

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

KATHLEEN M. GRIFFITH, ET AL., :

Plaintiffs, : CASE NO. 00CVC05-4488

vs. : JUDGE BESSEY

WAUSAU BUSINESS INSURANCE :  
COMPANY, ET AL.,

Defendants. :

**DECISION DENYING DEFENDANT WAUSAU'S**  
**MOTION FOR SUMMARY JUDGMENT,**  
**FILED JULY 30, 2001**  
**AND**  
**DECISION GRANTING PLAINTIFFS'**  
**CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT,**  
**FILED AUGUST 7, 2001**

FILED  
COMMON PLEAS COURT  
FRANKLIN COUNTY, OHIO  
2001 SEP 27 AM 10:38  
CLERK OF COURTS

These matters are before the Court upon the Motion for Summary Judgment filed by Defendant, Wausau Business Insurance Company (hereinafter "Defendant Wausau"), on July 30, 2001.

On August 3, 2001, the parties filed an Agreed Entry and Order granting Plaintiffs, Kathleen M. Griffith and James Griffith (hereinafter "Plaintiffs"), until August 10, 2001 to file their Memorandum Contra Defendant Wausau's Motion for Summary Judgment, which was to be combined with their Cross-Motion for Partial Summary Judgment. Defendant Wausau was also granted fourteen days to file its Memorandum Contra Plaintiffs' Cross-Motion for Partial Summary

Judgment, which was to be combined with its Reply Memorandum to Plaintiffs' Memorandum Contra. Following Defendant Wausau's filing, Plaintiffs were granted seven days in which to file their Reply Memorandum to Defendant Wausau's Memorandum Contra.

On August 7, 2001, Plaintiffs filed their Memorandum Contra Defendant Wausau's Motion for Summary Judgment, along with their own Cross-Motion for Partial Summary Judgment.

On August 17, 2001, Defendant Wausau filed its Reply Memorandum to Plaintiffs' Memorandum Contra along with its Memorandum Contra Plaintiffs' Cross-Motion for Partial Summary Judgment.

**I. Facts**

On September 14, 1999, Plaintiff, Kathleen Griffith, was driving her car westbound on State Route 37 in Granville Township, Licking County, Ohio, when Donald Riley, was driving eastbound on the same road, and went left of center causing a crash. Plaintiff, Kathleen Griffith, contends that she suffered serious personal injuries, including a closed head brain injury that caused partial paralysis, numbness and weakness of her extremities, and other physical and emotional consequences.

State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") was the automobile liability insurer for Donald Riley. State Farm has

offered its liability limits of \$100,000.00 in exchange for settlement of Plaintiff's claims against Donald Riley, and a waiver from Defendant Wausau of its subrogation claims against Donald Riley.

On September 14, 1999, Plaintiff, Kathleen Griffith, was employed as a teacher by the Granville Exempted Village School District (hereinafter "Granville"). However, at the time of the accident, she was not acting within the scope of her employment with Granville.

On September 14, 1999, Defendant Wausau insured Granville under a business auto coverage policy, policy number 0839-03-005341, which had a policy period of October 22, 1998 through October 22, 1999, and which provided UM/UIM coverage in the amount of \$1,000,000.00 per accident.

## **II. Standard of Review**

When deciding the above motions for summary judgment, the Court must first examine the standard under which summary judgments are properly granted.

A motion for summary judgment is properly granted in favor of the moving party, if the court, upon viewing the evidence in a light most favorable to the party against whom the motion is made, determines that: 1) there are no genuine issues as to any material fact; 2) the movant is entitled to a judgment as a matter of law; and, 3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. See Civ.R. 56(C); *State ex.*

*rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589; *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 617.

In a summary judgment proceeding, the moving party bears the initial burden of informing the trial court of the basis for the motion, and must specifically identify those portions of the record, pursuant to Civ.R. 56(C), which entitle the movant to judgment as a matter of law. See *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. Therefore, when a plaintiff moves for summary judgment, the burden of showing that no genuine issue exists as to any material fact falls upon the plaintiff. See *Mitseff*, 38 Ohio St.3d 112, 115. If the plaintiff fails to satisfy this initial burden, the motion for summary judgment must be denied. See *Kulch v. Structural Fibers, Inc., et al.* (1997), 78 Ohio St.3d 134, 147. However, as to issues for which the plaintiff meets its initial burden, the defendant must produce evidence on any issue for which that party bears the burden of production at trial, in order to avoid summary judgment. See *Dresher* at 288-289; see, also, *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111; *Carter v. Consol. Rail Corp.* (C.A.10 1998), 126 Ohio App.3d 177, 181, citing, *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, 623 N.E.2d 591; *Cullen v. Ohio Dept. of Rehab. & Corr.* (C.A.10 1998), 125 Ohio App.3d 758, 764, citing, *Stewart*.

### **III. Discussion**

#### **A. Were Plaintiffs insureds under Granville's business auto coverage policy with Defendant Wausau?**

To determine whether Plaintiff, Kathleen Griffith, was an insured under Defendant Wausau's business auto coverage policy for purposes of UIM coverage, the Court must first look to the terms of the policy itself.

The named insured of Defendant Wausau's business auto coverage policy was the Granville Exempted Village School District. Under the "Business Auto Coverage Form," in the portion of the policy, located directly above and prior to "Section I – Covered Autos," the policy states: "Throughout this policy the words "you" and "your" refer to the Named Insured Shown in Declarations." This is the only section in the entire policy that defines the word "you."

The UIM coverage language under Defendant Wausau's business auto coverage policy is contained in the portion of the policy entitled "Ohio Uninsured Motorist Coverage – Bodily Injury" and provides:

#### **A. COVERAGE**

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or operator of:
  - a. An "uninsured motor vehicle" as defined in Paragraphs F.3.a., b. and c. because of "bodily injury":
    - (1) Sustained by the "insured"; and
    - (2) Caused by an "accident."

b. An "uninsured motor vehicle" as defined in Paragraph F.3.d. because of "bodily injury" sustained by an "insured."

The owner's or operator's liability for these damages must result from the ownership, maintenance or use of the "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." 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."

In the case at hand, there is no dispute that Plaintiff, Kathleen Griffith, suffered "bodily injury" as the result of an "accident" arising out of the operator's use of the "uninsured motor vehicle" as defined by the above stated policy. However, the Court must decide whether Plaintiff, Kathleen Griffith, was an "insured" as defined by the UIM coverage endorsement of the policy.

The Court finds that because Granville is not an individual, and because Plaintiff, Kathleen Griffith, was not "occupying" a covered "auto" at the time of the accident, and because Plaintiff, Kathleen Griffith, was the one who sustained the "bodily injury," Plaintiff, Kathleen Griffith, does not qualify as an "insured" under numbers 2, 3, or 4 of "WHO IS AN INSURED." Therefore, the only way for Plaintiff, Kathleen Griffith, to be an "insured," for purposes of UIM coverage,

is if the Court finds that the term “you” includes, Plaintiff, Kathleen Griffith, by her being an employee of Granville.

To determine whether “you” as used in Defendant Wausau’s policy for purposes of UIM coverage includes an employee of Granville, the Court must determine whether the protection found in Defendant Wausau’s policy is substantially different or substantially similar to the UM coverage reviewed in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St. 3d 660. And, after reviewing the decision in *Scott-Pontzer*, the Court finds the *Scott-Pontzer* case to be almost identical to the case at hand.

In *Scott-Pontzer*, Christopher T. Pontzer was killed in an automobile collision caused by the negligence of Troy Taylor. At the time of the collision, Pontzer was an employee of Superior Dairy, Inc., who was insured by Liberty Mutual. Pontzer’s wife, on behalf of his Estate, presented a claim to Liberty Mutual, arguing that based on the policy language contained in the UIM coverage of the policy, Pontzer was an “insured” at the time of the collision. However, Liberty Mutual argued that the policy language indicated the intent of the parties to the insurance contract was to provide that Superior Dairy was the only named insured. In coming to the conclusion that Pontzer was an insured under the Liberty Mutual policy, the Court stated the following:

It would be contrary to previous dictates of this court for us now to interpret the policy language at issue here as providing

underinsured motorist insurance protection solely to a corporation without any regard to persons. See *Ady v. W. Am. Ins. Co.* (1982), 69 Ohio St. 2d 593, 23 Ohio Op. 3d 495, 433 N.E.2d 547. Rather, it would be reasonable to conclude that "you," while referring to Superior Dairy, also includes Superior's employees, since a corporation can act only by and through real live persons. It would be nonsensical to limit protection solely to the corporate entity, since a corporation, itself, cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle. Here, naming the corporation as the insured is meaningless unless the coverage extends to some person or persons -- including to the corporation's employees.

*Id.* at 664.

In the case at hand, the Court finds that the policy language defining an "insured" is identical to the policy in *Scott-Pontzer*. And like Superior Dairy, Granville is not a person, and therefore, not capable of sustaining bodily injury. As a result, the Court finds that the "you," in Defendant Wausau's policy, for purposes of UIM coverage, includes the employees of Granville, which therefore includes, Plaintiff, Kathleen Griffith, and makes Plaintiff, Kathleen Griffith, an "insured."

Furthermore, the Court also finds that Plaintiff, Kathleen Griffith, as an employee of Granville, is an "insured" for purposes of UIM coverage, even though she was not acting in the course and scope of her employment with Granville at the time of the collision. The Court comes to this conclusion, because it could find no limitation in the UIM portion of Defendant Wausau's policy to limit UIM

coverage to only those employees acting in the course and scope of their employment. The court in *Scott-Pontzer* came to the same conclusion, and stated:

In *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d at 214, 519 N.E.2d at 1386, we noted that "in the construction of insurance contracts, 'where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof.' " (Quoting *Home Indemn. Co. v. Plymouth* [1945], 146 Ohio St. 96, 32 Ohio Op. 30, 64 N.E.2d 248, paragraph two of the syllabus.) The Liberty Fire policy contains no language requiring that employees must be acting within the scope of their employment in order to receive underinsured motorist coverage. Thus, we find that appellant is entitled to underinsured motorist benefits under the Liberty Fire policy.

*Id.* at 665-666.

In addition, the Court also finds that due to the fact that Plaintiff, James Griffith, was married to Plaintiff, Kathleen Griffith, at the time of the accident, and was residing with Plaintiff, Kathleen Griffith, at the time of the accident, Plaintiff, James Griffith, pursuant to *Ezawa v. Yashuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St. 3d 557, 715 N.E.2d 1142, was also an insured under Section B4. of the portion of Defendant Wausau's business auto coverage policy entitled "Ohio Uninsured Motorist Coverage – Bodily Injury." Section B4. defines "WHO IS AN INSURED" as anyone who "is entitled to recover because of "bodily injury" sustained by another "insured.'" Therefore, based on this endorsement,

the Court finds that Plaintiff James Griffin, was also an insured for purposes of UIM coverage under Defendant Wausau's business auto coverage policy.

Defendant Wausau argues that because the Granville Board of Education did not adopt a resolution or make an agreement to purchase UIM coverage for employees who were engaged in personal business, they were unauthorized to purchase such coverage. However, the Court disagrees.

The Court finds that both R.C. 3313.201 and R.C. 3327.09 specifically allow the board of education to purchase UIM coverage, and that neither statute has made the limitation that the UIM coverage can only cover employees within the scope of their employment. As a result, Granville had a free choice of whether or not to purchase UIM coverage.


For the foregoing reasons, the Court finds that since Plaintiff, Kathleen Griffith, was an "insured" under Defendant Wausau's business auto coverage policy, Plaintiffs are entitled to UIM coverage up to the policy limit of \$1,000,000.00, subject to actual damages.

#### **IV. Conclusion**

For the foregoing reasons, the Court hereby **DENIES** Defendant Wausau's Motion for Summary Judgment, and **GRANTS** Plaintiffs' Cross-Motion for Partial Summary Judgment.

Counsel for Plaintiffs shall submit the appropriate Judgment Entry pursuant to Loc. R. 25.01 and 25.02.

**IT IS SO ORDERED.**

  
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JOHN P. BESSEY, JUDGE

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