ATTORNEY FOR APPELLANT

Stephen C. Wheeler
Fisher Maas Howard Lloyd & Wheeler, P.C.
Carmel, Indiana

ATTORNEYS FOR APPELLEE

David W. Stone IV
Stone Law Office
Anderson, Indiana

Nathan D. Foushee
Nunn Law Office
Bloomington, Indiana

IN THE COURT OF APPEALS OF INDIANA

Auto-Owners Insurance Company,
Appellant-Defendant,

v.

Zachary Shipley,
Appellee-Plaintiff

December 2, 2021

Court of Appeals Case No. 21A-CT-761

Appeal from the Marion Superior Court

The Honorable Patrick J. Dietrick, Judge

Trial Court Cause No. 49D12-1909-CT-39866

Vaidik, Judge.

Case Summary

[1] Zachary Shipley worked for a company that did roadside tire repair, and he was sent to assist a customer pulled over on an interstate exit. He parked his

company van in front of the customer's car, removed the necessary tools, left some of the doors open, and began his work between the van and the car. Just before Shipley was going to go back to the van to turn on an air compressor, a runaway tire from another vehicle struck him. Shipley later sued his employer's auto insurer for underinsured-motorist benefits. The insurer moved for summary judgment, arguing that Shipley was not "using" the van at the time of the accident and that, even if he was, he was not using it "as an auto," as required by the policy. The trial court denied the motion, and the insurer appeals.

[2] We affirm. At the time of the accident, Shipley was using his roadside-assistance vehicle exactly as a roadside-assistance vehicle is meant to be used—relying on it and the items it held to repair a customer's vehicle. Therefore, Shipley was using the van "as an auto" and is entitled to underinsured-motorist benefits.

Facts and Procedural History

[3] On August 21, 2018, Shipley was working for R & H Tire as a roadside tire technician and was sent to assist a customer parked on the shoulder of the Mann Road exit from I-465 in Indianapolis. Driving a van owned by R & H, Shipley went to the location, pulled in front of the customer's car, and backed up so that the rear of the van was about seven feet from the front of the car. Shipley exited the van, opened the side doors, and took out an air hose and tire bars. The customer's regular tire had gone flat earlier and been replaced with

the spare, and the spare had gone flat as well, so Shipley's task was to dismount the flat regular tire from its rim, mount a new tire on the rim, inflate it, and then replace the flat spare and rim with the new tire and rim. Leaving some of the van doors open, Shipley removed the flat tire and rim from the trunk of the car and placed them on the ground between the van and the car. As Shipley was standing on the rim, working to dismount the flat tire and mount the new tire, he was struck by a runaway tire that had fallen off a truck being driven by Levi Garrett. When Shipley was hit, he was "about 20 seconds" from going back to the van to start an air compressor to inflate the new tire. Appellant's App. Vol. II p. 69.

[4] A year after the accident, Shipley sued R & H's auto insurer, Auto-Owners Insurance Company, for underinsured-motorist ("UIM") benefits under the Commercial Auto Policy R & H had in effect at the time of the accident ("the Policy").[1] Auto-Owners moved for summary judgment, arguing that Shipley was neither occupying nor using the van at the time of the accident, as required for UIM coverage. The trial court denied the motion, and Auto-Owners sought and received permission to bring this interlocutory appeal.

[1] Shipley's complaint also included a negligence claim against Garrett. Shipley and Garrett later stipulated to the dismissal of that claim.

Discussion and Decision

[5] Auto-Owners contends the trial court erred by denying its motion for summary judgment. We review such motions de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[6] Shipley has two possible paths to UIM coverage. First, he is entitled to coverage if, at the time of the accident, he met the definition of "insured" under the Policy's UIM endorsement. That endorsement defines an "insured" as, among other things, "Anyone **occupying** a covered **auto**," and it defines "occupying" as "in, upon, getting in, on, out or off." Appellant's App. Vol. II pp. 87, 90.

[7] Second, even if Shipley did not meet that definition, he is entitled to UIM coverage if, at the time of the accident, he would have been entitled to liability coverage under the Policy (for example, if he had let a tire roll onto the road, causing an accident). This is so because, as Auto-Owners acknowledges, it is the public policy of Indiana that "those persons who have liability coverage must be considered to be insured for the purpose of uninsured or underinsured motorist coverage." Appellant's Br. p. 28 (citing *Gheae v. Founders Ins. Co.*, 854 N.E.2d 419, 422-23 (Ind. Ct. App. 2006), *Smith v. Allstate Ins. Co.*, 681 N.E.2d 220, 222 (Ind. Ct. App. 1997); *Peterson v. Universal Fire and Cas. Ins. Co.*, 572

N.E.2d 1309, 1311-1312 (Ind. Ct. App. 1991)). The liability section of the Policy provides, in relevant part, "**We** will pay all sums an **insured** legally must pay as damages because of **bodily injury** or **property damage** to which this insurance applies, caused by an **accident** and resulting from the ownership, maintenance or use of a covered **auto** as an **auto**." Appellant's App. Vol. II p. 69.

[8] Shipley contends that at the time of the accident he was both "occupying" the van for purposes of the UIM endorsement and "using" the van for purposes of the liability coverage. Because we agree he was "using" the van under the liability section of the Policy, we need not decide whether he was "occupying" the van under the UIM endorsement.

[9] The Policy does not define "use." However, two of this Court's decisions are particularly helpful. In *Monroe Guaranty Insurance Co. v. Campos*, 582 N.E.2d 865 (Ind. Ct. App. 1991), *trans. denied*, a tow-truck driver was dispatched to the scene of a possible drunk-driving arrest. He pulled the truck into a parking lot and exited to talk to a police officer. The officer said he was awaiting the results of a breathalyzer test and directed the tow-truck driver to wait in the police car. Shortly thereafter, the officer learned the suspect had been arrested and asked the tow-truck driver to tow the vehicle. The tow-truck driver indicated he would go to the arrestee's vehicle and determine how it could safely be removed from the street. However, as he was exiting the police car, he was struck by an uninsured motorist. We held the tow-truck driver was "using" the tow truck at the time of the accident, explaining:

> The contract between [the insurer] and [the towing company] provides insurance coverage to [the towing company] and its employees who are engaged in the business of towing disabled vehicles. The parties certainly would have contemplated the nature of this business activity. Removal of disabled vehicles from roadways cannot be accomplished solely by the activity of "propelling or directing" the towing vehicle. Reasonable persons would expect that a tow truck operator must engage in other activities during the towing process, some of which will require that he exit the vehicle (e.g. evaluation of the towing scene, securing the vehicle to be towed, attachment of towing equipment to the disabled vehicle, conferring with appropriate officials concerning safety procedures).

Id. at 870.

[10] More recently, in *Argonaut Insurance Co. v. Jones*, 953 N.E.2d 608 (Ind. Ct. App. 2011), *trans. denied*, a sheriff's deputy was dispatched to the scene of an accident and used her car to block a lane of traffic so the pickup involved in the accident could be towed. The deputy left her engine running and activated her emergency lights to redirect traffic. She then exited the car and began directing traffic using hand signals and a flashlight. As she was doing so, she was struck by an underinsured motorist. We held the deputy was "using" her car at the time of the accident because she "had an active relationship to the patrol car" and "the car was central to her role in controlling traffic at the scene." *Id.* at 620.

[11] Just as the towing company in *Campos* was engaged in the business of towing disabled vehicles, R & H was in the business of providing roadside assistance to disabled vehicles. As such, Auto-Owners certainly contemplated that tire

technicians like Shipley would park R & H vehicles on the roadside and exit to do their work. And like the sheriff's deputy in *Jones*, Shipley maintained an active relationship with his van while he did his work, and the van was "central" to his work. He parked his van within feet of the customer's car, and there is no evidence he was ever going to be more than a car length or two away. Upon exiting the van, he immediately opened the side doors and took out an air hose and tire bars—items he needed for the job and would have to put back in the van when he was done. When he was hit by the runaway tire, some of the van doors were still open, and he was only about twenty seconds from going back to the van to turn on an air compressor to inflate the new tire. These facts support the conclusion Shipley was "using" the van at the time of the accident.

[12] Auto-Owners points out that the policies at issue in *Campos* and *Jones* required only the "ownership, maintenance or use" of an auto, whereas the Policy here requires the ownership, maintenance, or use of an auto "as an **auto**." Appellant's App. Vol. II p. 69. Auto-Owners asserts that because of this "as an auto" qualifier,

> it is not enough that Shipley might have been "using" his van by being close to it, driving it to the repair site, by keeping his tools and paperwork in it, and by intending to drive it away after the job was done. The liability coverage language would require Shipley to be using the van in the way everyone uses a van – by moving it or directing its movement.

Appellant's Br. p. 34. We disagree. At the time of the accident, Shipley was using his roadside-assistance van as a roadside-assistance van—to accomplish the repair necessary to get the customer back on the road. He parked the van just in front of the customer's car, opened doors to remove tools, left doors open while he worked, and was about to go back to the van to turn on the air compressor. This constituted the use of an auto as an auto.

[13] For these reasons, we affirm the trial court's denial of summary judgment to Auto-Owners on the issue of UIM coverage.[2]

[14] Affirmed.

May, J., and Molter, J., concur.

[2] Auto-Owners also argues it is entitled to summary judgment on the issue of coverage under the medical-payments section of the Policy. Because Shipley's claim against Auto-Owners is limited to UIM coverage, and says nothing about medical-payments coverage, *see* Appellant's App. Vol. II p. 12, we need not address this issue.