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**IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO**

SHARON KASSON, et al.,

Plaintiffs,

vs.

RONALD R. GOODMAN, et al.,

Defendants.

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Case No.: CI 00-1682

Honorable J. Ronald Bowman

**OPINION AND JUDGMENT ENTRY**

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This matter is before the Court on the cross-motions for summary judgment filed herein by defendant Cincinnati Insurance Company and defendant Royal Insurance Company of America. The Court rules as the following paragraphs indicate.

**I**

A brief summary of the pertinent facts and proceedings is as follows.

On February 29, 2000, Sharon Kasson, individually and as parent and natural guardian of Caitlyn Kasson, a minor, ("plaintiffs"), filed the above-captioned lawsuit in the Lucas County Court of Common Pleas. Listed as parties defendant on the original complaint are Ronald R. Goodman, ("defendant Goodman"), Royal & SunAlliance and a John Doe. The plaintiffs aver that on April 12,

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1999, the vehicle driven by defendant Goodman ran a red light and negligently struck plaintiff Sharon Kasson's automobile. Equally important, plaintiff Caitlyn Kasson was a passenger in the car driven by plaintiff Sharon Kasson. The plaintiff's complaint further alleges that due to the auto collision, both plaintiffs sustained physical injury.

The original complaint also sets forth a claim against defendant Royal & SunAlliance. Apparently, Royal & SunAlliance was the insurance carrier providing coverage for the vehicle driven by plaintiff Sharon Kasson. The plaintiffs seek uninsured/underinsured motorist benefits from defendant Royal & SunAlliance.

On April 4, 2001, the plaintiffs filed an amended complaint. According to the amended complaint, the parties defendant are now listed as follows: (1) defendant Goodman; (2) Royal Insurance Company of America, ("defendant Royal"); (3) The Cincinnati Insurance Company, ("defendant Cincinnati"); and (4) John Doe. In the amended complaint, as noted, the plaintiffs replaced defendant Royal & SunAlliance with defendant Royal. However, the plaintiffs still aver that defendant Royal is the plaintiffs' automobile insurance company, which is obligated to provide uninsured/underinsured motorist coverage. Additionally, the record indicates that the applicable Royal policy potentially provides \$300,000.00 in available uninsured/underinsured motorist coverage.

The facts further indicate that on April 12, 1999, plaintiff Sharon Kasson was an employee of Manor Homes, Inc., ("MHI"). In addition, prior to the auto wreck defendant Cincinnati issued to MHI two insurance policies. The first insurance policy is a Business Auto Insurance Policy, policy no. CAP 500 74 67, which had a policy period from March 19, 1999, until March 19, 2000. Moreover, this policy has a limit of \$500,000.00 in uninsured/underinsured motorist coverage. The second insurance policy is the Professional Umbrella Liability Policy, policy no. CCC 441 33 72,

which has a policy period from March 13, 1997, until March 19, 2000. This policy has a limit of \$2,000,000.00 each occurrence and \$2,000,000.00 aggregate. The plaintiffs allege that they may be entitled to uninsured/underinsured motorist coverage under these two insurance policies.

On May 4, 2001, defendant Cincinnati submitted an answer which contained a counter-claim. In said counter-claim defendant Cincinnati acknowledges that it did issue the Business Auto Insurance Policy and the Professional Umbrella Liability Policy to MHI. However, defendant Cincinnati contends that the plaintiffs do not qualify as insureds, and are therefore not entitled to coverage under these policies. Thus, defendant Cincinnati seeks a declaration that the plaintiffs' claim to uninsured/underinsured motorist coverage under the two Cincinnati policies is invalid.

On July 2, 2001, defendant Cincinnati filed a motion for summary judgment. First, defendant Cincinnati reiterates that the plaintiffs do not qualify as insureds under either the Business Auto Insurance Policy or the Professional Umbrella Liability Policy. Further, defendant Cincinnati states that it anticipates that the plaintiffs will attempt to utilize the ruling in *Scott-Pontzer v. Liberty Mut. Ins. Co.* (1999), 85 Ohio St.3d 660, to demonstrate their entitlement to uninsured/underinsured motorist coverage. Defendant Cincinnati avers that the facts upon which the *Scott-Pontzer* decision is based, are distinguishable from those of the instant matter. Accordingly, defendant Cincinnati asserts that the plaintiffs may not use this ruling in order to obtain coverage.

Next, defendant Cincinnati states that even if the Court determines that the plaintiffs qualify as insureds in accord with *Scott-Pontzer*, no coverage exists under the Professional Umbrella Liability Policy. Specifically, defendant Cincinnati points out that the insured previously executed a waiver form eliminating uninsured/underinsured motorist coverage. Thus, defendant Cincinnati states that the plaintiffs' claims concerning the Professional Umbrella Liability Policy are unfounded.

Defendant Cincinnati also states that an additional ground for denying coverage exists. In particular, defendant Cincinnati notes that plaintiff Sharon Kasson's car is not specifically listed as an insured vehicle under the schedule of covered autos in the two policies issued to MHL. Moreover, defendant Cincinnati contends that the applicable statutory law permits an insurer to include policy language that excludes uninsured/underinsured motorist coverage for anyone operating a car owned by the insured and not specifically listed in the policy. Thus, defendant Cincinnati provides an additional argument in support of denying coverage.

Furthermore, defendant Cincinnati notes that the Professional Umbrella Liability Policy contains further qualifications limiting coverage. More specifically, the policy establishes that if an organization is listed as an insured, its employees are covered if they are acting in the scope of their employment at the time of the accident. Defendant Cincinnati notes that the record clearly reflects that plaintiff Sharon Kasson was not within the scope of her employment during the occurrence of the wreck.

Last, defendant Cincinnati states that if it is determined that coverage exists, such coverage is excess over the insurance supplied by defendant Goodman's policy and the policy issued by defendant Royal.

On July 2, 2001, defendant Royal submitted a motion for partial summary judgment. Defendant Royal seeks a declaration that both it and defendant Cincinnati have an obligation to provide uninsured/underinsured motorist coverage on a pro-rata basis. In support of its motion, defendant Royal maintains that the manner in which both Cincinnati policies define an insured is ambiguous. For this reason, defendant Royal contends that the plaintiffs qualify as insureds under both Cincinnati policies.

Additionally, defendant Royal insists that the uninsured/underinsured motorist coverage

waiver, executed in connection with the Professional Umbrella Liability Policy, is invalid. Defendant Royal states that in order for such a waiver to be valid, the insurer must demonstrate that certain safeguards have been met. In the instant case, defendant Royal contends that the appropriate prerequisites have not be fulfilled, and for this reason, uninsured/underinsured motorist coverage arises by operation of law. Further, since coverage allegedly results by operation of law, defendant Royal asserts that any restriction in the policy limiting coverage to a named insured is immaterial. Thus, defendant Royal states that the umbrella policy issued by defendant Cincinnati affords uninsured/underinsured motorist coverage in this instance.

Defendant Royal concludes by stating that defendant Cincinnati must provide coverage on a pro-rata basis. Specifically, defendant Royal asserts that when two insurance carriers provide coverage concerning the same risk, and both carriers claim that their coverage is excess over all other insurance, the excess insurance provisions are inapplicable and the two carriers become liable in proportion to the amount of insurance provided by their respective policies. Hence, defendant Royal maintains that the policies issued by defendant Cincinnati provide coverage on a pro-rata basis, in conjunction with the uninsured/underinsured motorist coverage issued by defendant Royal.

On July 16, 2001, the plaintiffs filed a memorandum in opposition to defendant Cincinnati's motion for summary judgment. Essentially, the plaintiffs reiterate all the arguments proffered by defendant Royal.

On July 31, 2001, both defendant Cincinnati and defendant Royal submitted briefs in opposition to the respective motions for summary judgment. Thereafter, both defendants tendered reply briefs in support of their motions. Therefore, the cross-motions for summary judgment are now decisional.

## II.

The standard governing a motion for summary judgment is set forth in Civ.R. 56, which provides:

**\*\* \* \* Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. \* \* \* A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. \* \* \*** Civ.R. 56(C).

When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. When a properly supported motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in [the] rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

## III.

As mentioned, the plaintiffs claim entitlement to uninsured/underinsured motorist coverage under two policies of insurance issued by defendant Cincinnati. The Court will first review the Business Auto Insurance Policy, policy no. CAP 500 74 67, and then the Court shall evaluate the Professional Umbrella Liability Policy, policy no. CCC 437 50 37, in order to determine whether the plaintiffs are eligible to receive uninsured/underinsured motorist coverage from defendant

Cincinnati. Last, if coverage is found to exist under one or both of the Cincinnati policies, the Court will then determine the manner in which both the defendants shall contribute to the plaintiffs' loss.

**I. Business Auto Liability Policy, Policy No. CAP 500 74 67**

Pursuant to the Common Policy Declarations of the Business Auto Insurance Policy, in order to ascertain the identity of a named insured, the declarations page refers to page IA905 of the policy. Page IA905 lists the following as named insureds: (1) MHI; (2) McClellan Management Co., Inc.; (3) William J. McClellan; and (4) Joshua McClellan. Further, on page AA 501 01 92, entitled Business Auto Coverage Part Declarations, this section establishes that \$500,000.00, is available for uninsured motorist coverage. Equally important, the Ohio Uninsured Motorists Coverage - Bodily Injury section of the policy contains the following information pertaining to coverage:

**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".

Section F, entitled "Additional Definitions," defines an uninsured motor vehicle as follows:

3. "Uninsured motor vehicle" means a land motor vehicle or trailer:

\* \* \*

- b. Which is an underinsured motor vehicle. An "underinsured motor vehicle" means a land motor vehicle or trailer for which the sum of all liability bonds or policies applicable at the time of an "accident" provides at least the amounts required by the applicable law where a covered "auto" is principally garaged but their limits are less than the Limit of Insurance of this coverage.

Furthermore, the Business Auto Insurance Policy defines an insured in the following manner:

**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".

The plaintiffs contend that the manner in which the Business Auto Insurance Policy defines an insured is ambiguous. Additionally, in accord with the authority established in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, the plaintiffs assert that the word "you" as used in the definition of an insured contemplates both the corporation, in this case MHI, and the corporation's employees. In *Scott-Pontzer* the Ohio Supreme Court evaluated a commercial auto insurance policy, in which the only named insured, Superior Dairy, was a corporation. The Court held that the manner in which the defendant, Liberty Mutual Fire Insurance Company, drafted the policy was ambiguous. *Id.* More specifically, the Court articulated as follows:

\* \* \* it would be reasonable to conclude that "you," while referring

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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 the corporation's employees.

In light of the ruling handed down in *Scott-Pontzer, supra*, the plaintiffs insist that plaintiff Sharon Kasson, an employee of MHI, qualifies as an insured. The plaintiffs also contend that plaintiff Caitlyn Kasson meets the definition of an insured in accord with paragraph B, subsection 2 of the uninsured motorist endorsement.

Defendant Cincinnati counters the plaintiffs' argument, stating the facts of the case *sub judice* differ from those presented in *Scott-Pontzer*. In particular, defendant Cincinnati notes that the named insureds in the Business Auto Insurance Policy, unlike the commercial auto liability policy in *Scott-Pontzer*, list persons along with corporations as named insureds. The fact that an individual person may qualify for uninsured/underinsured motorist coverage, according to defendant Cincinnati, renders the *Scott-Pontzer* ruling inapplicable to the instant controversy. Therefore, defendant Cincinnati contends that the plaintiffs do not qualify as insureds in accord with the Business Auto Liability Policy.

Under Ohio law, an insurance policy constitutes a contract and the relationship between the insured and the insurer is purely contractual in nature. *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St.3d 107. The Court further notes that when an insurance policy is open to varying interpretations, the policy shall be construed most favorably to the insured and strictly against the insurer. *Faruque v. Provident Life & Acc. Inc. Co.* (1987), 31 Ohio St.3d 34. Nevertheless, where the clear and unambiguous policy language utilized evidences the parties intent, a trial court must not read into the contract a purpose not contemplated by the parties. *Weiker v. Motorists Mut. Ins.*

Co. (1998), 82 Ohio St.3d 182. As stated, the term "you" as used in the Business Auto Insurance Policy refers to corporate entities, i.e. MHI and McClellan Management Co., as well as individual persons. A reasonable interpretation of this policy leads to the conclusion that the word "you" refers solely to the individual named insureds, i.e. William J. McClellan and Joshua McClellan. However, an equally sensible understanding is that in the context of the policy as a whole, a named insured can be interpreted as referring to all employees of MHI, including plaintiff Sharon Kasson. As noted, the Ohio Supreme Court established that an inherent ambiguity exists when an insurer lists a business entity as a named insured in an automobile insurance policy. *Scott-Pontzer, supra*. Defendant Cincinnati created this ambiguity. Equally important, defendant Cincinnati could have eliminated the uncertainty by amending the text of the policy to define a named insured as employees of the corporation in the scope of their employment, or anyone, e.g. a human being, that operates a covered vehicle. Thus, due to the ambiguity that exists in the Business Auto Insurance Policy, the Court determines that plaintiffs Sharon Kasson and Caitlyn Kasson qualify as insureds for the purposes of uninsured/underinsured motorist coverage. See *Faruque, supra*.

Defendant Cincinnati next contends that an exclusion contained in the Business Auto Insurance Policy would still preclude coverage in the event the Court determines that the plaintiffs qualify as insureds. Specifically, defendant Cincinnati refers to paragraph C subsection 5 of the uninsured motorist endorsement. This section reads pertinently as follows:

**C. Exclusions**

This insurance does not apply to:

\* \* \*

5. "Bodily injury" sustained by an "insured" while the "insured" is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse or a

resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided.

In the case *sub judice*, defendant Cincinnati points out that plaintiff Sharon Kasson drove her own vehicle at the time of the collision. Defendant Cincinnati further notes that plaintiff Sharon Kasson's vehicle is not listed in the Business Auto Insurance Policy as a covered automobile. For these reasons, defendant Cincinnati asserts that paragraph C subsection 5 of the uninsured motorists endorsement excludes uninsured/underinsured motorist coverage.

Defendant Royal counters, stating that this exclusion contained in paragraph C subsection 5 is irrelevant. In particular, defendant Royal contends that said qualification only applies to those individuals that drive a car owned by, furnished to, or available for the use of a named insured. Defendant Royal also notes that plaintiff Sharon Kasson does not constitute a named insured. According to defendant Royal plaintiff Sharon Kasson attained her status as insured by operation of *Scott-Pontzer*, not by having her name specifically identified in the declarations page of the policy. Therefore, defendant Royal insists that this policy exclusion is inapplicable, and that the plaintiffs are entitled to receive uninsured/underinsured motorist coverage.

Page one of the Business Auto Coverage Form establishes that "[t]hroughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations." As accurately noted by defendant Royal, neither plaintiff Sharon Kasson nor plaintiff Caitlyn Kasson appear on the declarations page. For this reason, the Court concludes that the coverage exclusion contained in paragraph C subsection 5 of the uninsured motorist coverage form does not apply in this instance. Specifically, neither plaintiff sustained injury while driving a vehicle owned by, furnished to, or available for use by a "named insured." Thus, the Court determines that the plaintiffs are eligible

to receive uninsured/underinsured motorist coverage pursuant to the Business Auto Insurance Policy.

**Professional Umbrella Liability Policy, Policy No. CCC 437 50 37**

In evaluating whether uninsured/underinsured motorist coverage exists pursuant to the Professional Umbrella Liability Policy, the Court first turns to Section II of the policy, entitled "Who is an Insured." This section reads in pertinent part as follows:

1. If you are designated in the Declarations as:

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d. An organization other than a partnership, joint venture, or limited liability company, you are an insured.

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2. Each of the following is also an insured:

a. Any "executive officer", director, "employee" or stockholder of yours while acting within the scope of their duties as such.

Furthermore, the Named Insured Endorsement to the Professional Umbrella Liability Policy lists the following as named insureds: (1) MHI; (2) MHI, dba, Richland Manor Nursing Home; (3) McClellan Management Co., Inc.; (4) McClellan Management Co., Inc., dba, Genoa Care Center; and (5) William J. McClellan.

In terms of coverage afforded under this policy, the coverages section reads pertinently as follows:

**A. Insuring Agreement**

1. We will pay on behalf of the insured the "ultimate net loss" which the insured is legally obligated to pay as damages in excess of the "underlying insurance" or for an "occurrence" covered by this policy which is either excluded or not covered

by "underlying insurance" because of:

- a. "Bodily injury" or "property damage" covered by this policy occurring during the policy period and caused by an "occurrence"; or
- b. "Personal injury" or "advertising injury" covered by this policy committed during the policy period and caused by an "occurrence".

Further, this policy defines "bodily injury" to include "bodily harm or injury, sickness, disease, disability, humiliation, shock fright, mental anguish or mental injury, including care, loss of services or death resulting from any of these at any time." Further, as evidenced by section B, Exclusions, paragraph 12, this policy affords auto insurance in limited form. Section B, paragraph 12, reads as follows:

**B. Exclusions**

This policy does not apply to:

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**12. Non-owned Auto Limitation**

Any liability of the owner or anyone else, except "executive officers" and owners of insured organizations, arising out of the ownership, maintenance or use of any "auto" which you do not own, unless such coverage is provided by a valid and collectible policy listed in the Schedule of Underlying Policies, and then only for such hazards for which coverage is provided by such "underlying insurance".

Given all the forgoing, it is apparent that the Professional Umbrella Liability Policy constitutes an automobile liability policy of insurance as contemplated by R.C. 3937.18 (A). R.C. 3937.18 (A) reads as follows:

(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by

law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a 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 both of the following coverages are offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

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

For purposes of division (A)(1) of this section, an insured is legally entitled to recover if the insured is able to prove the elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity under Chapter 2744 of the Revised Code or a diplomatic immunity that could be raised as a defense in an action brought against the owner or operator by the insured does not affect the insured's right to recover under uninsured motorist coverage. However, any other type of statutory or common law immunity that may be a defense for the owner or operator of an uninsured motor vehicle shall also be a defense to an action brought by the insured to recover under the uninsured motorist coverage.

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

underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

In view of the above, when an insurer offers automobile liability coverage, even in limited form, uninsured/underinsured motorist coverage must be provided. See also *Selander v. Erie Ins. Group* (1999), 85 Ohio St.3d 541. Equally important, if uninsured/underinsured motorist coverage is not offered, it becomes part of the policy by operation of law. *Abate v. Pioneer Mut. Cas. Co.* (1970), 22 Ohio St.2d 161.

The issue relating to the Professional Umbrella Liability Policy is whether the plaintiffs qualify as insureds, and whether defendant Cincinnati properly offered uninsured/underinsured motorist coverage. Initially, the Court determines that plaintiff Sharon Kasson qualifies as an insured under this policy. Specifically, as previously determined, listing a business entity as a named insured in an auto insurance policy is manifestly absurd. Due to the fact that the term "you," in Section II - Who is an Insured, refers to a business entity, this necessarily implies that all employees of MHI qualify as insureds under the Professional Umbrella Liability Policy. For this reason, plaintiff Sharon Kasson qualifies as an insured. However, unlike the Business Auto Insurance Policy, the Professional Umbrella Liability Policy does not include language extending coverage to the family members of a named insured. Accordingly, plaintiff Caitlyn Kasson does not qualify as an insured.

Nevertheless, defendant Cincinnati Insurance argues that this policy does not afford uninsured/underinsured motorist coverage, regardless of whether the plaintiffs qualify as insureds. More specifically, defendant Cincinnati notes that a waiver form is attached to the Professional Umbrella Policy which allegedly rejects uninsured/underinsured coverage. In this document, entitled "Application for Excess Uninsured/Underinsured Motorist Coverage," Joshua McClellan placed a

check-mark in the box accompanying the sentence "I reject Excess Uninsured/Underinsured Motorists coverage under this policy." Further, Joshua McClellan signed this form, which is dated April 23, 1997, and bears the policy no. CCC 441 33 72. Pursuant to this waiver, defendant Cincinnati states that uninsured/underinsured motorist coverage is excluded in this instance.

The Supreme Court of Ohio, in *Linko v. Indemnity Insurance Co. of N. Am.* (2000), 90 Ohio St.3d 445, examined the issue of what constitutes an express and knowing rejection of uninsured/underinsured motorist coverage by a corporation on the part of associated corporations and other insureds. The Court established the requisite elements for an offer of uninsured/underinsured motorist coverage under R.C. 3837.18. The Court determined that three elements are mandatory. *Id.* The three requirements which must be listed for a valid offer include: (1) a brief description of the coverage; (2) the premium for that coverage; and (3) an express statement of the uninsured/underinsured coverage. Without the inclusion of this information, the Supreme Court held that a valid offer of uninsured/underinsured coverage does not exist. *Id.*

Review of the instant rejection form indicates that defendant Cincinnati did not comply with the requirements imposed by *Linko, supra*. In particular, the rejection form does not include a description of the coverage, the applicable premium, or a statement regarding the uninsured/underinsured motorist coverage. Despite these facts, defendant Cincinnati claims that the *Linko* requirements are inapplicable to the instant case. Defendant Cincinnati contends that the insurance policy evaluated by the Ohio Supreme Court in *Linko* predated an amendment to R.C. 3937.18. Specifically, defendant Cincinnati notes that R.C. 3937.18, as amended by Am.Sub.H.B. 261, requires that in order to waive uninsured/underinsured motorist coverage an insured need only execute a written rejection. Defendant Cincinnati contends that Joshua McClellan's signature on the waiver form satisfies this requirement. Hence, defendant Cincinnati advances that the Professional

Umbrella Liability Policy affords no coverage to the plaintiffs.

However, the Court concludes that defendant Cincinnati's argument is flawed for two reasons. First, as indicated by the declarations page the Professional Umbrella Liability Policy was issued on March 19, 1997, and remained in effect until March 19, 2000. In addition, as established by the Ohio Supreme Court in *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281, when interpreting an insurance agreement, a court must apply the statutory law in effect on the date of the issuance of each new insurance policy. The Ohio Supreme Court further held that in accord with R.C. 3937.31 (A), every auto insurance policy must include a guaranteed two year policy period, during which the terms of the agreement cannot be modified except by stipulation of the parties. *Wolfe v. Wolfe* (1998), 88 Ohio St.3d 246. For these reasons, defendant Cincinnati's contention that *Linko* is inapplicable to the instant situation is incorrect.

Second, even if the subsequently amended version of R.C. 3937.18 (C) did apply, uninsured/underinsured motorist coverage was not properly rejected. Specifically, R.C. 3937.18 (C), as amended on September 3, 1997, reads in pertinent part as follows:

(C) A named insured or applicant may reject or accept both coverages as offered under division (A) of this section, or may alternatively select both such coverages in accordance with a schedule of limits approved by the superintendent. The schedule of limits approved by the superintendent may permit a named insured or applicant to select uninsured and underinsured motorists coverages with limits on such coverages that are less than the limit of liability coverage provided by the automobile liability or motor vehicle liability policy of insurance under which the coverages are provided, but the limits shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death.

As stated, the rejection form was signed by Joshua McClellan. Review of the declarations page indicates that Joshua McClellan is not a named insured. Further, nothing in the record supports a finding that Joshua McClellan constitutes an applicant under the Professional Umbrella Liability

Policy. Thus, even if the post Am.Sub.H.B. 261 version of R.C. 3937.18 applied, which it does not, uninsured/underinsured motorist coverage was not properly rejected. Thus, due to the fact that defendant Cincinnati never properly offered uninsured/underinsured motorist coverage, such coverage arises by operation of law. See R.C. 3937.18 (A).

Additionally, as stated earlier, Section II, "Who is an Insured," paragraph two of the Professional Umbrella Liability Policy restricts coverage to employees, in that an employee must sustain injury during the scope of their employment. It is undisputed that plaintiff Sharon Kasson was not acting in the scope of her employment during the auto collision. However, this fact does not restrict plaintiff Sharon Kasson's entitlement to uninsured/underinsured motorist coverage. In particular, the Ohio Supreme Court in *Scott-Pontzer, supra*, determined that when an insurance carrier that issued an umbrella policy did not offer uninsured/underinsured motorist coverage, any policy language limiting coverage was determined to apply only to excess liability coverage and not for purposes of uninsured/underinsured coverage. Consequently, Section II, paragraph two of the policy, which limits coverage to actions which occur within the scope of employment is not applicable to the uninsured/underinsured motorist coverage which arises by operation of R.C. 3937.18 (A).

In view of all the above, the Court determines that plaintiff Sharon Kasson qualifies as an insured under both the Business Auto Insurance Policy and the Professional Umbrella Liability Policy. As stated, the Business Auto Insurance Policy has policy limits of \$500,000.00, while the Professional Umbrella Liability Policy has policy limits of \$2,000,000.00. For this reason, plaintiff Sharon Kasson, depending on the extent of her damages, is eligible to receive \$2,500,000.00 in uninsured/underinsured motorist coverage. Furthermore, plaintiff Caitlyn Kasson is an insured under the Business Auto Insurance Policy, and, depending on the extent of her damages, she may

receive up to \$500,000.00 in uninsured/underinsured motorist coverage. However, as established, plaintiff Caitlyn Kasson does not qualify as an insured under the Professional Umbrella Liability Policy. Additionally, upon review of the applicable sections of the two policies, the Court concludes that the insurance benefits provided by both policies constitutes primary coverage.

All parties stipulate that the auto insurance policy issued by defendant Royal to plaintiff Sharon Kasson potentially provides \$300,000.00 in primary uninsured/underinsured motorist coverage to the plaintiffs. As determined, both defendant Royal and defendant Cincinnati provide primary coverage for the accident which occurred on April 12, 1999. Pursuant to Ohio law, in the event that two insurance policies cover the same risk and both establish that their liability shall be excess insurance over other valid, collectable insurance, the two insurance providers shall be liable in proportion to the amount of insurance supplied by their respective policies. *Buckeye Union Ins. Co. v. State Auto. Mut. Ins. Co.* (1977), 49 Ohio St.2d 213; *Westfield Ins. Co. v. Nationwide Mut. Ins. Co.* (1993), 99 Ohio App.3d 114; and *Barker v. Lightning Rod Mut. Ins. Co.* (1993), 90 Ohio App.3d 190. In this case the Cincinnati policy provides \$2,500,000.00 worth of liability coverage for plaintiff Sharon Kasson's claim, and the Royal policy provides \$300,000.00 worth of coverage. Basing liability in proportion to the total amount of \$2,800,000.00 indicates that defendant Cincinnati's obligation is 89% of the judgment or settlement which may be obtained for plaintiff Sharon Kasson's claim, and that defendant Royal's obligation shall be 11% of the judgment or settlement established for plaintiff Sharon Kasson's claim. Applying the same principles to the claim of plaintiff Caitlyn Kasson, the Court determines that the Cincinnati policy provides \$500,000.00 worth of liability coverage for plaintiff Caitlyn Kasson's claim, and the Royal Policy provides \$300,000.00 in coverage. Basing liability in proportion to the total amount of \$800,000.00 reveals that defendant Cincinnati's obligation is 62% of the judgment or settlement which may be

obtained, and that defendant Royal's obligation is 38% of the judgment or settlement which may be obtained.

#### **JUDGMENT ENTRY**

It is ORDERED, ADJUDGED and DECREED that the motion for summary judgment filed herein on July 2, 2001, by defendant Cincinnati Insurance Company, be, and hereby, is found not well-taken and same is OVERRULED and DENIED.

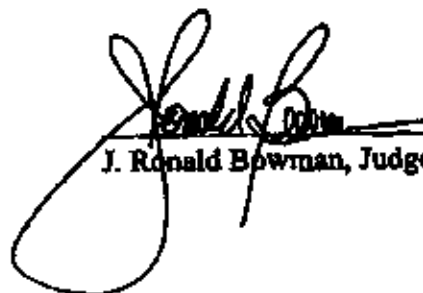
It is FURTHER ORDERED, ADJUDGED and DECREED that the motion for partial summary judgment filed herein on July 2, 2001, by defendant Royal Insurance Company of America, be, and hereby, is found well-taken in part and not well-taken in part. Specifically, the Court determines that plaintiff Sharon Kasson qualifies as an insured pursuant to both the Business Auto Insurance Policy and the Professional Umbrella Liability Policy issued by defendant Cincinnati Insurance Company. For this reason, plaintiff Sharon Kasson, depending on the extent of her damages, is entitled to receive \$2,500,000.00 in uninsured/underinsured coverage in accord with the two policies issued by defendant Cincinnati Insurance Company. Additionally, the Court determines that plaintiff Caitlyn Kasson qualifies as an insured under the Business Auto Insurance Policy only. For this reason, plaintiff Caitlyn Kasson, depending on the extent of her damages, is entitled to receive \$500,000.00 in uninsured/underinsured coverage in accord with the Business Auto Insurance Policy issued by defendant Cincinnati Insurance Company.

It is FURTHER ORDERED, ADJUDGED and DECREED that in the event that plaintiff Sharon Kasson obtains a judgment in her suit for personal injuries, Lucas County Common Pleas Case No. CI 00-1682, or if a settlement is established in her favor, defendant Cincinnati Insurance Company is obligated to pay 89% of the judgment or settlement, and defendant Royal Insurance

Company of America is obligated to pay 11% of the judgment or settlement.

It is FURTHER ORDERED, ADJUDGED and DECREED that in the event that plaintiff Caitlyn Kasson obtains a judgment in her suit for personal injuries, Lucas County Common Pleas Case No. CI 00-1682, or if a settlement is established in her favor, defendant Cincinnati Insurance Company is obligated to pay 62% of the judgment or settlement, and defendant Royal Insurance Company of America is obligated to pay 38% of the judgment or settlement.

It is so ORDERED.



J. Ronald Bowman, Judge

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