[Cite as *Kekic v. Royal & Sunalliance Ins. Co.*, 2002-Ohio-5563.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80693

LISA KEKIC,

Plaintiff-appellant

vs.

ROYAL AND SUNALLIANCE INSURANCE COMPANY, ET AL.,

Defendant-appellee

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT OF DECISION:	OCTOBER 17, 2002
CHARACTER OF PROCEEDING:	Civil appeal from Court of Common Pleas, Case No. CV-425478
JUDGMENT:	Reversed and remanded.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For plaintiff-appellant:	PAUL W. FLOWERS, ESQ. PAUL W. FLOWERS CO. L.P.A. 1200 Illuminating Building 55 Public Square Cleveland, Ohio 44113 JAMES M. KEHN, ESQ. 5555 Mayfield Road Lyndhurst, Ohio 44124
(Appearances continued on next page)	
For defendant-appellee:	JOHN G. FARNAN, ESQ. JILL S. PATTERSON, ESQ. DANIEL A. RICHARDS, ESQ.

WESTON HURD FALLON PAISLEY &
HOWLEY, L.L.P.
2500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113-2241

KARPINSKI, J.:

{¶1} Plaintiff-appellant, Lisa Kekic, appeals the trial court granting summary judgment in favor of defendant-appellee, Royal and SunAlliance Insurance Company[1] dba American and Foreign Insurance Company. Plaintiff argues the trial court erred by determining that she is not entitled to uninsured motorist coverage under a commercial auto insurance policy defendant issued to her employer. For the reasons that follow we agree with plaintiff and reverse the judgment of the trial court.

{¶2} In June 1999, plaintiff sustained physical injuries in an automobile accident caused by defendant Mike Roberson ("Roberson"). At the time of the accident, it is undisputed that plaintiff, an employee of Apple American Group ("Apple"), was off duty and driving her own vehicle. It is also undisputed that Roberson was uninsured at the time of the accident and plaintiff exhausted the uninsured coverage available to her under her own auto insurance policy.

{¶3} Plaintiff filed suit against defendant arguing that, as one of Apple's employees, she was entitled to additional uninsured motorist ("UM") compensation under Apple's Policy.

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[1] "Royal and SunAlliance" is a trade name only.

{¶4} Defendant filed a motion for summary judgment[2] in which it argued that plaintiff was precluded from UM coverage under its "covered autos" language. In pertinent part, the employer's policy[3] applies only to those "autos" designated as "covered autos." This policy specifically lists the make and model of five different vehicles which comprise some of the UM "covered autos" insured under the policy. None of these autos, however, is the one plaintiff was driving at the time of the accident.

{¶5} Page one of the employer's policy also describes other vehicles that would be covered under the UM provision. The policy denotes these other vehicles by expressly assigning the designation "2" for all "covered autos." The vehicles assigned the "2" designation are defined as "only those autos you own ***." In other words, under the policy, an insured is covered if driving a car an insured owns.

{¶6} In the policy's UM section, various exclusions are listed, including the one defendant claims applies to plaintiff in this case. In pertinent part, that exclusion states:

{¶7} "This insurance does not apply to:

{¶8} "***

{¶9} "5. 'Bodily Injury' sustained by:

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[2]Plaintiff also filed a motion for summary judgment which the court denied the same day it granted defendants' motion.

[3]Under the uninsured motorist coverage provisions, the limits of liability were one million dollars ($1,000,000.00).

{¶10} "a. You while 'occupying' or when struck by any vehicle owned by you that is not a covered 'auto' for Uninsured Motorist Coverage under this Coverage Form;"

{¶11} The trial court agreed that the UM exclusion applied to plaintiff and granted defendant's motion for summary judgment. The court issued a written Opinion And Order in which it detailed the reasons it found for denying plaintiff UM coverage under the Policy. In addition to the written order, the trial court's docket entry, states, in part:

{¶12} "PTLFS. MOTION FOR SUMMARY JUDGMENT (FILED 7/30/01) IS DENIED. DEFT AMERICAN AND FOREIGN INSURANCE COMPANY'S MOTION FOR SUMMARY (FILED 6/27/01) IS GRANTED. THE COURT FINDS PLTF'S CLAIM FOR UNDERINSURED MOTORIST COVERAGE IS EXCLUDED BY THE "OTHER OWNED VEHICLE" EXCLUSION IN THE POLICY***."

{¶13} After the court granted defendant's motion for summary judgment, plaintiff voluntarily dismissed her claim against Roberson, without prejudice. Plaintiff timely filed this appeal in which she presents one assignment of error.

{¶14} "I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY CONCLUDING THAT PLAINTIFF WAS NOT ENTITLED TO UNINSURED MOTORISTS COVERAGE PURSUANT TO THE POLICIES THAT HAD BEEN ISSUED BY DEFENDANTS TO HER EMPLOYER."

{¶15} Plaintiff argues the trial court erred in determining that she is not entitled to UM motorist coverage under her employer's commercial auto insurance policy. Because of the

decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 664, 710 N.E.2d 1116, we must agree with plaintiff.

{¶16} Our review of the trial court's decision to grant summary judgment is *de novo*. *De Uzhca v. Derham* (April 5, 2002), Montgomery App. No. 19106, 2002 Ohio App. LEXIS 1538; *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App. 3d 158, 162, 703 N.E.2d 841. Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, 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. See *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St. 3d 181, 183, 677 N.E.2d 343; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 65-66, 375 N.E.2d 46.

{¶17} Ohio law liberally construes the language of an insurance contract in favor of the insured. *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko* (1995), 72 Ohio St.3d 120, 122, 647 N.E.2d 1358. Further, where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, such provisions will strictly be construed against the insurer. *Scott-Pontzer,* supra. In the case at bar, there are actually two questions presented by plaintiff's single assignment of error: (1) Is plaintiff an "insured" under the policy? If she is not an insured, our inquiry is at an end. On the other hand, if plaintiff

is an insured, is she, nonetheless, excluded from coverage under the UM exclusion?

{¶18} First, we note that plaintiff's status as an insured under the policy is undisputed. The record reveals that when it filed its motion for summary judgment, defendant did not argue against nor did it produce any evidence controverting plaintiff's claim that she is an insured. Defendant's attempt to argue now that plaintiff is not an insured is waived because it was not argued in the trial court. *Ahern v. Ameritech Corp.* (2000), 137 Ohio App. 3d 754, 779, 739 N.E.2d 1184 citing *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm.* (1993), 91 Ohio App.3d 76, 631 N.E.2d 1068.

{¶19} Even if defendant had not waived the issue of plaintiff's status as an insured under the employer's policy, we would still conclude that she is an insured. The relevant part of the policy's UM coverage section defines who is entitled to coverage under that section:

{¶20} "***

{¶21} "B. Who Is An Insured

{¶22} "1. You.

{¶23} "***"

{¶24} This language is identical to the policy language in *Scott-Pontzer,* supra. In its analysis, the Ohio Supreme Court noted that "[t]hroughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations." The Supreme

Court stated that, even though the policy's named insured was appellant's corporate employer,

{¶25} "uninsured motorist coverage "was designed *** to protect persons, not vehicles. ***.

{¶26} "It would be reasonable to conclude that 'you,' while referring to [the corporation], also includes [the corporation'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." Id.

{¶27} The Supreme Court concluded that the employee was an insured and entitled to UIM coverage under his employers' auto insurance policy.

{¶28} In this case, because the language defining an insured under the UM section is identical to that in *Scott-Pontzer*, supra, we must follow the Ohio Supreme Court and interpret "you" to include Apple's employees, which includes plaintiff.

{¶29} We find additional support for this conclusion by contrasting the liability section of defendant's policy. In that section, which precedes the UM section, an "insured" is

{¶30} "You for any covered auto [or] [a]nyone else while using with your permission a covered "auto" you own, hire, or borrow **except**:

{¶31} "***

{¶32} "(2) Your "employee" if the covered "auto" is owned by that employee ***." (Emphasis added.)

{¶33} The language in the **liability** section of the policy expressly **excludes** coverage for employees who sustain injuries in their own vehicles. In *Scott-Pontzer*, supra, the court addressed a substantially similar situation and concluded that

{¶34} "*** any language in the Liberty Mutual umbrella policy restricting insurance coverage was intended to apply solely to excess *liability* coverage and not for purposes of underinsured motorist coverage." *Scott-Pontzer*, supra, at 666.

{¶35} As in *Scott-Pontzer,* supra, the UM portion of defendant's policy in this case does not, however, contain any language expressly precluding uninsured coverage to Apple's employees; that language is only in the liability section. Accordingly, we must conclude plaintiff is an intended insured under the UM portion of the Policy.

{¶36} Next, even though plaintiff is an insured under defendant's policy, we must still determine whether the UM exclusion applies to her. This question is answered by again focusing on "you." The express and unambiguous language of the policy states that only a "covered auto" is insured. A "covered auto" is an auto "you," the insured, own. The language of the UM exclusion, however, states, in part:

{¶37} "This insurance does not apply to:

{¶38} "***

{¶39} "5. 'Bodily Injury' sustained by:

{¶40} "a. You while 'occupying' or when struck by any vehicle owned by you that is not a covered 'auto' for Uninsured Motorist Coverage under this Coverage Form;"

{¶41} This provision does not merely "exclude"; rather, it contradicts the prior provisions. We have already concluded that plaintiff is an insured under the policy and is, therefore, included in all the references to "you." By definition, a "covered auto" is one owned by "you," the insured. In light of the inescapable conclusion that a "covered auto" is any auto the insured owns, the language of the UM exclusion makes no sense because, under the exclusion, if the insured sustains bodily injury while occupying a vehicle owned by her, there is no coverage. In light of *Scott-Pontzer,* supra, the language of the policy's UM exclusion is in direct contradiction to the policy's definitions of who is an insured and what is a "covered auto" for purposes of UM coverage. Such a result forces us to conclude that the UM exclusion cannot apply to plaintiff, an insured, who is entitled to coverage if she is injured in a "covered auto," that is, a car she owns. It is not disputed that at the time of the accident, plaintiff was driving her own vehicle. Accordingly, we conclude that the policy's UM exclusion cannot apply to plaintiff.

{¶42} For the foregoing reasons, we find merit in plaintiff's single assignment of error. Accordingly, the judgment of the trial court is reversed and remanded for proceedings consistent with this opinion.

This cause is reversed and remanded.

It is, therefore, ordered that appellant recover of appellees her costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, J., CONCURS IN JUDGMENT ONLY;

KENNETH A. ROCCO, P.J., DISSENTS WITH

SEPARATE OPINION.

DIANE KARPINSKI

JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This

decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J. DISSENTING:

{¶43} Accepting (as we must) that Kekic is an insured entitled to UM/UIM coverage based on the Ohio Supreme Court's analysis of identical policy language in *Scott-Pontzer*, I would find that coverage is precluded by the "other owned vehicle" exclusion. Therefore, I dissent.

{¶44} First, I am compelled to note that courts applying *Scott-Pontzer* -- including the majority in the case at bar -- have succeeded in including virtually every person alive within the uninsured/underinsured motorist (UM/UIM) coverage provided by a single corporate insurance policy. In my opinion, *Scott-Pontzer* extends UM/UIM coverage beyond the bounds of reason, or even common sense.

{¶45} Were we not bound by the Supreme Court's analysis of the policy language in *Scott-Pontzer,* I would hold that Kekic is not an insured under the UM/UIM coverage afforded by the policy issued to her employer. Contrary to the holding in *Scott-Pontzer*, I would find the term "you" is not ambiguous. Rather, the policy specifically defines "you" as the named insured, that is, in this case, Apple American Group. This definition does not include individual employees.

{¶46} The court in *Scott-Pontzer* asserted that 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." This analysis might suggest that the coverage of the named insured which I believe to be afforded here is illusory. It is not. The UM/UIM coverage protects not only "you" (that is, the corporate insured) but also persons occupying a covered auto. Thus, the policy does afford significant UM/UIM coverage to individual occupants of covered vehicles.

{¶47} Nevertheless, I am compelled to follow the dictates of the supreme court in *Scott-Pontzer*, and to find that Kekic is an insured under the UM/UIM endorsement.

{¶48} Contrary to the majority's view, however, I would find that coverage is excluded by the "other owned vehicle" exclusion. This exclusion states:

{¶49} "This insurance does not apply to:

{¶50} "***

{¶51} "5. 'Bodily injury' sustained by:

{¶52} "a. You while 'occupying' or when struck by any vehicle owned by you that is not a covered 'auto' for Uninsured Motorists Coverage under this Coverage Form;"

{¶53} The policy declarations define "covered 'autos' for a particular coverage by the entry of one or more of the symbols from the covered auto section of the business auto coverage form next to the name of the coverage." Next to the name "uninsured motorist" is the symbol "2." This symbol designates "only those 'autos' you own ***." Thus, "only those 'autos' you own" are "covered autos" for purposes of uninsured motorist coverage.

{¶54} The key to whether this exclusion precludes UM/UIM coverage for the injury sustained by appellant while she was driving her own automobile lies in the question whether her auto may be considered an auto "you own." If "you" for purposes of the policy declaration is considered ambiguous because of the ambiguity the *Scott-Pontzer* court found in the UM/UIM endorsement, then "you" would include appellant, an employees of the insured corporation, and appellant's personal auto would be a covered auto, that is, an "'auto' you own." On the other hand, if the definition of "you" set forth in the business auto coverage form applies, then "'autos' you own" are limited to those autos owned by the named insured corporations.

{¶55} While the Supreme Court has found the term "you" to be ambiguous when used to define who is an insured for purposes of

{¶56} UM/UIM coverage, to apply this broadened definition of "you" for all purposes under the policy ignores the parties express intent. The business auto coverage form specifically defines "you" as the named insured. Corporations can own automobiles; the term "you" is, therefore, not ambiguous when used to designate automobiles "you" own as covered automobiles.

{¶57} Furthermore, this definition gives meaning to all terms of the policy. If every automobile owned by an employee is an "'auto' you own" (and thus covered), then there will never be a case in which an employee will be occupying an auto he or she owns that is not a covered auto. The exclusion would be meaningless in all cases.

{¶58} I recognize that this analysis incorporates the two different definitions of "you" into the same exclusion: coverage is excluded if "you" (employee) are occupying an automobile owned by "you" (employee) that is not a covered auto, i.e., an automobile owned by "you" (named insured corporation). However, in my opinion, this apparent inconsistency is necessary to bring some sense back to the construction of the term "you" as it is used for different purposes throughout the policy.

{¶59} In my opinion, coverage was excluded by the policy because Kekic was occupying a vehicle she owned which was not a covered auto. Accordingly, I would affirm the common pleas court's judgment.