[Cite as *Landers v. Lucent Technologies, Inc.*, 2003-Ohio-3657.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA
GERALD E. FUERST, CLERK OF COURTS

COREY LANDERS,	:		
	:	COA NO.	LOWER COURT NO.
Plaintiff-Appellant	:	81506	CP 442573
	:	81531	CP 442573
-vs-	:		
	:		
LUCENT TECHNOLOGIES, INC.,	:	COMMON PLEAS COURT	
ET AL.,	:		
	:	MOTION NO. 350250	
Defendants-Appellees	:		

Date JULY 9, 2003

JOURNAL ENTRY

{¶1} THE PRIOR JOURNAL ENTRY AND OPINION, 2003-Ohio-3326, RELEASED JUNE 26, 2003 IS HEREBY REVISED AND AMENDED NUNC PRO TUNC. THE SEPARATE CONCURRING OPINION IS HEREBY REVISED ON PAGE 7 DELETING THE NUMERICAL NUMBER "2" SHOWN AS A FOOTNOTE. AS SO AMENDED, THE JOURNAL ENTRY AND OPINION SHALL STAND IN FULL FORCE AND EFFECT IN ALL ITS PARTICULARS. THE CORRECTED ENTRY IS ATTACHED.

_____
MICHAEL J. CORRIGAN
PRESIDING JUDGE

JUDGE PATRICIA A. BLACKMON, CONCURS.

JUDGE DIANE KARPINSKI, CONCURS.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 81506 & 81531

COREY LANDERS,	:	
	:	JOURNAL ENTRY
Plaintiff-Appellant	:	
	:	AND
vs.	:	
	:	OPINION
LUCENT TECHNOLOGIES, INC., ET AL.,	:	
	:	
Defendants-Appellees	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	JUNE 26, 2003
CHARACTER OF PROCEEDINGS	:	Civil appeal from Common Pleas Court Case No. 442573
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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MICHAEL J. CORRIGAN, P.J.:

Corey Landers suffered injuries in an automobile accident, and his damages exceeded the limits of liability on both his and the tortfeasor's auto policies. Taking advantage of the holding in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, Landers brought suit against his parents' employers, Lucent Technologies, Inc. ("Lucent") and the Cuyahoga County Commissioners, seeking to recover underinsured motorists benefits under policies held by the employers. On cross-motions for summary judgment, the court denied coverage. Landers filed separate appeals from the summary judgments, and we have consolidated them for briefing and disposition. The parties filed stipulations of fact, so there is no issue of material fact and summary judgment may be rendered as a matter of law. See Civ.R. 56.

I. Lucent Technologies

The court granted Lucent summary judgment on several grounds, but we find one ground dispositive: that Lucent was, for practical purposes, self-insured because its deductible matched its limits of

liability; therefore, Lucent had no obligation to carry uninsured motorists coverage.

We decided this precise issue in *Straubhaar v. Cigna Prop. & Casualty Co.*, Cuyahoga App. No. 81115, 2002-Ohio-4791, and could summarily affirm on that basis alone. We are aware, however, that *Straubhaar* was assigned to the accelerated docket of this court and our decision was issued in conclusory form as permitted by App.R. 11.1(E). We therefore take this opportunity to make a fuller statement of the reasons supporting our decision.

At the time Lucent entered into the contract of insurance with Reliance National, former R.C. 3937.18(A) generally required that insurance companies offer uninsured/underinsured motorists coverage when issuing automobile liability insurance. Although that section has since been amended to delete any mandatory offer of such coverage, we are obligated to review the policy under the law that existed at the time the parties entered into the contract. See *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281, syllabus. If coverage is not specifically rejected by the insured, it arises by operation of law. See *Abate v. Pioneer Mutual and Casualty Co.* (1970), 22 Ohio St.2d 161, paragraph two of syllabus. The Reliance National policy does not contain any uninsured/underinsured motorists coverage, nor is there any evidence that it had been offered and rejected by Lucent. Coverage would therefore arise by operation of law. Under the law existing

at the time Lucent and Reliance National entered into the contract of insurance, the law would require that uninsured motorists coverage arise by operation of law.

A very significant exception to this law exists in cases involving self-insurers. In *Grange Mut. Cas. Co. v. Refiners Transp. & Term. Corp*. (1986), 21 Ohio St.2d 47, the supreme court held that the R.C. 3937.18 mandatory offer requirement of UM/UIM coverage did not apply to a self-insurer. Quoting *Snyder v. Roadway Express, Inc.* (1982), 7 Ohio App.3d 218, 219, the supreme court stated that a requirement forcing a self-insurer to make an explicit rejection "would result in the absurd 'situation where one has the right to reject an offer of insurance to one's self *** *'; even if applicable, 'we believe the insured's rejection must be presumed.'"

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). The parties agree that Lucent did not provide either the surety bond or a certificate of self-insurance.

But the absence of proof of financial responsibility as allowed by statute is not dispositive. 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."

We acknowledge that *Grange* did not involve insurance of the kind involved in this case, but that is a distinction without meaning. The undisputed facts show that Lucent carried what is known as a "fronting" policy with Reliance National Indemnity Company. 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. The Reliance National policy had liability limits of $2,500,000 and a matching deductible of $2,500,000. In the "practical sense," Reliance National would have no obligation to pay any claim because the Lucent deductible equaled the limits of liability under the policy. The risk of loss stays entirely with Lucent -- 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; *Dalton v. Wilson*, Franklin App. No. 01 AP-1014, 2002-Ohio-4015, at ¶35.

It makes no difference to our conclusion that Lucent holds a policy of insurance with Reliance National. Some might argue that this would suggest they are not self-insured, but the practicalities of transacting business dictate the opposite conclusion. A corporation like Lucent would want to hold a policy of insurance, even though its deductible matches the limits of liability, so as to have a clear set of terms that define the limits of its liability. In other words, Reliance National provides Lucent with a policy that sets forth all the terms under which Lucent can be held liable. Reliance National also can deal with the complexities of individual state law and ensure that Lucent carries the type of coverage mandated in a particular state. Moreover, an insurance company has expertise in processing and handling claims, and Lucent clearly paid a premium for that service.

We acknowledge, but disagree with, *Tucker v. Wilson*, Clermont App. No. CA2002-01-002, 2002-Ohio-5142, in which the Twelfth District considered a very similar fronting agreement and held that the insurer retained some risk of loss based on the existence of a bankruptcy clause which "clearly provides that were [the insured] to file bankruptcy or otherwise become insolvent, [the insurer] would not be relieved of its obligation to pay a valid loss during the term of the policy to a third party." Id. at ¶14. The court concluded that the operation of the bankruptcy clause would mean

that the self-insured would not retain one hundred percent of the loss, "however minuscule the risk" of loss might be. Id.

We do not believe that the presence of a bankruptcy clause in an insurance policy is as telling as *Tucker* believed. That kind of clause simply memorializes R.C. 3929.05, which provides that "the liability of the insurance company is absolute, and the payment of said loss does not depend upon the satisfaction by the assured of a final judgment against him for loss, damage, or death occasioned by such casualty." This simply means that the insured's discharge in bankruptcy would not affect the insurance company's absolute liability under the policy. See *Kutza v. Parker* (1962), 115 Ohio App. 313. Although the insurance company has absolute liability under the policy in the event that the self-insured is unable to satisfy the judgment, the self-insured in a fronting agreement continues to bear the present risk of loss.

But our primary disagreement with *Tucker* centers on its failure to perceive that a fronting agreement in which an insurance company acts as a surety is, for all practical purposes, no different than the R.C. 4509.59 surety bond which can be used as proof of financial responsibility for 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. Under R.C. 4509.59, proof of financial responsibility may be evidenced by the "bond of a surety company." 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.

Lucent's policy with Reliance National bore all the markings of a surety relationship. Lucent agreed to bear all of the loss, with Reliance National agreeing to be responsible for the loss in the event Lucent went into bankruptcy. Perhaps *Tucker* read too literally an often-cited definition of self-insurance: "Self-insurance is not insurance; it is the antithesis of insurance." See *Physicians Ins. Co. of Ohio v. Grandview Hosp. & Med. Ctr.* (1988), 44 Ohio App.3d 157, 158. That definition cannot be accurate in this context, however, since proof of financial responsibility with a surety bond is no different than a fronting policy in which the insurance company acts -- in the practical sense -- as a surety in the event the self-insured were to become bankrupt.

Finally, even if we are wrong about our conclusion that a fronting policy is similar in application to a surety bond, we respectfully submit that *Tucker* gave too much credit to the idea that we must apply the law based on the "minuscule" risk that a self-insured would become insolvent. Admittedly, a corporation the size of Lucent Technologies could be subject to insolvency -- the Enron and MCI/WorldCom bankruptcies have shown us that much.

Nevertheless, Lucent is not currently in bankruptcy and we must assume in the absence of argument or fact to the contrary that it is able to satisfy the full amount of its deductible under the Reliance National policy. At this point in time, Lucent bears the entire risk under the policy. We do not believe that the law should be read so rigidly that it elevates a minuscule chance of risk to the status of *fait accompli*. As long as there is no proof that the self-insured is not presently capable of satisfying the full amount of the deductible in a fronting agreement, we will not be in any hurry to declare that a party to a fronting agreement is not self-insured.

For these reasons, we find that Lucent is self-insured and thus no UM/UIM coverage can arise by operation of law. The court did not err by granting summary judgment to Lucent.

II. Cuyahoga County Commissioners

A

During the relevant time frame, R.C. 3937.18(C) provided that insureds could reject UM/UIM coverage. In *Linko v. Indemnity Insurance Co.* (2000), 90 Ohio St.3d 445, 449, the supreme court held that a written offer to provide UM/UIM coverage must contain "a brief description of the coverage, the premium for that coverage, and an express statement of the UM/UIM coverage limits." If those elements were not present, a rejection of UM/UIM coverage was deemed ineffective.

On October 31, 2001, the General Assembly amended R.C. 3937.18(C) to expressly overrule *Linko*. The new version of the statute simply stated that a named insured or applicant could reject UM/UIM coverage "in writing" and "signed by the named insured or applicant." The commissioners rejected UM/UIM coverage on October 9, 1997. American States concedes that the form signed by the commissioner's representative did not comply with the *Linko* requirements.

The first question presented is whether the *Linko* elements for rejection of UM/UIM coverage continue to apply after the amendment to R.C. 3937.18(C).

The supreme court recently held that they did, in *Kemper v. Michigan Millers Mut. Ins. Co.*, 98 Ohio St.3d 162, 2002-Ohio-7101. The supreme court answered "yes" to this question: "are the requirements of *Linko v. Indemnity Ins. Co.*, 90 Ohio St.3d 445, 2000-Ohio-92, 739 N.E.2d 338, relative to an offer of UM/UIM coverage, applicable to a policy of insurance written after enactment of [1997] HB 261 and before [2001] SB 97?" Because the commissioners signed the rejection after the enactment of HB 260, but before the October 2001 amendments which overruled *Linko*, the Linko requirements are applicable. American States' failure to include the requisite elements for a knowing rejection means that UM/UIM coverage arises by operation of law.

American States acknowledges *Linko*, but argues on authority of *Manalo v. Lumbermans Mut. Ins. Co.*, Montgomery App. No. 19391, 2003-Ohio-613, that the absence of the *Linko* requirements are not necessarily determinative of a knowing rejection of UM/UIM coverage where other evidence exists to show that the insured understood the effect of rejecting UM/UIM coverage, particularly when the insured is a "sophisticated large corporation" that was involved in *Manalo*.

Although *Manalo* reached an interesting result, the facts of that case are significantly different than those presented in this case. Most notably, the insured in *Manalo* did choose UM/UIM coverage, albeit at a level lower than the liability coverage. The evidence in *Manalo* also included an affidavit from the risk manager of Avon Products, Inc., which stated that the risk manager was well aware of the requirements for an offer of UM/UIM coverage, that premiums would be increased if he were to select. There is no evidence of that kind in the record before us, so the specific facts would not permit the conclusion that the commissioners made the same kind of knowing rejection of coverage as made in *Manalo*.

B

Having found that UM/UIM coverage exists by operation of law, the next set of issues involve the application of *Scott-Pontzer*. In *Scott-Pontzer*, the supreme court held that the standard definition of a "person" within the UM/UIM provisions of automobile insurance policies covered persons, not vehicles, and that "[i]t

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." 85 Ohio St.3d at 664. As applied to corporations, the supreme court concluded that the term "you" as contained in the definitions of who was insured included not only a corporation, but also the corporation's employees. Id. Landers' father seeks coverage under a liability policy issued by American States because he is a covered person as defined by *Scott-Pontzer*.

In its motion for summary judgment, the commissioners raised the issue whether a political subdivision was bound by *Scott-Pontzer* in light of R.C. 9.83(A), which grants statutory permission for a political subdivision to procure policies of insurance that insure its employees for liability arising from injury "while engaged in the course of their employment or official responsibilities for the state or political subdivision." The commissioners argued that Landers' father, although their employee, had not been engaged in the course of his official responsibilities at the time of Landers' accident.

The General Assembly is charged with providing by general law for the organization and government of counties. See Article X, Section 1 of the Ohio Constitution. As creations of the General Assembly, counties derive their power from the General Assembly and are subject to whatever limits are placed upon it by the law. In

Commr. of Hamilton Cty. v. Noyes (Sup.Ct. 1875), 5 Ohio Dec.Rep. 281, 221, affirmed (1878), 35 Ohio St. 201, the Superior Court for Hamilton County stated:

"These authorities render it clear that county organizations are mere agencies of the state for certain specified purposes; that such powers as they possess and such liabilities as they may create are given by statute; that these statutes are to be strictly construed in favor of the state, which reserves to itself all power not thus delegated ***." See, also, *Geauga Cty. Bd. of Commrs. v. Munn Road Sand & Gravel* (1993), 67 Ohio St.3d 579, 583 ("Counties, on the other hand, may exercise only those powers affirmatively granted by the General Assembly. Therefore, in the absence of a specific statutory grant of authority, a board of county commissioners is powerless to enact legislation.") (Citations omitted.)

Although *Scott-Pontzer* would normally operate to give rise to coverage for employees of an employer, the commissioner's ability to purchase liability insurance coverage stems from an express grant of authority by the General Assembly. There are two statutes which give the commissioners the authority to purchase motor vehicle insurance: the aforementioned R.C. 9.83(A) and R.C. 307.44, which permits a county board of commissioners to procure policies of insurance insuring officers and employees of the county against

liability on account of damage or injury occasioned by the operation of vehicles owned or operated by the county.

R.C. 307.44 would not apply since Landers' father was not driving a vehicle "owned or operated by the county."

This leaves R.C. 9.83(A) as the enabling source for the commissioners' purchase of insurance. R.C. 9.83(A) states in relevant part:

"The state and any political subdivision may procure a policy or policies of insurance insuring its officers and employees against liability for injury, death, or loss to person or property that arises out of the operation of an automobile, truck, motor vehicle with auxiliary equipment, self-propelling equipment or trailer, aircraft, or water craft by the officers or employees while ***."

A county is a political subdivision. See R.C. 2744.01(F). It can therefore procure insurance to its officers and employees for liability arising out of the use of a vehicle, but only to the extent that the injury arose while the officers or employees were "engaged in the course of their employment or official responsibilities for the state or the political subdivision." Landers' father was not engaged in the course of his employment for the commissioners at the time of Landers' accident.

We are aware that this court, as well as other courts of appeals, have decided this issue differently in the context of boards of education. In *Mizen v. Utica Nat. Ins. Group*, 147 Ohio App.3d 274, 2002-Ohio-37, the panel considered whether *Scott-Pontzer* applied to insurance policies purchased by a board of education. R.C. 3313.203 authorizes boards of education to purchase policies of insurance to insure employees against acts or omissions "resulting solely out of his membership on, or employment by, or volunteer services to the board. ***" the panel held:

"We do not agree with the trial court that R.C. 3313.203 limits a school district's authority to purchase insurance coverage. R.C. 3313.203 merely provides that a board of education may purchase liability insurance for employees within the scope of their employment. It does not state that a board of education may not purchase insurance for reasons other than those contained in the statute."

Likewise, in *Roberts v. Wausa Business Ins. Co.*, 149 Ohio App.3d 612, 2002-Ohio-4734, appeal allowed, 2003-Ohio-303, the Tenth Appellate District found that even though the General Assembly gave school districts permission to purchase UM/UIM coverage, "there is nothing limiting such coverage to only those employees who are within the scope and course of employment." Id. at ¶61.

The obvious distinction between the board of education cases and this case filed against the commissioners is that the enabling legislation granting the commisioners permission to purchase liability insurance specifically states that it is limited to occurences which occur in the course and scope of employment. Were we to apply *Scott-Pontzer* to the facts of this case in the manner urged by Landers, it would mean that Landers' father would be entitled to coverage that the commissioners could not, by law, provide to him. Since we are obligated to construe R.C. 9.83(A) strictly in favor of the state, we are compelled to give meaning to the words of the statute. *Scott-Pontzer* cannot operate to extend coverage to Landers' father beyond that which had been specifically authorized by the General Assembly. For this reason, we find as a matter of law that the court did not err by granting summary judgment, although we do so on an alternative ground.

Our ruling necessarily renders moot any consideration of the alternative grounds listed for summary judgment. See App.R. 12(A)(2).

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas 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.

MICHAEL J. CORRIGAN
PRESIDING JUDGE

PATRICIA A. BLACKMON, J., CONCURS.

DIANE KARPINSKI, J., CONCURS IN JUDGMENT ONLY WITH SEPARATE CONCURRING OPINION.

KARPINSKI, J., CONCURRING IN JUDGMENT ONLY:

I agree with the outcome, but for reasons different from what the majority gives. I do not believe Lucent was self-insured. I would affirm, however, because plaintiff is not included as a family member in the policy.

It is agreed that the mandate of R.C. 3937.18, along with its requirement that uninsured/underinsured coverage be offered by insurers to their insureds, is not applicable if a company is self-insured. According to Lucent, it is a self-insured company because it has 100% of the risk.

Landers, on the other hand, says Lucent cannot be self-insured because it does not have a certificate of insurance on file with

the state nor does it assume 100% of the financial risk under the policy.

Risk

"In determining whether an entity is self-insured, courts look at who bears the risk of loss." *Dalton v. Wilson*, Franklin App. No. 01 AP-1014, 2002-Ohio-4015, at ¶35. "While insurance shifts the risk of loss from the insured to the insurer, self-insurance involves no risk-shifting." *Jennings v. Dayton* (1996), 114 Ohio App.3d 144, 148. Rather, "self-insurance 'is the retention of the risk of loss by the one upon whom it is directly imposed by law or contract.'" *Physicians Ins. Co. of Ohio v. Grandview Hosp. & Med. Ctr.* (1988), 44 Ohio App.3d 157, 158.

The Supreme Court of Ohio has explained in order for a company to be a self-insurer, it must always retain the risk of loss. Thus the Supreme Court held that "a financial responsibility bond is not liability insurance." The court explained that the company was "a 'self-insurer' in the practical sense in that [the employer] was ultimately responsible under the term of its bond either to a claimant or the bonding company in the event the bond company paid any judgment claim." *Grange Mut. Cas. Co. v. Refiners Transport and Terminal Corp.* (1986), 21 Oh. St.3d 47. The Fifth Appellate District has similarly found a letter of credit is not liabilitty insurance. *Dijon DeLong v. Brandon Myers*, 2003-Ohio-2702.

Other courts have subsequently expanded this exemption for self-insurers. *Dolly v. Old Republic Ins. Co.*, (N.D. Ohio 2002),

200 F.Supp.2d 823; *Lafferty v. Reliance Ins. Co.* (S.D. Ohio 2000), 109 F.Supp.2d 837; *McCollum v. Continental Ins. Co.* (Apr. 9, 1993), Lucas App. No. L-92-141; *Fonseca v. Fetter*, (June 15, 2001), Lucas C.P. No. CI 99-4712; and *DeWalt v. State Farm Ins. Cos.* (Sept. 11, 1997), Lake C.P. No. 96CV001173.

The Fifth District has acknowledged a self-insured exemption for a company lacking the normal certificate but only under certain conditions. In *Dalton v. Travelers Ins. Co.*, (December 23, 2002), Stark App. Nos. 2001CA00380, 2001CA00393, 2001CA00407, 2001CA00409, 2002-Ohio-7369, the court held that even though the company had not complied with filing a certificate of insurance or a bond, it had nonetheless proven that it bore the financial responsibility at all times.

Attached to its motion for summary judgment, the company included "a Payment Agreement ***. The payment agreement makes Collins responsible upon billing for each payment made under the policy, up to $ 500,000 for the commercial automobile policy and $1,000,000 for the general liability policy. *** In order to secure the amounts that may be paid, Collins is required to provide *a promissory note and a security acceptable as collateral*." Based upon these documents, the court's opinion found "Collins is responsible for payments made to claimants under the policy up to the retained amounts. By agreeing to reimburse and provide a promissory note and security, Collins is self-insured up to the

retained amounts because the risk of loss has not shifted away from Collins." (Emphasis added.) In other words, a company claiming to be self-insured and therefore exempt from R.C. 3937.18 must prove that it has taken definitive and legally certain steps to guarantee it always retains financial responsibility for any claimed loss.

No such proof was provided in the case at bar. It is agreed Lucent did not file a certificate of insurance with the state, nor does it have a bond. Lucent's motion, moreover, did not attach any proof of its financial ability to pay claims as was produced in *Dalton v. Travelers*, supra. Nor did Lucent take any "definitive and legally certain steps" such as providing a "promissory note and security acceptable as collateral."

An Insurance Policy with Matching Deductible and Liability

Lucent argues it is a self-insurer because it has a fronting policy in which the deductible matches its liability limits. Because the deductible of those fronting policies is exactly equal to the liability limits of the policies and the risk of loss never leaves the company, Lucent claims the company is self-insured and, therefore, not bound by R.C. 3937.18.

The Tenth District, in *Dalton v. Wilson* (Aug. 8, 2002), Franklin App. No. 01AP-1014, 2002-Ohio-4015, rejected expanding self-insurance in the "practical sense" to a policy containing "matching deductible" language. The court explained: "Because [the insured] neither obtained a certificate of self-insurance

certifying that it is of sufficient financial ability to pay judgments against it (as contemplated in *Snyder*), nor posted a financial responsibility bond (as contemplated in *Grange*), [the insured] may not be considered a self-insurer. As the Montgomery County Court of Common Pleas stated in *Roberts v. State Farm Mutual Auto. Ins. Co.* (2001), Montgomery C.P. No. 00-CV-0886: 'It may be well and good and entirely lawful for a "fronting agreement" *** to spare [an entity] the expense and potential administrative quagmires of formal registration in every state, territory and country where it does business and for these "devices" to provide [an entity] the use of [an insurer's] filings and claims service, but they do not paralyze or mute the walking and quacking duck of insurance coverage.'" The Tenth District found this argument persuasive and concluded that Parker was not self-insured and therefore its policy was subject to the requirements of R.C. 3937.18. Moreover, "[s]ince Parker attempted to satisfy R.C. 4509.45 via its automobile liability policy with [the insurer], the insurer] was required to offer UM/UIM coverage."

Bankruptcy

Even if we assume, arguendo, that a fronting policy with matching liability limits and deductible is enough to result in a self-insurer "in the practical sense," the remaining issue is whether the bankruptcy provision in the insurance policy undercuts Lucent's claim to being a self-insurer.

The majority admits that "the insurance company has absolute liability under the policy in the event that the self-insured is unable to satisfy judgment ***." Although such a provision may satisfy the need for a guarantee, it also raises the threshold question of whether the employer is self-insured if, in the event of bankruptcy, the risk shifts to an insurance company. I disagree with the majority's sweeping conclusion that "the insured's discharge in bankruptcy would not affect the insurance company's absolute liability under the policy." For the majority, proof of financial responsibility is irrelevant so long as the self-insured "continues to bear the present risk of loss." The majority has impermissibly narrowed the proof of financial responsibility to the "present risk of loss."

[Cite as *Landers v. Lucent Technologies, Inc.*, 2003-Ohio-3657.]

The majority is following the Fourth District, which begins its analysis with risk as the defining characteristic of a self-insured: "While insurance shifts the risk of loss from the insured to the insurer, self-insurance involves no risk shifting. Rather, in the self-insurance context, the risk is borne by the one on whom the law imposes it. The defining characteristic of insurance, the assumption of specific risks from customers in consideration for payment, is entirely absent where an entity self insures." *Musser v. Musser*, 2003-Ohio-1440 ¶17, citing *Jennings v. Dayton* (1996), 114 Ohio App.3d 144.

The Twelfth Appellate District, however, distinguished between a fronting policy with matching liability limits and deductible, on the one hand, and, on the other hand, a policy with a clause specifying that during bankruptcy *the insurer* is obliged to pay a valid loss. *Tucker v. Wilson*, 2002-Ohio-5142 ¶14. Although both focus on risk, the Fourth and Twelfth Districts disagree in their analysis of the effect of the bankruptcy clause found in the insurance policy.

In the case at bar, the provision in the "Business Auto Coverage Form" reads: "Bankruptcy or insolvency of the 'insured' or the 'insured's estate will not relieve us of any obligations under this Coverage Form."[1] "Us" refers to drafter of the policy, that is, the insurance company. In *Tucker* the Business Automobile policy contained an identical

[1]In *Musser*, the Fourth District, noting that the provision in its case was similar to the one in *Tucker*, erroneously quoted the *Tucker* policy as follows: "In the case at bar, the bankruptcy clause of the [Business Auto] policy clearly provides that were 'the employer' to file bankruptcy or otherwise become insolvent, *[the insured]* would not be relieved of its obligation to pay a valid loss during the term of the policy to a third party. Thus, although [the insured] argues that [the employer] retains full risk under the [Business Auto] policy, the language of the policy refutes that argument." (Emphasis added.) ¶20 Note 7. Clearly, "us" in the original refers to the insurance company, not the "insured," which is the word the *Musser* court inserted.

"bankruptcy clause that provided that 'bankruptcy or insolvency of the insured or the insured's estate will not relieve *us* [the insurer] of any obligations under this Coverage Form.'" (Emphasis added.) Id. ¶2. The *Tucker* court held that in the event of bankruptcy, the risk falls upon the insurer. The court emphasized, "***however minuscule the risk to [the insurer] may be, [the insured] does not retain 100 percent of the risk of loss. Rather, some risk has shifted to [the insurer]." Id. ¶4.

In a cryptic paragraph, the *Musser* court disagreed that the presence of the bankruptcy clause changed the result. The *Musser* court claimed the employer retained "the risk of loss at all times." The court explained: "The employer's bankruptcy or insolvency simply relieves the employer of a *present obligation to pay* the deductible. The insurer *presumably could later attempt* to recover the funds from the employer." (Emphasis added.) ¶20. This latter explanation glosses over the contradiction of the prior statement. If the insurer cannot recover the funds from the employer, then the employer did not retain the risk of loss at all times. Moreover, any future relief of a "present obligation to pay" is shifts the risk. Whatever distinctions one makes between present relief and future attempts, the risk shifts. Where there is a dependency upon an insurance policy to provide the necessary guarantees, the statutory requirements governing an insurance policy applies.

I agree with Judge Harsha's dissent in *Musser*: "***the legislature has created specific requirements for 'self-insurance.' An entity that wishes to avail itself of that status ought to comply with the statutory scheme created by the legislature." ¶24.

I, therefore, believe Landers' first assignment of error has merit.

However, I would affirm the trial court's ruling that both the Lucent and American States policies did not extend to family members.[2]

Unlike the policy in *Scott-Pontzer,* neither Lucent's nor American States' policy has "family member" language. In *Edmondson v. Premier Indus. Corp.* Cuyahoga App. No. 81132, 2002-Ohio-5573, this court noted the importance of language referencing "family members." "Absent such language, the coverage in the policy does not extend to family members of employees. *Allen v. Johnson,* 9th Dist. No. 01 CA0047, 2002-Ohio-3404; see also, *Devore v. Richmond*, 6th Dist. No. WD-01-044, 2002-Ohio-3965 (coverage did not extend to wife when policy specified employees covered when action within the scope of employment). Accordingly, Rodney Edmondson is not an 'insured' under CNA's policy and summary judgment in favor of CNA and Premier was appropriate."

Similarly, in *Personal Serv. Ins. Co. V. Werstler*, Stark App. Nos. 2002CA00232 and 2002CA00250, 2003-Ohio-932, the court stated: "[B]ecause the definition of "insured" does not contain the 'if you are an individual, any family member' language found in the *Scott-Pontzer* policy, *** [plaintiff] *** is not an 'insured' under the liability portion of [the] policy."

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[2]Assignments of Error II and VI, which both question whether family members are excluded, state as follows: "II. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE LUCENT POLICY DID NOT EXTEND TO FAMILY MEMBERS." "VI. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE AMERICAN STATES POLICY DID NOT EXTEND TO FAMILY MEMBERS."

In the case at bar, neither policy contains the crucial "family member" language present in *Scott-Pontzer.* I would thus overrule the second and sixth assignments of error. Because this issue is dispositive of the entire appeal, the trial court did not err in granting summary judgment to Lucent and American States.

I thus concur in judgment only with the majority opinion.