

\$25,000 in policy limits to Tuffey. Tuffey received workers' compensation benefits amounting to approximately \$80,000.00. Tuffey also sought to recover under Albany's policy.

Reliance, the relevant insurance carrier for Albany, was placed on notice of Tuffey's claim for underinsured motorist coverage under supplementary underinsured motorist coverage (SUM coverage).¹ By letter dated August 10, 2000, Reliance notified Tuffey that SUM coverage was available and also that coverage was available under Tuffey's personal automobile policy.² Also, Reliance requested a copy of Tuffey's personal automobile policy, advising Tuffey that it could not determine the level of contribution without first reviewing the personal automobile policy. (Tuffey Exhibit "B" attached to the Notice of Objection filed April 4, 2005, Letter of Reliance dated August 10, 2000.) Subsequently, Tuffey filed a claim for coverage. By letter dated May 6, 2003, GAB Robins³ notified Tuffey that the claim was denied for lack of coverage. The determination of lack of coverage was predicated upon three points:

- 1) the policy was for uninsured motorist coverage and not underinsured motorist coverage;
- 2) the auto driven by Tuffey was not a covered auto; and
- 3) at the time of the accident, Tuffey was not in the auto but walking along the berm of the road.

¹ Dunn's insurance company tendered coverage to Tuffey.

² Reliance Insurance was not the carrier for the personal automobile policy.

³ GAB Robins North America, Inc. (GAB Robins) is the Third Party Administrator, assigned by the New York State Insurance Department to handle Reliance in ancillary receivership matters arising in the State of New York.

(Liquidator's Exhibit B, Letter of Claims Adjuster Jack Lerner.) Thereafter, and in accordance with the terms of the Reliance policy, Tuffey filed an application for arbitration of the insurance claim. However, the claim was stayed by application of this Court's Liquidation Order. By notice dated, March 10, 2005, the Liquidator issued a notice of determination finding that the loss was not included within the insuring agreement of the policy. (Tuffey Exhibit "A.") Tuffey's objections to the Liquidator's determination and the Liquidator's response thereto are now before the Court for disposition.

Tuffey argues the doctrine of equitable estoppel precludes the Liquidator from disclaiming coverage because the delay in asserting the disclaimer of coverage was unreasonable as a matter of law. Tuffey contends that the combination of the preliminary acceptance of coverage and subsequent delay in asserting disclaimer of coverage constitutes a waiver of the disclaimer of coverage. Alternatively, Tuffey contends that, *assuming arguendo*, the Liquidator has not waived the disclaimer issue, there is no evidence to support the lack of coverage. Tuffey does not challenge the authenticity of the insurance declaration page appended to the Liquidator's filing. Tuffey instead argues that the insurance policy must be read standing alone, that is, without reference to statutory authority or case law. The Liquidator responds that coverage cannot be created by waiver. I find no merit to the issues raised by Tuffey.

Among the documents appended to the paper books filed with the Court are the Common Policy Declarations Page, and the Business Auto Coverage Form Declarations pertaining to Policy Number VQ8606580 (hereinafter, the Policy). There is no challenge to the authenticity of the Policy or its relevance to this action. The Policy names Albany as the Insured and denotes the policy period

as January 1, 1999 to January 1, 2000. The Policy reflects the terms of the business auto coverage policy purchased by Albany. The Court accepts the document as being the contract of business automobile insurance between Albany and Reliance.

Under the terms of the Policy, uninsured motorist (UM) coverage and supplementary underinsured motorist (SUM) coverage was available for "covered autos." "Covered autos" are defined as:

OWNED AUTOS SUBJECT TO A COMPULSORY UNINSURED MOTORIST LAW. Only those autos you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorist Coverage

(Policy Declaration Page, set forth in the Liquidator's Exhibit "A" to the Response to the Objections.) To determine whether a police vehicle is subject to the compulsory uninsured motorist provisions of the Law, reference is made to Section 388(2) of New York's Vehicle and Traffic Law, N.Y. Veh. & Traf. §388(2) (2005), which states that police and fire vehicles are not covered automobiles. That interpretation of the statute was upheld by the courts in *State Farm Mutual Auto Insurance Co. v. Amato*, 528 N.E.2d 162 (N.Y. 1988) (Ins. Law §3420(f), providing that the requirement that all "motor vehicle" insurance policies must contain uninsured motorist coverage -- has no application to police vehicles). I find no error in the Liquidator's conclusion that coverage did not extend to this

incident since Tuffey had been operating a police cruiser⁴ and a police cruiser is not a covered vehicle under the terms of the policy.

Likewise, the Liquidator correctly determined that where no coverage exists, coverage cannot be created by waiver or estoppel. This is well-settled law in this Commonwealth just as it is in the state of New York. While the doctrine of estoppel can be used to make a contract or a contract provision operable, it cannot be used to create a contract where none existed. *Donovan v. New York Casualty Co.*, 94 A.2d 570 (Pa. 1953) (citing *Antone v. New Amsterdam Casualty Co.*, 6 A.2d 566 (Pa. 1939)). The doctrines of waiver and estoppel cannot apply where no contract exists. *Donovan*. Similarly, in *Zappone v. Home Insurance Company*, 432 N.E.2d 783, (N.Y. 1982), the New York court held that where a policy does not provide coverage for the loss in the first instance, coverage cannot be created by waiver or estoppel. The rule advanced is that the elemental issue of whether coverage exists cannot be waived through mere delay.

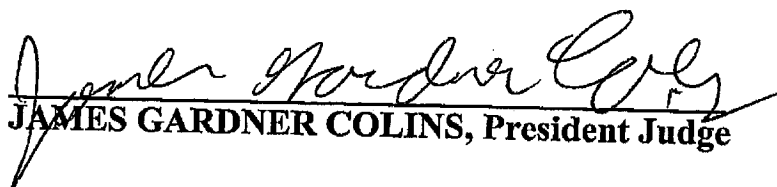
Based on the foregoing, I find no error with the Liquidator's conclusion that Tuffey's claim for coverage is not a covered claim under the City of Albany business auto insurance policy, and as such is not the obligation of the insured, Albany; therefore, the claim is not a loss under the policy of insurance issued to Albany and not a Reliance claim. Accordingly, the following is entered.

⁴ In light of the Court's conclusion that a police cruiser is not a covered vehicle, the Court will not address the issue of whether Tuffey's walking along the berm of the road excluded him from coverage.

ORDER

AND NOW, this 3rd day of August, 2005, Tuffey's objections to the Liquidator's NOD with respect to the classification of its claim as priority level (b), with a valuation of \$0.00, are overruled.

The Liquidator is directed to serve a copy of this order upon those listed on the master service list and to file an affidavit of service with the Court on or before August 10, 2005.


JAMES GARDNER COLINS, President Judge