Insurance Company policy.

Simply stated, when an uninsured motorist endorsement to a business auto liability policy defines an insured as "you or any family member," the endorsement is ambiguous. Everyone agrees that a corporation cannot have a "family member," thus the definition of an insured as such is ambiguous. Any doubt or ambiguity in an insurance policy should be interpreted against the insurer and in favor of coverage. *Credeur v. Luke*, 368 So.2d 1030 (La.1979). It would be a simple and inexpensive matter to use an endorsement which did not create such an ambiguity if the intention was to cover someone only while occupying a covered auto.

Under the ambiguity of this endorsement, I would extend uninsured motorist coverage to the employee to whom the covered auto was assigned. WATKINS, Judge, concurring in part and dissenting in part.

I concur in that part of the majority opinion which affirms the trial court's judgment against Aetna. I dissent from that part of the majority opinion denying uninsured motorist coverage for the reasons assigned by Judge Lottinger. I also dissent from that part of the majority opinion which reverses the JNOV granted by the trial court in favor of Aetna on statutory penalties and attorney's fees, because I do not find Aetna's failure to settle was arbitrary and capricious.

LeBLANC, Judge, concurring and dissenting.

I concur with the majority in its ruling that Daniel White was not covered by the Reliance policy.

I respectfully dissent from the majority's finding of coverage under the Aetna policy for the reasons set forth below.

Aetna's Appeal

Aetna contends Daniel White's injuries are not covered under the excess indemnity policy it issued

to S.I.D. because White was not an insured under the policy at the time of his injury. Plaintiffs dispute this assertion, arguing White was an "insured" under Section 3.1(d) of the policy which provides, in part, that an insured under the policy includes any "employee ... of the *named insured* [S.I.D.] while acting within the scope of his duties as such...." Since there is no question that White was an employee of S.I.D., the dispositive issue is thus whether he was "acting within the scope of his duties as such" at the time of his injury.

It is not disputed that the subject of the meeting Daniel White attended on the afternoon of the accident concerned renovations being performed on the Metairie premises preparatory to opening it as a retail furniture store. It is also not disputed that the lease for these premises and the contract for renovations were executed by Monasco, through Mona Barnes. The jury also apparently accepted Warren Jack's uncontradicted testimony that he *1172 and White discussed the renovation project the entire time they were together in the Quarter Note Lounge. I find no manifest error in this conclusion.

Nevertheless, Aetna's position is that even if White and Jack did discuss business the entire time, it was business which concerned the renovation of the Metairie store only, which was not undertaken on behalf of S.I.D., the named insured, but rather for the benefit of Monasco, an entirely separate corporation and therefore was not within the scope of his duties for S.I.D. Plaintiffs' apparent response to this argument is that Monasco was a mere alter ego or instrumentality of S.I.D. and was not a true separate entity. The first essential inquiry thus is whether Monasco was actually an alter ego of S.I.D.

A corporation is a legally separate entity. *G.I.'s Club of Slidell v. Am. Leg. Post* 374, 504 So.2d 967 (La.App. 1st Cir.1987); *Adams v. Associates Corp. of North America*, 390 So.2d 539 (La.App. 3d Cir.1980), *writ refused*, 396 So.2d 884 (La.1981). However, under certain circumstances, if the business of the corporation is conducted in such a man-

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ner that its identity becomes indistinguishable from that of its shareholders (or another corporation), then a corporation may be determined to be the shareholders' (or the other corporation's) alter ego, justifying a disregard of its separate identity. *Harris v. Best of America Inc.*, 466 So.2d 1309 (La.App. 1st Cir.) writ denied, 470 So.2d 121 (La.1985); *Adams, supra*. However, this may occur only in exceptional circumstances. *Id.* Further, the party seeking to disregard the separate entity principal bears a heavy burden of establishing by clear and convincing evidence that a corporation is not a separate entity, but merely an alter ego of its shareholders or another corporation. *Harris, supra*. Significant factors in this determination include: commingling of corporation or shareholder funds; failure to follow statutory formalities for incorporation and for the transaction of corporate affairs; undercapitalization; failure to provide separate bank accounts and bookkeeping records; and, failure to hold regular shareholder or director meetings. *G.I.'s Club of Slidell, supra*.

An examination of the record in this case indicates that S.I.D. originally began business in 1973 as a partnership between Mona Barnes and James White (Daniel's uncle). White provided the capital for the venture and Ms. Barnes ran the business. Their respective ownership interests were 40/60. The business was incorporated in 1975, with the parties retaining the same respective interests in the corporation's stock. Ms. Barnes was S.I.D.'s president and White its vice-president and secretary, although he continued to have no function in the daily operation of the corporation.

On July 9, 1982, Ms. Barnes incorporated Monasco International, Inc. (Monasco) with herself as the sole shareholder. The name "Monasco" was an acronym for "Mona's company". She stated that she formed the corporation "thinking of something entirely different that didn't have anything to do with the furniture business." However, later in her testimony she contradicted herself, saying Monasco was incorporated for the purpose of the sale of fur-

niture and for other purposes. Ms. Barnes stated Monasco was merely a paper corporation with no assets, employees, bank account or insurance. Yet Monasco did have a separate tax identification number and apparently filed separate tax returns.

At some point, Ms. Barnes became interested in opening a second furniture store. She testified that a corporate resolution was necessary for S.I.D. to open a second location. However, James White was not interested in such a venture and a corporate resolution was never passed apparently for this reason. On July 19, 1982, shortly after Monasco was incorporated, a lease for certain premises in Metairie for the operation of a "retail furniture store" was executed by Ms. Barnes on behalf of Monasco, to commence on March 1, 1983. ^{FN1} Mona Barnes was listed as guarantor on *1173 this lease and her personal address was listed as the tenant's address.

FN1. The tenant was listed at one space on the lease as "Monasco International, Inc. d/b/a Shop in Denmark", although elsewhere on the lease it was referred to as Monasco International, Inc.

Thereafter, sometime in August of 1982, a problem evidently arose regarding the renewal of the lease of the S.I.D. store on St. Charles Avenue. Ms. Barnes testified that because the lessor did not wish to conduct any business with James White, the St. Charles Avenue store was eventually leased to Monasco, which then sub-leased it to S.I.D.

On May 11, 1983, Monasco, through Ms. Barnes, entered into a contract with A.S.H. to perform renovations to the interior of the Metairie furniture store. This work was eventually paid for after the accident in question, with the proceeds of a S.B.A. loan obtained by Ms. Barnes on behalf of Monasco. The store in Metairie was eventually opened on November 2, 1983 as the "Denmark Shop". No S.I.D. funds were used in opening the store.

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Based on the totality of the evidence in the record regarding the relationship of S.I.D. and Monasco, as detailed above, I conclude the evidence is clearly insufficient to establish Monasco was an alter ego of S.I.D. While the record contains some indications Monasco may have been an alter ego of Mona Barnes, individually, the same can not be said of S.I.D. Plaintiffs do not dispute that Monasco was properly incorporated. Further, no evidence was presented of any commingling of funds between S.I.D. and Monasco. Nor was there any evidence that corporate formalities were not observed in the transaction of Monasco's business, that it failed to keep separate bookkeeping records or failed to hold regular shareholder or director meetings. There was evidence that Monasco obtained a S.B.A. loan to pay for the renovations to the Metairie store, that it had a separate tax identification number and that it filed separate tax returns. Considering all these factors, I do not believe the exceptional circumstances necessary to justify disregarding the separateness of a corporate entity can be said to be present herein. The evidence in the record is insufficient to meet the burden of proof necessary to establish that Monasco was merely an alter ego or instrumentality of S.I.D. Accordingly, I conclude that, at the time of his accident Daniel White was engaged in activities on behalf of Monasco rather than his employer, S.I.D. Although the jury did not make a specific finding on this exact issue, I observe that any conclusion to the contrary would have been clearly erroneous.^{FN2}

FN2. We note incidentally that the jury was not instructed on the appropriate burden of proof to be applied in considering whether one corporation is the alter ego of another, which is a heavier burden than the normal preponderance of the evidence standard. See, *Harris v. Best of America, Inc.*, 466 So.2d 1309 (La.App. 1st Cir.), writ denied, 470 So.2d 121 (La.1985). This omission was not assigned as error, however, and we do not now address it as

such.

However, the conclusion that White was acting for the benefit of a corporation other than his employer does not end the inquiry as to whether he was acting within the scope of his duties as S.I.D.'s employee at the time of his injury.^{FN3} The Supreme Court recently pronounced in *Ermert v. Hartford Insurance Company*, 559 So.2d 467, 477 (La.1990) that the fact that the predominant motive of a servant's conduct is to benefit himself or a third party does not necessarily preclude the conduct from being within the scope of his employment, if the purpose of serving the master's (employer's) business actuates the servant to any appreciable extent and the conduct is otherwise within the service.

FN3. Plaintiffs argue that the standard applied in determining the scope of employment for worker's compensation purposes should be applied in this case, rather than the standard applied in tort cases. It is well-established that for reasons of public policy, a more liberal construction is given to this determination, in worker's compensation than in tort cases. *Reed v. Gulf Ins. Co.*, 447 So.2d 1102, ftnt. 1 (La.App. 4th Cir.1984) affirmed, 468 So.2d 1159 (1985); *McGee v. State Farm Mut. Auto. Ins.*, 428 So.2d 1287 (La.App. 3d Cir.1983); *Harris v. Hymel Store Co.*, 200 So.2d 84 (La.App. 1st Cir.) writ refused, 251 La. 47, 202 So.2d 657 (1967). However, since these policy considerations are not applicable herein, we see no justification for applying the more liberal construction to the terms of Aetna's policy. *McGee, supra*.

There are no hard and fast rules for determining whether a particular employee's*1174 conduct is within the course and scope of his employment. *Fogg v. Lott*, 444 So.2d 177 (La.App. 1st Cir.1983). This determination is dependent upon the particular facts and circumstances of each case. *Id.* However, in considering this issue the following observations made by the Supreme Court in *Reed v. House of*

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Decor, Inc., 468 So.2d 1159 (La.1985), should be borne in mind.

Determination of the course and scope of employment is largely based on policy. The risks which are generated by an employee's activities while serving his employer's interests are properly allocated to the employer as a cost of engaging in the enterprise. However, when the party (the alleged employer) upon whom vicarious liability is sought to be imposed had only a marginal relationship with the act which generated the risk and did not benefit by it, the purpose of the policy falls, and the responsibility for preventing the risk is solely upon the tortfeasor who created the risk while performing the act. 468 So.2d at 1162.

In the present case, I believe White's activities bore only a marginal relationship to his employment for S.I.D. Further, there was no evidence that S.I.D. benefited in any manner from White's activities relative to opening the Metairie store, which was owned by a separate corporation. In fact, since both corporations (S.I.D. and Monasco) were in the business of selling contemporary Danish furniture, they might even have been considered competitors. White's conduct would appear to have been motivated either by a desire to serve his mother's interest, since she was Monasco's sole shareholder, or his own, since it was contemplated that he would become the manager of the Metairie store. Although plaintiffs allege in their brief that White's employer (presumably his mother) assigned him the task of supervising the renovations of the Metairie store, the record does not adequately substantiate this contention. Under these circumstances, I do not believe White's conduct can be attributed to his employment with S.I.D. so as to render it within the scope of his employment. Thus, I conclude White was not acting "within the scope of his duties" as S.I.D.'s employee when he was injured as required for coverage under the Aetna policy. The jury clearly erred in concluding otherwise, the evidence presented being insufficient to sustain such a con-

clusion.

Because I find no coverage under the Aetna policy, I express no opinion on the percentage of fault attributed to parties by the jury. Neither do I express any opinion on the issue of penalties and attorney fees.

LANIER, J., concurs in reasons.

La.App. 1 Cir., 1991.
 Barnes v. Thames
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(Cite as: 554 So.2d 177)



Court of Appeal of Louisiana,
Second Circuit.

Nannette P. BRYANT, et al., Plaintiffs/Appellees,
v.
PROTECTIVE CASUALTY INSURANCE COM-
PANY, et al., Defendants/Appellants.

No. 21003-CA.
Dec. 6, 1989.
Writ Denied Feb. 2, 1990.

Surviving widow and children of employee who was killed in automobile collision brought action for damages, naming employer's automobile insurer as defendant. The First Judicial District Court, Parish of Caddo, Charles Rex Scott, J., dismissed suit against insurer, and appeal was taken. The Court of Appeal, Hall, C.J., held that employee who was killed while driving vehicle that was not a "covered auto" under his corporate employer's automobile policy was not a "named insured" under uninsured motorist provision of policy.

Affirmed.

West Headnotes

Insurance 217 ↪ 2660.5

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(A) In General

217k2660 Persons Covered

217k2660.5 k. In general. Most Cited

Cases

(Formerly 217k2660, 217k467.51(3))

Employee who was killed while driving vehicle that was not a "covered auto" under his corporate employer's automobile policy was not a "named insured" under uninsured motorist provision of policy, even though he was in course and scope of his employment at time of accident; policy defined

insured as "you or any family member," and did not extend coverage to employees. LSA-R.S. 22:1406.

*177 Joseph W. Greenwald, Shreveport, for defendants/appellants.

Cook, Yancey, King & Galloway by F. Drake Lee, Jr., Lunn, Irion, Johnson, Salley & Carlisle by James A. Mijalis, Jack E. Carlisle, Jr., Shreveport, for plaintiffs/appellees.

Before HALL, SEXTON and LINDSAY, JJ.

HALL, Chief Judge.

Plaintiffs, the surviving widow and children of the late Rex S. Bryant, brought this action for damages after the decedent was killed during the course and scope of his employment in an automobile accident caused by the negligence of an underinsured motorist. Aetna Casualty and Surety Company was made defendant as the uninsured/underinsured motorist carrier of *178 decedent's employer, Berg Mechanical, Inc. Aetna filed a motion for partial summary judgment alleging that its policy did not afford coverage to the plaintiff. The trial court granted the motion and dismissed plaintiffs' suit against Aetna. The sole issue in this appeal is whether the trial court erred in concluding that the deceased was not an insured under the Aetna policy.

At the time of the accident, the deceased was operating a 1976 Ditch Witch tractor model V-30 trencher owned by his employer. The accident occurred when an automobile crashed into the rear of the Ditch Witch, killing the deceased. There was in effect at the time of the accident a business auto policy issued by Aetna to Berg Mechanical, Inc. The parties agree that for coverage to attach the deceased had to be an "insured" under the uninsured motorists provisions of Aetna's policy, since he was not operating a "covered auto" at the time of the accident. Therefore, the issue in this appeal is whether

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the deceased, Mr. Bryant, was an insured.

“Insured” is defined in the Words and Phrases with Special Meaning section of the policy as “any person or organization” qualifying as an “Insured” in the “Who Is Insured” section of the applicable insurance. The applicable insurance in this case is found in endorsement CA 2X17 entitled Uninsured Motorist Insurance. In that section of the policy, “Who Is Insured” is defined as:

1. You or any family member.
2. Anyone else occupying a covered auto ...
3. Anyone for damages he is entitled to recover because of bodily injuries sustained by another insured.

Part I of the policy defines “You” as “the person or organization shown as the named insured in Item One of the declarations.” Berg Mechanical, Inc. is the “named insured” in this case.

“Family Member” means a person related to you by blood, marriage, or adoption who is a resident of your household, including a ward or foster child. The deceased obviously could not qualify as a family member since a corporation is the named insured.

Appellants argue that the deceased is an insured by virtue of being included in the term “You or any family member.” They argue that Berg Mechanical, Inc., the named insured, includes the employees of Berg Mechanical. Appellee argues that this question was decided adverse to appellants in *Saffel v. Bamburg*, 478 So.2d 663 (La.App. 2d Cir.1985), writ denied 481 So.2d 1335 (La.1986).

In *Saffel*, we held that “You or any family member” contained in the uninsured motorist endorsement CA 2X17, the same endorsement as in this case, applies only to the organization to whom the policy is issued. Although in *Saffel* the factual situation was somewhat different than in this case in that it was the spouse of an employee of the in-

sured company who was injured, the principal holding is applicable here. “You or any family member” does not include an employee or family member of an employee of a corporate named insured.

Appellants rely on *Employers Insurance Company of Wausau v. Dryden*, 422 So.2d 1243 (La.App. 1st Cir.1982), for the proposition that employees of an entity qualify as insureds for purposes of uninsured motorist coverage. In *Dryden*, a deputy sheriff was injured while in the course and scope of his employment. The policy named the “Terrebonne Parish Sheriff's Office” as the named insured. The First Circuit held that the deputy was an “insured” under the policy because the “Sheriff's Office” includes not only the sheriff but his deputies. The court stated that the policy would have named only the sheriff as the “named insured” if that was the intent. The deputy in *Dryden* was also an “insured” because he was occupying a “covered auto” at the time of the accident. The *Dryden* case is distinguishable because the “named insured” in that case was not a specific named corporate entity as in the instant case.

Appellee contends that only the entity, Berg Mechanical, Inc., is the named insured and that the naming of a corporation does *179 not include its employees, citing *Pierron v. Lirette*, 468 So.2d 1305 (La.App. 1st Cir.1985). *Pierron* was a case in which the deceased was an officer of two closely held corporations. He was operating a vehicle owned by Corporation A at the time of the accident. The insurance policy covering that auto did not have uninsured motorist coverage. An attempt was made to recover against a policy covering a vehicle owned by Corporation B, but not involved in the accident. The court held that the deceased was not an insured under the policy covering the auto owned by Corporation B because he was not a “named insured” or designated insured. The corporation was the “named insured” as in the instant case.

In *Hogan v. State Farm Automobile Insurance Company*, 449 So.2d 555 (La.App. 1st Cir.1984),

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the issue was whether an employee of an incorporated "named insured" was thereby a "named insured" for purposes of uninsured motorist coverage. The court found that decedent's status as an employee of the named insured was immaterial because the policy provided coverage only for certain vehicles and the employee was not using an insured vehicle at the time of the accident.

In *Morris v. Mitchell*, 451 So.2d 192 (La.App. 1st Cir.1984) a bus driver for the Washington Parish School Board attempted to recover under the uninsured motorist provisions of a business auto policy issued to the Washington Parish School Board as the "named insured." Uninsured motorist coverage was afforded to the bus driver only while occupying a covered vehicle. The plaintiff was not occupying her bus, the covered vehicle, at the time of the accident. Plaintiff argued that she was a named insured because she paid the premiums on the policy insuring the bus. The First Circuit stated that the plaintiff was only covered by the uninsured motorist provision while occupying a covered vehicle. The court stated that the "named insured" listed in the policy was the school board and, therefore, the plaintiff was not an insured to whom uninsured motorist coverage was provided.

LSA-R.S. 22:1406 requires that insurance policies provide uninsured motorist coverage only for persons insured under the policy. *Seaton v. Kelly*, 339 So.2d 731 (La.1976). In this case, the deceased could have been an insured only by satisfying one of two requirements. He had to be either occupying a "covered auto", which the parties stipulated he was not, or be the party named in Item One, a "named insured." In this case, a corporation is the "named insured."

Appellants assert that when a corporation is the "named insured" we should logically extend coverage to all of the corporation's employees, since only natural people can operate automobiles and not the corporation itself. Such an extension is not appropriate in this case. Employees are covered only while operating a "covered auto." The insurance

policy contemplates that the employees will be covered only when occupying vehicles for which the corporation has bought insurance.

It is to be noted that endorsement 9910 attached to this policy specifically amended the uninsured motorist provisions of the policy to add three named individual employees or officers of the corporation to the "Who Is Insured" provisions of the policy, supporting the interpretation that other employees not specifically designated are not insureds under the policy provisions.

The deceased was not a "named insured" under this policy even though he was an employee of the corporate "named insured" and was in the course and scope of his employment at the time of the accident. The policy did not afford him uninsured motorist coverage. The judgment of the trial court dismissing the plaintiffs' suit against Aetna Casualty and Surety Company is affirmed, at appellants' cost.

AFFIRMED.

La.App. 2 Cir.,1989.
Bryant v. Protective Cas. Ins. Co.
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COZORT, Judge, concurring in part and dissenting in part.

I agree with that portion of the majority which affirmed the trial court's order awarding permanent alimony to defendant. I disagree with the majority's conclusion that the trial court erred in awarding attorneys' fees to defendant.

Defendant is 68 years old, in bad health, and did not work outside the home during the marriage. At separation, she had no income and no significant separate estate. After equitable distribution, she has a sizable "paper" estate; however, the bulk of that estate is the marital home and investment accounts received in the equitable distribution which provide some income for the defendant. If defendant must pay her own attorneys' fees, she must use all the alimony received from plaintiff for a substantial period of time, sell the marital home, or liquidate the investment assets received in the equitable distribution. Neither option is, in my view, appropriate. The law should not require the dependent spouse to deplete that which she receives in equitable distribution or as alimony payments in order to pay her attorneys for services rendered to her. I vote to affirm the trial court's decision to award attorneys' fees to defendant.



103 N.C.App. 592

Cathy Elaine BUSBY, Plaintiff,

v.

Mark Anthony SIMMONS, Defendant.

No. 9010SC1196.

Court of Appeals of North Carolina.

Aug. 6, 1991.

Corporate insured's majority shareholder sought underinsured motorist benefits after she was injured when her bicycle was struck by automobile. The Wake

County Superior Court, Robert H. Hobgood, J., entered judgment in favor of insurer, and appeal was taken. The Court of Appeals, Orr, J., held that majority shareholder was not "named insured" under corporation's policy.

Affirmed.

Insurance ⇐467.51(3)

Corporate insured's majority shareholder, who was injured when her bicycle was struck by automobile, was not "named insured" who could recover underinsured motorist benefits, despite contention that, because of her status as both majority shareholder and insured driver under corporation's policy, she was same as corporation, which was only named insured. G.S. § 20-279.21(b)(3, 4).

See publication Words and Phrases for other judicial constructions and definitions.

This action arises from an accident on 9 March 1988, in which plaintiff was struck by an automobile operated by defendant. Plaintiff was riding her bicycle at the time of the accident and sustained severe injuries. Plaintiff filed this cause of action on 20 April 1990.

In addition to compensation from defendant, plaintiff seeks underinsured motorist benefits from the unnamed defendant, State Farm Mutual Automobile Insurance Company (hereinafter State Farm) under N.C.Gen.Stat. § 20-279.21(b)(4) pursuant to an insurance policy State Farm issued to Capital Physical Therapy, Inc. (hereinafter Capital). Plaintiff and her father are employed by and own all stock in Capital.

State Farm filed a motion for summary judgment under Rule 56 of the N.C. Rules of Civil Procedure on 24 July 1990. The trial court granted this motion on 6 September 1990. From this judgment, plaintiff appeals.

Young, Moore, Henderson & Alvis, P.A. by Johnny S. Gaskins, Raleigh, for plaintiff-appellant.

DeBank, McDaniel, Holbrook & Anderson by Douglas F. DeBank, Raleigh, for unnamed defendant-appellee.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting summary judgment in State Farm's favor. For the following reasons, we hold that the trial court did not err and affirm the order of 6 September 1990.

Under N.C.Gen.Stat. § 1A-1, Rule 56(c) (1990), summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." This remedy permits the trial court to decide whether a genuine issue of material fact exists; it does not allow the court to decide an issue of fact. *Sauls v. Charlotte Liberty Mut. Ins. Co.*, 62 N.C.App. 533, 535, 303 S.E.2d 358, 360 (1983) (citations omitted).

In a summary judgment proceeding, the trial court must view all evidence presented in the light most favorable to the nonmoving party and determine if there is a triable material issue of fact. *Land-of-Sky Regional Council v. Co. of Henderson*, 78 N.C.App. 85, 336 S.E.2d 653 (1985), *disc. review denied*, 316 N.C. 553, 344 S.E.2d 7 (1986); *Walker v. Westinghouse Electric Corp.*, 77 N.C.App. 253, 335 S.E.2d 79 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). A defendant is entitled to summary judgment if he establishes that no claim for relief exists or that the plaintiff cannot overcome an affirmative defense. *Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C.App. 213, 341 S.E.2d 61 (1986) (citation omitted).

In the present case, the evidence, viewed in the light most favorable to plaintiff, tends to show that plaintiff owns two-thirds of the stock in Capital. At the time of the accident in question, the corporation owned two automobiles—a 1987 Toyota and a 1988 Mazda. Plaintiff had exclusive business and personal use of the 1988 Mazda and did not use any other vehicle reg-

istered in her name. The Mazda was registered in the name of the corporation and not in plaintiff's name "to take advantage of certain tax benefits." Plaintiff reimbursed Capital approximately \$3,000.00 per year for the personal use of the vehicle.

State Farm provided insurance on these vehicles with the insurance policy being issued in the corporate name. The insurance agent involved in issuing the policies advised plaintiff's father that by adding plaintiff as an insured driver, plaintiff would have all of the benefits under the policy available to an individual. Plaintiff's father intended that plaintiff receive all of the benefits which "could have been available to them if they had registered their own personal vehicles in their personal names and obtained liability insurance in their personal names," including uninsured/underinsured motorist benefits under the policy. The named insured, however, remained in Capital's name at all times pertinent to this action.

At the time of the accident, plaintiff was riding her bicycle and was not engaged in any activity on behalf of the corporation or acting in an official capacity. Plaintiff subsequently filed a claim for underinsured motorist coverage benefits for injuries sustained in the accident pursuant to the policy on the 1988 Mazda. State Farm declined to extend such benefits because plaintiff was not the named insured on the policy and she was not occupying the insured automobile or any other automobile at the time of the accident as required by the policy. Based upon these facts, the trial court granted summary judgment in State Farm's favor.

The insurance policy in question provides uninsured (or underinsured) motorists coverage for an "insured."

"Insured" as used in this Part [C] means:

1. You or any family member.
 2. Any other person occupying:
 - a. your covered auto; or
 - b. any other auto operated by you.
- (Emphasis in the original.)

Throughout the policy, "you" is referred to as the named insured in the "Declarations." In the present case, the named

insured on the Declarations page is Capital Physical Therapy, Inc. Plaintiff's name appears only as a named driver and person insured for coverage. Her name does not appear anywhere as a named insured.

Plaintiff maintains that because she is an insured driver and the major stockholder in the corporation, she is the same as the corporation (the named insured), and therefore is entitled to underinsured coverage under subsection 1 above. Defendant argues that subsection 1 applies only to the named insured (the corporation itself), therefore placing plaintiff in subsection 2, which requires that she occupy a vehicle to recover her underinsured motorist benefits under the policy. Defendant asserts that because plaintiff was riding a bicycle and not occupying a covered auto or operating any other auto, she may not recover these benefits.

In *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991), our Supreme Court stated that, "[w]hen examining cases to determine whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy." The type of coverage involved in the present case is underinsured motorist coverage (UIM), and the relevant statute is N.C.Gen.Stat. § 20-279.21(b)(4), which incorporates the definition of "persons insured" under § 20-279.21(b)(3). "Persons insured" means

the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

N.C.Gen.Stat. § 20-279.21(b)(3) (1983).

Under this statute, there are two classes of "persons insured":

(1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

Crowder v. N.C. Farm Bureau Mut. Ins. Co., 79 N.C.App. 551, 554, 340 S.E.2d 127, 129-30, *disc. review denied*, 316 N.C. 731, 345 S.E.2d 387 (1986). In the first class, a person is insured whether or not the insured vehicle is involved in the injuries; a person is insured in the second class only when the insured vehicle is involved in the injuries. *Id.* 79 N.C.App. at 554, 340 S.E.2d at 130.

Under this analysis, category (2) does not apply to the case *sub judice*; therefore, plaintiff would be a "person insured" only if she is the "named insured." We hold that she is not. Plaintiff cites no case (and we find no case) which expands the term "named insured" to include officers, directors, or stockholders of a corporation when the named insured is the corporation. "Named insured" has a common sense and explicit meaning. It is the named individual (or corporation) on the declarations page of the policy. "Named insured" is used throughout the above statutory scheme to distinguish it from others covered under a policy. *See, e.g.*, § 20-279.21(b): "Such owner's policy of liability insurance: ... (2) shall insure the person named therein and any other person[.]" and § 20-279.21(b)(3): "For purposes of this section 'persons insured' means the named insured...." Moreover, under the policy, "named insured" means the name appearing on the Declarations page of the policy. Here, it is Capital Physical Therapy, Inc.

Finally, our decision today is consistent with a recent decision from this Court with similar circumstances. In *Brown v. Truck Insurance Exchange*, 103 N.C.App. 59, 404 S.E.2d 172 (1991), this Court held that Brown (the plaintiff was Brown's personal representative in this case because Brown died in the accident) was not an insured motorist for purposes of UIM coverage. Brown was an independent trucker, who

leased his services and some trucks to the named insured corporation (Schneider National Carriers, Inc.). At the time of the accident, Brown was not engaged in any business covered by his corporate contract and was not in one of his leased trucks. Schneider was the "named insured" on the declarations page of the policy. Applying the same analysis as we have in the present case, Judge Johnson, writing for this Court, concluded that Brown was not entitled to receive UIM benefits under this policy and was not entitled to insurance coverage under the terms of the contract. Judge Johnson further stated that such corporate coverage is not required by the "Financial Responsibility Act and is voluntary additional coverage."

Courts in other jurisdictions have made similar holdings. See, e.g. *Continental Ins. Co. v. Velez*, 134 A.D.2d 348, 520 N.Y.S.2d 824 (1987) (officer, director and shareholder of a named insured company struck while riding his bicycle on a personal mission is not entitled to UM coverage on a policy issued to the corporation); *Buckner v. Motor Vehicle Acc. Indemnification Corp.*, 66 N.Y.2d 211, 486 N.E.2d 810, 495 N.Y.S.2d 952 (1985) (corporation cannot suffer bodily injury or have a spouse, relative or household member as designated in an UM policy endorsement); and *Dixon v. Gunter*, 636 S.W.2d 437 (Tenn.App.1982) (automobile insurance issued to the corporation does not allow UM coverage to the president and sole shareholder of the corporation when such individual was not engaged in corporate business and was injured by a third party).

For the above reasons, we hold that plaintiff is not entitled to claim UIM benefits under the automobile insurance policy issued to Capital Physical Therapy, Inc. Therefore, the trial court did not err in granting summary judgment as a matter of law in favor of State Farm.

Affirmed.

COZORT and WYNN, JJ., concur.



103 N.C.App. 642

Barbara FINE, as Guardian Ad Litem
for John L. Fine, Plaintiff-Appellee,

v.

Paul I. FINE, Defendant-Appellant.

No. 9018SC1218.

Court of Appeals of North Carolina.

Heard June 5, 1991.

Decided Aug. 6, 1991.

Appeal was taken from judgment of the Superior Court, Guilford County, Lester P. Martin, Jr., J., entered in action based on custodian's alleged misappropriation of minor's funds. The Court of Appeals, Wells, J., held that violations of Rules of Appellate Procedure, including failure to separately number assignments of error, to confine assignments of error to single issue of law and to include record of proceeding in which notice of voluntary dismissal was given required dismissal of appeal.

Appeal dismissed.

Phillips, J., filed dissenting opinion.

Appeal and Error ⇐784, 785

Violations of Rules of Appellate Procedure, including failure to separately number assignments of error, confine assignments of error to single issue of law, and to include record of proceeding in which notice of voluntary dismissal was allegedly given required dismissal of appeal. Rules App.Proc., Rules 10, 10(c)(1), 28(b)(5).

According to the record filed in this Court, this action was instituted by the filing of a complaint by plaintiff against defendant and proper service upon defendant. Plaintiff asserted four claims for relief: (1) fraud, (2) breach of custodial and

sistent with the logic of *Carey*, and would defeat the purpose of § 1983 by denying compensation for genuine injuries caused by the deprivation of constitutional rights.



477 U.S. 317, 91 L.Ed.2d 265

131 CELOTEX
CORPORATION, Petitioner

v.

Myrtle Nell CATRETT, Administratrix
of the Estate of Louis H.
Catrett, Deceased.

No. 85-198.

Argued April 1, 1986.

Decided June 25, 1986.

Administratrix of estate of deceased worker brought action against asbestos manufacturer. The United States District Court for the District of Columbia granted manufacturer's motion for summary judgment and administratrix appealed. The Court of Appeals for the District of Columbia Circuit, 756 F.2d 181, reversed. The Supreme Court, Justice Rehnquist, held that: (1) Rule 56(c) mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial; (2) there is no requirement that moving party support its motion with affidavits or other similar materials negating the opponent's claim; and (3) nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.

Reversed and remanded.

Justice White filed an opinion concurring in the Court's opinion and judgment.

Justice Brennan filed a dissenting opinion in which Chief Justice Burger and Justice Blackmun joined.

Justice Stevens filed a dissenting opinion.

Opinion on remand, 826 F.2d 33.

1. Federal Civil Procedure ⇄2466

Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish that existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Fed. Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2. Federal Civil Procedure ⇄2470

Where party will have burden of proof on an element essential to its case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

3. Federal Civil Procedure ⇄2535

Party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

4. Federal Civil Procedure ⇄2536

There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

Cite as 106 S.Ct. 2548 (1986)

5. Federal Civil Procedure ⇌2536

Regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may and should be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment set forth in Rule 56(c) is satisfied. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

6. Federal Civil Procedure ⇌2536

Where nonmoving party will bear burden of proof at trial on a dispositive issue, summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file and such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule" so that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial. Fed. Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

7. Federal Civil Procedure ⇌2545

Nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

8. Federal Civil Procedure ⇌2536, 2544

Last two sentences of Rule 56(e) precluding a nonmoving party from resting on its pleadings to avoid summary judgment were added to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings and were not intended to reduce the burden of the moving party or to add to that burden. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

9. Federal Civil Procedure ⇌2461

Summary judgment procedure is properly regarded not a disfavored procedural shortcut but, rather, as an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and

inexpensive determination of every action. Fed.Rules Civ.Proc.Rules 1, 56, 28 U.S.C.A.

10. Federal Civil Procedure ⇌2461

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the rule prior to trial, that the claims and defenses have no factual basis. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

*Syllabus**

In September 1980, respondent administratrix filed this wrongful-death action in Federal District Court, alleging that her husband's death in 1979 resulted from his exposure to asbestos products manufactured or distributed by the defendants, who included petitioner corporation. In September 1981, petitioner filed a motion for summary judgment, asserting that during discovery respondent failed to produce any evidence to support her allegation that the decedent had been exposed to petitioner's products. In response, respondent produced documents tending to show such exposure, but petitioner argued that the documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion. In July 1982, the court granted the motion because there was no showing of exposure to petitioner's products, but the Court of Appeals reversed, holding that summary judgment in petitioner's favor was precluded because of petitioner's failure to support its motion with evidence tending to *negate* such exposure, as required by Federal Rule 56(e) of Civil Procedure and the decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142.

Held:

1. The Court of Appeals' position is inconsistent with the standard for summa-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

ry judgment set forth in Rule 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pp. 2552-2554.

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to ¹³¹⁸make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 2552-2553.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. *Adickes v. S.H. Kress & Co.*, *supra*, explained. Pp. 2553-2554.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action was commenced and since

the parties had conducted discovery. Moreover, any potential problem with such premature motions can be adequately dealt with under Rule 56(f). P. 2554.

2. The questions whether an adequate showing of exposure to petitioner's products was in fact made by respondent in opposition to the motion, and whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial, should be determined by the Court of Appeals in the first instance. Pp. 2554-2555.

244 U.S.App.D.C. 160, 756 F.2d 181, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 2555. BRENNAN, J., filed a dissenting opinion, in which BURGER, C.J., and BLACKMUN, J., joined, *post*, p. 2555. STEVENS, J., filed a dissenting opinion, *post*, p. 2560.

Leland S. Van Koten, Baltimore, Md., for petitioner.

Paul March Smith, for respondent.

¹³¹⁹Justice REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. *Catrett v. Johns-Manville Sales Corp.*, 244 U.S.App.D.C. 160, 756 F.2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese*

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Electronic Products, 723 F.2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).¹ We granted certiorari to resolve the conflict, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's *in personam* jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional³²⁰ limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's sum-

mary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970-1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217.² Respondent³²¹ appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's

1. Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted here by the District of Columbia Circuit. See *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (1986).

2. Justice STEVENS, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products in the District of Columbia. See *post*, at 2561. According to Justice STEVENS, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to Celotex asbestos products in Chicago during 1970-1971. See *Ibid.*

Justice STEVENS' position is factually incorrect. The District Court expressly stated that

respondent had made no showing of exposure to Celotex asbestos products "in the District of Columbia or elsewhere." App. 217 (emphasis added). Unlike Justice STEVENS, we assume that the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by Justice STEVENS, and decided that "[t]he District Court's grant of summary judgment must therefore have been based on its conclusion that there was 'no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia or elsewhere within the statutory period.'" *Catrett v. Johns-Manville Sales Corp.*, 244 U.S.App.D.C. 160, 162, n. 3, 756 F.2d 181, 183, n. 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares Justice STEVENS' view of the District Court's decision.

summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." 244 U.S.App.D.C., at 163, 756 1322F.2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,³ and this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *Id.*, at 167, 756 F.2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.*, at 166, 756 F.2d, at 187.

3. Rule 56(e) provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, sum-

[1, 2] We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure.⁴ Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation,³²³ there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)..." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

mary judgment, if appropriate, shall be entered against him."

4. Rule 56(c) provides:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

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242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

[3-5] Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported³²⁴ claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.⁵

[6] Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this

rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

[7] We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

³²⁵The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U.S.C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclu-

5. See Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745, 752 (1974); Currie, Thoughts on Directed Verdicts

and Summary Judgments, 45 U.Chi.L.Rev. 72, 79 (1977).

sively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Id.*, at 159, 90 S.Ct., at 1609. We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

[8] The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes*, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to ¹³²⁶facilitate the granting of motions for summary judgment would be interpreted to make it *more difficult* to grant such motions. Nothing in the two sentences themselves requires this result,

6. Rule 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the ap-

plication for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 U.S.App.D.C., at 167-168, 756 F.2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2720, pp. 28-29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),⁶ which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was ¹³²⁷made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if

made, would be sufficient to justify the ap-

Cite as 106 S.Ct. 2548 (1986)

reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

[9, 10] The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

¹³²⁸The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defen-

dant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect ¹³²⁹of the case, I agree that the case should be remanded for further proceedings.

Justice BRENNAN, with whom THE CHIEF JUSTICE and Justice BLACKMUN join, dissenting.

This case requires the Court to determine whether Celotex satisfied its initial

burden of production in moving for summary judgment on the ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the non-moving party cannot prove its case.¹ This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

— 1330 I

Summary judgment is appropriate where the Court is satisfied "that there is no genuine issue as to any material fact and

1. It is also unclear what the Court of Appeals is supposed to do in this case on remand. Justice WHITE—who has provided the Court's fifth vote—plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse rather than to vacate the judgment below implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer expression from the Court to the contrary, Justice WHITE's understanding would seem to be controlling. Cf. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977).

2. The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore ¶ 56.15[3], pp. 56-466; 10A Wright, Miller & Kane § 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2514, 91

that the moving party is entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p. 121 (2d ed. 1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed. 1985) (hereinafter Moore) (citing cases). See also, *ante*, at 2553; *ante*, at 2555 (WHITE, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the non-moving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright, Miller & Kane § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion² unless and until the Court finds that the moving party has discharged its initial¹³³¹ burden of production. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-161, 90 S.Ct. 1598, 1608-1610, 26 L.Ed.2d 142 (1970); 1963 Advisory Committee's Notes on Fed. Rule Civ. Proc. 56(e), 28 U.S.C.App., p. 626.

L.Ed.2d 202 (1986), and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. 10A Wright, Miller & Kane § 2721, p. 44; see, e.g., *Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 930 (CA1 1983); *Higgenbotham v. Ochsner Foundation Hospital*, 607 F.2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), "[i]f ... there is any evidence in the record from any source from which a reasonable inference in the [non-moving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment...." 723 F.2d, at 258.

The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright, Miller & Kane § 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial. *Ibid.* Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a “genuine issue” for trial or to submit an affidavit requesting additional time for discovery. *Ibid.*; Fed.Rules Civ.Proc. 56(e), (f).

If the burden of persuasion at trial would be on the *non-moving* party, the party moving for summary judgment may satisfy Rule 56’s burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the non-moving party’s claim. Second, the moving party may demonstrate to the Court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. See 10A Wright, Miller & Kane § 2727, pp. 130–131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745, 750 (1974) (hereinafter *Louis*). If the non-moving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510–2511, 91 L.Ed.2d 202 (1986).

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party—who will bear the burden of persuasion at

trial—has ¹³³²no evidence, the mechanics of discharging Rule 56’s burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante*, at 2555 (WHITE, J., concurring). Such a “burden” of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See *Louis* 750–751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante*, at 2553. This may require the moving party to depose the nonmoving party’s witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the non-moving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the Court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the Court’s attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56’s burden of production.³ Thus, if the record disclosed that the

3. Once the moving party has attacked whatever

record evidence—if any—the nonmoving party

moving party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the Court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

The result in *Adickes v. S.H. Kress & Co., supra*, is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and then was arrested for vagrancy by a local policeman as she left. Petitioner brought an action under 42 U.S.C. § 1983 claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[i]f a policeman were present, . . . it would be open to a jury, in light of the sequence that followed,³³⁴ to infer from the circumstances that the policeman and Kress em-

purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright, Miller & Kane § 2727, pp. 138-143. Summary judgment should be grant-

ed if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, e.g., *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

ployee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." 398 U.S., at 158, 90 S.Ct., at 1609. Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. *Id.*, at 157-158, 90 S.Ct., at 1608-1609.

The opinion in *Adickes* has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n. 30 (citing cases). The Court of Appeals apparently read *Adickes* this way and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of *Adickes* was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different than the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her

ed if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, e.g., *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

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decendent had ever been exposed to Celotex asbestos.⁴ App. 170. Celotex supported this motion with a ¹³³⁵two-page "Statement of Material Facts as to Which There is No Genuine Issue" and a three-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See *id.*, at 171-176.

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[a]t the very least . . . demonstrate that there is a genuine factual dispute for trial," *id.*, at 143: (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, *id.*, at 160; (2) a letter from T.R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, *id.*, at 162; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, *id.*, at 164. Plaintiff also apparently ³³⁶indicated at that time that she intended to call Mr. Hoff as a witness at trial. Tr. of Oral Arg. 6-7, 27-29.

4. Justice STEVENS asserts that the District Court granted summary judgment on the ground that the plaintiff had failed to show exposure in the District of Columbia. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was "palpably erroneous" to grant summary judgment on this basis. *Post*, at 2561 (dissenting). The Court replies that what the District Court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere." *Ante*, at 2551, n. 2. In my view, it does not really matter which reading is correct in this case. For, contrary to Justice STEVENS' claim, deciding this case on the ground that Celotex failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." *Post*, at 2561 (STEVENS, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straightforward and well established, and deciding the

Celotex subsequently withdrew its first motion for summary judgment. See App. 167.⁵ However, as a result of this motion, when Celotex filed its second summary judgment motion, the record *did* contain evidence—including at least one witness—supporting plaintiff's claim. Indeed, counsel for Celotex admitted to this Court at oral argument that Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr. of Oral Arg. 5-7. Moreover, plaintiff's response to Celotex' second motion pointed to this evidence—noting that it had already been provided to counsel for Celotex in connection with the first motion—and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App. 188.

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial

case on this basis does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case. The choice to reverse because of "palpable erro[r]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elements of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the basis of the Court of Appeals' decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case.

5. Celotex apparently withdrew this motion because, contrary to the assertion made in the first summary judgment motion, its second set of interrogatories had not been served on the plaintiff.

burden of production under Rule 56, and thereby rendered summary judgment improper.⁶

¹³⁷This case is indistinguishable from *Adickes*. Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production.⁷

Justice STEVENS, dissenting.

As the Court points out, *ante*, at 2551, petitioner's motion for summary judgment

6. If the plaintiff had answered Celotex' second set of interrogatories with the evidence in her response to the first summary judgment motion, and Celotex had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, Celotex obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence plaintiff relied upon to support her claim was acquired by Celotex other than in plaintiff's answers to interrogatories.

7. Although Justice WHITE agrees that "if [plaintiff] has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact," he would remand "[b]ecause the Court of Appeals found it unnecessary to address this aspect of the case." *Ante*, at 2555 (concurring). However, Celotex has admitted that plaintiff had disclosed her intent to call Mr. Hoff as a witness at trial before Celotex filed its second motion for summary judgment. Tr. of Oral Arg. 6-7. Under the circumstances, then, remanding is a waste of time.

1. See Motion of Defendant Celotex Corporation for Summary Judgment, App. 170 ("Defendant Celotex Corporation, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corpo-

was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia.¹ ¹³⁸Respondent made an adequate showing—albeit possibly not in admissible form²—that her husband had been exposed to petitioner's product in Illinois.³ Although the basis of the motion and the argument had been the lack of exposure *in the District of Columbia*, the District Court stated at the end of the argument: "The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217 (emphasis added). The District Court offered no additional explanation and no writ-

ration was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court*") (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant Celotex Corporation for Summary Judgment, *id.*, at 175 (Plaintiff "must demonstrate some link between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence *within the jurisdictional confines of this Court*") (emphasis added); Transcript of Argument in Support of Motion of Defendant Celotex Corporation for Summary Judgment, *id.*, at 211 ("Our position is . . . there has been no product identification of any Celotex products . . . that have been used *in the District of Columbia* to which the decedent was exposed") (emphasis added).

2. But cf. *ante*, at 2553 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

3. See App. 160 (letter from Aetna Life Insurance Co.) (referring to the "asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company" and noting that the "manufacturer of this product" was purchased by Celotex); *id.*, at 162 (letter from Anning-Johnson Co.) (confirming that Catrett worked for the company and supervised the installation of asbestos produced by the company that Celotex ultimately purchased); *id.*, at 164, 164c (deposition of Catrett) (description of his work with asbestos "in Chicago").

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ten opinion. The Court of Appeals reversed on the basis that Celotex had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language.⁴

Taken in the context of the motion for summary judgment on the basis of no exposure in the District of Columbia, the ¹³³⁹District Court's decision to grant summary judgment was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.⁵

I respectfully dissent.



4. See *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 185, n. 14 (1985) ("[T]he discussion at the time the motion was granted actually spoke to venue. It was only the phrase 'or elsewhere,' appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

5. Cf. n. 2, *supra*. The Court's statement that the case should be remanded because the Court of Appeals has a "superior knowledge of local law," *ante*, at 2555, is bewildering because there is no question of local law to be decided. Cf. *Bishop v. Wood*, 426 U.S. 341, 345-347, 96 S.Ct. 2074, 2077-2079, 48 L.Ed.2d 684 (1976).

The Court's decision to remand when a sufficient ground for affirmance is available does

477 U.S. 340, 91 L.Ed.2d 285

¹³⁴⁰MacDONALD, SOMMER &
FRATES, Appellant

v.

YOLO COUNTY et al.

No. 84-2015.

Argued March 26, 1986.

Decided June 25, 1986.

Rehearing Denied Sept. 3, 1986.

See 478 U.S. 1035, 107 S.Ct. 22.

A property owner filed an action in the California state court seeking declaratory and monetary relief for inverse condemnation. The court sustained a demurrer to the complaint, and the property owner appealed. The California Court of Appeal affirmed and the California Supreme Court denied the property owner's petition for hearing, and the property owner appealed. The Supreme Court, Justice Stevens, held that it could not determine whether a "taking" had occurred as a result of rejection of a subdivision proposal or whether county failed to provide "just compensation" in absence of the final and authoritative determination by county planning commission as to how it would apply the challenged regulations to the property in question.

Affirmed.

Justice White filed a dissenting opinion in which Chief Justice Burger, Justice Powell and Justice Rehnquist joined in part.

reveal, however, the Court's increasing tendency to adopt a presumption of reversal. See, e.g., *New York v. P.J. Video, Inc.*, 475 U.S. 868, 884, 106 S.Ct. 1610, 1619, 89 L.Ed.2d 871 (1986) (MARSHALL, J., dissenting); *Iceberg Seafoods, Inc. v. Worthington*, 475 U.S. 709, 715, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986) (STEVENS, J., dissenting); *City of Los Angeles v. Heller*, 475 U.S. 796, 800, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986) (STEVENS, J., dissenting); *Pennsylvania v. Goldhammer*, 474 U.S. 28, 31, 106 S.Ct. 353, 88 L.Ed.2d 183 (1985) (STEVENS, J., dissenting). As a matter of efficient judicial administration and of respect for the state and federal courts, I believe the presumption should be precisely the opposite.

1

484 U.S. 1066, 98 L.Ed.2d 992

Alexander DAMASCUS, petitioner, v. Patty BORGIA, et al. No. 87-1086.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Feb. 22, 1988. Denied.

Rehearing Denied April 18, 1988.

See 485 U.S. 1015, 108 S.Ct. 1490.



2

484 U.S. 1066, 98 L.Ed.2d 992

CELOTEX CORPORATION, petitioner, v. Myrtle Nell CATRETT, etc. No. 87-1087.

Former decision, 477 U.S. 317, 106 S.Ct. 2548.

Case below, *Patrett v. Johns-Manville Sales Corp.*, 244 U.S.App.D.C. 160, 756 F.2d 181; 263 U.S.App.D.C. 399, 826 F.2d 33.

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Feb. 22, 1988. Denied.



3

484 U.S. 1066, 98 L.Ed.2d 992

Robert S. CROWDER, Sr., et ux., et al., petitioners, v. SOUTHERN BAPTIST CONVENTION and Executive Committee of the Southern Baptist Convention. No. 87-1088.

Case below, 637 F.Supp. 478; 828 F.2d 718.

Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Feb. 22, 1988. Denied.



4

484 U.S. 1066, 98 L.Ed.2d 992

THREE MOVIES OF TARZANA, petitioner, v. PACIFIC THEATRES, INC., et al. No. 87-1089.

Case below, 828 F.2d 1395.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Feb. 22, 1988. Denied.



5

484 U.S. 1066, 98 L.Ed.2d 992

Anant B. GOEL, et ux., et al., petitioners, v. ENTRE COMPUTER CENTERS, INC. No. 87-1090.

Case below, 829 F.2d 31.

Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Feb. 22, 1988. Denied.



6

484 U.S. 1066, 98 L.Ed.2d 993

Oliver L. NORTH, petitioner, v. Lawrence E. WALSH, etc. and Edwin Meese, III, Attorney General of the United States; and Oliver L. NORTH, petitioner, v. Edwin MEESE, III, Attorney General of the United States, and Lawrence E. Walsh, etc. No. 87-1094.

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 134 A.D.2d 348, 520 N.Y.S.2d 824

In the Matter of Continental Insurance Company, Respondent,

v.

Gabriel Velez, Jr., Appellant, et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York

November 9, 1987

CITE TITLE AS: Matter of Continental Ins. Co. v Velez

OPINION OF THE COURT

Mangano, J. P., Brown, Lawrence and Spatt, JJ., concur.

In a proceeding to permanently stay arbitration pursuant to an uninsured motorist endorsement of an insurance policy, Gabriel Velez, Jr., appeals from a judgment of the Supreme Court, Queens County (Kassoff, J.), dated August 25, 1986, which granted the application.

Ordered that the judgment is affirmed, with costs.

The sole issue of this case is whether Gabriel Velez, Jr., an officer, director and shareholder of Frio Cold Sales and Service Corp. can recover under an uninsured motorist provision of a policy issued to the corporation.

Mr. Velez was struck by a car while riding his bicycle on the North Service Road of the Long Island Expressway. After ascertaining that the vehicle and the driver were uninsured, he notified Continental Insurance Company (hereinafter Continental), of his intention to arbitrate under the uninsured motorist provision of the automobile insurance policy issued to Frio Cold Sales and Service Corp., a corporation in which he and his parents each owned one third of the stock and were the sole officers and directors. Continental moved for a stay of arbitration claiming that Mr. Velez was not covered under the policy. After a hearing, the Supreme Court, Queens County, concluded that Continental's policy did not cover the appellant. We agree.

The Court of Appeals in *Buckner v. MVAIC* (66 NY2d 211) recently held that a corporation cannot suffer bodily injury or have a spouse, relative or household as designated in an uninsured motorist endorsement of an insurance policy worded almost identically to the policy at issue here. The court reasoned that "[w]hether the policy covers plaintiff turns on a reading of the entire policy *** only if it can reasonably be said *** as a whole that the words, 'who is insured 1. You or any family member' appearing in that endorsement would be so understood by the average person applying common speech *** can it be ***349 held that [an insurance company] is obligated to cover such injuries" (*Buckner v. MVAIC*, supra., at 213-214).

Upon a reading of the instant policy, there is no possible means by which an average person could construe the uninsured motorist provision of Continental's policy to include the appellant. The policy on its face can easily be understood to cover only automobiles owned by the corporation and the occupants thereof. To hold that the policy covers officers and shareholders of the corporation, when they are not occupying corporate vehicles, and when none are mentioned or alluded to in the policy, would be to reach beyond the plain meaning of the policy (see, *Kaysen v. Federal Ins. Co.*, 268 NW2d 920 [Minn]; *Dixon v. Gunter*, 636 SW2d 437 [Tenn]; *Polzin v. Phoenix of Hartford Ins. Cos.*, 5 Ill App 3d 84, 283 NE2d 324; *General Ins. Co. v. Icelandic Bldrs.*, 24 Wash App 656, 604 P2d 966).

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Continental Ins. Co. v. Velez
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Supreme Court, Appellate Division, Second Department, New York.

In the Matter of **CONTINENTAL INSURANCE COMPANY**,
Petitioner-Respondent,

v.

Gabriel **VELEZ, Jr.**, Appellant, et al., Respondents.

Nov. 9, 1987.

Insurer sought to stay arbitration sought by insured's director to obtain uninsured motorist coverage. The Supreme Court, Queens County, Kassoff, J., granted application. Director appealed. The Supreme Court, Appellate Division, held that uninsured motorist provision of automobile policy issued to corporation did not cover director, who was injured while riding bicycle.

Affirmed.

West Headnotes (1)

Change View

- 1 **Insurance** Uninsured or Underinsured Motorist Coverage
Uninsured motorist provision of automobile policy issued to corporation did not cover director, who was also officer and one-third shareholder, where director was injured while riding bicycle.

6 Cases that cite this headnote

Attorneys and Law Firms

****824** Isaacson, Schiowitz, Korson & Slony, New York City (Susan Mandel, of counsel), for appellant.

Alio, Leahy and Dent, Huntington Station (Carol Simonetti, of counsel), for petitioner-respondent.

Before ***349** MANGANO, J.P., and BROWN, LAWRENCE and SPATT, JJ.

Opinion

****825** MEMORANDUM BY THE COURT.

***348** In a proceeding to permanently stay arbitration pursuant to an uninsured motorist endorsement of an insurance policy, Gabriel **Velez, Jr.**, appeals from a judgment of the Supreme Court, Queens County (Kassoff, J.), dated August 25, 1986, which granted the application.

ORDERED that the judgment is affirmed, with costs.

The sole issue of this case is whether Gabriel **Velez, Jr.**, an officer, director and shareholder of Frio Cold Sales and Service Corp. can recover under an uninsured motorist provision of a policy issued to the corporation.

Mr. **Velez** was struck by a car while riding his bicycle on the North Service Road of the Long Island Expressway. After ascertaining that the vehicle and the driver were uninsured, he notified **Continental Insurance Company** (hereinafter **Continental**), of

his intention to arbitrate under the uninsured motorist provision of the automobile insurance policy issued to Frio Cold Sales and Service Corp., a corporation in which he and his parents each owned one-third of the stock and were the sole officers and directors. Continental moved for a stay of arbitration claiming that Mr. Velez was not covered under the policy. After a hearing, the Supreme Court, Queens County, concluded that Continental's policy did not cover the appellant. We agree.

The Court of Appeals in *Buckner v. Motor Vehicle Acc. Indemnification Corp.*, 66 N.Y.2d 211, 495 N.Y.S.2d 952, 486 N.E.2d 810, recently held that a corporation cannot suffer bodily injury or have a spouse, relative or household as designated in an uninsured motorist endorsement of an insurance policy worded almost identically to the policy at issue here. The court reasoned that "[w]hether the policy covers plaintiff turns on a reading of the entire policy * * * only if it can reasonably be said * * * as a whole that the words, 'who is insured 1. You or any family member' appearing in that endorsement would be so understood by the average person applying common speech * * * can it be held that [an insurance company] is obligated to cover such injuries" (*Buckner v. Motor Vehicle Acc. Indemnification Corp.*, *supra*, at 213-214, 495 N.Y.S.2d 952, 486 N.E.2d 810).

Upon a reading of the instant policy, there is no possible means by which an average person could construe the uninsured motorist provision of Continental's policy to include the appellant. The policy on its face can easily be understood to cover only automobiles owned by the corporation and the occupants thereof. To hold that the policy covers officers and shareholders of the corporation, when they are not occupying corporate vehicles, and when none are mentioned or alluded to in the policy, would be to reach beyond the plain meaning of the policy (see, *Kaysen v. Federal Ins. Co.*, 268 N.W.2d 920 [Minn.]; *Dixon v. Gunter*, 636 S.W.2d 437 [Tenn.]; *Polzin v. Phoenix of Hartford Ins. Companies*, 5 Ill.App.3d 84, 283 N.E.2d 324; *General Ins. Co. of America v. Icelandic Builders*, 24 Wash.App. 656, 604 P.2d 966).

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602 So.2d 104
(Cite as: 602 So.2d 104)



Court of Appeal of Louisiana,
Fourth Circuit.

Pete DAVIS Jr.
v.
Lionel BROCK.

No. 91-CA-1711.
June 18, 1992.

Writ Denied Oct. 16, 1992.

Employee brought action against employer's business automobile insurer, seeking recovery for injuries sustained when he was struck by uninsured motorist as he attempted to cross street on foot. The Civil District Court, Orleans Parish, Robert A. Katz, J., granted employee's motion for summary judgment, and insurer appealed. The Court of Appeal, Plotkin, J., held that employee was not entitled to coverage under underinsured motorist provisions of employer's automobile policy.

Reversed.

West Headnotes

[1] Insurance 217 2660.5

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2660 Persons Covered
217k2660.5 k. In general. Most Cited
Cases
(Formerly 217k2660, 217k467.51(3))

Insured's employee was not entitled to coverage under uninsured motorist provisions of insured's business automobile policy for injuries sustained when employee was struck by uninsured motorist as he crossed street on foot; employee was not insured under either express language of policy's underinsured motorist endorsement, or liability provision.

[2] Insurance 217 2772

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(D) Uninsured or Underinsured Motorist Coverage
217k2772 k. In general. Most Cited Cases
(Formerly 217k467.51(1))
Insurance policies are to be liberally construed in favor of underinsured motorist coverage, and any exception to mandatory underinsured motorist coverage must be strictly construed.

[3] Insurance 217 2660.5

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2660 Persons Covered
217k2660.5 k. In general. Most Cited
Cases
(Formerly 217k2660, 217k467.51(3))

Insurance 217 2661

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2660 Persons Covered
217k2661 k. Family members; household. Most Cited Cases
(Formerly 217k467.51(3))
Fact that named insured was corporate entity did not render ambiguous business automobile policy which extended coverage to "family members" of named insured.

*105 Charles A. Kronlage, Jr., New Orleans, for plaintiff/appellee.

Dara L. Baird, Metairie, for defendant/appellant.

Before CIACCIO, ARMSTRONG and PLOTKIN, JJ.

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PLOTKIN, Judge.

Defendant Home Indemnity Co. (Home) appeals a trial court judgment granting a motion for summary judgment in favor of plaintiff Pete (Junius) Davis, holding that Davis was covered under the uninsured motorist (UM) provisions of an insurance policy issued by Home to Davis' employer. Home also appeals the trial court's denial of its motion for summary judgment based on its allegation that Davis is not covered under the policy as a matter of law. We reverse on both issues.

Facts:

Davis suffered injuries November 7, 1982, when he was struck by an automobile owned and driven by defendant Lionel Brock while Davis was a pedestrian attempting to cross Elysian Fields Avenue at its intersection with North Claiborne Avenue. Brock was uninsured.

Davis brought suit, *inter alia*, against Home, which had issued a "Business Auto Policy," naming Davis' employer, Jaeger's Inc., which is a seafood restaurant, as the named insured. Davis had been employed by Jaeger's as a delivery truck driver from sometime in the 1950's until the date of the accident. Jaeger's owned two trucks which were driven almost exclusively by Davis.

Standard for Reviewing Trial Court's Grant of Motion for Summary Judgment

When reviewing a trial court decision granting a motion for summary judgment, appellate courts consider the evidence *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Schroeder v. Board of Supervisors*, 591 So.2d 342, 345 (La.1991). Thus, the appellate court must make an independent determination of whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law." La.C.C.P. art. 966(B). Thus, a trial court judgment granting a motion for summary judgment must be reversed unless the reviewing

court finds that the mover proved both of the following elements: (1) no genuine issues of material fact exist, and (2) the mover is entitled to judgment as a matter of law. *Chaisson v. Domingue*, 372 So.2d 1225, 1227 (La.1979); *Transworld Drilling v. Texas General Petroleum Co.*, 524 So.2d 215, 217 (La.App. 4th Cir.1988). Likewise, a trial court judgment denying a motion for summary judgment should be reversed if the appellate court finds that the moving party did prove the two elements listed above. In both instances, all evidence and inferences drawn from the evidence must be construed in the light most favorable to the party opposing the motion. *Schroeder*, 591 So.2d at 345. Additionally, all allegations of the party opposing the motion must be taken as true and all doubt must be resolved in his favor. *Id.*

In the instant case, this court must review two trial court decisions—the one granting the motion for summary judgment filed by Davis and the one denying the motion for summary judgment filed by Home. The parties agree on all the material facts. Thus, the only question before this court is whether either party proved that it was entitled to judgment as a matter of law. That issue turns on whether Davis is covered for UM purposes under the insurance policy between Home and Jaeger's. If Davis is covered, the trial court properly *106 granted Davis' motion and denied Home's motion. However, if Davis is not covered, the trial court judgment is incorrect on both issues and must be reversed on both issues.

Uninsured Motorist Coverage Under the Policy

[1] The insurance contract at issue in the instant case provides, in pertinent part, as follows:

PART IV-LIABILITY INSURANCE

(D) WHO IS INSURED

1. You are an **insured** for any covered **auto**.
2. Anyone else is an **insured** while using with **your** permission a covered **auto** you own, hire or

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borrow....

.....

UNINSURED MOTORISTS INSURANCE D. WHO IS INSURED

1. You or any **family member**.
2. Anyone else **occupying** a covered **auto** or a temporary substitute for a covered **auto**. The covered **auto** must be out of service because of its breakdown, repair, servicing, loss or destruction.
3. Anyone for damages he is entitled to recover because of **bodily injury** sustained by another **insured**.

(Emphasis in the original.) Under the definitions section of the policy, “you” indicates “the person or organization shown as the named insured in Item 1 of Declarations”—in this case, Jaeger's Inc. “Family member” is defined as “a person related to you by blood, marriage or adoption, who is a resident of your household, including a ward or foster child.”

Under the express language of the UM endorsement attached to the policy at issue, the plaintiff in the instant case was obviously not insured. Nevertheless, Davis claims that he is entitled to UM coverage under the Louisiana Supreme Court's opinion in *Howell v. Balboa Insurance Co.*, 564 So.2d 298 (La.1990).

In *Howell*, the court extended UM coverage to the son of the named insured, who had been injured by an uninsured motorist while riding in an automobile owned and operated by someone other than the named insured in the policy. Unquestionably, the plaintiff in *Howell*, like the plaintiff in the instant case, did not qualify as an insured for UM purposes under the language of the policy, which afforded coverage to a “family member” only under the following circumstances: “while occupying an insured automobile, or, while not occupying a mo-

tor vehicle, when struck by an uninsured motor vehicle.” *Id.* The court found that UM coverage under Louisiana law “cannot be qualified by a requirement of a relationship with an insured vehicle,” then stated as follows:

We expressly hold that UM coverage attaches to the person of the insured, not the vehicle, and that any provision of UM coverage purporting to limit insured status to instances involving a relationship to an insured vehicle contravenes LSA-R.S. 22:1406(D). In other words, **any person who enjoys the status of insured under a Louisiana motor vehicle liability policy which includes uninsured/underinsured motorist coverage enjoys coverage protection simply by reason of having sustained injury by an uninsured/underinsured motorist.**

Id. at 301-02. (Emphasis added.) Davis claims that the above quoted portions of the *Howell* case require that the policy issued by Home in this case be interpreted to extend coverage to his injuries in this case.

We disagree. Davis' argument ignores the fact that, under the circumstances of this case, he did not enjoy “insured” status under either the liability or the UM provisions of the subject policy; that fact alone distinguishes this case from *Howell*. The plaintiff in *Howell* was an insured for liability purposes under the express provisions of the policy at issue in that case because he was a “family member” of the named insured; thus, the court found that he was also insured for UM purposes. However, in the instant case, Davis would have been afforded insured status for liability purposes only if he was himself the named insured or if he was using a covered auto owned by the named insured with the *107 named insured's permission. Neither of those situations was present in the instant case.

Davis also sets forth several “policy” reasons to support his argument that the subject policy should be “reformed,” like the policy in *Howell*, to

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afford him coverage under the UM provisions. First, Davis claims that the fact that he was virtually the only driver of the covered vehicles made him an “insured” under the liability provisions “continuously and without interruption” from the time the policy was issued on March 1, 1981 until the time of his accident. However, that argument also ignores the express language of the policy at issue, which affords “insured” status only to the named insured and to those using a covered auto with the named insured's permission.

Second, Davis claims that the Home policy is ambiguous because of the language of the UM provisions, which extend coverage to a “family member” of the named insured. Since the named insured in the policy is a corporate entity, Davis argues, it is incapable of having any “family members.” Further, Davis argues, if a corporate entity can be considered to have “family members,” its employees must be considered part of that group.

[2] We recognize the basic premise that insurance policies are to be liberally construed in favor of UM coverage, and that any exception to mandatory UM coverage must be strictly construed. *Hoefly v. Government Employees Insurance Co.*, 418 So.2d 575, 578 (La.1982). However, that premise does not require that any person who claims that it is “only fair” that he be afforded coverage be recognized as an “insured” for UM purposes. A fair interpretation of the policy in the instant case does not demand that Davis be afforded UM coverage for a injuries sustained while a pedestrian, not in the course and scope of his employment.

[3] The Louisiana First Circuit Court of Appeals recently rejected the exact arguments made by Davis in *Barnes v. Thames*, 578 So.2d 1155 (La.App. 1st Cir.1991), which concerned factually similar circumstances to those in the case at hand. Based on a definition of insured for UM purposes identical to that in the policy at issue in the instant case, the *Barnes* case stated, in pertinent part, as follows:

Because [the plaintiff employee] is not a named insured, is not related to the named insured, and was not occupying a covered automobile, he did not fit within the definition of an “insured” and was not covered by the uninsured motorist provisions of the Reliance policy.

We find no merit in plaintiff's contention that since the policy in question is a business automobile policy issued to a corporation, the definition of an insured as “you or any family member” renders the policy ambiguous [Several previous cases] involved policies issued to a municipality or corporations and contained policy language similar, if not identical, to the language in the instant case. These provisions were found to have a clear meaning and were not considered ambiguous in those cases. Nor do we find it to be ambiguous herein.

Id. at 1163. (Citations omitted.)

The difference in the result reached in the instant case and in *Thames* from the result in *Howell* is easily explained by the fact that *Howell* involved a family automobile insurance policy, while both *Howell* and the instant case involved business automobile policies. The purposes of the two types of policies are different. A family automobile policy is designed to protect all persons who qualify as family members in all situations involving injuries caused by automobiles, while a business automobile policy is designed to protect the business from liability for injuries sustained by employees in the course and scope of their employment duties. Given that difference, the results in the cases are perfectly consistent.

Conclusion

For the reasons stated, we find that Davis was not entitled to coverage under the UM provisions of the policy issued by Home to Jaeger's Inc. Thus, the plaintiff failed to prove that he was entitled to judgment*108 as a matter of law, and the trial court improperly granted the plaintiff's motion for summary judgment. However, the defendant did met its bur-

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den of proving that it was entitled to judgment as a matter of law. Thus, the trial court improperly denied its motion for summary judgment. Therefore, the trial court judgment granting the plaintiff's motion for summary judgment and denying the defendant's motion for summary judgment is reversed.

REVERSED.

La.App. 4 Cir., 1992.
Davis v. Brock
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H

Appellate Court of Illinois,
 Third District.
 Debbie DESAGA, Individually and as Administrator of the Estate of Felix DeSaga, Deceased,
 Plaintiff and Counterdefendant–Appellant,
 v.
 WEST BEND MUTUAL INSURANCE COMPANY, Defendant and Counterplaintiff–Appellee.

No. 3–08–0645.
 June 15, 2009.

Background: Driver's widow sought insurance benefits related to driver's motor vehicle accident under underinsured motorist (UIM) endorsement of automobile policy issued to driver's employer. Insurer denied coverage. The Circuit Court, Will County, Bobbie N. Petrunaro, J., granted insurer summary judgment. Widow appealed.

Holdings: The Appellate Court, Carter, J., held that: (1) insurer could not deny UIM coverage once it had been determined that the driver was an insured under liability section of the policy, and (2) driver was “occupying” vehicle under circumstances of accident.

Reversed and remanded.

West Headnotes

[1] Judgment 228 ↪ 181(23)

228 Judgment
 228V On Motion or Summary Proceeding
 228k181 Grounds for Summary Judgment
 228k181(15) Particular Cases
 228k181(23) k. Insurance Cases. Most Cited Cases
 The interpretation of an insurance policy is a question of law that may properly be decided on a motion for summary judgment.

[2] Insurance 217 ↪ 1809

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1809 k. Construction or Enforcement as Written. Most Cited Cases

Insurance 217 ↪ 1812

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1811 Intention
 217k1812 k. In General. Most Cited Cases

Insurance 217 ↪ 1813

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1811 Intention
 217k1813 k. Language of Policies. Most Cited Cases

When interpreting an insurance policy or any other contract, the primary goal is to give effect to the intent of the parties as expressed in the agreement; if the terms of an insurance policy are clear and unambiguous, they must be given their plain and ordinary meaning and enforced as written, unless to do so would violate public policy.

[3] Insurance 217 ↪ 1831

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
 217k1831 k. In General. Most Cited Cases

Insurance 217 ↪ 1832(1)

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217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
 Conflict 217k1832 Ambiguity, Uncertainty or
 Cited Cases 217k1832(1) k. In General. Most

Insurance 217 ↪1833

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
 Power of Insureds. Most Cited Cases 217k1833 k. Status or Bargaining
 Insurance policies are to be liberally construed in favor of the insured; any ambiguity that exists in the language of a policy must be resolved against the insurer, since the insurer drafted the policy.

[4] Insurance 217 ↪1835(2)

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
 Provisions of Policies 217k1835 Particular Portions or Provisions of Policies
 217k1835(2) k. Exclusions, Exceptions or Limitations. Most Cited Cases
 Any provision in an insurance policy that limits or excludes coverage must be construed liberally in favor of the insured and against the insurer.

[5] Insurance 217 ↪1721

217 Insurance
 217XIII Contracts and Policies
 217XIII(A) In General
 217k1720 Validity and Enforceability
 217k1721 k. In General. Most Cited

Cases

Insurance 217 ↪1722

217 Insurance
 217XIII Contracts and Policies
 217XIII(A) In General
 217k1720 Validity and Enforceability
 217k1722 k. Violation of Statute. Most Cited Cases
 A provision in an insurance policy that conflicts with the law will be deemed to be void.

[6] Contracts 95 ↪105

95 Contracts
 95I Requisites and Validity
 95I(F) Legality of Object and of Consideration
 95k104 Violation of Statute
 95k105 k. In General. Most Cited Cases
 In determining whether a statutory provision will override a contractual one, a court must be mindful of the principles of freedom of contract.

[7] Contracts 95 ↪108(1)

95 Contracts
 95I Requisites and Validity
 95I(F) Legality of Object and of Consideration
 95k108 Public Policy in General
 95k108(1) k. In General. Most Cited Cases
 A court's power to declare a provision of a contract void as against public policy must be exercised sparingly.

[8] Automobiles 48A ↪43

48A Automobiles
 48AII License and Registration of Private Vehicles
 48Ak43 k. Bond or Other Security. Most Cited Cases

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Insurance 217 2736

217 Insurance

- 217XXII Coverage—Automobile Insurance
- 217XXII(C) Liability Coverage
- 217k2735 Mandatory Coverage
- 217k2736 k. In General. Most Cited

Cases

Main purpose of the mandatory automobile liability insurance requirement is to protect the public by securing payment of their damages. S.H.A. 215 ILCS 5/143a; 625 ILCS 5/7-601(a).

[9] Insurance 217 2772

217 Insurance

- 217XXII Coverage—Automobile Insurance
- 217XXII(D) Uninsured or Underinsured Motorist Coverage
- 217k2772 k. In General. Most Cited Cases

Purpose of uninsured motorist (UM) coverage, and underinsured motorist (UIM) coverage, is to place the insured in the same position that the insured would have been in if the tortfeasor had carried adequate insurance. S.H.A. 215 ILCS 5/143a.

[10] Appeal and Error 30 170(1)

30 Appeal and Error

- 30V Presentation and Reservation in Lower Court of Grounds of Review
- 30V(A) Issues and Questions in Lower Court
- 30k170 Nature or Subject-Matter of Issues or Questions
- 30k170(1) k. In General. Most Cited Cases

Plaintiff did not waive appellate argument that Illinois law prohibited insurer from defining term “insured” more narrowly for underinsured motorist (UIM) coverage than it did for liability coverage, for failure to raise argument in trial court, where argument was based on recent Appellate Court decision, but at time of trial court proceedings, existing cases did not support plaintiff’s position.

[11] Insurance 217 2660.5

217 Insurance

- 217XXII Coverage—Automobile Insurance
- 217XXII(A) In General
- 217k2660 Persons Covered
- 217k2660.5 k. In General. Most Cited Cases

Automobile insurer was prohibited from altering definition of term “insured,” as it was defined in the liability-coverage section of the policy, more narrowly in the underinsured motorist (UIM) endorsement of the policy, in order to deny UIM coverage, and thus, driver, who qualified as an insured for liability coverage, also qualified as “insured” for UIM coverage; insurer could not either directly or indirectly deny UIM coverage once it had been determined that the driver was an insured under liability section of policy. S.H.A. 215 ILCS 5/143a.

[12] Insurance 217 2670

217 Insurance

- 217XXII Coverage—Automobile Insurance
- 217XXII(A) In General
- 217k2668 Occupancy of Vehicle
- 217k2670 k. Uninsured or Underinsured Motorist Coverage. Most Cited Cases

Even if driver was not otherwise entitled to underinsured motorist (UIM) benefits under automobile policy, he was in virtual physical contact with the covered vehicle at time of accident, as required to support finding that he was an insured because he was “occupying” covered vehicle, under terms of UIM endorsement in policy, so as to be entitled to UIM coverage; driver had been using covered vehicle just moments before accident occurred, he had parked vehicle nearby, he had put his flashing emergency lights on, and he had left engine of vehicle running when he exited vehicle to remove pieces of angle iron that fell out of vehicle onto roadway. S.H.A. 215 ILCS 5/143a.

****161** Jerry A. Esrig (argued), Robert J. Zaideman, Zaideman & Esrig, P.C., Chicago, IL, for Appellant.

Francis A. Spina (argued), James B. Walton, Cre-

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mer, Shaughnessy, Spina, Jansen, & Siegert, LLC, Chicago, IL, for Appellee.

Justice CARTER delivered the opinion of the court:

***88 *1063 Decedent, Felix De Saga, was hit by a car and killed after he went into the roadway to remove some pieces of angle iron that had fallen off of his truck. Plaintiff, Debbie DeSaga, decedent's widow and the administrator of his estate, sought insurance benefits related to the accident under the underinsured motorist (UIM) endorsement of the insurance policy issued to decedent's employer by defendant, West Bend Mutual Insurance Company. Defendant denied coverage claiming that decedent was not "occupying" the covered vehicle at the time of the accident as required under the policy to trigger UIM coverage. Plaintiff brought the instant action seeking a declaratory judgment that decedent was entitled to UIM coverage at the time of the accident. Defendant counterclaimed for a declaratory judgment to the contrary. Both sides moved for summary judgment. The trial court granted summary judgment for defendant, finding that decedent was not entitled to UIM coverage under the policy because he was not "occupying" the covered vehicle at the time of the accident. Plaintiff appeals. We reverse the trial court's grant of summary judgment in favor of defendant, enter summary judgment in favor of plaintiff, and remand this case for further proceedings in the trial court.

FACTS

The accident in question occurred on October 6, 2006, at about 6:30 a.m. at the intersection of Wilmington–Peotone Road and Old *1064 Chicago Road in Will County, Illinois. Wilmington–Peotone Road runs east and west and has one lane in each direction at that location. Old Chicago Road runs north and south and also has one lane in each direction at that location.

The facts leading up to the accident are not in dispute. At about 6 a.m., decedent was working and was driving a truck owned by his employer eastbound on Wilmington–Peotone Road, carrying a

load of angle iron. When decedent turned left onto Old Chicago Road, some of the pieces of angle iron fell from the back of his truck onto the roadway, blocking the intersection ***89 **162 to some extent. Each piece of angle iron was about 10 to 20 feet long.

Decedent completed his turn, pulled his truck over onto the east shoulder of Old Chicago Road north of the intersection, and got out of his truck to clear the angle iron off of the roadway. He left his truck running with the flashing emergency lights on. Steven Dreiling was traveling behind decedent and stopped to help. Decedent and Dreiling moved a couple of the pieces of angle iron to the side of the road and then went back out into the roadway to clear off another piece that was located in the northeast quadrant of the intersection, the portion of the intersection that was the closest to where decedent's truck was parked. As they were bending down to pick up the piece of angle iron, an underinsured motorist driving westbound on Wilmington–Peotone Road drove through the intersection and struck both decedent and Dreiling with his vehicle. Decedent was killed. Dreiling was injured. At the time that he was hit by the underinsured motorist, decedent was standing on the roadway in the northeast quadrant of the intersection near the yellow center line of Wilmington–Peotone Road. The record does not indicate exactly how far decedent was from his own work truck when he was hit or the exact amount of time that passed from when decedent got out of his truck until he was hit.

Decedent's employer had a business automobile insurance policy (the policy) that had been issued by defendant and was in effect at the time of the accident. The truck that decedent was using that morning was a covered vehicle under the policy. In the liability-coverage section of the policy, the term "insured" was defined as the named insured for any covered vehicle, anyone using a covered vehicle with the permission of the named insured (with some exceptions not relevant to this appeal), and anyone liable for the conduct of an "insured" (as

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described in the previous two categories). The policy contained an Illinois UIM endorsement, which provided a definition of the term “insured” that was more narrow than the definition provided in the liability-coverage section of the policy. For the purpose of UIM coverage, the term “insured” was defined as anyone “occupying” a covered *1065 vehicle and anyone with regard to damages he or she was entitled to recover because of bodily injury sustained by another “insured.” “Occupying” was defined in the endorsement as “in, upon, getting in, on, out or off.”

Plaintiff filed with defendant a request for UIM benefits under the policy. Defendant denied coverage, claiming that decedent was not “occupying” the covered vehicle at the time of accident as required under the policy to trigger UIM coverage.

After coverage was denied, plaintiff brought the instant lawsuit seeking a declaratory judgment that decedent was entitled to coverage under the UIM portion of the policy. Defendant filed a counterclaim for declaratory judgment to the contrary. The only issue before the trial court was whether decedent was “occupying” the covered vehicle at the time of the injury. Both sides filed motions for summary judgment on that issue. The trial court granted summary judgment for defendant finding that decedent was not “occupying” the covered vehicle when the accident occurred. Plaintiff brought the instant appeal, challenging the trial court's grant of summary judgment for defendant. Just prior to the date of oral argument in this case, plaintiff filed a motion to add authority, citing the First District Appellate Court case of *Schultz v. Illinois Farmers Insurance Co.*, 387 Ill.App.3d 622, 327 Ill.Dec. 224, 901 N.E.2d 957 (2009). The decision in *Schultz* had not been issued until after the briefs on appeal in the ***90 **163 instant case had been filed. In her motion to add authority, plaintiff sought to add a new assertion in support of her argument that summary judgment should not have been granted in defendant's favor—that defendant could not define “insured” more narrowly

in the UIM endorsement than it did in the liability-coverage section of the policy. We allowed the motion to add authority and gave the parties additional time to file supplemental briefs on the new assertion raised by plaintiff in the motion to add authority.

ANALYSIS

As noted above, plaintiff argues on appeal that the trial court erred in granting summary judgment for defendant. In support of that argument, plaintiff asserts first that summary judgment should not have been granted for defendant, and should have instead been granted for plaintiff, because Illinois law prohibits an insurer from defining the term “insured” more narrowly for UIM coverage than it does for liability coverage (raised by plaintiff in the motion to add authority). Thus, plaintiff contends that since decedent is an “insured” as defined in the liability-coverage section of the policy, Illinois law requires that he be deemed to be an “insured” for UIM coverage under the policy as well.

*1066 Defendant argues that the trial court's grant of summary judgment is proper and should be affirmed. Defendant contends that although Illinois law prohibits an insurer from defining the term “insured” differently for uninsured motorist (UM) coverage than it does for UIM coverage, it does not prohibit an insurer from defining the term “insured” differently for liability coverage than it does for UM or UIM coverage. Defendant contends further that such a difference is allowed under the law because liability coverage, which applies when the insured is sued for injuries caused to a third party (third-party coverage), has a different and broader purpose than UM or UIM coverage, which applies when the insured is injured and is trying to recover for those injuries under the policy (first-party coverage).

The purpose of summary judgment is not to try a question of fact, but to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 42–43, 284 Ill.Dec. 302, 809 N.E.2d 1248, 1256 (2004). Summary judgment should be granted only

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where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006); *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d at 1256. In appeals from summary judgment rulings, the standard of review is *de novo*. *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d at 1256.

[1][2][3][4] The interpretation of an insurance policy is a question of law that may properly be decided on a motion for summary judgment. *Schultz*, 387 Ill.App.3d at 625, 327 Ill.Dec. 224, 901 N.E.2d at 960. When interpreting an insurance policy or any other contract, the primary goal is to give effect to the intent of the parties as expressed in the agreement. *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill.2d 407, 416, 307 Ill.Dec. 626, 860 N.E.2d 280, 286 (2006). If the terms of an insurance policy are clear and unambiguous, they must be given their plain and ordinary meaning and enforced as written, unless to do so would violate public policy. *Nicor, Inc.*, 223 Ill.2d at 416-17, 307 Ill.Dec. 626, 860 N.E.2d at 286; ***91**164 *Abrell v. Employers Insurance of Wausau*, 343 Ill.App.3d 260, 262, 277 Ill.Dec. 557, 796 N.E.2d 643, 645 (2003). Insurance policies are to be liberally construed in favor of the insured (*Addison Insurance Co. v. Fay*, 232 Ill.2d 446, 328 Ill.Dec. 858, 905 N.E.2d 747, 753 (2009)) and in favor of coverage (*United Services Automobile Ass'n v. Dare*, 357 Ill.App.3d 955, 963-64, 294 Ill.Dec. 258, 830 N.E.2d 670, 678 (2005)). Any ambiguity that exists in the language of a policy must be resolved against the insurer, since the insurer drafted the policy. See *Dare*, 357 Ill.App.3d at 963-64, 294 Ill.Dec. 258, 830 N.E.2d at 678. In addition, any provision in a policy that limits or excludes coverage must be construed liberally in favor of the insured and against the insurer. *Dare*, 357 Ill.App.3d at 964, 294 Ill.Dec. 258, 830 N.E.2d at 678.

[5][6][7] *1067 A provision in an insurance policy that conflicts with the law will be deemed to be void. See *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill.2d 121, 129, 293 Ill.Dec. 677, 828 N.E.2d 1175, 1180 (2005). However, in determining whether a statutory provision will override a contractual one, a court must be mindful of the principles of freedom of contract. *Progressive Universal Insurance Co. of Illinois*, 215 Ill.2d at 129, 293 Ill.Dec. 677, 828 N.E.2d at 1180. As our supreme court noted out in *Progressive*:

"The freedom of parties to make their own agreements, on the one hand, and their obligation to honor statutory requirements, on the other, may sometimes conflict. These values, however, are not antithetical. Both serve the interests of the public. Just as public policy demands adherence to statutory requirements, it is in the public's interest that persons not be unnecessarily restricted in their freedom to make their own contracts." *Progressive Universal Insurance Co. of Illinois*, 215 Ill.2d at 129, 293 Ill.Dec. 677, 828 N.E.2d at 1180.

A court's power to declare a provision of a contract void as against public policy, therefore, must be exercised sparingly. *Progressive Universal Insurance Co. of Illinois*, 215 Ill.2d at 129, 293 Ill.Dec. 677, 828 N.E.2d at 1180.

[8][9] Illinois has a statutory scheme for automobile insurance that provides for liability coverage, UM coverage, and UIM coverage. 625 ILCS 5/7-601(a) (West 2006); 215 ILCS 5/143a, 143a-2(4) (West 2006). Illinois law requires that all motor vehicles operated or registered in this state and designed for use on a public highway be covered by a liability insurance policy with minimum liability limits of \$20,000/\$40,000 for bodily injury or death. 625 ILCS 5/7-601(a), 7-203 (West 2006). From a legislative standpoint, the main purpose of the mandatory liability insurance requirement is to protect the public by securing payment of their damages. *Progressive Universal Insurance*

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Co. of Illinois, 215 Ill.2d at 129, 293 Ill.Dec. 677, 828 N.E.2d at 1180. In addition to liability coverage, Illinois law also requires that automobile insurers provide UM coverage in the policies that they issue. 215 ILCS 5/143a (West 2006). The purpose of UM coverage (and UIM coverage) is to place the insured in the same position that the insured would have been in if the tortfeasor had carried adequate insurance. *Sulser v. Country Mutual Insurance Co.*, 147 Ill.2d 548, 555, 169 Ill.Dec. 254, 591 N.E.2d 427, 429 (1992). The amount of UM coverage must at least be equal to the \$20,000/\$40,000 minimum liability limits (the statutory minimum limits), and if the liability limits under the policy are in excess of the statutory minimum limits, the UM coverage must be equal to the amount of liability coverage, unless the insured specifically rejects having UM coverage in excess of ***92 **165 the statutory minimum limits. 215 ILCS 5/143(a), 5/143(a)-2(1) (West 2006). Furthermore, if the policy provides for UM coverage in excess of the statutory minimum limits, the policy must also provide for UIM coverage in amount equal to the amount of UM coverage. 215 *1068 ILCS 5/ 143a-2(4) (West 2006). Thus, under the statutory scheme described above, the amount of UM and UIM coverage must always be equal. See 215 ILCS 5/143a-2(4) (West 2006); *Lee v. John Deere Insurance Co.*, 208 Ill.2d 38, 44-45, 280 Ill.Dec. 523, 802 N.E.2d 774, 778 (2003).

It is within the above statutory framework that we must consider the assertion made by plaintiff in her motion to add authority on appeal—that Illinois law prohibits an insurer from defining the term “insured” more narrowly for UIM coverage than it does for liability coverage. The discussion of this issue initially stems from the decision of our supreme court in *Heritage Insurance Co. of America v. Phelan*, 59 Ill.2d 389, 321 N.E.2d 257 (1974). In *Phelan*, our supreme court held that a restrictive operator endorsement, attached to an insurance policy and agreed to by the named insured, was sufficient to exclude the named insured's son from UM coverage under the policy. See *Phelan*, 59 Ill.2d at

391-99, 321 N.E.2d at 258-62. In reaching that conclusion, our supreme court made the following statement in dicta:

“It is clear from the holdings of *Barnes*[v. *Powell*, 49 Ill.2d 449, 275 N.E.2d 377 (1971)], *Doxtater* [v. *State Farm Mut. Auto. Ins. Co.*, 8 Ill.App.3d 547, 290 N.E.2d 284 (1972)], and [*Madison County Mut. Auto. Ins. Co. v.*] *Goodpasture*[49 Ill.2d 555, 276 N.E.2d 289 (1971)] and from the language of the statute itself that the legislative intent was to provide extensive uninsured-motorist protection for those who are ‘insureds’ under an automobile liability policy. But neither the statute nor any of these decisions places any restriction on the right of the parties to an insurance contract to agree on which persons are to be the ‘insureds’ under an automobile insurance policy. It is only after the parties designate the ‘insureds’ that the statute and case law become applicable and prohibit an insurance company from either directly or indirectly denying uninsured-motorist coverage to an ‘insured.’ ” *Phelan*, 59 Ill.2d at 395, 321 N.E.2d at 260.

That statement by the supreme court in *Phelan* was later referenced by the First District Appellate Court in *Cohs v. Western States Insurance Co.*, 329 Ill.App.3d 930, 264 Ill.Dec. 201, 769 N.E.2d 1038 (2002). In *Cohs*, the First District Appellate court held that the definition of the term “insured” under the UM provision of an insurance policy, although more narrow than the definition of the term “insured” under the liability coverage section of that same policy, was not unduly restrictive and did not violate the uninsured motorist statute. *Cohs*, 329 Ill.App.3d at 937, 264 Ill.Dec. 201, 769 N.E.2d at 1044. In reaching that conclusion, the appellate court in *Cohs* relied on a portion of the supreme court's statement in dicta from *Phelan*, that section 143a does not *1069 place “ ‘any restriction on the right of the parties to an insurance contract to agree on which persons are to be the “insureds” under an automobile insurance policy.’ ” *Cohs*, 329 Ill.App.3d at 937, 264 Ill.Dec. 201, 769 N.E.2d at

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1045, quoting *Phelan*, 59 Ill.2d at 395, 321 N.E.2d at 257. A similar result was reached by the United States District Court for the Northern District of Illinois in *Employers' Fire Insurance Co. v. Berg*, No. 05 C 4710, slip op. at 4, 2007 WL 273559 (N.D.Ill. January 25, 2007), a case which was not reported in the second edition of the Federal Supplement.

****166 ***93** In the recent case of *Schultz v. Illinois Farmers Insurance Co.*, cited above, a panel of the First District Appellate Court, different from the one that decided *Cohs*, was faced with the issue of whether an insurer could define the term “insured” differently for UIM coverage than it did for UM coverage in the same policy. *Schultz*, 387 Ill.App.3d at 623, 327 Ill.Dec. 224, 901 N.E.2d at 959. The appellate court held that the term “insured” had to be defined the same way for both UM and UIM coverage and that the use of two different definitions of that term for UM and UIM coverage contravened the intent of section 143a-2(4) of the Illinois Insurance Code. *Schultz*, 387 Ill.App.3d at 629, 327 Ill.Dec. 224, 901 N.E.2d at 963. In reaching that conclusion, the appellate court stated in *dicta* that it read *Phelan* as “holding that section 143a does not restrict the parties to an insurance contract from determining initially who will be insured under the policy, but once that determination has been made, section 143a mandates that UM coverage be extended to anyone who is an insured for purposes of liability coverage.” *Schultz*, 387 Ill.App.3d at 627, 327 Ill.Dec. 224, 901 N.E.2d at 961. The appellate court panel in *Schultz* noted that the previous panel in *Cohs* had failed to consider the entire statement of the supreme court (referenced above) in *Phelan* and instead had only considered the first portion of that statement. *Schultz*, 387 Ill.App.3d at 626-27, 327 Ill.Dec. 224, 901 N.E.2d at 961.

[10] Plaintiffs assertion in the instant case—that Illinois law prohibits an insurer from defining the term “insured” more narrowly for UIM coverage than it does for liability coverage—is

based upon the *dicta* in *Schultz* and upon the interpretation in *Schultz* of the *dicta* in *Phelan*. Defendant initially argues that the assertion is waived because plaintiff failed to raise the assertion in the trial court. See *Illinois Farmers Insurance Co. v. Cisco*, 178 Ill.2d 386, 395, 227 Ill.Dec. 325, 687 N.E.2d 807, 811 (1997) (an argument not made in the trial court is generally waived or forfeited on appeal). Defendant contends that although *Schultz* is a new case, it merely presents a different interpretation of *Phelan*, an interpretation that plaintiff was obligated to argue for in the trial court. However, as plaintiff correctly points out, at the time of the trial court proceedings, the only cases interpreting *Phelan* were contrary to the interpretation set forth in *Schultz*. See ***1070***Cohs*, 329 Ill.App.3d at 937, 264 Ill.Dec. 201, 769 N.E.2d at 1044-45; *Berg*, slip op. at 4. Had this particular assertion been made in the trial court, the trial court would have been required to reject it, based upon the interpretation of *Phelan* set forth in *Cohs*, an interpretation that the trial court was required to follow. See *People v. Harris*, 123 Ill.2d 113, 128, 122 Ill.Dec. 76, 526 N.E.2d 335, 340 (1988) (the decisions of an appellate court are binding precedent on all of the trial courts regardless of locale). Under these circumstances, we find that plaintiff has not waived or forfeited this particular assertion by failing to raise it in the trial court. Although we are mindful of the importance of the waiver or forfeiture rule to the appellate process, we note that it is a rule that is binding upon the parties and not upon the court. See *Dillon v. Evanston Hospital*, 199 Ill.2d 483, 504-05, 264 Ill.Dec. 653, 771 N.E.2d 357, 371 (2002). Thus, we would have elected to reach the merits of this issue, regardless of any waiver or forfeiture that may have occurred.

[11] Turning to the merits of plaintiff's assertion, we agree with the appellate court's analysis in *Schultz*. Under Illinois's statutory scheme of automobile insurance, liability coverage, UM coverage, *****94 **167** and UIM coverage are all connected. See 625 ILCS 5/7-601(a) (West 2006); 215 ILCS 5/ 143a, 143a-2 (West 2006). UM and UIM cover-

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age were intended by the legislature to compliment the liability coverage that the insured had obtained. See *Phelan*, 59 Ill.2d at 393, 321 N.E.2d at 259. Illinois law requires that the insurer provide UM and UIM coverage at the same amount as liability coverage.^{FN1} Once it has been determined who will be insured under the liability section of the policy, the insurer may not, either directly or indirectly, deny UM or UIM coverage to an insured. See *Phelan*, 59 Ill.2d at 395, 321 N.E.2d at 260; *Schultz*, 387 Ill.App.3d at 628, 327 Ill.Dec. 224, 901 N.E.2d at 962. An insurer's attempt to define the term "insured" differently for UM or UIM coverage than it did for liability coverage is exactly what our supreme court condemned in *Phelan* — an indirect attempt by the insurer to deny UM or UIM coverage to an "insured." Thus, we find in the present case that defendant's attempt to define the term "insured" more narrowly for UIM coverage under the policy than it did for liability coverage violates Illinois law. See *Phelan*, 59 Ill.2d at 395, 321 N.E.2d at 260; *Schultz*, 387 Ill.App.3d at 628, 327 Ill.Dec. 224, 901 N.E.2d at 962. Plaintiff's decedent, therefore, is entitled to UIM coverage under the policy.

FN1. As noted above, if the amount of liability coverage exceeds the statutory minimum limits, the insured may reject UM coverage in excess of the statutory limits. 215 ILCS 5/143a-2(1) (West 2006).

[12] Furthermore, even if we had declined to reach the merits of plaintiff's initial assertion or had declined to follow the analysis in *1071 *Schultz*, we still would have ruled in plaintiff's favor in this case. Plaintiff's alternative assertion on appeal is that the trial court erred in finding that decedent was not "occupying" the covered vehicle at the time of the accident and in granting summary judgment for defendant on that basis. We agree with that assertion.

The broad definition of "occupying" that was used in the policy in the present case has previously been interpreted by this court and other Illinois

courts. See *Abrell*, 343 Ill.App.3d at 262, 277 Ill.Dec. 557, 796 N.E.2d at 645; *Mathey v. Country Mutual Insurance Co.*, 321 Ill.App.3d 805, 806, 254 Ill.Dec. 857, 748 N.E.2d 303, 305 (2001); *Cohs*, 329 Ill.App.3d at 932, 264 Ill.Dec. 201, 769 N.E.2d at 1041. In those cases, it was held that to impose liability on the insurer, two requirements must be satisfied related to the accident in question: (1) there must be some nexus or relationship between the injured party and the covered vehicle, and (2) there must be actual or virtual physical contact between the injured party and the covered vehicle. See *Abrell*, 343 Ill.App.3d at 262, 277 Ill.Dec. 557, 796 N.E.2d at 645; *Mathey*, 321 Ill.App.3d at 812, 254 Ill.Dec. 857, 748 N.E.2d at 310; *Cohs*, 329 Ill.App.3d at 934, 264 Ill.Dec. 201, 769 N.E.2d at 1042. The analysis in this case is more narrow still since defendant concedes that there is a relationship between decedent and the covered vehicle and since the parties agree that decedent was not in actual physical contact with the covered vehicle at the time of the accident. Thus, to determine if decedent was entitled to coverage under the UIM provision of the policy in the present case, we need only to determine whether decedent was in virtual physical contact with the covered vehicle when the accident occurred.

We answer that question in the affirmative. It is clear from the record in this case that decedent had been using the covered vehicle just moments before the accident occurred, that he had parked the ***95 **168 vehicle nearby, that he had put his flashing emergency lights on, and that he had left the engine of the vehicle running as he went to remove the pieces of angle iron from the roadway. Arguably, decedent may have had a statutory obligation to promptly attend to the traffic hazard that had been created. See 625 ILCS 5/ 11-1413(b) (West 2006). At the very least, it was the responsible thing for decedent to do. Based upon the unique facts of this particular case, we find that decedent was in virtual physical contact with the covered vehicle at the time of the accident and that he was, therefore, "occupying" the covered vehicle when the accident

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occurred. See *De Almeida v. General Accident Insurance Co. of America*, 314 N.J.Super. 312, 316-17, 714 A.2d 967, 970 (1998) (decedent, who was retrieving cones from roadway during work, did not relinquish his "occupying" status as to the covered vehicle). Thus, decedent is entitled to UIM coverage under the policy, even if the definition of the term "insured" placed in the UIM endorsement is allowed to stand.

*1072 For the foregoing reasons, we reverse the trial court's grant of summary judgment in favor of defendant. Instead, we grant plaintiff's motion for summary judgment on this issue and remand the case to the trial court for further proceedings.

Reversed; summary judgment granted for plaintiff; cause remanded.

O'BRIEN, P.J. and McDADE, J., concurring.

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RELATED TOPICS

- Contracts and Policies
- Fair and Reasonable Construction of Insurance Contract
- General Rules of Construction
- Provision of Contract Ambiguous General Rule of Contra Proferentum

Mary Jo DIXON, Plaintiff-Appellant,
 v.
 George E. GUNTER and Continental Insurance Company, Defendants
 -Appellees.

Feb. 25, 1982. Permission to Appeal Denied by Supreme Court July 12, 1982.

Wife sued for wrongful death of her husband, president and sole stockholder of corporation, which resulted from automobile collision and named as defendants alleged uninsured motorist and subsidiary of insurance company which had issued automobile policy containing uninsured motorist coverage to corporation of which husband was president and sole stockholder. The Fifth Circuit Court, Davidson County, Stephen North, J., dismissed insurance company, and wife brought interlocutory appeal. The Court of Appeals, Todd, P. J. (M.S.), held that policy issued to corporation did not afford uninsured motorist protection to president and sole stockholder of corporation while operating vehicle belonging to third party and not engaged in business of corporation.

Affirmed and remanded.

West Headnotes (6)

Change View

- 1 **Contracts** Construction against party using words
 Rule of construction against writer of instrument requires latent ambiguity.
 1 Cases that cite this headnote
- 2 **Insurance** Ambiguity, Uncertainty or Conflict
 Provision in automobile liability policy issued to corporation which referred to personal injuries and family was patent ambiguity and any reference to personal injuries or family would therefore be regarded as surplus and rejected as such.
 5 Cases that cite this headnote
- 3 **Insurance** Reasonableness
Insurance Construction to be fair
 A contract of insurance should be given a fair and reasonable construction; and likewise should be given sensible construction, consonant with apparent object and plain intention of parties; construction such as would be given the contract by an ordinary and intelligent businessman; and practical and reasonable rather than literal construction.
 11 Cases that cite this headnote
- 4 **Insurance** Reasonableness
Insurance Construction to be unstrained
Insurance Construction to be fair
 Insurance contract should not be given a forced, unnatural or unreasonable construction which would extend or restrict policy beyond what is fairly within its terms, or which would lead to an absurd conclusion or render policy nonsensical and ineffective.

4 Cases that cite this headnote

5 **Insurance**  Rules of Construction
 Authorities cited for interpretation of insurance policies issued to partnerships are not deemed applicable to situation involving policy issued to corporation.

6 **Insurance**  Persons Covered
 Policy issued to corporation did not afford uninsured motorist protection to president and sole stockholder of corporation who was injured while operating vehicle belonging to third party and not engaged in business of corporation.

10 Cases that cite this headnote

Attorneys and Law Firms

*438 Fred Cowden, Jr., Robert Hoehn, Nashville, for plaintiff-appellant.

Thomas Mink, II, Parker, Nichol & Finley, Nashville, for The Continental Ins. Co.

ABRIDGED

Opinion

OPINION

TODD, Presiding Judge, Middle Section.

(With the concurrence of participating judges, the original opinion has been abridged for publication.)

This is an interlocutory appeal for which permission was granted by the Trial Court and this Court. Plaintiff sued for wrongful death of her husband, Alfred Wayne **Dixon**, in an automobile collision. Named as defendants were George E. **Gunter**, an alleged uninsured motorist involved in the collision and Continental Insurance Company, a subsidiary of which had issued an automobile policy containing uninsured motorist coverage to Nashville Stone Erection Company, Inc., of which Alfred Wayne **Dixon** was president and sole stockholder.

The Trial Judge entered summary judgment dismissing Continental, and plaintiff appealed.

The sole issue presented by appellant is whether the policy issued to the corporation afforded uninsured motorist protection to the president and sole stockholder of the corporation while operating a vehicle belonging to a third party and not engaged in the business of the corporation.

The following stipulation was submitted to the Trial Judge:

It is agreed by and between the parties that plaintiff's intestate was the driver of an automobile owned by Juanita Sutton on August 2, 1980, when he was in collision with an automobile owned and driven by defendant, George E. **Gunter**, of Crab Orchard, Tennessee, said accident occurring at Third Avenue and Jefferson Street in Nashville, Davidson County, Tennessee;

That the automobile driven by plaintiff's intestate was insured through State Farm Automobile Insurance Company with uninsured motorist coverage of *439 Twenty-five Thousand Dollars (\$25,000.00), and that defendant's automobile was uninsured.

That said State Farm Automobile Insurance Company has paid to plaintiff, as administratrix of the estate of deceased, Alfred Wayne **Dixon**, the sum of Twenty-three Thousand Dollars (\$23,000.00) under the uninsured motorist provision of the policy;

That said deceased was president and principal owner of Nashville Stone Erection Company, Inc., which corporation was insured by Glen Falls Insurance Company

under a policy providing liability and uninsured motorist coverage, and that said policy was in full force and effect on said date of August 2, 1980.

That the documents referred to and attached to this stipulation, to wit: release; Glen Falls Insurance Company policy number LBA2 60 29 89, both of which are true, correct and complete copies of the originals and are to be considered by the Court as originals.

The policy, issued to Nashville Stone Erection Company, Inc., includes "Item Two-Schedule of Coverages and Covered Autos" as follows:

COVERAGES	COVERED AUTOS
(Entry of one or more of the symbols from ITEM THREE shows which autos are covered autos)	
LIABILITY INSURANCE	1
PERSONAL INJURY PROTECTION (P.I.P.) (for equivalent No-fault coverage)	
ADDED P.I.P (for equivalent added No-fault cov.)	
PROPERTY PROTECTION INSURANCE (P.P.I.) (Michigan only)	
AUTO MEDICAL PAYMENTS INSURANCE	7
UNINSURED MOTORISTS INSURANCE	1
PHYSICAL DAMAGE INSURANCE:	
COMPREHENSIVE COVERAGE	7
SPECIFIED PERILS COVERAGE	
COLLISION COVERAGE	7
TOWING AND LABOR (Not available in Calif.)	

Included in "Item Three-Description of Covered Auto Designation Symbols" are the following pertinent provisions:

SYMBOL

- 1 = ANY AUTO
- 7 = SPECIFICALLY DESCRIBED AUTOS.
Only those autos described in ITEM FOUR for which a premium charge is shown (and for liability coverage any trailers you don't own while attached to any power unit described in ITEM FOUR).

Included in "Item Four-Schedule of Covered Autos" is the following:

***440 "Part I, Words and Phrases with Special Meaning-Read Them Carefully"** contains the following pertinent provision:

The following words and phrases have special meaning throughout this policy and appear in bold-face type when used:

A. "You" and "your" mean the person or organization shown as the named insured in ITEM ONE of the declarations.

....

F. "Insured" means any person or organization qualifying as an insured in the WHO IS INSURED section of the applicable insurance. Except with respect to our limit of liability, the insurance afforded applies separately to each insured who is seeking coverage or against whom a claim is made or suit is brought.

Included in "Part II-Which Autos Are Covered Autos" is the following:

- A. ITEM TWO of the declarations shows the autos that are covered autos for each of your coverages. The numerical symbols explained in ITEM THREE of the declarations describe which autos are covered

autos. The symbols entered next to a coverage designate the only autos that are covered autos.

The "Uninsured Motorists Insurance" endorsement of the policy states:

A. WORDS AND PHRASES WITH SPECIAL MEANING.

In addition to the WORDS AND PHRASES WITH SPECIAL MEANING in the policy, the following words and phrases have special meaning for UNINSURED MOTORISTS INSURANCE:

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

....

B. WE WILL PAY

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

....

D. WHO IS INSURED

1. Your or any family member.

2. Anyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction.

3. Anyone for damages he is entitled to recover because of bodily injury sustained by another insured.

The Trial Judge concluded that, since there was no evidence that deceased was an occupant of the insured vehicle or a temporary substitute therefor at the time of his injury, there was no liability under the quoted provisions of the policy.

Appellant insists that the defendant is liable because the policy, quoted above, covers "any auto" and because the uninsured motorists provisions of the policy covers "your or any family member." Appellant insists that, since the named insured, a corporation, could not receive personal injuries and could not have any "family member", this Court must look beyond the corporate structure and hold that "you" was intended to mean the individual owning all of the stock of the corporation.

1 2 If none of the foregoing insistences are accepted, then appellant relies upon the rule of construction against the writer of an instrument. The application of such a rule requires a latent ambiguity which is not present in the present case. The ambiguity is patent. That is, it is obvious, even to a casual reader, that the insured was to be a corporation which could not possibly have personal injuries or family. Therefore, any reference to personal injuries or family must be regarded as surplus and rejected as such. 17A C.J.S. Contracts, s 316, p. 180.

3 4 A contract of insurance should be given a fair and reasonable construction; and likewise should be given a sensible construction, consonant with the apparent object and plain intention of the parties; a construction such as would be given the contract by an ordinary intelligent business man; and a practical and reasonable rather than a literal construction. The contract should not be given a forced, unnatural or unreasonable construction which would extend or restrict the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion or render the policy nonsensical and ineffective. 44 C.J.S. Insurance, s 296, pp. 1163, 1164, 1165.

5 Authorities cited for the interpretation of policies issued to partnerships are not deemed applicable to the present situation involving a corporation. A partnership is

composed of individuals and, generally has no existence except through its individual components. A corporation is an entity separate and apart from its individual officers, directors, stockholders and employees.

It has been held that individual owners of a corporation are not, as such, insureds under a policy issued to the corporation. *Polgin v. Phoenix of Hartford Insurance Companies*, 1972, 5 Ill.App.3d 84, 283 N.E.2d 324; *Kaysen v. Federal Insurance Company, Minn.* 1978, 268 N.W.2d 920; *General Insurance Company of America v. Icelandic Builders, Inc.* 1979, 24 Wash.App. 656, 604 P.2d 966.

6 This Court agrees with the Trial Judge that the policy in question did not extend uninsured motorist coverage to deceased while driving a vehicle not owned by the insured and not being used as a substitute vehicle for the insured vehicle.

Affirmed and remanded.

LEWIS and CONNER, JJ., concur.

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1

In the Interest of A.J.T.

No. ED 91088.

Missouri Court of Appeals,
Eastern District,
Division Two.

Nov. 4, 2008.

Appeal from the Circuit Court of St. Louis County, Michael David Burton, Judge.

Christopher M. Braeske, St. Louis, for Appellant.

Allison M. Wolff, Clayton, for Respondent.

Before ROY L. RICHTER, P.J.,
LAWRENCE E. MOONEY, J., and
GEORGE W. DRAPER III, J.

ORDER

PER CURIAM.

T.L.S. ("Mother") appeals the trial court's termination of her parental rights ("TPR") to her child A.J.T. We have reviewed the briefs of the parties and the record on appeal and find no error of law. No jurisprudential purpose would be served by a written opinion. However, the parties have been furnished with a memorandum for their information only, setting forth the facts and reasons for this order.

The judgment is affirmed pursuant to Rule 84.16(b).



2

Jennifer ELDRIDGE, Appellant,

v.

COLUMBIA MUTUAL INSURANCE
COMPANY, Respondent.

No. WD 69444.

Missouri Court of Appeals,
Western District.

Nov. 12, 2008.

Background: Mother of child killed in car collision in vehicle driven by child's stepmother brought action against stepmother's alleged insurer. The Circuit Court, Pettis County, Robert Lawrence Koffman, J., granted summary judgment in favor of insurer. Mother appealed.

Holding: The Missouri Court of Appeals, Lisa White Hardwick, J., held that stepmother did not qualify as an insured under policy which identified stepmother's father as the named insured and listed stepmother as a driver of a vehicle not involved in the collision.

Affirmed.

1. Appeal and Error ⇨934(1)

When considering appeals from summary judgments, the appellate court takes as true the facts set forth by affidavit or otherwise in support of a party's motion unless contradicted by the other party's response to the summary judgment motion. V.A.M.R. 74.04.

2. Appeal and Error ⇨78(1), 870(2)

Generally, an order denying a motion for summary judgment is not a final judgment and therefore is not reviewable on appeal; if, however, the merits of the denied motion for summary judgment are intertwined with the propriety of an appealable order granting summary judgment to another party, the denial of a

motion for summary judgment may be reviewed on appeal. V.A.M.R. 74.04.

3. Appeal and Error ⇄893(1)

The interpretation of an insurance policy is a question of law entitled to de novo review.

4. Insurance ⇄1822

A court interprets an insurance policy according to the plain and ordinary meaning of its language.

5. Insurance ⇄1810, 1822

When interpreting an insurance policy, a court does not determine the plain meaning of the words and phrases in isolation; rather, it does so with reference to the context of the policy as a whole.

6. Insurance ⇄1809, 1822

Unless insurance policy language is ambiguous, appellate courts must enforce the contract as written, giving the words and phrases their ordinary meaning.

7. Insurance ⇄1808

An ambiguity arises where there is a duplicity, indistinctness, or uncertainty in the meaning of the words used in an insurance contract.

8. Insurance ⇄1808, 1824

If a term is defined in an insurance policy, courts must look to that definition and nowhere else; however, the absence of a definition for a key term does not necessarily render the policy ambiguous.

9. Insurance ⇄1808

When interpreting an insurance policy, courts should be careful not to create ambiguities where none exist.

10. Insurance ⇄2660.5, 2661

Named insured's adult daughter, who was not a resident of named insured's household and who was listed only as a "driver" under automobile insurance poli-

cy, was a covered driver with regard to the policy's covered vehicle, but did not otherwise qualify as an insured under the policy, and thus daughter was not an insured with regard to an accident in which she was driving another vehicle; term "driver," although undefined in the policy, did not have the same meaning as "named insured" under the policy.

See publication Words and Phrases for other judicial constructions and definitions.

Harry R. Gaw, Jr., Tipton, MO, for appellant.

Susan F. Robertson, Wade H. Ford, Jr., Co-Counsel, Columbia, MO, for respondent.

Before DIV II: SMART, P.J.,
HARDWICK and WELSH, JJ.

LISA WHITE HARDWICK, Judge.

Jennifer Eldridge appeals from a summary judgment ruling that denied coverage under an automobile insurance policy issued by Columbia Mutual Insurance Company. Eldridge contends the circuit court erred in granting summary judgment because the insurance policy was ambiguous in failing to define the term "driver." As explained herein, we find no ambiguity and affirm the summary judgment.

[1] When considering appeals from summary judgments, we review the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). We take as true the facts set forth by affidavit or otherwise in support of a party's motion unless contradicted by the other party's response to the summary judgment motion. *Id.* We give the non-prevailing party the benefit of all

reasonable inferences from the record. *Id.*

The underlying facts in this case are not in dispute. On February 2, 2004, Jennifer Eldridge's son, Gage Savage, was a passenger in a 1990 Ford Tempo owned by Gage Savage's father, Joshua Savage, and driven by Victoria Savage, Gage Savage's step-mother. The Ford Tempo was traveling north on Missouri State Route B, south of Boonville, when it collided with a vehicle driven by Robert Bail. As a result of the collision, Gage Savage died.

The Ford Tempo was covered under an insurance policy issued to Joshua Savage by American Standard Insurance. Eldridge sought the policy limits from American Standard, but the coverage afforded by that policy is not at issue in this case.

Eldridge also sought the policy limits from Columbia Mutual Insurance Company. The Columbia Mutual policy insured a 2000 Chevrolet Malibu that was not involved in the accident. The Columbia Mutual policy showed John Earnest as the named insured and his daughter, Victoria Earnest (whose married name is now Savage) as a driver of the Chevrolet Malibu. Columbia Mutual refused Eldridge's demand for payment on grounds that Victoria Savage was not an insured under the policy because she was not driving the Chevrolet Malibu at the time of the accident.

Eldridge filed a wrongful death action against Victoria Savage and acquired a judgment against Victoria Savage in the amount of \$450,000. Eldridge and Victoria Savage thereupon entered into an agreement with a restricted partial release, reservation of claim, and covenant not to execute. Victoria Savage agreed to entry of a consent judgment in the amount of \$450,000 in favor of Eldridge, and Eldridge agreed that she would not execute against the real or personal property of

Victoria Savage and that she would seek to satisfy the judgment from the American Standard policy, the Columbia Mutual policy, and any claims or causes of action that she may have against other persons or entities. Joshua Savage also agreed that Eldridge was entitled to 100% of the proceeds from the American Standard and Columbia Mutual policies. Based on those agreements, the circuit court ordered American Standard to pay its policy limits of \$25,000 to Eldridge for the wrongful death of Gage Savage.

On February 14, 2006, Eldridge filed her petition for declaratory judgment against Columbia Mutual alleging that Victoria Savage was an insured under the policy insuring the 2000 Chevrolet Malibu and that Columbia Mutual had failed to defend its insured in the wrongful death action and had refused to settle for the policy limits. Eldridge and Columbia Mutual filed cross-motions for summary judgment seeking determination of whether or not coverage was afforded to Victoria Savage under the Columbia Mutual policy. The circuit court denied Eldridge's motion for summary judgment and granted Columbia Mutual's motion for summary judgment. The court found that Columbia Mutual's policy was not ambiguous, that Victoria Savage was not a named insured under the policy and, at the time of the accident, she was driving a vehicle that was not covered by the policy.

[2] On appeal, Eldridge contends that the circuit court erred in denying her motion for summary judgment and in granting Columbia Mutual's motion for summary judgment. "Generally, an order denying a motion for summary judgment is not a final judgment and therefore is not reviewable on appeal." *Fischer v. City of Washington*, 55 S.W.3d 372, 381 (Mo.App.2001). If, how-

ever, the merits of the denied motion for summary judgment “are intertwined with the propriety of an appealable order granting summary judgment to another party,” the denial of a motion for summary judgment may be reviewed on appeal. *Id.* Such is the case here.

We review the circuit court’s granting of a summary judgment *de novo*. *ITT Commercial*, 854 S.W.2d at 376. “The propriety of summary judgment is purely an issue of law.” *Id.* Because the circuit court’s judgment is based on the record submitted and the law, we need not defer to the circuit court’s order granting summary judgment. *Id.* We will affirm the circuit court’s grant of summary judgment if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.* at 380; Rule 74.04(c)(6).

[3–6] The interpretation of an insurance policy is also a question of law entitled to *de novo* review. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). We interpret the policy according to the plain and ordinary meaning of its language. *Mo. Employers Mut. Ins. Co. v. Nichols*, 149 S.W.3d 617, 625 (Mo. App.2004). We do not determine the plain meaning of the words and phrases in isolation; rather, we do so with reference to the context of the policy as a whole. *Miller v. O’Brien*, 168 S.W.3d 109, 114 (Mo. App.2005). Unless the policy language is ambiguous, appellate courts must enforce the contract as written, giving the words and phrases their ordinary meaning. *Id.*

[7–9] “An ambiguity arises where there is a duplicity, indistinctness, or uncertainty in the meaning of the words used in an insurance contract.” *Am. Family Mut. Ins. Co. v. Peck*, 169 S.W.3d 563, 567 (Mo.App.2005)(quoting *Nichols*, 149 S.W.3d at 625). If a term is defined in the policy, courts must “look to that definition

and nowhere else.” *Heringer v. Am. Family Mut. Ins. Co.*, 140 S.W.3d 100, 103 (Mo.App.2004). However, the absence of a definition for a key term does not necessarily render the policy ambiguous. *Peck*, 169 S.W.3d at 567. Courts should be careful not to create ambiguities where none exist. *Id.*

[10] The threshold issue before us is whether an ambiguity existed in the policy issued by Columbia Mutual. Eldridge contends the circuit court erred in granting summary judgment because the term “driver” was undefined in the policy, thereby creating an ambiguity that would lead a reasonable person to assume a “driver” is an insured under the policy.

On the declarations page of the Columbia Mutual policy, the “Named Insured” is identified as “John M. Earnest.” In a separate section of the same page is the heading “Driver(s) Summary,” under which John Earnest is listed as “Driver 001” and Victoria Earnest is listed as “Driver 002.” Under the heading “Vehicle(s) Summary,” the declarations page listed “Driver 002” as the driver of the 2000 Chevrolet Malibu.

Amended Part A of the Liability Coverage for the policy states: “We will pay damages for ‘bodily injury’ or ‘property damage’ for which any ‘insured’ becomes legally responsible because of an auto accident.” (Emphasis added). The Liability Coverage defines “insured” in relevant part as:

1. You for the ownership, maintenance or use of any auto or “trailer”.
2. Any “family member”:
 - a. Who does not own an auto, for the maintenance or use of any auto or “trailer”.
 - b. Who owns an auto, but only for the use of “your covered auto”

3. Any person using "your covered auto"...
4.
5. For any auto or "trailer", other than "your covered auto", any other person or organization but only with respect to legal responsibility for acts or omissions of you or any "family member" for whom coverage is afforded under this Part.

The definition section further defines "you" or "your" as "[t]he 'named insured' shown in the Declarations" and "[t]he spouse if a resident of the same household." The policy defines "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household."

Victoria Savage was not a resident of John Earnest's household at the time of the accident. Additionally, she is not listed as a "Named Insured" on the Declarations page of the policy. She is listed in the policy only as a "Driver." More specifically, she is listed as a driver for the 2000 Chevrolet Malibu, which is a covered vehicle under the policy but was not involved in the subject accident. Based on the plain language of the insurance agreement, Victoria Savage was a covered driver with regard to the 2000 Chevrolet Malibu, but she was not an insured for any other purposes under the policy.

We disagree with Eldridge's argument that the term "driver" is unclear because it was not defined in the policy. The mere lack of definition does not create an ambiguity. *Peck*, 169 S.W.3d at 567. Nothing in the policy suggests that its use of the term has any meaning beyond the plain and ordinary meaning of "driver." *Merriam Webster's Collegiate Dictionary*, 353 (10th ed.2000) defines "driver" as "one that drives: as a: COACHMAN b: the operator of a motor vehicle[.]" These definitions are consistent with the everyday use of the

word with respect to automobiles and do not create confusion or uncertainty. Further, the double listing of John Earnest in the policy, once as the "named insured" and again in another section of the policy set off with horizontal lines and headed by the bolded words "DRIVER(S) SUMMARY," prevents an understanding that "driver" could have the same meaning as "named insured" under the policy.

Although Missouri has not directly addressed this issue, other jurisdictions have recognized that the designation of "driver" on the declarations page of an insurance policy is not without effect. In *Kitmirides v. Middlesex Mutual Assurance Co.*, 65 Conn.App. 729, 783 A.2d 1079, 1084 (2001), under similar circumstances to those before us, the court held that the policy's definition of an insured is unambiguous when one party is listed as a named insured on the declarations page and another is listed as a driver, a term undefined by the policy. The court concluded that the driver designation serves as dispositive evidence of permission to use a covered vehicle. *Id.* at 1083 n. 7.

Indiana and Kentucky have also rejected the notion that an ambiguity arises when an automobile insurance policy fails to define the term "driver." *Millspaugh v. Ross*, 645 N.E.2d 14 (Ind.Ct.App.1994); *True v. Raines*, 99 S.W.3d 439, 444 (Ky. 2003). The Indiana court found that while the designation of driver was significant for some purposes, including the amount of the premium due under the policy, it did not create a right to coverage under all provisions of the policy. *Millspaugh*, 645 N.E.2d at 16-17. Likewise, North Carolina has held that the term "named insured" unambiguously excludes persons listed only as drivers in policies similar to the one at issue here. *Nationwide Mut. Ins. Co. v. Williams*, 123 N.C.App. 103, 472 S.E.2d 220, 222 (1996). This view is in

keeping with *Couch on Insurance*, which explains that “one listed on the policy, but only in the status of a driver of a vehicle, is not a named insured despite the fact that such person’s name was physically on the policy.” 7A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d § 110:1 (2005).

The circuit court properly granted summary judgment in favor of Columbia Mutual because the insurance policy at issue is not ambiguous. The policy plainly states that Victoria Savage is entitled to insurance coverage as a driver of the 2000 Chevrolet Malibu. Because Victoria Savage was not driving the Chevrolet Malibu at the time of the accident and did not otherwise qualify as an insured under definitions in the policy, no insurance claim could be stated on her behalf against Columbia Mutual. The point on appeal is denied.

We affirm the circuit court’s judgment.

ALL CONCUR.



PAYROLL ADVANCE, INC., Appellant,

v.

Barbara YATES, Respondent.

No. SD 29040.

Missouri Court of Appeals,
Southern District,
Division One.

Nov. 17, 2008.

Background: Employer filed petition for injunctive relief and for breach of employment contract which contained a covenant not to compete. The Circuit Court, Dunklin

County, Stephen R. Sharp, J., entered judgment in favor of former employee, and employer appealed.

Holding: The Court of Appeals, Robert S. Barney, J., held that employer was not entitled to permanent injunction to enforce terms of the covenant not to compete. Affirmed.

1. Appeal and Error ⇨846(1), 1010.1(6), 1012.1(1)

In a bench-tryed case, appellate court must sustain the decree or judgment of the trial court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.

2. Contracts ⇨117(3)

Injunction ⇨61(2)

Employer was not entitled to permanent injunction to enforce terms of the covenant not to compete, which declared that employee could not compete with employer as owner, manager, partner, stockholder, or worker in any business that was in competition with employer and within a 50 mile radius of employer’s business; under the covenant not to compete, former employee would be barred from working in competing business within 50 miles of any of employer’s branch offices, covenant failed to set out with precision what was to be considered a competing business and did not specify that it only applied to other payday loan businesses, and former employee was unable to find a job in area in a business other than another payday loan establishment.

3. Antitrust and Trade Regulation ⇨413

A “trade secret” can be any formula, pattern, device or compilation of informa-

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COUCH § 110:1
7A Couch on Ins. § 110:1

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Couch on Insurance Third Edition
Database updated June 2011

Lee R. Russ in consultation with Thomas F. Segalla

Part
VI. RISKS AND ACTIVITIES COVERED BY INSURANCE POLICY
Subpart
B. RISKS COVERED UNDER LIABILITY AND RELATED INSURANCE
Subpart
2. AUTOMOBILE LIABILITY AND RELATED INSURANCE COVERAGES
Chapter
110. Persons Covered: General Rules; Age and License Exclusions
1. IN GENERAL

References

§ 110:1. Definitions; Distinction Between “Insured” and “Named Insured”**West's Key Number Digest**West's Key Number Digest, Insurance  2660**A.L.R. Library**

2660

Who Is “Named Insured” Within Meaning of Automobile Insurance Coverage, 91 A.L.R. 3d 1280

Legal Encyclopedias

Am. Jur. 2d, Automobile Insurance § 222

Every contract of insurance specifies an insured.[1] The term “named insured” is not synonymous with “insured,” but has a restricted meaning; it does not apply to any person other than those specified by name in the policy.[2]

Observation:

As these terms are often used interchangeably by the courts, practitioners should carefully review the decisions and pleadings to determine which term is the correct term. The proper designation is also of obvious importance to the insurer because it defines the extent of the basic risk.

One can only become a named insured by being named as such on the policy and not by conduct.[3]

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In addition, policies of automobile liability insurance generally define certain other persons, commonly described by class, as additional or other insureds.[4] The term “insured” is not limited to the named insured, but applies to anyone who is insured under the policy.[5]

To qualify as an “insured” under a policy of automobile insurance, parties must either be the named insured or establish that they were a driver or occupant of a covered vehicle involved in an accident.[6]

Throughout this chapter, it must be recognized that only persons within the intent of the policy will be covered.[7] Thus, where there is no evidence to demonstrate a change in the agreement of the policyholders with an insurance company, a court will not vary from the terms of the policy defining a husband and wife as the named insureds, so that the named insureds' daughters cannot be considered as named insureds even though they have free use of the insured vehicles to carry out family business and responsibilities due to the wife's blindness.[8] And one listed in the policy, but only in the status of a driver of the vehicle, is not a named insured despite the fact that such person's name was physically in the policy.[9]

In harmony with the concept that the contract of insurance is a personal contract,[10] there is no coverage where the right of the other driver is predicated upon an assignment or transfer to him or her by the original insured of the motor vehicle or of any license or franchise. Thus, it has been held that a policy covering a jitney bus while being operated by the insured does not inure to the benefit of one to whom the insured has assigned his or her driver's license in violation of law, although the latter has the bond changed so as to cover a car owned by the assignee, the insurer having no knowledge of the transfer of the operator's license.[11]

CUMULATIVE SUPPLEMENT

Cases:

Listed operators have a different status in automobile insurance policies from that of named insureds. *Kanamaru v. Holyoke Mut. Ins. Co.*, 72 Mass. App. Ct. 396, 892 N.E.2d 759 (2008).

[END OF SUPPLEMENT]

[FN1] See Couch on Insurance 3d, § 17:4.

As to the definition of insured, generally, see Couch on Insurance 3d, § 40:1.

[FN2] *Kohly v. Royal Indem. Co.*, 190 So. 2d 819 (Fla. Dist. Ct. App. 3d Dist. 1966), cert. denied, 200 So. 2d 813 (Fla. 1967); *Industrial Fire & Casualty Ins. Co. v. Jones*, 363 So. 2d 1168 (Fla. Dist. Ct. App. 3d Dist. 1978), cert. denied, 372 So. 2d 469 (Fla. 1979); *State Farm Mut. Auto. Ins. Co. v. Register*, 583 S.W.2d 705 (Ky. Ct. App. 1979); *Stone v. Waters*, 483 S.W.2d 639 (Mo. Ct. App. 1972); *Hertz Corp. v. Ashbaugh*, 94 N.M. 155, 607 P.2d 1173 (Ct. App. 1980), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Where automobile liability policy of transfer company would have, under the omnibus clause, made railroad an additional insured during loading operation at railroad warehouse, but special endorsement to policy extended coverage of railroad for the use in its business of any vehicle owned or operated by

the transfer company, railroad was a named insured and not merely an additional insured. *Minneapolis, S. P. & S. S. M. R. Co. v. St. Paul Mercury Indem. Co.*, 268 Minn. 390, 129 N.W.2d 777 (1964).

Annotation: Who is "named insured" within meaning of automobile insurance coverage, 91 A.L.R.3d 1280.

[FN3] *Hille v. Safeco Ins. Co.*, 25 Ariz. App. 353, 543 P.2d 474 (1975).

[FN4] See, for example, Couch on Insurance 3d, §§ 115:5, 115:127, 114:5.

[FN5] *Midwest Contractors Equipment Co. v. Bituminous Casualty Corp.*, 112 Ill. App. 2d 134, 251 N.E.2d 349 (1st Dist. 1969).

[FN6] *Archunde v. International Surplus Lines Ins. Co.*, 120 N.M. 724, 905 P.2d 1128 (Ct. App. 1995) (where policy of school bus company defined named insured as "you" and "if you are an individual, any family member," and, as defined in policy, term "family member" was defined as individual related by blood, marriage or adoption, who is resident of named insured's household, and did not extend to bus company employees, nor did driver assert that he or she was either named insured or household member of named insured, and policy expressly excluded any coverage for bodily injury to employee of insured arising out of, and in course of, employment by insured, summary judgment was properly granted for bus company's insurer on issue of uninsured/underinsured coverage under policy).

Though declarations page of automobile policy listed son along with husband and wife under general heading "6. Insured Information" and under particular subheading "Name," policy was not ambiguous, and son was not "named insured" under policy where policy definition plainly and explicitly limited meaning of "named insured" to individual named in "item 1" (and to his or her spouse if he or she was also listed or was resident in same household), and only husband's name was listed under item 1. *Jarvis v. Aetna Casualty & Sur. Co.*, 633 P.2d 1359 (Alaska 1981).

[FN7] *Capital Ins. & Surety Co. v. Globe Indem. Co.*, 382 F.2d 623 (9th Cir. Guam 1967); *Billups v. Alabama Farm Bureau Mut. Casualty Ins. Co.*, 352 So. 2d 1097 (Ala. 1977), appeal after remand, 366 So. 2d 1109 (Ala. 1979).

[FN8] *Curtis v. State Farm Mut. Auto. Ins. Co.*, 591 F.2d 572 (10th Cir. Wyo. 1979).

As to when family members are included within coverage, generally, see Couch on Insurance 3d, Chapter 114.

[FN9] *Griffin v. State Farm Mut. Auto. Ins. Co.*, 129 Ga. App. 179, 199 S.E.2d 101 (1973).

Named insured's adult daughter, who was not a resident of named insured's household and who was listed only as a "driver" under automobile insurance policy, was a covered driver with regard to the policy's covered vehicle, but did not otherwise qualify as an insured under the policy, and thus daughter was not an insured with regard to an accident in which she was driving another vehicle; term "driver," although undefined in the policy, did not have the same meaning as "named insured" under the policy. *Eldridge v. Columbia Mut. Ins. Co.*, 270 S.W.3d 423 (Mo. Ct. App. W.D. 2008).

[FN10] See Couch on Insurance 3d, §§ 1:11 et seq.

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7A Couch on Ins. § 110:1

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[FN11] Young v. Wilson, 99 Wash. 159, 168 P. 1137 (1917).

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667 So.2d 1112, 95-1937 (La.App. 4 Cir. 11/30/95)
 (Cite as: 667 So.2d 1112, 95-1937 (La.App. 4 Cir. 11/30/95))



Court of Appeal of Louisiana,
 Fourth Circuit.

Barry H. HOBBS, Sr. et al.,
 v.
 Charles W. RHODES, et al.

No. 95-C-1937.
 Nov. 30, 1995.
 Rehearing Denied Feb. 22, 1996.
 Writ Denied May 3, 1996.

Employee sued employer's automobile insurer, seeking uninsured motorist (UM) coverage after he was struck by uninsured vehicle while walking across remote jobsite. The Civil District Court, Parish of Orleans, No. 94-6500, Louis A. DiRosa, J., denied insurer's summary judgment motion. Insurer sought supervisory relief and certiorari was granted. The Court of Appeal, Waltzer, J., held that: (1) insured did not validly waive UM coverage; (2) since employee qualified as insured for purposes of liability coverage, he qualified as insured for purposes of UM coverage; and (3) fact that employee was not actually getting into employer's van to leave the remote worksite when he was struck by the uninsured vehicle was irrelevant to his status as insured.

Writ granted; relief denied.

West Headnotes

[1] Insurance 217 ↪ 2772

217 Insurance
 217XXII Coverage--Automobile Insurance
 217XXII(D) Uninsured or Underinsured Motorist Coverage
 217k2772 k. In general. Most Cited Cases
 (Formerly 217k467.51(1))
 Uninsured motorist (UM) statute is liberally construed in order to carry out public policy object-

ive of promoting recovery of damages for innocent victims of automobile accidents when tort-feasor is without insurance, and as additional or excess coverage when tort-feasor is inadequately insured. LSA-R.S. 22:1406.

[2] Insurance 217 ↪ 2778

217 Insurance
 217XXII Coverage--Automobile Insurance
 217XXII(D) Uninsured or Underinsured Motorist Coverage
 217k2773 Mandatory Coverage
 217k2778 k. Acceptance or rejection.
 Most Cited Cases
 (Formerly 217k130.5(4))
 Uninsured motorist (UM) coverage accompanies any automobile insurance policy unless that coverage has been clearly and unmistakably rejected. LSA-R.S. 22:1406.

[3] Insurance 217 ↪ 2778

217 Insurance
 217XXII Coverage--Automobile Insurance
 217XXII(D) Uninsured or Underinsured Motorist Coverage
 217k2773 Mandatory Coverage
 217k2778 k. Acceptance or rejection.
 Most Cited Cases
 (Formerly 217k130.5(4))
 Form used to deny uninsured motorist (UM) coverage must give meaningful selection to insured, placing insured in position to make informed rejection by setting out at least three options: (1) UM coverage equal to bodily injury policy limits; (2) UM coverage lower than bodily injury policy limits; or (3) no UM coverage at all. LSA-R.S. 22:1406, subd. D(1)(a)(i).

[4] Insurance 217 ↪ 2778

217 Insurance
 217XXII Coverage--Automobile Insurance
 217XXII(D) Uninsured or Underinsured Mo-

667 So.2d 1112, 95-1937 (La.App. 4 Cir. 11/30/95)
 (Cite as: 667 So.2d 1112, 95-1937 (La.App. 4 Cir. 11/30/95))

torist Coverage

217k2773 Mandatory Coverage

217k2778 k. Acceptance or rejection.

Most Cited Cases

(Formerly 217k130.5(4))

Insured did not validly waive uninsured motorist (UM) coverage in Louisiana by signing form that waived such coverage in Florida, notwithstanding that word "Florida" did not appear in heading of waiver, where "Florida" appeared at bottom of page as indication that waiver was to apply to Florida only, and waiver nowhere rejected UM coverage "in the State of Louisiana." LSA-R.S. 22:1406, subd. D(1)(a)(i).

[5] Insurance 217 ↪ 2778

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(D) Uninsured or Underinsured Motorist Coverage

217k2773 Mandatory Coverage

217k2778 k. Acceptance or rejection.

Most Cited Cases

(Formerly 217k130.5(4))

"Generic" waiver form signed by insured did not effect valid waiver of uninsured motorist (UM) coverage in Louisiana, where it did not contain requisite language regarding option to select UM coverage below limits of bodily injury liability, failed to specify date on which coverage was rejected, and nowhere rejected UM coverage "in the State of Louisiana." LSA-R.S. 22:1406, subd. D(1)(a)(i).

[6] Insurance 217 ↪ 2660.5

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(A) In General

217k2660 Persons Covered

217k2660.5 k. In general. Most Cited

Cases

(Formerly 217k2660, 217k467.51(3))

Any person who enjoys status of insured under motor vehicle liability policy which includes uninsured/underinsured motorist (UM/UIM) coverage

enjoys UM/UIM coverage simply by reason of having sustained injury by uninsured/underinsured motorist. LSA-R.S. 22:1406.

[7] Insurance 217 ↪ 2660.5

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(A) In General

217k2660 Persons Covered

217k2660.5 k. In general. Most Cited

Cases

(Formerly 217k2660, 217k467.51(3))

Employee qualified as insured for purposes of uninsured motorist (UM) coverage under employer's automobile insurance policy, even though employees were not listed in policy section declaring who was insured for UM coverage, where policy extended insured status to employees for purposes of policy's liability coverage, and employee at issue was acting in course and scope of employment when he was injured by uninsured vehicle. LSA-R.S. 22:1406.

[8] Insurance 217 ↪ 2772

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(D) Uninsured or Underinsured Motorist Coverage

217k2772 k. In general. Most Cited Cases

(Formerly 217k467.51(3))

Uninsured motorist (UM) coverage attaches to the person of the insured, not to the vehicle. LSA-R.S. 22:1406.

[9] Insurance 217 ↪ 2670

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(A) In General

217k2668 Occupancy of Vehicle

217k2670 k. Uninsured or under-

insured motorist coverage. Most Cited Cases

(Formerly 217k467.51(3))

Fact that employee was not actually getting in-

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to employer's van to leave remote worksite when he was struck by uninsured vehicle was irrelevant to whether he qualified as insured for purposes of uninsured motorist (UM) coverage under employer's automobile policy. LSA-R.S. 22:1406.

*1113 Brian Carl Bossier, Mickal P. Adler, Blue Williams, L.L.P., Metairie, for Relator, National Union Fire Ins. Co.

Anthony Louis Glorioso, Metairie, for Respondents, Barry J. Hobbs, Sr. and Kristina C. Hobbs.

William G. Argeros, Dan Richard Dorsey, Porteous, Hainkel, Johnson & Sarpy, New Orleans, for Respondent, State Farm Mutual Automobile Ins. Co.

Before LOBRANO, ARMSTRONG and WALTZER, JJ.

WALTZER, Judge.

STATEMENT OF THE CASE

Plaintiff, Barry Hobbs, Sr., is a forklift truck mechanic employed by Briggs-Weaver, Inc. Mr. Hobbs performed on-site repairs of forklifts through contracts that Briggs-Weaver holds with other companies. While he was walking across the "yard area" at the Reily Foods job site, an uninsured motor vehicle injured Mr. Hobbs. This vehicle had *1114 entered the "yard" in order to retrieve scrap metal from that area. Both the driver and the owner of the vehicle were uninsured motorists.

Plaintiff claims uninsured motorist (UM) coverage under his employer's insurance policy. (Reily Foods and their insurer have also been named in the lawsuit.) The Briggs-Weaver insurer is National Union Fire Insurance Company (National Union), who holds auto liability insurance for the employer in several states. The insurer moved for summary judgment on two grounds: first, claiming that UM coverage was waived for the State of Louisiana. Secondly, and in the alternative, even if UM cover-

age was not waived, the plaintiff is not covered because he is not an insured under the terms of the policy.

The trial court denied the motion for summary judgment. The defendant insurer, National Union, seeks supervisory relief. We granted certiorari, and after review of the application and the opposition thereto, we affirm the trial court judgment.

FIRST ASSIGNMENT OF ERROR

In its first assignment of error, Relator contends that the trial court erred in denying its motion for summary judgment because UM coverage was clearly waived.

[1][2] In Louisiana, UM coverage is provided for by statute and reflects a strong public policy. The statute promotes recovery of damages for innocent victims of automobile accidents when the tortfeasor is without insurance, and as an additional or excess coverage when he is inadequately insured. Consequently, the statute is liberally construed in order to carry out this public policy objective. This means that UM coverage accompanies any automobile insurance policy unless that coverage has been clearly and unmistakably rejected. *Roger v. Estate of Moulton*, 513 So.2d 1126, 1130 (La.1987).

The courts have imposed strict requirements for the effective waiver of UM coverage in Louisiana. LSA-R.S. 22:1406(D)(1)(a)(i) states that UM coverage is provided in "not less than the limits of bodily injury liability provided by the policy," although "the coverage required under this Subsection shall not be applicable where any insured named in the policy shall reject in writing, as provided herein, the coverage or selects lower limits." In *Roger*, the Louisiana Supreme Court interpreted this language to mean:

"[T]he insured or his authorized representative must expressly set forth in a single document that UM coverage is rejected in the State of Louisiana as of a specific date in a particular policy issued

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or to be issued by the insurer. A writing, regardless of the intention of the insured, of a less precise nature is insufficient to effect a valid rejection.” *Roger*, 513 So.2d at 1132.

[3] The same issue was more recently addressed by the Supreme Court in *Tugwell v. State Farm Ins. Co.*, 609 So.2d 195 (La.1992). In that case, the court required that the form used to deny UM coverage must give a “meaningful selection” to the insured under LSA-R.S. 22:1406(D)(1)(a)(i). *Tugwell*, 609 So.2d at 197, citing *Henson v. Safeco Ins. Co.*, 585 So.2d 534, 539 (La.1991): “The insurer must place the insured in a position to make an informed rejection.” More precisely, the form must set out at least three options: 1) UM coverage equal to the bodily injury policy limits; 2) UM coverage lower than the bodily injury policy limits; or 3) no UM coverage at all. *Tugwell*, 609 So.2d at 197.

[4] In its application for writs, the relator claims that the insured, plaintiff's employer, validly waived UM coverage in Louisiana by virtue of having signed a “generic waiver” as well as having signed waivers in other states: New Jersey, South Dakota, Connecticut, California, Hawaii, Kansas, North Carolina and Washington. Furthermore, the insured signed a waiver which ostensibly applies to the state of Florida but which the relator claims can be analogized to Louisiana since it fulfills the requirements for the waiver of UM rights under *Roger* and *Tugwell*. National Union supports its argument that the Florida waiver should apply because the word “Florida” does not appear at the heading of the waiver. However, on the second page of that waiver, “Florida” appears at the bottom of the page as an indication that this *1115 waiver is to apply to the State of Florida and to no other states. Moreover, the “Florida” waiver nowhere rejects UM coverage “in the State of Louisiana” as required by statute.

[5] National Union also points to the “generic” waiver signed by the insured, but this waiver does not fulfill the statutory and jurisprudential require-

ments for waiving UM coverage. The insured must be given the opportunity to make an informed rejection of coverage to the limits of bodily injury liability or below the full coverage. However, the generic waiver in the policy simply states:

In those jurisdictions that have no state requirements for uninsured motorist coverage and/or underinsured motorist coverage or allow an insured to reject his right to such coverage, by signing this endorsement, the insured evidences that no such coverage [is] required. Also, by signing this endorsement the insured further evidences that any and all such coverage as may be waived or rejected is hereby waived or rejected.

This waiver does not contain the requisite language regarding the option to select UM coverage below the limits of regular bodily injury liability. *Tugwell* specifically states that the insured must make an informed decision and be given the options of full coverage, less than full coverage, or no coverage. *Tugwell*, 609 So.2d at 198-99. This generic waiver simply does not meet those requirements. Furthermore, this waiver fails to specify the date on which coverage was rejected as required in *Roger*, 513 So.2d at 1132. Moreover, the generic waiver nowhere rejects UM coverage “in the State of Louisiana” as required by the statute. LSA-R.S. 22:1406(D)(1)(a)(i).

Finally, the insurance policy contains several addenda and endorsement changes to the policy that are specific to certain states. The policy contains sections entitled “Louisiana Changes” and “Louisiana Changes-Cancellation and Nonrenewal.” However, there is no individual waiver of UM coverage for Louisiana, notwithstanding several other individualized UM waivers.

For these reasons we find that UM coverage was not validly waived by the insured in the State of Louisiana.

SECOND ASSIGNMENT OF ERROR

In the alternative, National Union contends that

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the trial court erred in denying summary judgment because even if UM coverage was not validly waived, the plaintiff in this case is not covered by the policy. First, National Union claims that the policy does not cover employees. Second, National Union claims that the plaintiff was not anywhere in or near the covered vehicle, therefore making UM coverage inapplicable. We find neither contention has merit.

[6] In *Mills v. Hubbs*, 597 So.2d 87, 89 (La.App. 4th Cir.1992), writ denied 600 So.2d 677 (La.1992), this Court held:

The Louisiana Uninsured Motorist Statute, LSA-R.S. 22:1406 requires that, unless it is waived, all policies issued in Louisiana shall provide UM coverage for persons who qualify as “insureds” under the policy.

Applying *Mills*, an employee who is an insured under the policy would also have UM coverage unless that coverage had been waived.

The *Mills* holding is confirmed in *Howell v. Balboa Ins. Co.*, 564 So.2d 298 (La.1990), in which the Louisiana Supreme Court held:

[A]ny person who enjoys the status of insured under a Louisiana motor vehicle liability policy which includes uninsured/underinsured motorist coverage enjoys coverage protection simply by reason of having sustained injury by an uninsured/underinsured motorist. *Howell*, 564 So.2d at 301.

[7] We find that the policy covers Briggs-Weaver's employees. The general liability policy contains a specific addendum which includes employees in the general liability coverage. This addendum appears to amend the section of the “Business Auto Coverage Form” which states that an employee is not insured under the employer's policy if said employee is driving his own car. The addendum states:

The following is added to the LIABILITY COV-

ERAGE WHO IS AN INSURED provision: Any employee of your is an “insured” while using a covered “auto” you *1116 don't own, hire or borrow in your business or personal affairs.

This addendum extends liability coverage as it applies to employees to include not only company-owned cars driven by employees, but also to include, among others, employee-owned cars driven by employees in the scope of their employment.

Secondly, even if the addendum referring to employees did not exist, the “Business Auto Coverage Form” includes a section entitled “Who is an insured,” which states:

The following are “Insureds:”

a. You for any covered “auto.”

b. Anyone else while using with your permission a covered “auto” you own, hire or borrow, *except*:

.....

(2) Your employee if the covered auto is owned by that employee or a member of his or her household ^{FN1}....

FN1. See, discussion *infra* regarding the addendum to this section.

(4) Anyone *other than* your employees, partners, a lessee or borrower or any of their employees, while moving property to or from a covered “auto.” (Emphasis added.)

Section b(4) *excludes* employees from the *exception*; in other words, an employee, partner or lessee is covered for general bodily injury liability. Since Briggs-Weaver failed to waive UM coverage, then under LSA-R.S. 22:1406 (D)(1)(a)(i), *Mills*, and *Howell*, UM coverage would extend to the amount of full bodily injury liability, and to all those who are insured under the general policy.

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National Union claims that employees cannot be covered under the policy because in the “uninsured Motorist Coverage” portion of the policy, Section “B” declares who is an insured:

1. You.
2. If you are an individual, any “family member.”
3. Anyone else “occupying” a covered “auto” or temporary substitute for a covered “auto.” The covered “auto” must be out of service because of its breakdown, repair, servicing, loss or destruction.
4. Anyone for damages he or she is entitled to recover because of “bodily injury” sustained by another “insured.”

National Union claims that because employees are not listed in this section, the employee must not be covered. National Union points out that a similar situation was addressed in *Davis v. Brock*, 602 So.2d 104 (La.App. 4th Cir.1992), *writ denied*, 605 So.2d 1146 (La.1992), in which this Court held that the plaintiff was not covered under the UM “Who is an Insured” portion of the policy. However, the Court found that the plaintiff in *Davis* was not in the course and scope of his employment when he was injured. *Davis*, 602 So.2d at 107. Therefore, because he would not have been covered under the general liability section of the policy, he could not have UM coverage.

In the case before us, it has been established that employees are, in fact, covered under the general liability section of the policy. It is also clear that Mr. Hobbs was in the course and scope of his employment when he was injured. Because Louisiana law requires that UM coverage shall extend to ALL insureds under the policy, and employees are included as insureds in the general liability section of the policy, employees must also be included in the UM coverage. The strict interpretation of UM waivers mandated by the courts requires that UM coverage be rejected specifically. Since the UM

Coverage portion of the policy says nothing about employees, we assume that employees are covered to the extent of the general liability. This result is consistent with the strong public policy of providing UM coverage for all insureds. *Roger*, 513 So.2d at 1130.

[8][9] As to the insurer's contention that there must be a relationship between plaintiff and the covered auto, the Louisiana Supreme Court held in *Howell* that UM coverage cannot be qualified by such a requirement. *Howell*, 564 So.2d at 301. The court held:

UM coverage attaches *to the person of the insured, not the vehicle*, and that any provision of UM coverage purporting to limit *1117 insured status to instances involving a relationship to an insured vehicle contravenes LSA-R.S. 22:1406 (D). *Id.* (Emphasis added.)

In the instant case, Mr. Hobbs had been walking across the “yard area” to retrieve a screwdriver and to go to the tool shed where he intended to wash his hands. Only after washing his hands was he going to get into his employer's van and insurance policy, it is not necessary that he be closer to the covered vehicle.

This tenet that UM coverage attaches to the person, not the vehicle, is well established in Louisiana. In *Elledge v. Warren*, 263 So.2d 912, 918 (La.App. 3rd Cir.1972), *writ refused* 262 La. 1096, 266 So.2d 223 (1972), the court held:

The uninsured motorists protection covers the insured ... while riding in uninsured vehicles, while riding in commercial vehicles, while pedestrians or while rocking on the front porch.

In *Frois v. Bullock*, 94-0061 (La.App. 4 Cir. 6/30/94), 639 So.2d 1218, *writ denied*, 94-2056 (La. 11/11/94), 644 So.2d 391, a law firm employee was struck while crossing the street and was found to be covered under the firm's general liability policy and thus UM coverage applied. Since we

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have determined that the employee is covered under the UM portion of the policy, it is irrelevant that Mr. Hobbs was not actually getting into the company van when he was hit by the uninsured vehicle.

CONCLUSION

A motion for summary judgment should be granted if, and only if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La.C.C.P. art. 966; *Dibos v. Bill Watson Ford, Inc.*, 622 So.2d 677, 680 (La.App. 4th Cir.1993). Under that standard, National Union is not entitled to summary judgment, and the trial court correctly denied its motion.

WRIT GRANTED.

RELIEF DENIED.

La.App. 4 Cir.,1995.
Hobbs v. Rhodes
667 So.2d 1112, 95-1937 (La.App. 4 Cir. 11/30/95)

END OF DOCUMENT



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RELATED TOPICS

Coverage of Automobile Insurance

Written Notice of Rejection of Uninsured Motorist Automobile Liability Insurance Coverage

Kottenbrook v. Shelter Mut. Ins. Co. 2011 WL 1880023
Court of Appeal of Louisiana, Second Circuit May 18, 2011 -- So.3d -- 46, 312 (La.App. 2 Cir. 5/18/11)

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Court of Appeal of Louisiana,
Second Circuit.

Jack KOTTENBROOK and Angela Kottenbrook, Plaintiffs-
Appellants

v.

SHELTER MUTUAL INSURANCE COMPANY, Defendant-Appellee.

No. 46,312-CA. May 18, 2011.

Synopsis

Background: Sheriff's deputy who was riding as a passenger in sheriff's cruiser, and who was severely injured when another vehicle failed to yield to cruiser's emergency lights, brought action against uninsured motorist (UM) insurer that provided coverage for a corporation to which deputy was associated. The Fourth Judicial District Court, Ouachita Parish No. 10-1992, Alvin R. Sharp, J., granted summary judgment in favor of insurer, and deputy appealed.

Holding: The Court of Appeal, Caraway, J., held that deputy was not entitled to UM benefits under corporation's automobile insurance policy.

Affirmed.

West Headnotes (8)

Change View

- 1 **Insurance** 🔑 Nonowned Automobiles in General
Uninsured motorist (UM) provision of corporation's automobile policy limited coverage to additional listed insureds' occupying an automobile owned by the corporation, and thus, an additional listed insured on corporation's insurance policy, who was injured while riding as a passenger in an automobile not owned by the corporation, was not entitled to UM benefits under corporation's policy. LSA-R.S. 22:1295.
- 2 **Insurance** 🔑 Policies Considered as Contracts
Insurance 🔑 Application of Rules of Contract Construction
An insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth in the Civil Code. LSA-C.C. arts. 2045, 2047.
- 3 **Insurance** 🔑 Reasonableness
Insurance 🔑 Construction to Be Unstrained
An insurance policy should not be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion.
- 4 **Insurance** 🔑 Validity and Enforceability

Insurance Exclusions and Limitations in General

Unless a policy conflicts with statutory provisions or public policy, it may limit an insurer's liability and impose and enforce reasonable conditions upon the policy obligations the insurer contractually assumes.

5 Insurance Ambiguity, Uncertainty or Conflict

Insurance Favoring Coverage or Indemnity; Disfavoring Forfeiture
If after applying the other general rules of construction an ambiguity remains, the ambiguous contractual provision is to be construed against the insurer and in favor of coverage.

6 Insurance Exclusions, Exceptions or Limitations

Under the rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer; that strict construction principle, however, is subject to exceptions.

7 Insurance Necessity of Ambiguity**Insurance** Exclusions, Exceptions or Limitations

One of the exceptions to the strict construction rule, under which equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer, is that the rule applies only if the ambiguous policy provision is susceptible to two or more reasonable interpretations; for the rule of strict construction to apply, the insurance policy must be not only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable.

8 Insurance Definitions in Policies

Where a policy of insurance contains a definition of any word or phrase, this definition is controlling.

Appealed from the Fourth Judicial District Court for the Parish of Ouachita, Louisiana, Trial Court No. 10-1992. Honorable Alvin R. Sharp, Judge.

Attorneys and Law Firms

Richard L. Fewell, Jr., for Appellants.

Davenport, Files & Kelly, L.L.P. by M. Shane Craighead, for Appellee.

Before GASKINS, CARAWAY and MOORE, JJ.

Opinion

CARAWAY, J.

*1 This appeal concerns a summary judgment in favor of defendant insurance company, holding that an injured passenger in a traffic accident was not an insured under the uninsured/underinsured ("UM") policy. The policy in dispute lists a corporation as the named insured. Although the injured plaintiff was associated with the corporation, he was not occupying the corporation's vehicle at the time of the accident. Agreeing with the trial court that UM coverage does not apply, we affirm.

Facts

On June 29, 2009, Jack Kottenbrook ("Kottenbrook") was on duty as a Ouachita Parish Sheriff's Deputy when he was involved in a traffic accident. Kottenbrook was riding as a passenger in his Sheriff's Department cruiser and sustained serious injuries as result of the collision. The driver of the other auto was at fault for the accident due to his failure to yield to the cruiser's emergency lights. After settling claims against the other driver and his insurer, Kottenbrook and his wife filed the instant suit against

Shelter Mutual Insurance Company ("Shelter"), the auto insurer of a corporation with which **Kottenbrook** is associated.

At the time of the accident, a Shelter policy of liability insurance, covered a 1999 Ford Mustang owned by Jack Armstrong, Inc. (hereinafter "JA, Inc."). Although JA, Inc. is the only "named insured" listed on the declarations page of the policy, the policy also lists as "Additional Listed Insured: MARY LYNN ARMSTRONG; JACK KOTTENBROOK; CINDY G WILKINSON." This policy provides UM coverage.

In response to **Kottenbrook's** action, Shelter filed a motion for summary judgment, arguing that **Kottenbrook** was not a "named insured" under its policy. **Kottenbrook** opposed Shelter's motion for summary judgment, arguing that he was covered as an "additional listed insured" under the corporation's policy. After a hearing, the trial court granted Shelter's motion. The **Kottenbrooks** now appeal.

Discussion

1 The only issue before this court is whether **Kottenbrook** can recover damages under the UM section of the corporation's insurance policy covering the corporation's vehicle which was not involved in the accident.

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Palmer v. Martinez*, 45,318 (La.App.2d Cir.7/21/10), 42 So.3d 1147, writs denied, 10-1952, 10-1953, 10-1955 (La.11/5/10), 50 So.3d 805. A motion for summary judgment is a procedural device used when there is no genuine issue of material fact. *In re Clement*, 45,454 (La.App.2d Cir.8/11/10), 46 So.3d 804. The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of every action allowed by law. La. C.C.P. art. 966(A)(2). A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 (B); *Palmer, supra*.

2 3 4 *2 Interpretation of an insurance policy usually involves a legal question which can be resolved properly in the framework of a motion for summary judgment. *Robinson v. Heard*, 01-1697 (La.2/26/02), 809 So.2d 943. An insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth in the Civil Code. *Cadwallader v. Allstate Ins. Co.*, 02-1637 (La.6/27/03), 848 So.2d 577. The judicial responsibility in interpreting insurance contracts is to determine the parties' common intent. La. C.C. art.2045; *Bonin v. Westport Ins. Corp.*, 05-0886 (La.5/17/06), 930 So.2d 906. Words and phrases used in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. La. C.C. art.2047; *Bonin, supra*. An insurance policy should not be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. Unless a policy conflicts with statutory provisions or public policy, it may limit an insurer's liability and impose and enforce reasonable conditions upon the policy obligations the insurer contractually assumes. *Bonin, supra*.

5 6 7 If after applying the other general rules of construction an ambiguity remains, the ambiguous contractual provision is to be construed against the insurer and in favor of coverage. *Cadwallader, supra*; *Carrier v. Reliance Ins. Co.*, 99-2573 (La.4/11/00), 759 So.2d 37. Under the rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer. *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Casualty Co.*, 93-0911 (La.1/14/94), 630 So.2d 759. That strict construction principle, however, is subject to exceptions. *Cadwallader, supra*; *Carrier, supra*. One of these exceptions is that the strict construction rule applies only if the ambiguous policy provision is susceptible to two or more reasonable interpretations. *Cadwallader, supra*. For the rule of strict construction to apply, the insurance policy must be not only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable. *Id.*

8 Most insurance policies expressly define words or phrases which may be understood in different senses. Where a policy of insurance contains a definition of any word or phrase, this definition is controlling. *Washington v. McCauley*, 45,916 (La.App.2d Cir.2/16/11), — So.3d —, 2011 WL 524177, citing, *Hendricks v. American Employers Ins. Co.*, 176 So.2d 827 (La.App. 2d Cir.1965), writ denied, 248 La. 415, 179 So.2d 15 (1965).

The pertinent provisions of the Shelter policy provided in its DEFINITIONS section are as follows:

In this policy, the words shown in bold type have the meanings stated below unless a different meaning is stated in a particular coverage or endorsement ...

*3 (7) **Described auto** means the vehicle described in the Declarations, but only if you own that vehicle. It includes a **temporary substitute auto**.

(12) **Insured** means the **person** defined as an **insured** in, or with reference to, the specific coverage or endorsement under which coverage is sought.

(18) **Named Insured** means all **persons** listed in the Declarations as such.

(26) **Person** means an **individual**, a corporation, or entity which has separate legal existence under the laws of the state in which this policy is issued.

(37) **You** means any **person** listed as a **named insured** in the Declarations and, if that **person** is an **individual**, his or her **spouse**.

The UM provisions are contained in Part IV of Shelter's policy and provide as follows:

ADDITIONAL DEFINITIONS USED IN PART IV

As used in this coverage,

(2) **Insured** means:

(a) **You**;

(b) any **relative**; and

(c) any other **person occupying the described auto** with expressed or implied **permission** ...

In contrast to the definition for an "Insured" under the policy's UM coverage, the provisions regarding liability coverage read as follows:

ADDITIONAL DEFINITIONS USED IN PART I

As used in this Part, **insured** means:

(1) **You**, with respect to **your ownership** or **use** of the **described auto** and **your use** of a **non-owned auto**;

(2) any **relative**, with respect to his or her **use** of the **described auto** or a **non-owned auto**;

(3) any **individual** who is:

(a) related to **you** by blood, marriage, or adoption, who is primarily a resident of, and actually living in, **your** household including **your** unmarried and unemancipated child away at school; or

(b) a foster child in **your** legal custody for more than ninety consecutive days immediately prior to the **accident**; but only with respect to that **individual's use** of the **described auto**

(4) any individual listed in the Declarations as an "additional listed insured," but only with respect to that **individual's use** of the **described auto**; and

(5) any **individual** who has expressed or implied **permission** or expressed or implied **general consent** to **use** the **described auto** ...

In *Valentine v. Bonneville Ins. Co.*, 96-1382 (La.3/17/97), 691 So.2d 665, the Louisiana Supreme Court reviewed a business auto policy containing a very similar definition of "insured" within the UM coverage of the policy. The named insured of the policy was the Webster Parish Sheriff's Department. The plaintiff was a Webster Parish deputy who was struck by a car while directing traffic and thus not "occupying" one of the insured public vehicles. Like the present policy, the policy for the sheriff's department extended UM coverage to "You," a defined term for the Named Insured, and also to persons occupying a covered vehicle described in the policy. The court determined that the plaintiff was not the named insured nor was he occupying a covered vehicle at the time of the accident. Had plaintiff been the named insured on a personal policy, the court acknowledged that "a named insured is provided UM coverage wherever he is, whatever he is doing, and regardless of whether he is on the job or merely tending to his private affairs." *Id.* at 669. Nevertheless, the court cited numerous rulings holding that an entity's auto policy with the entity as the named insured does not extend that same breadth of UM coverage to the employees, officers, shareholders or members of such entity. *Id.*, note 3.

*4 Additionally, the court in *Valentine* addressed the following argument by the plaintiff:

Deputy Valentine, however, argues that if he is not a named insured, then the Sheriff is the only named insured and thus the premiums collected for UM coverage extend coverage to only one person. We disagree. Valentine's argument assumes that the Sheriff is covered under the UM policy as a named insured. As noted above, we decline to comment on whether the Sheriff individually is included as a named insured under the policy issued to the Webster Parish Sheriff's Department. However, even if the Sheriff were not included as a named insured, the failure to have someone designated for coverage as a "you" (a named insured) is of no moment. In most cases, as in the present case, UM coverage is provided to protect against bodily injury damages. Corporations and political entities, legal persons that are incapable of sustaining bodily injury damage, buy UM policies in which the corporation or political entity is the named insured. As in the instant case, coverage is provided under these policies for anyone "occupying" a covered auto. Valentine's argument fails to recognize that coverage is provided to the Webster Parish Sheriff's Department for anyone "occupying" a covered auto or a temporary substitute for a covered auto. Thus, any person, whether that person is the Sheriff, a deputy, another employee of the Webster Parish Sheriff's Department or anyone else, is covered under the Commercial Union policy as long as that person is "occupying" a covered auto.

Id. at 669-670. See also, *Adams v. Thomason*, 32,728 (La.App.2d Cir.3/1/00), 753 So.2d 416, writ denied, 00-1221 (La. 6/16/00), 764 So.2d 965.

First, from a review of the policy's defined term, "You," and the policy's identification of "additional listed insured" for the extension of liability coverage, we find a clear distinction between the single "named insured" of this policy, which was the corporation, and the "additional listed insured," which included **Kottenbrook**. Next, from *Valentine* and the cases cited therein, we find that the coverage extended to **Kottenbrook** is defined and limited under the policy. Such coverage, both for liability and UM coverage, was limited to **Kottenbrook's** use of the described auto owned by JA, Inc. **Kottenbrook's** auto accident did not involve his use of the JA, Inc. vehicle. The policy

language listing JA, Inc. as the only named insured and making such limitations on coverage regarding **Kottenbrook** is clear. According to the interpretation of La. R.S. 22:1295 given by the jurisprudence, such limitations are permissible under Louisiana's UM law.¹ The trial court's ruling denying coverage is therefore affirmed.

Conclusion

For the foregoing reasons, the judgment of the trial court granting summary judgment on the issue of uninsured/underinsured motorist coverage in favor of defendant, Shelter, is affirmed. Costs of appeal are assessed to appellant.

***5 AFFIRMED.**

Parallel Citations

46,312 (La.App. 2 Cir. 5/18/11)

Footnotes

1 The appellant cites *Howell v. Balboa Ins. Co.*, 564 So.2d 298 (La.1990), which involved a policy listing an individual, as opposed to a corporation or other entity, as the named insured. For that reason, appellant's argument is unpersuasive.

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RELATED TOPICS

- Coverage—Automobile Insurance
- Medical Payments Coverage Clause of Motor Vehicle Liability Insurance Policy
- Corporate Employer Automobile Liability Policy

McMurtry v. Aetna Cas. & Sur. Co. (PDF) January 26, 1993 845 S.W.2d 700
 Missouri Court of Appeals, Eastern District, Division Two. 845 S.W.2d 700

Return to list 1 of 4,216 results Missouri Court of Appeals,
 Eastern District,
 Division Two.

Ellis McMURTRY, Plaintiff–Appellant,
 v.
 AETNA CASUALTY & SURETY COMPANY, Defendant–Respondent.

No. 61526. Jan. 26, 1993.

Employee who was struck by motor vehicle driven by uninsured intoxicated driver while employee was riding bicycle brought suit seeking to recover proceeds from uninsured motorist coverage provided by insurer to his employer. Summary judgment was entered in insurer's favor by the City of St. Louis Circuit Court, Arthur F. Miorelli, J., and employee appealed. The Court of Appeals held that employee who had permissive use of corporate automobile supplied him by employer, was not "owner" of car supplied to him by employer, and thus, occupancy restrictions could limit employee's uninsured coverage under employer's policy to accidents occurring when driving corporate vehicle.

Affirmed.

West Headnotes (1)

Change View

- 1 Insurance Persons Covered
 - Insurance Uninsured or underinsured motorist coverage
- Employee who had permissive use of corporate automobile supplied him by employer, was not "owner" of car supplied to him by employer, for purposes of Missouri uninsured motorist statute, and thus, occupancy restrictions could limit employee's uninsured coverage under employer's policy to accidents occurring when driving corporate vehicle, so as to exclude coverage for accident when employee was driving bicycle and was struck by uninsured motorist; employee's dominion and control over his automobile failed to establish "de facto ownership." V.A.M.S. § 379.203, subd. 1.

2 Cases that cite this headnote

Attorneys and Law Firms

*700 Walther/ Glenn Law Associates, Carrie L. Knoch, St. Louis, for plaintiff-appellant.

Moser and Marsalek, P.C., Thomas J. Magee, Gregory T. Mueller, St. Louis, for defendant-respondent.

Opinion

PUDLOWSKI, Judge.

Plaintiff-appellant, Ellis McMurtry, filed a petition to recover for personal injuries sustained when a motor vehicle driven by an uninsured intoxicated driver struck his bicycle on September 11, 1989. Appellant seeks to recover proceeds from the uninsured motorist insurance coverage provided by Aetna Casualty and Surety Company (Aetna) to his employer, the Mercantile Bancorporation (Mercantile). On July 12, 1991, the Circuit Court of the City of St. Louis granted summary judgment in Aetna's favor, and this appeal followed. We affirm.

The facts of the case are not in dispute. At the time of the accident, appellant was employed as a collections officer for Mercantile. As part of his compensation, Mercantile supplied appellant with an automobile for his business and personal use. Mercantile also insured appellant's automobile, along with 166 other automobiles, with Aetna. On the declarations in the Aetna insurance policy, Mercantile Bancorporation is listed as the named insured along with various divisions of the corporation *701 and branch banks. McMurtry is not listed as a named insured on the policy.

The dispositive issue on appeal is whether appellant can be compensated from Aetna for injuries sustained when he was struck by an uninsured motorist while on his bicycle rather than riding in the insured car. The portion of the insurance policy on the company car driven by appellant covering uninsured motorist insurance coverage provides in part:

UNINSURED MOTORIST INSURANCE COVERAGE

A. COVERAGE

1. We will pay all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "uninsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by an "accident." The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle."
2. If this insurance provides a limit in excess of the amounts required by the applicable law where a covered "auto" is principally garaged, we will pay only after all liability bonds or policies have been exhausted by judgments or payments.
3. Any judgment for damages arising out of a "suit" brought without our written consent is not binding on us.

B. WHO IS AN INSURED

1. You.
2. If you are an individual, any "family member."
3. Anyone else "occupying" a covered "auto" or temporary substitute for a covered "auto." ...

C. EXCLUSIONS

This insurance does not apply to any of the following:

1. Any claim settled without our consent.
2. The direct or indirect benefit of any insurer or self-insurer under any workers compensation, disability benefits or similar law.
3. "Bodily injury" sustained by you or any "family member" while "occupying" or struck by any vehicle owned by you or any "family member" that is not a covered "auto." ...

The policy is clear insofar as it attempts to place an occupancy restriction on drivers who are not the named insured. While occupancy restrictions for uninsured motorist insurance policies are not valid against named insureds and their relatives residing in the same household, such restrictions are valid against other permissive users. See *Hines v. Government Employee Ins. Co.*, 656 S.W.2d 262, 265 (Mo. banc 1983); *Adams v. Julius*, 719 S.W.2d 94, 101-02 (Mo.App.1986). Appellant does not dispute that under the policy he is not a named insured but rather a permissive user. As a permissive user, appellant claims that the public policy behind the Missouri uninsured motorist statute mandates insurance coverage for appellant's injuries even though the insurance policy on its face denies coverage. Appellant argues on appeal that because of his complete "dominion and control" over the automobile, his interest in the automobile amounts to an "ownership" interest even though Mercantile purchased and insured the automobile.

Missouri's uninsured motorist insurance act reads in part:

1. No automobile liability insurance covering liability arising out of ownership, maintenance, or use of any motor vehicle shall be delivered or issued ... unless coverage is provided ... for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom ... It also exists whether physical contact was made between the uninsured motor vehicle and the insured or the insured's motor vehicle.

§ 379.203.1, RSMo 1986. Section 379.203.1 mandates coverage for the protection of insureds who are legally entitled to recover damages from uninsured motorists. *Rister v. State Farm Mut. Auto. Ins. Co.*, 668 S.W.2d 132, 134 (Mo.App.1984). The purpose *702 of mandatory uninsured motorist insurance is to provide protection to automobile insurance purchasers equivalent to the minimum coverage required by the financial responsibility laws regardless of whether the offending vehicle was driven by an insured or uninsured operator. *Famuliner v. Farmers Ins. Co., Inc.*, 619 S.W.2d 894, 896-97 (Mo.App.1981). The uninsured motorist statute becomes a part of each liability automobile insurance policy issued in the state. See *Null v. State Farm Mut. Auto Ins. Co.*, 614 S.W.2d 280, 282 (Mo.App.1981).

Were we to classify appellant as the "owner" of the vehicle, appellant argues the occupancy restriction would be void under the uninsured motorist statute because as an "owner," appellant would be treated as though he were a named insured and his uninsured motorist coverage would cover the accident sustained on his bicycle. In support of his claim, appellant cites three cases dealing with whether a first permittee can impliedly give the named insured's permission to use an automobile to a second permittee and, thereby, access non-owned vehicle coverage. First among these is *United States Fidelity & G. Co. v. Safeco Ins. Co. of Am.*, 522 S.W.2d 809 (Mo. banc 1975). The issue in *Safeco* was whether the teenage daughter of the named insured could effectively give the "implied permission" of her parents to the girl's friend to use the automobile and, thereby, come under the omnibus clause of an automobile liability policy which required the permission of a named insured. The court considered the amount of time the daughter spent driving the car and the fact that the daughter could lend the car to friends of her choice in determining she could impliedly give the mother's permission. The court concluded that the daughter could impliedly give her parents' permission; principally due to her parents' permissive behavior concerning the daughter's use of the automobile. The *Safeco* court never concluded that the daughter's dominion over the car made her the "owner" of the vehicle but rather that permission could be imputed to the named insureds-the parents-from the loose nature of their control over their daughter's driving habits. *Safeco*, therefore, does not support the proposition that unfettered use of an automobile creates de facto ownership.

Appellant next cites to *Subscribers at Auto. Club, Etc. v. McClanahan*, 607 S.W.2d 718 (Mo.App.1980), which also makes clear that permission must come from the named insured in order to come under an omnibus clause for non-owned vehicles but that the permission can be inferred from a course of conduct of the named insured. Like *Safeco*, *Subscribers* does not in anyway imply that the Missouri courts consider first permittees as "owners" of automobiles by virtue of their unfettered control over the cars that they permissively use.

Appellant's third case holds that ownership will be implied under Missouri law when an individual, even though not possessing legal title to an automobile, can be the "owner" of the vehicle where that individual purchased the car with his own money. *State Farm Mut. Ins. Co. v. Foley*, 624 S.W.2d 853 (Mo.App.1981).

Our research failed to uncover any Missouri cases dealing with the scope of uninsured motorist insurance coverage for permissive users of corporate automobiles, but the majority of cases from other jurisdictions support the legality of occupancy restrictions for those drivers. In a strikingly similar case to the instant case, an employee and principal shareholder of a corporation was riding his bicycle on personal business when he was struck by an uninsured motorist. *Meyer v. American Economy Ins. Co.*, 103 Or.App. 160, 796 P.2d 1223 (1990). The employee, who had exclusive use of a

corporate automobile, attempted to recover under the provisions of an insurance policy covering a corporate automobile where the corporation was the named insured. The Oregon Court of Appeals held that where an uninsured motorist clause restricted recovery of permissive users to occupants of the insured vehicle, an employee could not recover under the policy for accidents sustained outside of the vehicle. *Id.* 796 P.2d at 1224. The clear majority of cases from other jurisdictions hold ***703** occupancy restrictions in uninsured (and underinsured) motorist insurance coverage valid where the corporation is the named insured in the policy and the injured employee is a permissive user of the automobile who is injured when not occupying the automobile. See generally *Barnes v. Firemans Fund Ins. Co.*, 578 So.2d 1155 (La.App.1991); *Davis v. Brock*, 602 So.2d 104 (La.App.1992); *Sproles v. Travelers Indemnity Co. of America*, 329 N.C. 603, 407 S.E.2d 497 (1991) (underinsurance context); *Chastain v. United States Fidelity & G. Co.*, 199 Ga.App. 86, 403 S.E.2d 889 (1991); *Sears v. Wilson*, 10 Kan.App.2d 494, 704 P.2d 389 (1985); *But cf. Hager v. American West Insurance Company*, 732 F.Supp. 1072 (D.Mont.1989); *Decker v. CNA Ins. Co.*, 66 Ohio App.3d 576, 585 N.E.2d 884 (1990).

In the instant case, appellant had permissive use of the car supplied to him by Mercantile, but it cannot be said that he "owned" the vehicle. Appellant did not pay for the car or its insurance and could not pass legal title in the automobile to someone else. As such, appellant is not the "owner" of the car for the purposes of Missouri uninsured motorist statute and the occupancy restrictions could validly constrain appellant's uninsured coverage to accidents occurring when appellant drove the vehicle. Appellant's dominion and control over his automobile fail to establish de facto ownership. Further, occupancy restrictions do not conflict with section 379.203.1 so long as they do not attempt to restrict the named insureds coverage to the insured vehicle. Affirmed.

CRANDALL, P.J., and GRIMM, J., concur.

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Westlaw

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Page 1

C

Court of Appeal of Louisiana,
First Circuit.

Hyacinthe C. PIERRON & Danny Seymour
v.
Kurt LIRETTE, Clyde Lirette, State Farm Mutual
Automobile Insurance Company and Farm Bureau
Insurance Company.

No. 84 CA 0248.
April 16, 1985.

Wife and major child of motorist who died in accident brought action against opposing driver, owner of vehicle used by opposing driver, and insurers, including uninsured motorist insurer of a corporation of which deceased motorist was vice-president and executive officer. The Thirty-Second Judicial District Court, Parish of Terrebonne, Timothy C. Ellender, J., entered judgment awarding major son \$10,000, \$65,000 to wife, and determining that uninsured motorist insurer of corporation employing husband did not cover him, and widow and major child appealed. The Court of Appeal, Carter, J, held that: (1) husband was not covered by uninsured motorist policy of corporation employing him; (2) trial court abused its discretion in award to wife, requiring increase in damages awarded her to \$125,000; and (3) trial court did not abuse its discretion in award to major child.

Amended and affirmed.

West Headnotes

[1] Insurance 217 ↪ 2658

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2651 Automobiles Covered
217k2658 k. Substitute automobiles.
Most Cited Cases

(Formerly 217k467.51(3))

Insurance 217 ↪ 2660.5

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2660 Persons Covered
217k2660.5 k. In general. Most Cited

Cases

(Formerly 217k2660, 217k467.51(3))

Motorist was not covered by uninsured motorist provision of policy held by corporation of which he was vice-president and executive officer where he was not named insured, was not named as a designated insured, vehicle he was driving did not satisfy definition of an "insured highway vehicle," as it was owned by another corporation, and did not constitute a "temporary substitute vehicle," as defined in the policy.

[2] Damages 115 ↪ 127.1

115 Damages
115VII Amount Awarded
115VII(A) In General
115k127.1 k. In general. Most Cited Cases
(Formerly 115k127)

In absence of insurance coverage or when insurance coverage is far below actual damages sustained, awards for damages in excess of insurance coverage must be predicated to some degree upon ability of defendant cast to pay.

[3] Appeal and Error 30 ↪ 1013

30 Appeal and Error
30XVI Review
30XVI(l) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1013 k. Amount of recovery. Most Cited Cases
In reviewing quantum damage awards, appel-

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late court should disturb award made by trial court only when record indicates that trier of fact abused its discretion.

[4] Appeal and Error 30 ↪ 1151(2)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(C) Modification
30k1151 Modification as to Amount of Recovery
30k1151(2) k. Reducing amount of recovery. Most Cited Cases

Appeal and Error 30 ↪ 1151(3)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(C) Modification
30k1151 Modification as to Amount of Recovery
30k1151(3) k. Increasing amount of recovery. Most Cited Cases

Upon finding that trier of fact abused its discretion in quantum damage award, award can be raised to the lowest point which is reasonably within discretion of trial court when insufficient or lowered to the highest point which is reasonably within discretion of trial court when excessive.

[5] Death 117 ↪ 98

117 Death
117III Actions for Causing Death
117III(H) Damages or Compensation
117k94 Measure and Amount Awarded
117k98 k. Inadequate damages. Most Cited Cases

In wrongful death action following automobile accident, trial court abused its discretion in awarding spouse only the sum of \$65,000, only \$10,000 in excess of insurance coverage, requiring increase in award to \$125,000, in light of general damages as \$100,000, lost past and future support in the minimum amount of \$221,330 and funeral expenses of over \$3,000.

[6] Death 117 ↪ 95(1)

117 Death
117III Actions for Causing Death
117III(H) Damages or Compensation
117k94 Measure and Amount Awarded
117k95 In General
117k95(1) k. In general. Most Cited Cases

In wrongful death action, trial court did not abuse its discretion in awarding adopted major son the sum of \$10,000, the same amount paid to each of four major children by a previous marriage who settled with insurer.

*1306 Joseph B. Dupont, Plaquemine, for plaintiffs and appellants, Hyacinthe C. Pierron & Danny Seymour.

Robert B. Butler, III, Houma, for appellees and defendants, Kurt & Clyde Lirette and State Farm Mut. Auto. Ins. Co.

Sidney Patin, Houma, for Great American Surplus Lines.

Charles Gary Blaize, Houma, for Kurt Lirette in the Criminal Proceedings.

Before COLE, CARTER and LANIER, JJ.

CARTER, Judge.

This is an appeal from the trial court's determination that there was no uninsured motorist coverage available to plaintiffs and the award of damages.

FACTS

On May 19, 1982, Roy J. Pierron was killed in an automobile accident which occurred when the GMC-Suburban he was driving, which was owned by H & R Towing, Inc., was forced off the road by a vehicle operated by Kurt Lirette and owned by his father, Clyde Lirette. Pierron's death was the result of the sole negligence *1307 of Kurt Lirette, who

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was driving while intoxicated at the time of the accident.

Roy Pierron was survived by his widow, Hyacinthe C. Pierron, an adopted major son, Danny Seymour, and four major children born of a prior marriage.

The vehicle operated by Kurt Lirette was insured under a policy of liability insurance issued by State Farm Mutual Automobile Insurance Company to Clyde Lirette. This policy had bodily injury limits of \$100,000.00 per person. Kurt Lirette resided in his father's home and had his father's permission to use the vehicle involved in this accident. Additionally, Kurt Lirette had a policy of insurance issued by Great American Surplus Lines Insurance Company with limits of \$5,000.00. There was no uninsured motorist insurance on the GMC-Suburban operated by Mr. Pierron and owned by his family corporation, H & R Towing, Inc.^{FN1} However, there was a policy of liability insurance with uninsured motorist protection in the sum of \$25,000.00 issued to Hy Fashions, Inc. by State Farm Mutual Automobile Insurance Company.^{FN2}

FN1. The record reflects that Roy J. Pierron, as an officer of H & R Towing, Inc., had signed a waiver of uninsured motorist coverage on the GMC-Suburban.

FN2. Hy Fashions, Inc. is another family corporation owned by the Pierrons and of which Mr. Pierron was an executive officer.

Prior to trial on the merits, State Farm, as Lirette's liability insurer, entered into settlements with each of decedent's four major children born of his prior marriage for the sum of \$10,000.00 each. After these settlements, there was remaining a sum of \$60,000.00 coverage under the policy issued by State Farm to Clyde Lirette and available to the claims of Mrs. Pierron and the adopted major child, Danny Seymour. Additionally, there remained the sum of \$5,000.00 available under the policy of

Great American Surplus Lines Insurance Company.

The trial judge found that State Farm's settlement with the decedent's four major children was reasonable. He also concluded that the policy issued to Hy Fashions, Inc. did not provide uninsured motorist coverage for Roy Pierron who was driving a GMC-Suburban vehicle owned by H & R Towing, Inc. at the time of the accident. In so concluding, the trial judge found that the remaining insurance available under the State Farm policy issued to Clyde Lirette was \$60,000.00 and that the remaining available insurance under the Great American Surplus Lines Insurance Company was \$5,000.00, for a total of \$65,000.00. The trial judge further found that, considering the inability of Kurt Lirette to pay, Mrs. Pierron was entitled to a total award of \$65,000.00 and Danny Seymour was entitled to an award of \$10,000.00, thus casting Kurt Lirette for a \$10,000.00 excess judgment. From this judgment, plaintiffs, Hyacinthe C. Pierron and Danny Seymour, appeal urging two assignments of error.

ASSIGNMENT OF ERROR NO. 1

[1] In this assignment of error, plaintiffs contend that Roy J. Pierron, as vice-president and executive officer of Hy Fashions, Inc., was covered under the uninsured motorist provision of the policy of insurance in the amount of \$25,000.00 issued by State Farm to Hy Fashions, Inc.

The Louisiana Uninsured Motorist Statute LSA-R.S. 22:1406, in effect at the time of the accident, required that insurance policies provide uninsured motorist coverage for a person who qualifies as an "insured" under the policy. However, a person who does not qualify as an "insured" under the policy of insurance is not entitled to uninsured motorist coverage. *Seaton v. Kelly*, 339 So.2d 731 (La.1976); *Malbrough v. Wheat*, 428 So.2d 1110 (La.App. 1st Cir.1983); *Schmidt v. Estate of Choron*, 376 So.2d 579 (La.App. 4th Cir.1979).

In the instant case, the uninsured motorist insurance portion of the State Farm policy defines insured as:

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(a) the **named insured** and any **designated insured** and, while residents of the same household, the spouse and relatives of either;

(b) any other person while **occupying an insured highway vehicle**; and

*1308 (c) any person, with respect to damages he is entitled to recover because of **bodily injury** to which this insurance applies sustained by an **insured** under (a) or (b) above.

Designated insured is defined as "an individual named in the declarations under Designated Insured." The uninsured motorist portion of the policy also indicates that the definitions of insured and named insured applicable to Part 1 (basic automobile liability insurance) also applies to the uninsured motorist insurance. Part 1 of the policy defines **insured** as:

(a) the **named insured**;

(b) any partner or executive officer thereof, but with respect to a **temporary substitute automobile** only while such **automobile** is being used in the business of the **named insured**; ...

The decedent, Roy J. Pierron, was not a named insured under the State Farm policy since the **named insured** is Hy Fashions, Inc. Nor was Pierron a **designated insured** under the policy because there is no individual named in the declaration of the policy under designated insured. Furthermore, since the named insured is a corporation, Pierron cannot reside with or be a relative of the named insured.

Furthermore, Pierron was not occupying an **insured highway vehicle**. The vehicle insured by State Farm was a 1979 Lincoln owned by Hy Fashions, Inc. At the time of the accident, Pierron was driving an automobile owned by H & R Towing, Inc., which was not a **temporary substitute vehicle**. See *Seaton v. Kelly, supra*; *Malbrough v. Wheat, supra*; *Schmidt v. Estate of Choron, supra*.

Clearly, Pierron does not qualify as an **insured**

under the State Farm policy.

Plaintiffs strenuously contend that if no uninsured motorist coverage is provided under the Hy Fashions, Inc. policy to Mr. Pierron, the company has been paying premiums for no coverage. Plaintiffs, however, are mistaken in this contention. The policy clearly provides uninsured motorist coverage for anyone occupying the insured highway vehicle, and, if Pierron had been occupying the insured vehicle, the uninsured motorist provisions of the policy would have applied. Everytime the insured automobile (the 1979 Lincoln) was used, whoever was occupying it was receiving the benefits of the uninsured motorist coverage. Even though Hy Fashions, Inc. is a family corporation with Mr. Pierron as vice-president and his wife as president,^{FN3} it is unfortunate that they were neither the named nor designated insureds. Clearly, if the policy had been in either Mr. or Mrs. Pierron's name, or if Mr. Pierron had been a designated insured, uninsured motorist coverage would have been applicable. Unfortunately, in the instant case, Mr. Pierron was not in the vehicle owned by Hy Fashions, Inc. and insured by State Farm, and the vehicle that he was occupying was owned by another family corporation, which did not have uninsured motorist protection.^{FN4}

FN3. Mrs. Pierron testified that Mr. Pierron was Secretary-Treasurer of Hy Fashions, Inc. In any event, he was an executive officer of this corporation.

FN4. See Footnote 1 supra.

The trial court correctly determined that the State Farm policy issued to Hy Fashions, Inc. did not provide uninsured motorist coverage to Pierron.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, plaintiffs contend that the trial court committed error in the amount of damages awarded the surviving widow, Hyacinthe C. Pierron.

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The policy limits of the State Farm policy issued to Clyde Lirette were \$100,000.00, and \$40,000.00 of these limits were exhausted by settlements with four major children of the deceased by a prior marriage. The trial judge concluded that the settlements which State Farm made with these four major children were reasonable. We agree. Accordingly, this left for the satisfaction of the claim of the widow and the major adopted son the sum of \$60,000.00 under the State Farm policy and *1309 \$5,000.00 under the Great American Surplus Lines policy. Since the total award of the trial judge was \$75,000.00, \$65,000.00 went to the widow and \$10,000.00 to the adopted major son, resulting in an excess judgment against Kurt Lirette for \$10,000.00.

At the time of his death, Roy J. Pierron was earning approximately \$86,503.00 per year. Dr. Jan Warren Duggar, expert in the field of economics, testified that since Roy J. Pierron was 66.3 years old at the time of his death, he had an average work life expectancy of an additional 3.1 years. He computed the present value of past earnings lost and future earnings lost, after deducting pertinent personal maintenance expenses, at \$221,330.00. Dr. Duggar estimated this sum to be the past and future loss of contribution to the family unit. Dr. Duggar further testified that in the event lost wages were computed during Mr. Pierron's life expectancy, then the figure would amount to \$321,866.00 as the value of lost wages during his life expectancy. It was further uncontradicted that funeral expenses of \$3,368.58 were incurred.

The defendant, Kurt J. Lirette, on the other hand, was unemployed at the time of the accident and on the date of trial. He testified that he spent most of his time playing pool and drinking beer. The record indicates that he had just been released from a detoxification center for alcohol and drug abuse. He had previously been injured in another vehicular accident and had been drawing social security in the amount of \$779.00 per month.^{FNS} It is not clear from the record whether Lirette is actually

disabled; however, he was definitely unemployed and had been unemployed for an extended period of time. His only assets were two vehicles, and he was otherwise indigent.

FNS. It is unclear as to whether Kurt Lirette's disability social security benefits had been terminated, but according to the testimony of Clyde Lirette, his father, they had been terminated.

[2] In the absence of insurance coverage or where insurance coverage is far below the actual damages sustained, awards for damages in excess of the insurance coverage must be predicated to some degree upon the ability of the defendant cast to pay. *Hurston v. Dufour*, 292 So.2d 733 (La.App. 1st Cir.1974), *writ denied*, 295 So.2d 178 (La.1974).

[3][4] In reviewing quantum awards, an appellate court should disturb an award made by the trial court only when the record indicates that the trier of fact abused his discretion in making the award. Upon finding an abuse of discretion, the award can be raised (lowered) to the lowest (highest) point which is reasonably within the discretion of the trial court. *Emerson v. Empire Fire & Marine Ins. Co.*, 393 So.2d 691 (La.1981); *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La.1976).

[5] Plaintiff Hyacinthe C. Pierron clearly sustained general damages of \$100,000.00 and lost past and future support in the minimum amount of \$221,330.00, together with funeral expenses in the amount of \$3,368.58. The ability of the defendant, Kurt Lirette, to pay, however, is somewhat uncertain. Therefore, we find that the trial judge abused his discretion in awarding only the sum of \$65,000.00 for Ms. Pierron. We find that in light of all of these factors, the minimum amount which should have been awarded plaintiff Hyacinthe C. Pierron is \$125,000.00.

[6] After reviewing the record, we conclude that there was no abuse of discretion by the trial

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court in awarding Danny Seymour, the adopted son, the sum of \$10,000.00. Therefore, we affirm the amount of the judgment as to this plaintiff.

For the above and foregoing reasons, the judgment is amended and rendered in favor of Hyacinthe C. Pierron and against Kurt Lirette to increase the total amount of the award to \$125,000.00. In all other respects, the judgment is affirmed. Costs are to be paid by defendant Kurt Lirette.

AMENDED AND AFFIRMED.

La.App. 1 Cir., 1985.
Pierron v. Lirette
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(Cite as: 556 So.2d 945)

C

Court of Appeal of Louisiana,
Third Circuit.

James PRIDGEN, et al., Plaintiffs-Appellants,
v.
Joseph L. JONES, et al., Defendants-Appellees.

No. 88-1108.
Feb. 7, 1990.

Employee sued employer's uninsured motorist insurer, seeking damages for accident sustained while driving his own automobile home from work. The Fifteenth Judicial District Court, Parish of Vermilion, Ronald D. Cox, J., entered summary judgment for insurer and employee appealed. The Court of Appeal, Laborde, J., held that: (1) employee was not entitled to benefits under the uninsured motorist portion of employer's policy, and (2) employee was not entitled to such benefits by virtue of being an "insured" under the liability portion of employer's policy.

Affirmed.

West Headnotes

[1] Insurance 217  2660.5

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2660 Persons Covered
217k2660.5 k. In general. Most Cited
Cases
(Formerly 217k2660, 217k467.51(3))

Employee injured in automobile accident while driving his own vehicle home from work was not entitled to uninsured motorist benefits under his employer's uninsured motorist coverage; employee did not meet policy definition of "person insured" as he was not named in the policy and was not occupying a vehicle owned by his employer.

[2] Insurance 217  2660.5

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2660 Persons Covered
217k2660.5 k. In general. Most Cited

Cases

(Formerly 217k2660, 217k467.51(3))

Employee who was injured in automobile accident while driving his own vehicle home from work was not a "person insured" under employer's liability insurance, so as to be entitled under statute to uninsured motorist coverage; employee was not a named insured, partner or executive officer of employer, or person using automobile owned or hired by employer, as required to qualify as a "person insured." LSA-R.S. 22:1406.

*946 Theall & Fontana, Anthony Theall, Ted Ayo, Abbeville, for plaintiffs-appellants.

Scott Silbert, Metairie, Sessions, Fishman, Rosen-son, Boisfontaine & Nathan, James Ryan, Peter Title, New Orleans, Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, Paul Bigson, Lafayette, Pamela Tynes, Ernest Gieger, Sharon Smith, New Orleans, Hary Hall, Baton Rouge, for defendants-appellees.

Before DOMENGEAUX, C.J., and FORET and LABORDE, JJ.

LABORDE, Judge.

This is a personal injury action brought by the plaintiffs, James D. Pridgen and Jennifer Ann Frederick (hereinafter collectively plaintiff), for damages sustained in a two car collision. Defendant, First Horizon Insurance Company (First Horizon), the uninsured/underinsured motorist insurer of Mr. Pridgen's employer, Petro-Marine Engineering, Inc., filed a motion for summary judgment on the ground that James D. Pridgen was not an insured

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under its policy. In its Judgment dated July 28, 1988, the trial court granted the motion for summary judgment. The plaintiff now appeals that decision. We affirm.

FACTS

The facts of this case are not in dispute. On July 24, 1986, James D. Pridgen was driving his 1983 Chrysler New Yorker in a northerly direction on Louisiana Highway 339. He was on his way home from work when his automobile was struck broadside by another vehicle being driven by Joseph L. Jones. Even though Mr. Pridgen was enroute home from work, he was nevertheless on his employer's time, as he was paid from the time he left his home until the time he returned. Mr. Pridgen allegedly sustained serious injuries as a result of the collision.

The plaintiff has filed suit against several defendants, including Mr. Pridgen's employer's uninsured motorist carrier, First Horizon. In turn, First Horizon filed a motion for summary judgment, contending that Mr. Pridgen did not qualify as an insured under the uninsured motorist policy it issued to his employer. The trial court agreed with the defendant and granted the motion for summary judgment.

The plaintiff raises only one specification of error on appeal; namely, that the trial court erred in finding that first Horizon's policy did not provide him with UM coverage.

*947 UM COVERAGE

[1] We begin our analysis by noting that it is clear that the plaintiff is not entitled to coverage under the UM provisions of First Horizon's policy. The UM section of the policy provides, in pertinent part, that:

"1. COVERAGE U-UNINSURED MOTORISTS

(Damages for Bodily Injury)

The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or

operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration."

"Persons insured" under the UM provisions of the policy are as follows:

"II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

(a) the named insured and any designated insured and, while residents of the same household, the spouse and relatives of either;

(b) any other person while occupying an insured highway vehicle; and

(c) any person, with respect to damages he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) above."

The plaintiff is not a "person insured" under II(a), as his name was not included on the endorsement to the policy which lists the named insureds. He is not a "person insured" under II(b) because an "insured highway vehicle" is defined by the policy as "any vehicle owned by the named insured," and the plaintiff was occupying a vehicle owned by himself at the time of the accident. Accordingly, we find that the plaintiff is not an insured under the UM provisions of the policy.

[2] Even though it is clear that the plaintiff is not covered under the UM provisions of the policy, he argues, in the alternative, that he is an insured under the liability provisions, and, as such, is entitled to UM coverage pursuant to LSA-R.S.

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22:1406. The plaintiff points out that since he never waived UM coverage, there is no reason to deny him such coverage.

LSA-R.S. 22:1406 provides in relevant part that:

“D. The following provision shall govern the issuance of uninsured motorist coverage in this state.

(1)(a) No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners and operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death resulting therefrom; provided, however, that the coverage required under this Subsection shall not be applicable when an insured named in the policy shall reject in writing the coverage or selects lower limits....”

The selection of lower limits or rejection altogether of UM coverage must be written and express. *Landry v. Government Employees Insurance Co.*, 390 So.2d 1385 (La.App. 3d Cir.1980).

While it may be true that the plaintiff never waived UM coverage, we find this fact to be of no consequence, given that the plaintiff never qualified as an insured under the liability provisions of the policy in the first place. In the liability section of *948 First Horizon's policy, “persons insured” are limited to:

“(a) the named insured:

(b) any partner or executive officer thereof, but with respect to a non-owned automobile only while such automobile is being used in the business of the named insured:

(c) any other person while using an owned automobile or a hired automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect to bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be an insured only if he is:

(1) a lessee or borrower of the automobile, or

(2) an employee of the named insured or of such lessee or borrower;

(d) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a), (b) or (c) above.”

For purposes of this section, an “owned automobile” is an automobile owned by the named insured and a “non-owned automobile” is an automobile which is neither an “owned automobile” or a “hired automobile.” A “hired automobile” is defined as:

“ ‘hired automobile’ means an automobile not owned by the named insured which is used under contract in behalf of, or loaned to, the named insured, provided such automobile is not owned by or registered in the name of (a) a partner or executive officer of the named insured or (b) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile.”

After a careful review of the facts of this case, we cannot see how the plaintiff, who was driving his own automobile, who is not a partner or executive officer of the named insured and who was compensated by the named insured for the use of his

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automobile, fits under any of the categories of "persons insured."

The plaintiff makes two arguments to support his position that he is covered by the liability provisions of the policy. Both of these arguments we find to be meritless. The plaintiff first contends that he is entitled to coverage because he falls under the "Class 1 persons" designation of the policy. The "Class 1 persons" designation appears on the schedule page of the policy. The designation is defined as follows:

"When used as a premium basis:

B. 'Class 1 persons' means the following persons, provided that their usual duties in the business of the named insured include the use of non-owned automobiles: (a) all employees, including officers of the named insured compensated for the use of such automobiles by salary, commission, terms of employment, or specific operating allowance of any sort; (b) all direct agents and representative of the named insured." (Emphasis added).

The defendant correctly points out that this designation is strictly used as a premium basis and has nothing whatsoever to do with liability coverage. We see no other way to interpret the "Class 1 persons" designation and we observe that where the language of an insurance contract is clear and free from ambiguity, it constitutes the contract between the parties and must be enforced as written. *Glass Services Unlimited v. Modular Quarters, Inc.*, 478 So.2d 1005 (La.App. 3d Cir.1985); *Cole v. State Farm Automobile Insurance Co.*, 427 So.2d 522 (La.App. 3d Cir.), writ denied, 433 So.2d 710 (La.1983).

The plaintiff's second argument for liability coverage involves the excess insurance provision of the "Additional Conditions" section of the policy. The excess insurance provision states:

"A. Excess Insurance-Hired and Non-Owned Automobiles

With respect to a hired automobile, or a non owned automobile, this insurance shall be excess insurance over any other valid and collectible insurance available to the *insured*." (Emphasis added).

Since we have determined that the plaintiff is not an insured under the policy, this provision is of no relevance.

*949 We conclude that the plaintiff is not covered under the liability provisions of First Horizon's policy. This court in *Stewart v. Robinson*, 521 So.2d 1241 (La.App. 3d Cir.1988), writ granted, dismissed November 21, 1988, has held that LSA-R.S. 22:1406 requires that UM coverage be provided for persons insured for purposes of liability under an automobile liability insurance policy. As the plaintiff is not covered under the liability provisions of the policy, UM coverage is not statutorily mandated.

We are satisfied that this matter was properly dismissed by way of summary judgment. A dispute as to the issue of whether, as a matter of law, the language of an insurance policy provides coverage to a party, can be properly resolved within the framework of a motion for summary judgment. *Saf-fel v. Bamburg*, 478 So.2d 663 (La.App. 2d Cir.1985), writ denied, 481 So.2d 1335 (La.1986). Under LSA-C.C.P. art. 966, we find no genuine issue of material fact; the defendant, First Horizon, should be granted judgment as a matter of law.

For the foregoing reasons, the decision of the trial court is affirmed. Costs are to be paid by the plaintiff.

AFFIRMED.

La.App. 3 Cir.,1990.
Pridgen v. Jones
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478 So.2d 663
(Cite as: 478 So.2d 663)

H

Court of Appeal of Louisiana,
Second Circuit.

Bobby R. SAFFEL, et al., Plaintiff-Appellant,
v.
James L. BAMBURG, et al., Defendant-Appellee.

No. 17331-CA.
Oct. 30, 1985.
Rehearing Denied Nov. 27, 1985.
Writ Denied Jan. 31, 1986.

Husband filed suit individually and as tutor of his minor daughter for wrongful death of his wife against multiple defendants, one of which was insurance company providing auto insurance to employer of driver of car which collided with car in which decedent was passenger. The Thirty-Ninth Judicial District Court, Red River Parish, Richard N. Ware, J., granted insurance company's motion for summary judgment to dismiss it from suit. Plaintiff appealed. The Court of Appeal, Sexton, J., held that there is no question of fact as to whether language of particular policy afforded coverage to decedent.

Affirmed.

West Headnotes

[1] Judgment 228 ↪ 181(23)

228 Judgment

228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(23) k. Insurance cases. Most

Cited Cases

Question whether as matter of law language of policy at issue afforded coverage to decedent in wrongful death action could be resolved within framework of insurer's motion for summary judgment. LSA-C.C.P. arts. 966, 967.

[2] Insurance 217 ↪ 2660.5

217 Insurance

217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2660 Persons Covered
217k2660.5 k. In general. Most Cited

Cases

(Formerly 217k2660, 217k467.51(3))

Insurance 217 ↪ 2661

217 Insurance

217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2660 Persons Covered
217k2661 k. Family members; household. Most Cited Cases
(Formerly 217k467.51(3))

Decedent killed by collision with car driven by employee of dairy was not covered under uninsured motorist insurance provision stating that "You or any family member" was an insured, where policy also stated that "you" meant person or organization shown as named insured, and dairy was insured named in policy.

*664 Charles W. Seaman, Natchitoches, for Bobby R. Saffel, plaintiff-appellant.

Brittain, Williams & McGlathery by Joe Payne Williams, Natchitoches, for Planet Ins. Co., defendant-appellee.

Before HALL, FRED W. JONES and SEXTON, JJ.

SEXTON, Judge.

Plaintiff appeals the granting of a summary judgment dismissing defendant, Planet Insurance Company, from his suit to recover for the wrongful death of his wife. We affirm.

On October 18, 1983, plaintiff's wife was a

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guest passenger in an automobile owned by Ellis Coleman and driven by Myrtle Coleman. The vehicle was hit head-on by an automobile owned by Rodney Messick and driven by James L. Bamburg. Mrs. Saffel and the six week old fetus she was carrying at the time died as a result of this accident. At the time of Mrs. Saffel's death, plaintiff was employed by Foremost Dairies, Inc., which was insured by the defendant, Planet Insurance Company.

Subsequent to the accident, Bobby R. Saffel instituted this suit individually and as natural tutor of his minor daughter, Christy, for the wrongful death of his wife. Among the multiple defendants is this defendant, Planet Insurance Company, the insurance company providing automobile insurance to Mr. Saffel's employer, Foremost Dairies, Inc., by virtue of a policy entitled a "Business Auto Policy."

Planet Insurance Company subsequently filed a motion for summary judgment alleging that under the terms of the policy issued by Planet to Foremost, no coverage was afforded. On December 26, 1984, judgment was rendered on the motion for summary judgment sustaining that motion and dismissing the defendant Planet Insurance Company from the lawsuit.

In this ensuing appeal, plaintiff-appellant contends both that there are factual issues to be resolved to determine coverage and that the trial court erred in determining as a matter of law that coverage was not available to the deceased under the policy at issue.

[1] Despite appellant's contrary assertion, we are unable to perceive that factual issues exist herein with respect to coverage. Considering the proof adduced in support of the motion for summary judgment, we discern that no genuine issues of material fact remain. While we tend to agree with the trial court that there are certain ambiguities inherent in this policy, any such possible ambiguities are not relevant to the issue of the coverage in question. Thus, the only significant issue in the case is whether as a matter of law the language of the

policy at issue affords *665 coverage to the deceased, an issue which can be resolved within the framework of appellee's motion for summary judgment. LSA-C.C.P. Arts. 966 and 967; *Hall v. Hall*, 460 So.2d 1053 (La.App.2d Cir.1984), and citations therein.

In contending that coverage is provided, plaintiff relies on the Uninsured Motorist Endorsement, Form CA 2X 17. Plaintiff particularly points to Section D of that endorsement entitled "WHO IS INSURED." Subparagraph (1) of Section D states that an insured is "You or any family member." Thus, plaintiff contends that his wife was an insured despite the fact that the deceased was a guest passenger in a non-covered automobile.

[2] However, we agree with appellee that coverage is not afforded under this policy. While it is true that Endorsement CA 2X 17 entitled Uninsured Motorist Insurance states that "You or any family member" is an insured, this endorsement is limited by the definitions section of this Business Auto Policy. There, Section A states that "you" means any person or organization shown as the named insured in Item 1 of the declarations. Of course, the named insured is Foremost Dairies.

We are buttressed in our opinion by Endorsement CA 99 33 entitled "Employees as Insureds." This one-line endorsement states that, "Any employee of *yours* is *insured* while using a covered *auto you* don't own, hire or borrow in *your* business or your personal affairs." This endorsement makes it clear that Foremost Dairies employees are insureds only under certain limited circumstances not present in this case. Thus, this endorsement emphasizes appellee's position with which we agree that the phrase "You or any family member" contained in the enumeration of those insured in the Uninsured Motorist Endorsement CA 2X 17 applies only to the organization to whom the policy is issued. This policy does not afford coverage to the deceased.

For the foregoing reasons, the judgment ap-

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pealed is affirmed at appellant's cost.

AFFIRMED.

La.App. 2 Cir., 1985.
Saffel v. Bamberg
478 So.2d 663

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aside. The intent of our order in *Language v. Language*, 96-1874 (La. 10/25/96), 681 So.2d 350, was for the court of appeal to consider the merits of relators' argument that the procedure employed in this case for determining relators' pauper status violated La.Code Civ.P. arts. 5181-5188. Accordingly, the case is remanded to the court of appeal to make a determination on the merits in this matter, based on the record before it.

filed its recommendations with the court, recommending approval of the proposed consent discipline.

Upon review of the record of the disciplinary board's findings and recommendations, and the record filed herein, it is the decision of the court that the disciplinary board's recommendation be adopted.

Accordingly, it is ordered that Edward F. Rodriguez be suspended from the practice of law for a period of one year and one day, with reinstatement conditioned upon (1) completion of all applicable continuing legal education requirements, (2) payment of disciplinary assessment fees, (3) payment of bar dues, and (4) proof that he has recovered from substance abuse. All costs of these proceedings are assessed against respondent.



97-0198 (La. 3/14/97)

In re Edward F. RODRIGUEZ.

No. 97-B-0198.

Supreme Court of Louisiana.

March 14, 1997.

In re Rodriguez, Edward F.;—Plaintiff(s);
Applying for Consent Discipline.

DISCIPLINARY PROCEEDINGS

PER CURIAM.*

Respondent, Edward F. Rodriguez, was the subject of a complaint filed with the disciplinary counsel. The complainant, who worked for an insurance company, alleged that respondent offered to pay him 10% of any settlement recovered on any case the complainant sent him, but then failed to pay and owed the complainant approximately \$10,000 under the agreement. The complaint was initially dismissed by the disciplinary counsel, but the disciplinary board remanded it to the disciplinary counsel for further investigation.

Before formal charges were filed, respondent filed a "Motion for Discipline by Consent," requesting that his license to practice law in Louisiana be revoked for a period of one year and one day. The disciplinary counsel concurred in the proposed discipline. On January 21, 1997, the disciplinary board

* Kimball, J. not on panel. Rule IV, Part 2, § 3.



2

96-1382 (La. 3/17/97)

Gary L. VALENTINE

v.

BONNEVILLE INSURANCE
COMPANY, et al.

No. 96-C-1382.

Supreme Court of Louisiana.

March 17, 1997.

Dissenting Opinion of
Chief Justice Calogero,
March 19, 1997.

Rehearing Denied May 9, 1997.

Deputy sheriff brought action to recover uninsured motorist (UM) benefits under business automobile insurance policy issued to sheriff's department. The Twenty-Sixth Judicial District Court, Parish of Webster, Harmon Drew, Jr., J., entered summary judgment in favor of deputy. Insurer appealed. The Court of Appeal, Norris, J., 672 So.2d 461, affirmed. Certiorari was granted. The Supreme Court, Victory, J., held that:

(1) abrogating *Employers Ins. Co. of Wausau*, 422 So.2d 1243, deputy was not named insured under the policy, and (2) deputy was not occupying vehicle when he was struck by uninsured motorist while directing traffic.

Reversed and rendered.

Calogero, C.J., and Johnson and Knoll, JJ., dissented and assigned reasons.

Calogero, C.J., and Johnson and Knoll, JJ., would grant a rehearing.

1. Insurance ⇨467.51(3)

Deputy sheriff was not "named insured" within meaning of business automobile insurance policy issued to sheriff's department; policy defined "named insured" as "You," uninsured motorist (UM) coverage would follow deputies regardless of where they were or what they were doing, if they were named insureds, and nothing indicated intent by sheriff to provide UM coverage at all times and places and under all conditions; abrogating *Employers Ins. Co. of Wausau v. Dryden*, 422 So.2d 1243.

See publication Words and Phrases for other judicial constructions and definitions.

2. Insurance ⇨124(1), 146

Insurance policy is contract between parties and should be construed according to general rules of interpretation of contracts.

3. Insurance ⇨146.1(2), 146.3(2)

If wording of insurance policy is clear and expresses intent of parties, agreement must be enforced as written.

4. Insurance ⇨146.3(2), 146.5(2)

Parties' intent, as reflected by words of insurance policy, determines extent of coverage, and such intent is to be determined in accordance with general, ordinary, plain, and popular meaning of words used in policy, unless words have acquired technical meaning.

5. Insurance ⇨146.4

Insurance policy should not be interpreted in unreasonable or strained manner so as to enlarge or restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve absurd conclusions.

* KIMBALL, J., not on panel. Rule IV, Part II,

6. Insurance ⇨146.7(8)

If ambiguity remains in insurance policy after applying other general rules of construction, ambiguous provisions are to be construed against insurer and in favor of insured.

7. Sheriffs and Constables ⇨134, 151

Parish sheriff's department has no legal status allowing it to sue or be sued; that status is reserved for sheriff.

8. Insurance ⇨467.51(4.1)

Deputy sheriff directing traffic at scene of traffic stop was not "occupying" covered vehicle when he was struck by uninsured motorist, was thus not "insured" under business automobile insurance policy issued to sheriff's department, and, therefore, was not entitled to uninsured motorist (UM) benefits; policy defined "occupying" as "in, upon, getting in, on, out or off," and deputy made no attempt to return to vehicle after he made initial stop.

See publication Words and Phrases for other judicial constructions and definitions.

Brian Allen Homza, Cook, Yancey, King & Galloway, Shreveport, for applicant.

James M. Johnson, Campbell, Campbell & Johnson, Minden, Graydon Kellyl Kitchens, III, Edward O. Kernaghan, Kitchens, Benton, Kitchens & Warren, Shreveport, for Respondent.

1 VICTORY, Justice.*

We granted writs in this case to determine (1) whether a deputy sheriff is included within the Uninsured Motorist ("UM") coverage provided by a Business Auto Policy where the named insured is the Webster Parish Sheriff's Department and (2) whether the deputy sheriff was occupying his vehicle such that he would be eligible for coverage under the provisions of the UM policy providing coverage for anyone "occupying" a covered auto. For the reasons that follow we reverse the court of appeal's finding that a sheriff's deputy is a named insured under the Busi-

§ 3.

ness Auto Policy issued to the Webster Parish Sheriff's Department. Furthermore, we find that Deputy Valentine was not "occupying" his vehicle as that term is defined in the Business Auto Policy.

FACTS AND PROCEDURAL HISTORY

While on duty, Webster Parish Sheriff's Deputy Gary L. Valentine observed a suspected DWI driver at approximately 6:30 p.m. on March 16, 1991 within the city limits of Minden, Louisiana. As was the custom when observing a traffic offense within city limits, Deputy Valentine radioed the Minden City Police Department for assistance. Officer Keith Banta of the Minden City Police Department arrived shortly thereafter and together with Deputy Valentine, the two officers stopped the suspect. After a brief discussion between Banta and Valentine, the officers decided that Officer Banta would investigate the suspect and Deputy Valentine would direct traffic to prevent any accidents.

With the overhead lights of both Officer Banta's and Deputy Valentine's vehicles for illumination, Deputy Valentine proceeded to the middle of Lewisville Road and began directing traffic. Deputy Valentine directed traffic using arm signals and a flashlight for approximately five to ten minutes when he was struck by a vehicle driven by Winnie S. Hall, an uninsured motorist.

Deputy Valentine filed suit against Mrs. Hall, her husband and their liability insurer, his personal uninsured motorist carrier, and Commercial Union Insurance Company ("Commercial Union"), the insurer of the Webster Parish Sheriff's Department.

Deputy Valentine and Commercial Union filed motions for summary judgment to determine if Deputy Valentine was covered under the underinsured motorist provisions of the Webster Parish Sheriff's Department's policy. After briefing and oral argument, the trial court granted Deputy Valentine's motion for summary judgment, determining not only was Deputy Valentine an insured under the Commercial Union policy, but he was also "occupying" a covered automobile and thus entitled to coverage under the policy. Commercial Union's motion for summary judgment was denied. The Second

Circuit Court of Appeal affirmed the trial court's finding that Deputy Valentine was an insured under the policy, but pretermitted any discussion of whether Deputy Valentine was also covered under the policy by virtue of "occupying" a covered auto. *Valentine v. Bonneville Insurance Company*, 28,109 (La. App. 2d Cir. 4/8/96); 672 So.2d 461. We granted writs to review the correctness of this ruling.

DISCUSSION

[1] The Commercial Union policy in question is a Business Automobile policy designed to provide liability and UM coverage to certain persons under limited circumstances. The relevant provisions of the policy are:

A. Coverage

1. We [Commercial Union] will pay all sums the 'insured' is legally entitled to recover as damage from the owner or driver of an 'uninsured motor vehicle....'

* * * * *

B. Who is an Insured

1. You
2. If you are an individual, any 'family member.'
3. Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.'

According to the policy, the word "you" refers to the Named Insured shown in the Declarations. The relevant portion of the declaration page that identifies who is the named insured reads as follows:

Named Insured & Mailing Address

Webster Parish Sheriff's Department
P.O. Box 877
Minden, LA 71055

The above policy language affords Deputy Valentine two opportunities to fall within the ambit of coverage provided. First, he may qualify for coverage as "you," that is, the named insured. Second, coverage is provided for anyone else "occupying" a covered auto.

[2-6] An insurance policy is a contract between the parties and should be construed using general rules of interpretation of contracts set forth in the civil code. *Lewis v. Hamilton*, 94-2204 (La. 4/10/95); 652 So.2d 1327. If the wording of the policy at issue is clear and expresses the intent of the parties, the agreement must be enforced as written. *Ledbetter v. Concord General Corp.*, 95-0809 (La. 1/6/96); 665 So.2d 1166. The parties' intent, as reflected by the words of the policy, determines the extent of coverage and such intent is to be determined in accordance with the general, ordinary, plain, and popular meaning of words used in the policy, unless the words have acquired a technical meaning. *Id.* at 1169. An insurance policy should not be interpreted in an unreasonable or strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve absurd conclusions. *Reynolds v. Select Properties, Ltd.*, 93-1480 (La. 4/11/94); 634 So.2d 1180. If ambiguity still remains after applying other general rules of construction, ambiguous provisions are to be construed against the insurer and in favor of the insured. *Crabtree v. State Farm Ins. Co.*, 93-0509 (La. 2/28/94); 632 So.2d 736.

1. *Is Deputy Valentine covered as a named insured?*

Relying on the First Circuit Court of Appeal's decision in *Employers Ins. Co. of Wausau v. Dryden*, 422 So.2d 1243 (La.App. 1st Cir.1982), the court of appeal determined that "the instant policy, issued to the Webster Parish Sheriff's Department, includes Dep. Valentine as a named Insured." *Valentine v. Bonneville Insurance Company*, 28-109 (La.App. 2d Cir. 4/8/96); 672 So.2d 461, 465.

In *Dryden*, Wausau's UM policy was issued to the "Terrebonne Parish Sheriff's Office." Similar to the instant case, the policy not only extended coverage to "the named insured," but also "to any other person while occupying an insured highway vehicle." *Dryden*, 422 So.2d at 1245. *Dryden*, a cap-

tain with the Terrebonne Parish Sheriff's Office, filed suit against Wausau after he was injured, claiming that he was both a named insured under the policy and that he was "occupying" a covered vehicle. The court of appeal agreed that Dryden was a named insured under the policy:

The policy gives "Terrebonne Parish Sheriff's Office" as Named Insured. The Named Insured is an Insured under clause (a). Obviously, "Terrebonne Parish Sheriff's Office" includes not only the Sheriff, but all Deputies as well, as, had the policy been intended to designate the Sheriff alone as Named Insured, the Named Insured would have been the Sheriff. By using the broader term, the policy makes the Sheriff and all Deputies the Named Insured. *Id.* at 1245.

After determining that the Wausau policy included the Sheriff as a named insured when the named insured was designated as the "Terrebonne Parish Sheriff's Office," the court of appeal found no reason to exclude the Sheriff's deputies from also being included as named insureds.

[7] It is well settled in the lower courts that a Sheriff's Department is not a legal entity capable of being sued. *Ferguson v. Stephens*, 623 So.2d 711 (La.App. 4th Cir. 1993); *Garner v. Avoyelles Parish Sheriff's Dept.*, 511 So.2d 8 (La.App. 3d Cir.1987); *Jenkins v. Jefferson Parish Sheriff's Office*, 385 So.2d 578 (La.App. 4th Cir.1980). It is the elected Sheriff, not the "Parish Sheriff's Office," that is the constitutionally designated chief law enforcement officer of the Parish. *Liberty Mut. Ins. Co. v. Grant Parish Sheriff's Department*, 350 So.2d 236 (La.App. 3d Cir.1977). The law of Louisiana affords no legal status to the "Parish Sheriff's Department" so that the department can sue or be sued, such status being reserved for the Sheriff. *Id.* at 238.

However, regardless of whether the policy issued to the "Webster Parish Sheriff's Department" includes as a named insured the Sheriff in his individual capacity,² we dis-

2. The issue presently before this Court does not call into question the inclusion or non-inclusion of the Sheriff as a named insured under the

Commercial Union policy issued to the Webster Parish Sheriff's Department. However, assuming arguendo that the policy does include the

agree with the *Dryden* court and the court of appeal in the instant case that the Sheriff's deputies are included as named insureds under a policy issued to the "Webster Parish Sheriff's Department."

The Named Insured under the Commercial Union policy is the Webster Parish Sheriff's Department, not the individual deputies. Under the policy, a named insured is provided UM coverage wherever he is, whatever he is doing, and regardless of whether he is on the job or merely tending to his private affairs. Thus, if the Sheriff's deputies are covered as named insureds, coverage would follow them regardless of where they were or what they were doing, thus negating the need for the deputies to obtain UM coverage for themselves. Because the Sheriff, as the employer of the deputies, has no obligation to supply the deputies with UM coverage at all, there is no reason to believe that the Sheriff intended to provide them with UM coverage at all times, all places and under all conditions. In addition, because there is no indication that the sheriff's deputies paid for UM coverage through the Sheriff's Department, it is much more reasonable to conclude that the Sheriff merely intended to cover his deputies when they were most at risk, i.e. when

they were driving or otherwise occupying their patrol cars.³

Deputy Valentine, however, argues that if he is not a named insured, then the Sheriff is the only named insured and thus the premiums collected for UM coverage extend coverage to only one person. We disagree. Valentine's argument assumes that the Sheriff is covered under the UM policy as a named insured. As noted above, we decline to comment on whether the Sheriff individually is included as a named insured under the policy issued to the Webster Parish Sheriff's Department. However, even if the Sheriff were not included as a named insured, the failure to have someone designated for coverage as a "you" (a named insured) is of no moment. In most cases, as in the present case, UM coverage is provided to protect against bodily injury damages. Corporations and political entities, legal persons that are incapable of sustaining bodily injury damage, buy UM policies in which the corporation or political entity is the named insured. As in the instant case, coverage is provided under these policies for anyone "occupying" a covered auto. Valentine's argument fails to recognize that coverage is provided to the Webster

Sheriff as a named insured, we disagree with the court of appeal's extension of coverage to include the Sheriff's deputies as well. According to the logic of the First Circuit Court of Appeal in *Dryden*, ("by using the broader term, the policy makes the Sheriff and all Deputies the Named Insured"), it would be difficult to hold that the use of the broad term "Sheriff's Department" did not also include every other employee of the Sheriff's Department as named insureds.

3. Louisiana courts have almost uniformly held that when the named insured is a political entity or a corporation, coverage is restricted to the named insured and does not extend to the members/employees of the political entity or employees of the corporation. *Davis v. Brock*, 602 So.2d 104 (La.App. 4th Cir.1992) (employee of seafood restaurant was not covered under employer's UM policy where the named insured was the corporation, Jaeger's Inc.); *Barnes v. Thames*, 578 So.2d 1155 (La.App. 1st Cir.1991) (employee of retail furniture store was not covered under employer's UM policy where named insured was the corporation, Shop in Denmark, Inc.); *Pridgen v. Jones*, 556 So.2d 945 (La.App. 3d Cir.1990) (employee was not covered under employer's UM policy where named insured was the corporation, Petro-Marine Engineering,

Inc.); *Bryant v. Protective Cas. Ins. Co.*, 554 So.2d 177 (La.App. 2d Cir.1989) (employee was not covered under employer's UM policy where named insured was the corporation, Berg Mechanical, Inc.); *Rodriguez v. Continental Cas. Co.*, 551 So.2d 45 (La.App. 1st Cir.1989) (Chief of Police was not covered under city's UM policy where named insured was a political entity, the City of Slidell); *Vera v. Centennial Ins. Co.*, 483 So.2d 1166 (La.App. 5th Cir.1986) (employee of furniture store was not covered under employer's UM policy where named insured was the corporation, Hurwitz Mintz Furniture Company); *Saf-fel v. Bamburg*, 478 So.2d 663 (La.App. 2d Cir. 1985) (wife of employee of dairy was not covered under employer's UM policy providing coverage to "you or any family member" where named insured was the corporation, Foremost Dairies); *Pierron v. Lirette*, 468 So.2d 1305 (La.App. 1st Cir.1985) (vice-president and executive officer of corporation was not covered under employer's UM policy where named insured was the corporation, Hy Fashions, Inc.); *Morris v. Mitchell*, 451 So.2d 192 (La.App. 1st Cir.1984) (school bus driver was not covered under school board's UM policy, despite the fact that she paid a pro-rata share of the premium, where named insured was the political entity, Washington Parish School Board).

Parish Sheriff's Department for anyone "occupying" a covered auto or a temporary substitute for a covered auto. Thus, any person, whether that person is the Sheriff, a deputy, another employee of the Webster Parish Sheriff's Department or anyone else, is covered under the Commercial Union policy as long as that person is "occupying" a covered auto.

Thus, for the reasons stated above, we hold that Deputy Valentine is not included as a named insured for purposes of UM coverage under the Commercial Union policy designating the Webster Parish Sheriff's Department as the named insured.

¶II. *Is Deputy Valentine covered by virtue of "occupying" a covered auto?*

[8] Although we have determined that Deputy Valentine fails to qualify for coverage under the Commercial Union policy as a named insured, this determination does not end our inquiry. Deputy Valentine also claims that he is covered under the policy because he was "occupying" a covered vehicle.

The Commercial Union policy defines "occupying" as "in, upon, getting in, on, out or off." Louisiana courts have had numerous occasions to interpret "occupying" clauses of various policies and have predictably reached different results based in large part on the specific language used in the policy at issue. For example, in *Westerfield v. LaFleur*, 493 So.2d 600 (La.1986), the UM policy at issue defined "occupying" to mean "in or upon or entering into or alighting from." Focusing on the words "entering into," this Court concluded that these words were ambiguous and could be construed to extend coverage to a child who was crossing the street to board a school bus when she was struck by an uninsured motorist. *Westerfield*, 493 So.2d at 606. Quoting with approval the reasoning of the Second Circuit Court of Appeal in *Day v. Coca-Cola Bottling Company, Inc.*, 420 So.2d 518 (La.App.2d Cir.1982), this Court in *Westerfield* stated:

4. See, e.g., *White v. Williams*, 563 So.2d 1316 (La.App. 3d Cir.1990) (holding that plaintiff was "occupying" the insured vehicle when he was struck while walking from a convenience store to

It is not physical contact with the vehicle that serves as a basis to determine whether a person is injured while alighting from a vehicle but it is the relationship between the person and the vehicle, obviously of time and distance with regard to the risk of alighting that determines specific coverage. *Westerfield*, 493 So.2d at 603.

This fact intensive process of determining how long a person has been out of the vehicle and how far away from the vehicle the person has gone has come to be known as the "physical relationship test." Using this test, other Louisiana courts have reached similar results in interpreting similar definitions of "occupying."⁴

However, in *Armstrong v. Hanover Ins. Co.*, 614 So.2d 312 (La.App. 4th Cir.1993), the Fourth Circuit Court of Appeal reached a different result when faced with policy language similar to that of the present case. In *Hanover*, the UM policy defined "occupying" in the exact manner as in the present case; "in, upon, getting in, on, out or off." The plaintiff, the widow of a worker killed while working as a flagman in connection with a construction project alongside a highway in Plaquemines Parish, sought coverage under her husband's employer's UM policy on the basis that her husband was "occupying" an insured vehicle at the time he was killed. Looking at the specific wording of the policy at issue and using the general, ordinary, plain and popular meaning of the words used in the policy, the court determined that plaintiff's husband was not covered under the employer's UM policy:

When the accident occurred the decedent was functioning as a flagman on the highway. His activity with respect to a tractor working on the side of the highway and a pick-up truck assigned to him cannot possibly be construed as "in" one of these vehicles, "upon" one, "getting in" one, "getting on" one, "getting out" one, or "getting off" one without distorting the plain words of the policy.

the insured vehicle after paying for gas he had just pumped into the insured vehicle. Policy defined "occupying" as "in, on, getting into or out of").

Furthermore, the court in *Hanover* distinguished *Westerfield* on the basis that the definition of "occupying" at issue in *Westerfield* was different than the definition in *Hanover's* policy:

Plaintiff's reliance on *Westerfield v. La-Fleur*, 493 So.2d 600 (La.1986) is misplaced because that case dealt with an entirely different definition than the one in *Hanover's* policy discussed above. In *Westerfield* the policy defined "occupying" to mean "in or upon or entering into or alighting from" the insured school bus. The court focused upon the words "entering into" and concluded they were ambiguous and could be construed to cover this child who was crossing the road to board the school bus. Those words "entering into" are not included in *Hanover's* policy so that the *Westerfield* case has no application to the present case.

We agree with the Fourth Circuit Court of Appeal's reasoning in *Hanover* and likewise conclude that *Westerfield* does not apply in the present case. Not only was the language used in the *Westerfield* policy different than the language used by Commercial Union in the present case, but the Court in *Westerfield* determined that the policy language in that case was ambiguous and thus susceptible to more than one meaning. In the present case, we find that the language of the Commercial Union policy is clear and unambiguous and thus determine the extent of coverage using the general, ordinary, plain and popular meaning of the words used in the policy.

In his deposition, Deputy Valentine stated that after stopping the suspected DWI driver, he and officer Banta approached the suspect's vehicle. At the time they stopped the suspect, all three vehicles were on the shoulder of the south-bound lane with the vehicles encroaching on the south-bound lane by approximately one foot. Deputy Valentine then asked the suspect to get out of the car and step to the rear of the vehicle. At this point, Deputy Valentine turned over the investigation to Officer Banta who was going to administer a field sobriety test and effect an arrest if necessary. Shortly thereafter, Deputy Valentine noticed that traffic was begin-

ning to build-up. Concerned that an accident might occur, Valentine proceeded to the middle of the road and began directing traffic. After directing traffic for about "five or ten minutes," Valentine was standing in the north-bound lane when he was struck by a vehicle driven by an uninsured motorist. At no time after he made the initial stop of the DWI suspect did Deputy Valentine return to or attempt to return to his vehicle. He was directing traffic when he was hit and injured.

As noted above, an insurance policy should not be interpreted in an unreasonable or strained manner so as to enlarge its provisions beyond what is reasonably contemplated by its terms. *Reynolds*, 634 So.2d at 1183. Based on Deputy Valentine's deposition testimony, he was clearly not "in" the vehicle, "upon" the vehicle, "getting in" the vehicle, "getting on" the vehicle, "getting out" of the vehicle, or "getting off" the vehicle when he was injured.

CONCLUSION

Because Deputy Valentine was not a named insured under the Commercial Union policy and the undisputed facts of this case show that he was not "occupying" a covered auto, the trial court and court of appeal erred in granting Valentine's motion for summary judgment and failing to grant summary judgment in favor of Commercial Union.

DECREE

For the reasons stated herein, the judgments of the trial court and the court of appeal are reversed. Judgment is entered sustaining Commercial Union's motion for summary judgment and rejecting Valentine's claims versus Commercial Union. All costs are assessed to Valentine.

REVERSED AND RENDERED.

CALOGERO, C.J., and JOHNSON and KNOLL, JJ., dissent and assign reasons:
1 JOHNSON, Justice, dissenting.

Gary L. Valentine, a Deputy Sheriff with the Webster Parish Sheriff's Office was assisting with a DWI arrest on the evening of March 6, 1991, when he stepped from his vehicle to direct traffic. Clearly, he was

within the course and scope of his employment while securing traffic.

Commercial Union Insurance Company urges us to hold that the policy of insurance issued to the Webster Parish Sheriff's Department did not include Deputy Valentine as an insured because under the facts of this case, he was not a named insured under the policy and he was not "occupying" a covered vehicle.

I agree with the reasoning of the appellate court that "Webster Parish Sheriff's Department easily and logically encompasses an identifiable group of persons, including sheriff's deputies; had only the sheriff himself been intended, the policy could have so stated." *Valentine v. Bonneville Insurance Company*, 672 So.2d 461, 464 (La.App.2d Cir. 1996).

I would affirm the judgment of the trial court and appellate court, and deny the Motion for Summary Judgment.

1KNOLL, Justice, dissenting.

I agree with Chief Justice Calogero's dissent regarding the ambiguity of the named insured in the policy. Additionally, I find it significant that Deputy Valentine was engaged in his duties as a deputy sheriff and was assigned to one of the insured patrol units at the time he was struck by the uninsured motorist.

The Webster Parish Sheriff's Department, as an unincorporated association, cannot perform any act without one of its agents acting for it. The Webster Parish Sheriff's Department cannot drive a patrol unit, nor can it suffer damages by being struck by an uninsured motorist. Most of the department's functions are necessarily performed by its deputies. We need not address the issue of whether Deputy Valentine is covered at all times, in all places, and under all conditions. We merely must decide whether a deputy is covered when he is struck by an uninsured motorist while he is on duty, performing an official traffic-related function, and assigned to an insured patrol unit. I find that at a bare minimum, while the deputy is performing his official duties, especially under the instant circumstances, he is the "Webster

Parish Sheriff's Department" named in the policy.

I find that under *Employers Ins. Co. of Wausau v. Dryden*, 422 So.2d 1243 12(La.App. 1 Cir.1982), Deputy Valentine is a named insured under the policy. I also find *Hobbs v. Rhodes*, 95-1937 (La.App. 4 Cir. 11/30/95); 667 So.2d 1112, writ denied, 96-0733 (La. 5/3/96); 672 So.2d 691, applicable. In *Hobbs* an employee of the named insured was covered when he was struck by an uninsured motorist, even though the employee was not occupying a covered vehicle at the time of the accident. The court in *Hobbs* cited *Howell v. Balboa Ins. Co.*, 564 So.2d 298 (La.1990), and held that because the employee was covered under the liability provisions of the policy while in the course and scope of his employment, he was necessarily covered to the same extent by the uninsured motorist provisions. I therefore find it significant that Deputy Valentine was in the course and scope of his employment at the time of the accident.

For the foregoing reasons, I respectfully dissent.

1CALOGERO, Chief Justice, dissenting.

The majority concludes that the plaintiff, a deputy sheriff, is not a "named insured" for purposes of U.M. coverage under the policy issued by the defendant. I disagree.

The pertinent policy provision reads as follows:

B. Who is an insured

1. You.
2. If You are an individual, any "family member."
3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto."

"You" refers to the "named insured," which the policy identifies as "Webster Parish Sheriff's Department." Under Louisiana law, the sheriff's department, unlike a corporation, is not a legal entity with its own separate existence apart from its members. See *Riley v. Evangeline Parish Police Jury*, 630 So.2d 1314 (La.App. 3d Cir.1993), reversed on other grounds, 94-0202 12(La.

Cite as 691 So.2d 673 (La. 1997)

4/04/94), 637 So.2d 395 (per curiam).¹ Thus, because the sheriff's department lacks a separate legal identity, the term "Webster Parish Sheriff's Department" is ambiguous with respect to the scope of coverage as a "named insured"—or a "You"—under the policy, and it is hornbook law that ambiguity in an insurance policy is construed against the insurer, the drafter of the policy. See, e.g., *Pareti v. Sentry Indem. Co.*, 536 So.2d 417, 420 (La. 1988).

Having determined that the Sheriff's Department is not a recognized legal entity, the inquiry then becomes: What or who is the sheriff's department? In my view, the sheriff's department is most analogous to an association, which *Black's Law Dictionary* defines, in pertinent part, as follows:

An unincorporated society; a body of persons united and acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise. It is not a legal entity separate from the persons who compose it.

BLACK'S LAW DICTIONARY 81 (6th ed. 1991). Thus, for all legal purposes, an association is defined by its membership.

Who then are the "members" of the sheriff's department? The answer is clear: the sheriff and the sheriff's employees. As such, it is entirely reasonable to conclude through a two-step process that, in the instant case, (1) "You" refers to the sheriff's department, which is an association, and (2) the association, having no separate legal existence, is only defined by its membership—the sheriff and his employees. Therefore, construing the ambiguous policy language in favor of the insured, the sheriff and his employees are covered, in my view, under the policy as "named insureds."

13The policy at issue also provides coverage to family members if and only if "you" is an individual. "You," as discussed above, refers

1. The Third Circuit's interpretation of the legal identity of a sheriff's department is in accord with the jurisprudence of other states, such as Alabama (*Dean v. Barber*, 951 F.2d 1210 (11th Cir.1992)); Florida (*Hutchison v. Prudential Ins. Co. of America*, 645 So.2d 1047 (Fla.App. 3d Dist.1994)); Indiana (*Slay v. Marion County Sheriff's Dep't*, 603 N.E.2d 877 (Ind.App. 4th Dist.

to the sheriff's department, an association, which although comprised of individuals is *not* in and of itself an individual. Therefore, the family members of the sheriff and his employees would not be covered, unless, of course, they were found to be "occupying" a covered vehicle.

For the reasons given above, I respectfully dissent.



96-2553 (La. 3/21/97)

STATE ex rel Kevin PARKER

v.

STATE of Louisiana.

No. 96-KK-2553.

Supreme Court of Louisiana.

March 21, 1997.

In re: State of Louisiana;—Defendant(s); Applying for Supervisory and/or Remedial Writ; Parish of East Baton Rouge 19th Judicial District Court Div. "E" Number 12-86-2, 12-87-750; to the Court of Appeal, First Circuit, Number KW96 1687.

PER CURIAM.

Writ granted in part and denied in part. The order of the First Circuit Court of Appeal, remanding the case to the district court to allow defendant to withdraw his guilty pleas is vacated. Defendant is granted an out of time appeal, and this case is remanded to the First Circuit for the sole purpose of hearing defendant's appeal on the denial of

1992); Michigan (*Rhodes v. McDannel*, 945 F.2d 117 (6th Cir.1991); Minnesota (*Maras v. City of Brainerd*, 502 N.W.2d 69 (Minn.App.1993); North Carolina (*Hughes v. Bedsole*, 913 F.Supp. 420 (E.D.N.C.1994); Tennessee (*Bradford v. Gardner*, 578 F.Supp. 382 (E.D.Tenn.1984), all of which conclude that a sheriff's department is not an entity that can sue or be sued.

Westlaw

Page 1

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 (Cite as: 483 So.2d 1166)

H

Court of Appeal of Louisiana,
 Fifth Circuit.

Edwardo E. VERA

v.

CENTENNIAL INSURANCE COMPANY and
 David H. Thomas, Jr.

No. 85-CA-476.

Feb. 13, 1986.

Writ Denied April 11, 1986.

Individual injured in automobile accident brought claim for uninsured motorist coverage against employer's insurer. The Twenty-Fourth Judicial District Court, Jefferson Parish, Thomas C. Wicker, Jr., J., found for insurer, and employee appealed. The Court of Appeal, Gaudin, J., held that employee who was not listed insured and who was injured on pleasure trip not related to his employment was not covered by policy.

Affirmed.

West Headnotes

Insurance 217 ↻ 2660.5

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(A) In General

217k2660 Persons Covered

217k2660.5 k. In general. Most Cited

Cases

(Formerly 217k2660, 217k467.51(3))

Employee of furniture company who was not a listed insured on automobile policy issued to employer, and who was injured on pleasure trip not related, directly or indirectly, to his employment, was not covered under uninsured motorist provisions of automobile policy. LSA-R.S. 22:1406.

*1167 Garland R. Rolling, Metairie, for plaintiff-

appellant Edwardo E. vera.

Vincent Paciera, Jr. New Orleans, for defendant-appellee USF&G.

Before CHEHARDY, GAUDIN AND DUFRESNE, JJ.

GAUDIN, Judge.

This is an appeal from a district court judgment dismissing, via a motion for summary judgment, one of the named defendants, United States Fidelity and Guaranty Company.

Appellant is Edwardo E. Vera, who was injured in an automobile accident on August 20, 1983. He argued unsuccessfully that an automobile insurance policy issued by USF&G to his (Vera's) employer, Hurwitz-Mintz Furniture Company, covered him under its uninsured motorist provisions.

The policy in question lists as named insured: Hurwitz-Mintz Furniture Company, Ellis Mintz, Mitchell Lloyd Mintz, Albert Mintz, Sol Mintz, Mrs. Bella Mintz Shlansky Goldberg and Units, a division of Hurwitz-Mintz Furniture Company.

The trial judge did not find that the policy provided coverage either to Vera or to the accident he was involved in. We affirm.

When the sued-on accident happened at approximately 3:30 a.m. on the Lake Pontchartrain Causeway, Vera was a passenger in an automobile driven by Gregory J. Meier. In denying coverage by USF&G, the trial judge in his "Reasons for Judgment" pointed out (1) that Vera was on a pleasure trip, (2) that he was not listed as an insured in the subject policy and (3) that he was not acting within the scope of his employment when he was hurt. Meier was not a Hurwitz-Mintz employee and his vehicle was neither owned by any of the named insureds nor being operated for the benefit of any of

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them.

Nonetheless, Vera contends that under the provisions of LSA-R.S. 22:1406 the uninsured motorist segment of the USF&G policy does afford him coverage. In his "Reasons," the trial judge stated:

"Plaintiff's argument ... rests upon his contention that under the law uninsured motorist coverage is presumed unless it is specifically excluded.

" LSA-R.S. 22:1406 requires that an insured's rejection of uninsured motorist coverage or selection of lower limits be in writing. See *Page v. American Motorist Insurance Co., Ltd.*, 381 So.2d 889 (La.App. 2nd Cir.1980), which held that LSA-R.S. 22:1406 requires that automobile liability policies written in Louisiana contain uninsured motorist coverage unless such coverage is rejected in writing by the insured.

"The Court finds the language in the USF&G policy is clear and unambiguous. Mr. Vera is not an insured ...

"... a person who does not qualify as an insured under the policy is not entitled to uninsured motorist coverage. *Malbrough v. Wheat*, 428 So.2d 1110 (La.App. 1st Cir.1983)."

We cannot say that the trial judge erred. We know of no Louisiana cases providing coverage to a claimant under facts and circumstances synonymous with Vera's. Appellant cites various cases but they are inapplicable.

***1168** It is undisputed that Vera was not a listed insured but only an employee of Hurwitz-Mintz unfortunately injured on a pleasure trip not related, directly or indirectly, to his employment. Accordingly, summary judgment dismissing USF&G was correct, there being no triable issues of either fact or law. Appellant is to pay costs.

AFFIRMED.

La.App. 5 Cir., 1986.

Vera v. Centennial Ins. Co.
483 So.2d 1166

END OF DOCUMENT

CERTIFICATE OF SERVICE

Elizabeth Bettridge, being first duly sworn on oath, deposes and states:

That on the 9th day of March, 2012, she caused to be sent a copy of Respondent's Appellate Brief; and this Certificate of Service to the below listed party of record in the above-captioned matter, as follows:

Office of Clerk
Court of Appeals – Division I
One Union Square
600 University Street
Seattle, WA 98101

Legal Messenger U.S. Mail E-mail

Howard M. Goodfriend, Esq.
Smith Goodfriend, P.S.
500 Watermark Tower, 1109 First Avenue
Seattle, WA 98101

Legal Messenger U.S. Mail E-mail

Richard H. Adler
Arthur Leritz
Adler Giersch PS
333 Taylor Avenue N
Seattle, WA 98109

Legal Messenger U.S. Mail E-mail

Simon Forgette
Attorney at Law
406 Market Street, Ste. A
Kirkland, WA 98033

Legal Messenger U.S. Mail E-mail

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DATED this 9th day of March, 2012 at Seattle, Washington.

Elizabeth Bettridge
Elizabeth Bettridge