[Cite as *Gilchrist v. Gonsor*, 2003-Ohio-2297.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 80944

MICHAEL J. GILCHRIST,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
ARTHUR M. GONSOR, et al.,	:	OPINION
Defendants-Appellants	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		MAY 8, 2003
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court Case No. CV-420200
JUDGMENT	:	AFFIRMED
DATE OF JOURNALIZATION	:	

APPEARANCES:

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(Continued)

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ANNE L. KILBANE, J.:

{¶1} This is an appeal from an order of Judge Kenneth R. Callahan that granted partial summary judgment to appellee, Michael J. Gilchrist, finding that he was entitled to uninsured motorist coverage under an insurance policy issued by United States Fidelity & Guaranty Company ("USF&G") to his employer, United Rentals ("United"). Appellants, St. Paul Fire and Marine Insurance Company ("St. Paul") and USF&G,[1] contend the policy had matching liability and deductible amounts which made United effectively self-insured and exempt from the provisions of R.C. 3937.18[2] and, therefore,

[1]The policy was issued by USF&G, but both it and St. Paul, which issued no policy to United, were named as defendant-insurers, and they have undertaken a joint defense without seeking the dismissal of St. Paul. Therefore, both will be retained as parties to this appeal but will be designated "USF&G."

[2]The applicable version of the statute is that in effect on January 1, 2000, the date the policy was issued. *Wolfe v. Wolfe*,

USF&G was not required to offer uninsured motorist protection to United. We disagree and affirm.[3]

{¶2} On August 19, 2000, Gilchrist, employed by United as a foreman at a construction site on Interstate 90, was seriously injured when struck by a car operated by Arthur M. Gonsor. He sued Gonsor and later amended the complaint to request a declaratory judgment and damages against St. Paul and USF&G, claiming that he was entitled to uninsured/underinsured motorist ("UMI") protection under primary and excess insurance policies issued by USF&G to United.[4] USF&G filed a joint answer and cross-claim against Gonsor.

{¶3} Moving for summary judgment against Gilchrist, they claimed that there was no UMI coverage available under any of three USF&G policies at issue: (1) a primary "business auto coverage" policy, with liability coverage up to $1,000,000 and a corresponding $1,000,000 deductible in the form of a "self-funded

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88 Ohio St.3d 246, 250, 2000-Ohio-322, 725 N.E.2d 261.

[3]The Ohio Supreme Court has recently accepted a case involving the same issue. *Tucker v. Wilson*, 98 Ohio St.3d 1474, 2003-Ohio-904, 784 N.E.2d 708. We have determined that a stay is not feasible at this point because of the length this case has been pending and the possibility that the *Tucker* case will not be decided on its merits. Furthermore, the discussion here might contribute something to the pending arguments and decision in *Tucker*.

[4]Gonsor subsequently was convicted of aggravated vehicular assault, and his insurer offered Gilchrist the limits of his insurance policy, $12,500.

retention" endorsement; (2) a $2,000,000 excess liability policy; and (3) a "commercial general liability" policy. Gilchrist claimed that he was entitled to UMI coverage under the primary auto policy because USF&G failed to offer UMI coverage to United and obtain an express rejection of that coverage, as required by R.C. 3937.18 and *Gyori v. Johnston Coca-Cola Bottling Group, Inc.*,[5] and moved for partial summary judgment. USF&G countered that the matching liability and deductible amounts rendered United a "practical self-insurer" and therefore exempt from the requirements of R.C. 3937.18 pursuant to *Grange Mut. Cas. Co. v. Refiners Transport & Terminal Corp.*[6]

{¶4} Rejecting the argument that United was a self-insured under the primary business auto policy and exempt from the requirements of R.C. 3937.18, the judge granted Gilchrist's motion for partial summary judgment. Because Gilchrist had abandoned his claims to UMI coverage under the commercial general liability policy, the judge granted summary judgment on that issue to USF&G. Finding it was unclear whether Gilchrist's damages would exceed the primary policy's limit, he denied judgment to USF&G on UMI coverage under the excess policy. He also determined that there was no just reason for delay.[7] The insurers state a single

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[5]76 Ohio St.3d 565, 568, 1996-Ohio-358, 669 N.E.2d 824.

[6](1986), 21 Ohio St.3d 47, 21 OBR 331, 487 N.E.2d 310.

[7]Civ.R. 54(B).

assignment of error challenging the ruling concerning the primary auto policy:

{¶5} "The trial court improperly denied appellants' motion for summary judgment and granted summary judgment to appellee as to the commercial auto liability policy ('policy no. DRE2256201')."

{¶6} We review the grant of summary judgment de novo, using the same standard as the trial judge.[8] USF&G contends that United is exempt from compliance with R.C. 3937.18 because it is a "practical self-insurer," but concedes that Gilchrist would be entitled to UMI coverage under the policy if United is not exempt from the statutory requirements. Because of the matching liability and deductible amounts under the "self-funded retention" endorsement, USF&G argues that, under this type of "fronting" policy, United retained all risk of loss and, quoting *Grange,*[9] was not required to "reject an offer of insurance to one's self."

{¶7} USF&G's reliance upon *Grange* and *Lafferty v. Reliance Ins. Co.,*[10] however, is misplaced. In *Snyder v. Roadway Express, Inc., supra,* the Ninth Appellate District noted that Ohio does not have mandatory motor vehicle insurance coverage and held that a certificate of self-insurance issued by the registrar of motor

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[8]Civ.R. 56(C); *Druso v. Bank One of Columbus* (1997), 124 Ohio App.3d 125, 130-131, 705 N.E.2d 717.

[9]21 Ohio St.3d at 49, quoting *Snyder v. Roadway Express, Inc.*, (1982), 7 Ohio App.3d 218, 219, 7 OBR 279, 455 N.E.2d 11.

[10](S.D.Ohio 2000), 109 F.Supp.2d 837.

vehicles under R.C. 4905.72 satisfies Ohio's financial responsibility law.[11] It held that R.C. 3937.18 was expressly intended to apply to insurance carriers writing motor vehicle liability insurance policies for Ohio drivers and not to those providing proof of financial responsibility by posting security under R.C. 4509.12 or one of the exempted alternatives.[12]

{¶8} The Ohio Supreme Court in *Grange* then built upon *Snyder* to clarify that not only was a financial responsibility bond not automobile liability insurance, an entity that obtains such financial responsibility under R.C. 4509.59 is also not a self-insured.[13] Such bonds were dissimilar to insurance policies and were intended to protect only the public, while an insurance policy also protects the insured and thus R.C. 3937.18 had no application.[14]

{¶9} Moreover, we do not find *Lafferty* persuasive because the later case of *Linko v. Indem. Ins. Co. of N.Am.*[15] refuted the district court's holding on offer and rejection of UMI coverage, and because *Lafferty's* comment that a policy with a matching

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[11]R.C. 4509.45(D).

[12]R.C. 4509.19 and 4509.45.

[13]*Grange*, 21 Ohio St.3d at 49-50, citing *Republic-Franklin Ins. Co. v. Progressive Cas. Ins. Co.* (1976), 45 Ohio St.2d 93, 74 O.O. 2d 202, 341 N.E.2d 600.

[14]Id.

[15]90 Ohio St.3d 445, 2000-Ohio-92, 739 N.E.2d 338.

liability limit and deductible, secured by a letter of credit,[16] made the insured a de facto self-insurer is mere dicta. The judge accepted the rationale that a fronting policy constitutes self-insurance because the insurer is immediately reimbursed for any payments it makes and therefore incurs no risk of loss, its service to the insured being merely "the use of its licenses as an insurer so that [the insured] could satisfy the automobile insurance requirements of the various states in which it operated motor vehicles."[17] This rationale, however, differs from that in *Grange* and does not support the exemption of a fronting policy from R.C. 3937.18.

{¶10} The dissent argues that United became a self-insurer "in the practical sense," which somehow transformed the insurance policy into a surety bond and eliminated USF&G's duty to comply with R.C. 3937.18. Attempting to expand *Grange's* holding to such "practical self-insurers," however, disregards the critical point: the defendant in *Grange* had filed an R.C. 4509.58 surety bond satisfying its statutory requirements of financial responsibility. The dissent mistakenly claims that the Grange opinion found that insured parties could be practical self-insurers "even if they did not comply with the statutory means for proving financial

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[16]R.C. Chapter 1305.

[17]*Lafferty*, 109 F.Supp.2d at 841.

responsibility." Such a statement reflects neither *Grange*'s facts, its holding, nor its import.

{¶11} The dissent also claims that we should follow, without question, the decision in *Straubhaar v. Cigna Prop. & Cas. Co.*[18] In fact, the judge asserts that we should "summarily reverse" the judgment here on the basis of an unexplained decision decided on the accelerated docket. Because the *Straubhaar* decision fails to explain its rationale, however, it has no persuasive authority.

{¶12} Moreover, the dissent's assertion that his three-paragraph opinion in *Straubhaar* did not require explanation because it was heard on this court's accelerated docket defeats, rather than supports, his claim that the case should now be regarded as persuasive. Cases on the accelerated docket **may** be ruled upon with abbreviated opinions,[19] but one engages in such abbreviation only at the cost of persuasive value. The law should always respect sound reasoning over naked appeals to authority.[20]

{¶13} In a well-reasoned opinion, the Tenth Appellate District[21] explained that cases such as *Lafferty* are mistaken in

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[18]Cuyahoga App. No. 81115, 2002-Ohio-4791.

[19]App.R. 11.1(E); Loc.App.R. 11.1(B)(5).

[20]"An opinion is huddled up in conference, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge..." Thomas A. Lipscomb, The Writings of Thomas Jefferson, 1903.

[21]*Dalton v. Wilson*, Franklin App. No. 01AP-1014, 2002-Ohio-

claiming that the insurer under a fronting policy bears no risk of loss; "the ultimate risk for the loss remains with [the insurer], if [the insured] either refuses or is financially unable to reimburse [the insurer] for the loss."[22] If the policy is certified, the insurers risked "absolute liability" under R.C. 4509.53(A) regardless of contrary terms in the policy. Moreover, under the terms of United's policy, the insured's insolvency does not relieve the insurer "of any obligations under this Coverage Form." USF&G did not take these risks lightly – it not only required an annual premium of $35,600, but retained ultimate authority to control the defense of claims and to settle all claims in good faith regardless of the self-funded retention.

{¶14} The USF&G declarations page and "covered auto designation symbol" endorsement state that the policy covers "[a]utos for which certification of financial responsibility is required in states where United Rentals is not qualified for self-insurance." This provision verifies that United did not intend to be a self-insured and that the policy was issued to satisfy its financial responsibility requirements, and thus is also intended to qualify as a "motor-vehicle liability policy" under R.C. 4509.01(L), and therefore under R.C. 3937.18.

4015.

[22]Id. at ¶42.

{¶15} We find, moreover, that allowing United "the use of USF&G's licenses as an insurer" is not inconsequential or a mere formality. To the contrary, if an insured chooses to provide proof of financial responsibility by entering into a relationship designed to meet technical statutory requirements, that relationship must comply with those mandates. We disagree with USF&G's premise that the policy was wholly a formality, because its insurance policy served a vital purpose in guaranteeing United's financial responsibility under Ohio law. Either United's policy is automobile liability insurance fulfilling all technical requirements or it consists of blank pieces of paper.[23] USF&G "cannot have it both ways."[24]

{¶16} The dissent claims the insurance policy "operates in exactly the same manner as a surety agreement" and thus should be exempted from compliance with statutory requirements for insurance policies. This argument, however, has no bearing on whether a document identified as a motor vehicle insurance policy should be required to satisfy statutory requirements affecting such policies. Nor does the dissent explain how "fronting agreements" can serve a useful purpose when such admittedly ersatz insurance policies are intended to avoid the mandates of Ohio law. If United had wanted

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[23]The dissent's assertion that the policy defines the limits of United's liability is mistaken. The policy defines USF&G's liability, not United's.

[24] *Dalton*, 2002-Ohio-4015, at ¶41.

financial protection that operated in exactly the same manner as a surety, it should have gotten a surety.

{¶17} The circumstances show that, unlike a surety bond, the USF&G policy benefitted United as well as the public, and the *Grange* rationale requires that the policy be subject to R.C. 3937.18. United benefitted because USF&G bore a risk of loss if it was insolvent or refused to pay, took ultimate responsibility for the defense and payment of claims, and relieved United of the need to comply with bonding, deposit, or other statutory requirements for proving financial responsibility.[25] United paid its premium not only for administrative services, as the dissent claims, but to maintain financial responsibility while avoiding the necessity of tying up capital in surety bonds.

{¶18} Instead of taking its duties of satisfying financial responsibility statutes upon itself, United paid its insurer to do so, and relied upon the insurer to provide it with an adequate "motor-vehicle liability policy."[26] Once this occurred the relationship was no different than that between any insurer and insured, and USF&G had a duty to inform its customer of the availability of UMI coverage and offer that coverage as part of the policy. The assignment of error is overruled.

Judgment affirmed.

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[25]R.C. 4509.101(G)(1), 4509.45.

[26]R.C. 3937.18(A), 3937.18(L); R.C. 4509.01(L), 4509.49.

DIANE KARPINSKI, J., CONCURS

MICHAEL J. CORRIGAN, P.J., DISSENTS WITH SEPARATE DISSENTING OPINION

ANNE L. KILBANE
JUDGE

MICHAEL J. CORRIGAN, P.J., DISSENTING:

{¶19} The fronting policy at issue in this case is self-insurance because under no circumstances will USF&G be required to pay under the policy -- United Rentals' deductible matches the limits of liability. This is the essence of practical self-insurance as described in *Grange Mut. Cas. Co. v. Refiners Transp. & Term. Corp*. (1986), 21 Ohio St.2d 47. Because United Rentals is for all practical purposes self-insured, USF&G had no obligation to make any offer of UIM coverage, and such coverage would not arise by operation of law under *Abate v. Pioneer Mut. & Cas. Co.* (1970), 22 Ohio St.2d 161, paragraph two of the syllabus.

{¶20} We recently had occasion to consider this same issue in *Straubhaar v. Cigna Prop. & Casualty Co.*, Cuyahoga App. No. 81115, 2002-Ohio-4791, albeit in conclusory form because the parties requested that the appeal be heard on the accelerated docket pursuant to App.R. 11.1(E). One could summarily reverse the court on that authority alone.

{¶21} However, R.C. 4509.45 permits one to be self-insured by submitting proof of financial responsibility by filing, among other things, a surety bond as provided in R.C. 4509.59 or a certificate of self-insurance as provided in R.C. 4509.72. See R.C. 4509.45(C) and (E).

{¶22} United Rentals did not submit proof of financial responsibility under R.C. 4509.45, but the absence of that proof is not dispositive of the question of self-insurance. In *Grange*, the supreme court recognized that entities could be self-insured in the "practical sense," even if they did not comply with the statutory (or "legal") means for proving financial responsibility. The syllabus to *Grange* states, "[t]he uninsured motorist provisions of R.C. 3937.18 do not apply to either self-insurers or financial responsibility bond principals."

{¶23} *Grange* did not involve insurance of the kind involved in this case, but that is a distinction without meaning. The undisputed facts show that United Rentals carried what is known as a "fronting" policy with USF&G. A fronting policy is a form of self-insurance in which the deductible is identical to the limits of liability, and the insurance company acts only as surety that the holder of the fronting policy will be able to pay any judgment covered by the policy. See *Air Liquide America Corp. v. Continental Cas. Co.* (C.A.10, 2000), 217 F.3d 1272, 1274, citing Note, Self-Insurance as Insurance in Liability Policy "Other

Insurance" Provisions (1999), 56 Wash. & Lee L.Rev. 1245, 1257. Because the USF&G policy had a deductible that matched the limits of liability, USF&G would, in the "practical sense," have no obligation to pay any claim because the United Rentals deductible equaled the limits of liability under the policy. The risk of loss stayed entirely with United Rentals -- and this is consistent with the concept of self-insurance. See *Lafferty v. Reliance Ins. Co.* (S.D.Ohio 2000), 109 F.Supp.2d 837; *Rutlin v. Nat'l. Union Fire* (Apr. 22, 2003), S.D. Ohio No. C-3-00-291; *Dalton v. Wilson*, Franklin App. No. 01 AP-1014, 2002-Ohio-4015, at ¶35; *Adams v. Fink*, Ross App. No. 02CA2660, 2003-Ohio-1457.

{¶24} It makes no difference to my conclusion that United Rentals holds a policy of insurance with USF&G. The majority argues that USF&G's position is such that it renders the policy a "blank piece of paper," but that is most certainly not true. The policy defines the limits of United Rentals's liability. It also permits USF&G to administer claims. USF&G also can deal with the complexities of individual state law and ensure that United Rentals carries the type of coverage mandated in a particular state. Moreover, an insurance company has expertise in processing and handling claims, and United Rentals clearly paid a premium for that service. All of these conditions are relevant to the administration of a claim against United Rentals, but in no way

affect the established fact that USF&G is not liable to pay any sum under the policy.

{¶25} I also disagree with the majority's reliance on *Dalton v. Wilson*, Franklin App. No. 01AP-1014, 2002-Ohio-4015, for the proposition that even under a fronting agreement the risk of loss stays with the insurer. At bottom, the fronting agreement in this case is no different in practical effect from a surety bond which is approved as a form of self-insurance. A surety is one who agrees to pay money or do any other act in the event that the principal fails to perform an act as set forth in the surety agreement. This means that the self-insured bears the burden of meeting any financial obligations that might arise in the event of a motor vehicle accident, and the surety acts to guarantee payment in the event the self-insured is unable to meet those obligations. The fronting agreement in place between USF&G and United Rentals operates in exactly the same manner as a surety agreement. USF&G has no liability unless and until United Rentals is unable to meet its deductible.

{¶26} Because I believe that United Rentals is self-insured in the practical sense described in *Grange*, I would find that the court erred by granting summary judgment to Gilchrist. I would reverse and enter judgment on behalf of USF&G.