

II. FACTS

On August 19, 2000, Michael Gilchrist was working for United Rentals, Inc., in a barricaded construction zone, when he was hit by Arthur Gonsor, who was driving under the influence of alcohol¹. The Plaintiff was severely wounded. Gilchrist suffered multiple fractures, as well as a brain injury. Defendant Gonsor carried liability insurance with Progressive with liability limits of \$25,000.

At the time of the accident, the Plaintiff's employer carried three policies of liability insurance. The first policy is a Commercial Insurance Policy issued by the United States Fidelity and Guaranty Company (USF&G), Policy No. DRE2256201. The insurance policy spoke specifically to the uninsured motorist coverage requirements in Kansas, Nebraska, and Oregon, but was silent as to Ohio. The second policy, also issued by USF&G, is an Excess Auto Liability Policy, Policy No. DRE 2556200². The Defendant USF & G also carried a commercial general liability policy (Policy No. DRE 2256204).

III. LAW AND CONCLUSIONS OF LAW

Ohio Rule of Civil Procedure 56(C) provides that summary judgment may be rendered when the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact demonstrate the absence of any genuine issue of material fact. The moving party bears the initial burden of demonstrating the absence of

¹The tortfeasor is incarcerated at the time of this writing.

²Currently there is no policy underwritten by St. Paul before the court in any motions. In the pleadings, St. Paul and USF & G contain the same address and are represented by the same counsel who has filed the dispositive motions on behalf of St. Paul and USF & G. For the purposes of this ruling the Court will treat the two insurance companies as the same entity.

a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St. 3d 280. Summary judgment is appropriate if reasonable minds can come to but one conclusion, that based on the evidence, no genuine issue of material fact exists.

COMMERCIAL AUTO LIABILITY POLICY

In order to determine whether or not coverage exists, the court must determine whether or not the Defendant is a self-insurer and exempt for the requirements of Ohio Revised Code § 3937.18.³ The Defendant contends that the commercial auto liability policy is a fronting agreement. In a fronting agreement, the policy has liability limits equal to the amount of the deductible. In these situations the insurance company completes all required filings in order to fulfill the auto financial responsibility laws of the multi-state region that the employer operates motor vehicles in, *but* the employer retains the risk of loss accruing from liability. In the present case, the commercial auto liability policy issued by USF & G to United Rentals has policy limits that match the policy deductibles, *i.e.*, \$1,000,000.00. The Defendant contends that the policy is a fronting agreement and thus makes them self insured, which alleviates them from the requirements of Ohio Revised Code § 3937.18. In support of this contention, the Defendants rely on *Lafferty v. Reliance Ins. Co.* (2000), 109 F. Supp. 2d 837, where the U.S. District Court for the Southern District of Ohio held:

The court concludes that under the matching deductible policy issued by Reliance [the Plaintiff's employer's insurance company], Conrail [the Plaintiff's employer] was a self-insurer in the practical sense and that the Reliance policy was not subject to the provisions of Ohio Revised Code § 3937.18.

The Defendant asserts that the Ohio Supreme Court's holding in *Grange v. Refiners Transport* (1986) 21 Ohio St. 3d 47 is also controlling. In *Grange*, the Ohio Supreme Court upheld

³ This statute makes mandatory the offering of uninsured motorist coverage by insurance companies licensed in the state. An insurer bears the burden of showing that any rejection of uninsured/underinsured motorist coverage was knowingly made by the customer. Failure to provide such evidence creates such coverage as a matter of law.

an appeal from the Eighth Appellate District Court and found that a self-insurer does not issue motor vehicle insurance policies. The *Grange* court found that there is no unequal bargaining position between the insured and the self-insurer because a self-insurer is in fact 'dealing with himself'. The court concluded that if one were to require a self-insurer to follow the mandates of Ohio Revised Code §3937.18, the requirement would defy logic since it would require one to write a rejection notice to himself declining the coverage.

The Plaintiff relies upon a recent ruling from the Eighth Appellate District Court. In *Tyler v. Kelley* (1994), 98 Ohio App. 3d 444, a car rental company (which was certified as a self-insurer), lost its self-insurer status by electing to offer and extend coverage to its customer and thus brought itself within the requirements of Ohio Revised Code § 3937.18. The Plaintiff contends that assuming *arguendo*, that the Defendant was a self-insurer⁴, the fact that they elected to extend uninsured coverage to a portion of their customers whose state legislatures require that uninsured/underinsured coverage be offered, the USF & G policy brought itself within the requirement of the uninsured motorist statute and thus uninsured/underinsured coverage is available to them as a matter of law.

The Defendant attempts to distinguish the case at bar from *Tyler* due to the fact that *Tyler* involved a situation where a self insurer offered liability insurance coverage to the public. This court finds the Defendant's argument to be without merit. The fact that whether or not the coverage offered is offered to a corporation or an individual is irrelevant in the present climate of insurance policy interpretation. See generally, *Scott-Ponzer v. Liberty Mutual Ins. Co.* (1999) 85 Ohio St. 3d 660 (court took issue with the "You" referred to in the policy and found "that naming the corporation

⁴The Plaintiff contends that this inference is strengthened due to the admission of, the Defendants they were not a certified self-insurer in State of Ohio on the date of the accident.

as the insured is meaningless unless the coverage extends to some person or persons.")

COMMERCIAL GENERAL LIABILITY POLICY

At the time of the accident, the Plaintiff's employer had Policy No. DRE 2256204, in effect which was issued by USF & G. The Defendant claims that this policy does not qualify as "an automobile liability or motor vehicle liability policy of insurance" pursuant to the Ohio Supreme Court's recent decision in *Davidson v. Motorists Mutual Ins. Co.* (2001), 91 Ohio St. 3d 262 because it does not expressly provide automobile liability coverage, but instead simply provides liability coverage for bodily injury and property damage. The Plaintiff's brief in opposition to the Defendant's motion for summary judgment does not address this issue. As the Plaintiff avers that he is not claiming coverage under the Commercial General Liability Policy, the Defendant's motion for summary judgment as to coverage under the Commercial General Liability Policy is granted.

EXCESS POLICY

At the time of the accident, the Plaintiff's employer had coverage under Policy No. DRE 25526200, which was an excess general liability policy issued by USF & G. Excess or secondary coverage is coverage whereby, under the terms of the policy, liability only attaches after a predetermined amount of coverage has been exhausted. A second insurer greatly reduces his risk of loss. This reduced risk is reflected in the cost of the policy. *Continental Marble & Granite v. Canal Ins. Co.*, 785 F. 2d 1258 (5th Cir. 1986) as cited in *American Special Risk Ins. Co. v. Cranford Ins. Co.* 975 F. Supp. 1019 (U.S. District Court for the Northern District of Ohio, Eastern Division 1997). As this court does not have before it the full extent of the Plaintiff's medical bills which resulted from the August 19, 2000 accident, this court is unable to determine whether or not the excess coverage policy should be put into effect.

IV. JUDGEMENT ENTRY

It is ORDERED, ADJUDGED and DECREED that the Plaintiff's partial motion for summary judgment on the issue of coverage is found well taken in part and not well taken in part.

It is FURTHER ORDERED, ADJUDGED and DECREED that the motions for summary judgment filed by the defendants St. Paul Fire and Marine Insurance Company and United States Fidelity & Guaranty Company Insurance Pennsylvania, be, and hereby, are found well-taken in part and not well-taken in part.

It is FURTHER ORDERED, ADJUDGED and DECREED that under the terms and conditions of the commercial general liability policy (Policy No. DRE 22562044) the Defendant's motion for summary judgment is deemed unopposed and granted. This Court hereby finds that the Plaintiff is entitled to uninsured/underinsured coverage found under the commercial auto liability policy (Policy No. DRE 2256201), issued by defendant St. Paul and USF & G, and by the operation of law, the limits of uninsured/underinsured motorist coverage available to plaintiff Michael J. Gilchrist is \$1,000,000. The issues of proximate cause and damage remain for the factfinder

To the extent that fewer than all claims of the parties have been finally resolved by this order, it is ordered that with respect to such issues as are resolved by this order, there is no just reason for delay.

IT IS SO ORDERED.


KENNETH R. CALLAHAN, JUDGE

Date: ^{February} ~~January~~ 6, 2002

CERTIFICATE OF SERVICE

A copy of the foregoing **Journal Entry** was sent by ordinary U.S. Mail this 1 day of ²⁰⁰² January, 2002 to:

Mark L. Wakefield, Esq.,
610 Skylight Office Tower
1660 West 2nd Street
Cleveland, Ohio 44113

Attorney for Plaintiff

Thomas W. Wright, Esq.
Patrick M. Roche
Davis & Young
1700 Midland Building
Cleveland, Ohio 44115

*Attorneys for Defendants,
St. Paul and Fire Insurance Company and
United Fidelity & Guaranty Company*

Andrew H. Isakoff, Esq.
1331 Illuminating Building
55 Public Square
Cleveland, Ohio 44113

Attorney for Defendant, Arthur Gonsor



KENNETH R. CALLAHAN, JUDGE