No. 13-1854

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
LICKING COUNTY, OHIO
CASE NO. 12 CA 0089

GRANGE MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v.

PATRICK J. LAUGHLIN, DEBORAH A. LAUGHLIN, and LOUIS BOROWICZ, ADM. OF THE EST. OF WILLIAM LAUGHLIN,

Defendants-Appellees.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT GRANGE MUTUAL INSURANCE COMPANY

Sean Harris (0072341)
KITRICK, LEWIS & HARRIS CO., LPA
445 Hutchinson Avenue, Suite 100
Columbus, OH 43235
Tel: (614) 224-7711
Fax: (614) 225-8985
sharris@klhlaw.com

Attorney for Appellee Louis Borowicz, Administrator of the Estate of William Laughlin, Deceased

Irene C. Keyse-Walker (0013143)
(COUNSEL OF RECORD)
Benjamin C. Sassé (0072856)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
Tel: (216) 696-3982
Fax: (216) 592-5009
ikeyse-walker@tuckerellis.com
benjamin.sasse@tuckerellis.com

Attorney for Appellant Grange Mutual Insurance Company

Gus Shihab (0061098)
SHIHAB & ASSOCIATES
65 E. State Street, Suite 1550
Columbus, OH 43215
Tel: (614) 255-4872
Fax: (614) 255-4872
gus@shibahlawyers.com

Attorney for Appellees Deborah and Patrick Laughlin

Glenn A. White (0023152)
MORROW GORDON & BYRD, LTD.
33 West Main St.
P.O. Box 4190
Newark, OH 43058

Attorney for Appellees Laughlin Custom Building & Cabinet Making and Patrick Laughlin

James E. Featherstone (0066520)
610 South Front Street
Columbus, Ohio 43215
Tel: (614) 449-5982
Fax: (614) 449-5980
featherstonej@grangeinsurance.com

Additional Counsel for Appellant Grange Mutual Insurance Company

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APPENDIX

I. EXPLANATION OF WHY THIS IS A CASE OF GREAT GENERAL AND PUBLIC INTEREST

The unwarranted expansion of coverages in a business liability policy by the courts below presents the following question of great general and public interest for this Court: What facts are relevant to a determination of whether a worker injured in the performance of services for another falls within the "employee exclusion" of business liability coverages in a commercial general liability policy of insurance? The answer to that question must be framed in the context of the distinct and mutually exclusive purposes of business liability coverages and workers' compensation coverages – otherwise, employers are "rewarded" for failing to comply with worker compensation laws. That is what occurred in this case.

This Court considered the "plain meaning" of an employee exclusion in *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107 (1995), and confirmed that the "what" – not the "why" – of work determines whether the exclusion applies. *Id.* at 109 (plaintiff's argument improperly focused on "'why' he was allowed to work on the farm for school credit, rather than 'what' activities he did on the farm and who controlled those activities"). The brief opinion in *Guman Bros. Farm*, however, did not analyze the mutually exclusive purposes and nature of business liability and workers' compensation coverages, or the public policy reasons supporting the consistent enforcement of employee exclusions. Such an analysis would offer guidance to Ohio's trial and appellate courts when interpreting

employee exclusions in an economy which has spawned an ever-evolving workplace. This case, in which the courts focused on the "why" instead of the "what," presents an opportunity for that guidance.

The purpose of a CGL policy is to provide coverage for "liability to the general public" for the negligence of employees; it "is not designed to provide coverage for an employer's liability for injuries to its employees." 9A *Couch on Insurance* 3d, § 129:10 (2005). The latter liability is covered through compliance with a state workers' compensation statute, which "constitutes the full extent" of liability for employee injuries in the scope of employment. *Id.* Because the coverages are mutually exclusive, the standard CGL policy expressly excludes liability coverage for any insured obligation under a workers' compensation law, and for bodily injury to employees. *Id.*, §§ 129:10, 129:11.

The primary purpose of an employee exclusion in a CGL policy is to implement the mutual exclusivity of coverages; i.e., "to draw a sharp line between employees and members of the general public." *American Family Mut. Ins. Co. v. Tickle*, 99 S.W.3d 25, 29 (Mo.App. 2003), quoting 9 *Couch on Insurance*, § 129:3 (3d ed. 1997). As the Fifth District itself has explained, the exclusion "comes as no surprise because many states, including Ohio, have a compulsory contribution system to compensate insured workers." *Sharp v. Thompson*, 5th Dist. No. 07CA0016, 2008-Ohio-4990, ¶ 19. "If an employer fails to obtain coverage and an employee is injured, workers' compensation coverage is still provided to the

employee and the employer is responsible for reimbursing the fund dollar for dollar for the costs of the claim." *Id.* But the Fifth District obliterated the "sharp line" between members of the public and employees in this case when it concluded that a CGL policy provided coverage for liability arising out of the death of a worker while performing the normal duties of the insured's business.

The policy at issue here contained standard provisions excluding coverage for: (1) "[a]ny obligation of the insured under a workers' compensation * * * law"; and (2) "'[b]odily injury' to * * * an 'employee' of the insured arising out of and in the course of * * * [e]mployment by the insured; or [p]erforming duties related to the conduct of the insured's business." The parties stipulated that at the time of his death, Billy Laughlin was "either in the course of employment by" his uncle's wood working and cabinet making business "or was performing duties related to the conduct" of the business – language precisely tracking the employee exclusion. Further, undisputed facts established that Billy Laughlin's uncle, Patrick Laughlin, controlled the material details of how Billy's work was done, and business records showed the payment of $750 in cash to Billy Laughlin for his eight weeks of work.

The Court of Appeals, however, held that these factors were overcome by: (1) the family relationship between Patrick and Billy; (2) Billy's ability to dictate how many hours he would work (since his uncle could not afford to pay him for full time work); and (3) Patrick's wife's characterization of the $750 cash payment by the business as "'pocket money', not compensation." *See* App. Op. (attached), ¶¶ 26-31.

According to the Court of Appeals, these factors made Billy "a volunteer or at best an independent contractor," such that the employee exclusion did not apply and the CGL policy provided coverages for liability to Patrick's business arising out of Billy's death. *Id.*, ¶ 31. The Court cited perceived policy grounds for its decision; a contrary result "would place every family relationship i.e., grandparent/grandchild, under the harsh light of employment status when in fact it is a gift generated by love to help those who need it or a 'bribe' to get a child to do chores or accept responsibility." App. Op. (attached), ¶ 19. That decision merits this Court's review for several reasons.

First, if courts fail to enforce the plain meaning of an employee exclusion, "*ipso facto*, every *** commercial general liability policy issued *** would be deemed to provide potential workers' compensation coverage as well as *** general liability coverage." *Brown v. Indiana Ins. Co.*, 184 S.W.3d 528, 532 (Ky. 2005). Such coverage expansions would require premium increases for the "responsible employers" who provide workers compensation coverages for their employees and increase the costs of doing business in the state. *Id.*

Second, the decision does not promote public policy, and in fact contravenes it. The plain and ordinary meaning of "employee" precludes the Fifth District's concern (App. Op., ¶ 19) that enforcing the employee exclusion could transform a "gift" or "bribe" from a family member into employment status. If anything, courts should be even more vigilant when a policyholder claims that a relative is not an

employee of the insured business. The familial relationship is more likely to make the injured worker reluctant to seek workers' compensation benefits (since his or her relative would be "responsible for reimbursing the fund dollar for dollar for the costs of the claim (*Sharp*, 2008-Ohio-4990, ¶ 19)), thus depriving the worker of important statutory protections.

Further, when a familial relationship or other irrelevant criterion for determining employee status results in the non-enforcement of an employee exclusion, the freedom to contract is compromised. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 281, 2003-Ohio-5849, ¶ 9. *Galatis* held that an interpretation of *ambiguous* policy language that expanded commercial auto policy coverages to employees not acting in the scope of their employment, could not be reconciled with the business risk insured against or the intent of the parties to the insurance contract. *Id.*, ¶¶ 37, 39. Here, an interpretation of plain and *un*ambiguous policy language[1] that expands business liability coverages to injuries sustained by employees in the scope of employment, cannot be reconciled with the risk insured against or the intent of the contracting parties. And although the expansion here (unlike *Galatis*) benefits the policyholder, it does so at an untenable cost – businesses are "rewarded for failure to obey workers' compensation law." *Johnson v. Marciniak*, 231 F.Supp.2d 958, 960 (D.N.D. 2002).

[1] "Employee" is not ambiguous. *Gruman Bros. Farm, supra*, 73 Ohio St.3d at 108.

Third, the factors utilized by the Fifth District in this case fall well outside the mainstream of statutory and common law definitions of "employee" in Ohio and elsewhere. *See, e.g., Guman Bros. Farm, supra,* 73 Ohio St.3d at 109 (applying the definition of "employee" in Black's Law Dictionary to an employee exclusion); *American Family Mut. Ins. Co. v. Tickle, supra,* 99 S.W.3d at 29 (looking to Missouri workers' compensation statute to determine applicability of employee exclusion); *Betts v. Ann Arbor Pub. Sch.,* 271 N.W.2d 498 (Mich. 1978) (four-month student teacher position fell within employee exclusion where school accepted beneficial services for which compensation would normally be paid or anticipated); *Judd v. Sanatorium Comm'n of Hennepin Cty.,* 35 N.W.2d 43 (Minn. 1948) (student dietician obtaining practical experience was employee where institution controlled the manner and means of work and student received room, board, and laundry). In contrast to these uniform authorities, the Fifth District's irrelevant, subjective and motive-based criteria for applying an employee exclusion, "muddie[s] the waters of insurance coverage litigation" (*Galatis,* ¶ 50), and will inevitably lead to the same kind of patchwork exceptions and limitations that plagued commercial auto policies prior to this Court's decision in *Galatis.*

II. STATEMENT OF THE CASE AND FACTS

This appeal is from a judicial declaration of coverages under a CGL policy issued by Grange Mutual Insurance Company ("Grange") to Patrick J. Laughlin and Laughlin Custom Building and Cabinet Making ("Laughlin Custom"). The policy contained a business owners coverage form, which insured against losses and liability incurred by the business. Exclusions included:

> (d) **Workers' Compensation and Similar Laws**
>
> Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.
>
> (e) **Employer's Liability**
>
> "Bodily Injuries" to:
>
> (1) an "employee" of the insured arising out of and in the course of:
>
> (a) Employment by the insured; or
>
> (b) performing duties related to the conduct of the insured's business * * *.

The policy defines "employee" as follows:

> "Employee" includes a "leased worker." "Employee" does not include a "temporary worker."

"Leased worker" is defined as:

> * * * a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker."

"Temporary worker" is defined as:

> * * * a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

Finally, the policy also defines "volunteer worker":

> * * * a person who is not "employee," and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not a paid fee, salary or other compensation by you or anyone else for their work performed for you.

This declaratory judgment action was filed when Patrick Laughlin and Laughlin Custom sought a defense and indemnity from Grange, after being sued by the estate of Patrick's nephew (Billy Laughlin). Patrick's 19-year-old nephew died after being overcome by fumes while he and his uncle were spraying lacquer on doors at the paint shop for Laughlin Custom. Grange asserted that the policy's employee exclusion relieved it of any duty to defend or indemnify Patrick and Laughlin Custom.

The trial court denied the parties' cross-motions for summary judgment and, following a bench trial, concluded that Billy was, "at best," an independent contractor. *See* App. Op. (Appendix ("Appx."), at 1, ¶ 19. The Fifth District affirmed, concluding that the trial court correctly found no employment relationship, and "[w]hether Billy was a volunteer or at best an independent contractor was not germane to the issue sub judice." *Id.*, ¶ 31.

The evidence presented in the summary judgment briefing and at trial established the following stipulated and/or undisputed "what" factors :

- In January, 2010, Billy Laughlin accepted an offer to come live with his aunt and uncle and "learn a trade" by working in his uncle's custom building and cabinet making business;

- Other than some experience as a painter, Billy had no particular training or skills in the custom building and woodworking business;

- Patrick had the right to discharge Billy at any time;

- Patrick supervised and directed the material details of Billy's work;

- Patrick provided all of the tools and equipment Billy needed to perform his tasks;

- Billy was performing tasks in the scope of that work and at shop premises at the time of his death;

- Over the eight weeks leading up to the fatal accident, in addition to room, board, and transportation, Billy received $750 in cash from Laughlin Custom;[2]

But in finding that Billy was not "an employee," the courts below relied on "why" factors; i.e.:

- Patrick did not have enough business to justify hiring a full-time worker;

- Because he could not pay Billy full-time wages, Patrick did not dictate when or how many hours Billy worked;

- The purpose of the arrangement was to help Billy learn a trade during a troubled time of his life; and

---

[2] Trial Exh. 3 was a business record, on the letterhead of Laughlin Custom, showing $750 in cash paid to William Laughlin for January through March, 2010 at the "workshop" location. Patrick's wife testified that $150 of the $750 was paid to an accountant to do Patrick's 2009 taxes.

- Patrick and his wife undertook the arrangement because "we loved him."

The Court of Appeals discounted the $750 cash payment because Patrick's wife "described the money as 'pocket money' not compensation" and because "[s]ome of the money [$150] included a payment to get Billy's taxes done" (*id.*, ¶ 26); relied on testimony that "Patrick did not require [Billy] to work any set days or hours" as probative of the absence of an employment relationship (because Patrick testified, "'if you can't afford to pay someone X amount of dollars, you can't expect X amount of work'") (*id.*, ¶ 28); and concluded that "[a]ccepting [Grange's] position with blinders on would place every family relationship i.e., grandparent/ grandchild, under the harsh light of employment status when in fact it is a gift generated by love to help those who need it or a 'bribe' to get a child to do chores or accept responsibility" (*id.* at ¶ 29). In sum:

> By assessing the circumstances as a whole and in particular, the obvious lack of control over Billy's comings and goings, we cannot say that the trial court erred as a matter of law in finding no employment relationship. Whether Billy was a volunteer or at best an independent contractor was not germane to the issue sub judice.

(*Id.* at ¶ 31.)

III. ARGUMENT

Proposition of Law No. 1

> **The purpose of business liability insurance is to cover the insured's liability to the public for the negligence of its employees under the doctrine of respondeat superior; it is not designed to cover an employer's liability for injures to employees.**

Proposition of Law No. 2

> **The "employee exclusion" provision in business liability coverages applies as a matter of law when it is undisputed that liability for a person's bodily injury or death arises out of the individual's performance of normal, routine, and necessary duties of the insured business; the insured had the power and right to control and direct the material details of how those duties were to be performed; and the individual was compensated for the performance of those duties.**

Whether the "employee exclusion" in a business liability policy applies to a particular claim presents a question of law. *See Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995) (interpretation of "employee" for purposes of construing employee exclusion is a question of law subject to de novo review). When the policy does not define "employee," the court will look to dictionary definitions and the common understanding of same. *Id.* at 109 (applying Black's Law Dictionary definition of "employee": "'A person in the service of another * * *, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed. * * * One who works for an employer; a person working for salary or wages'").

Billy Laughlin was an employee under the plain and ordinary meaning of the term. *See Guman Bros. Farm, supra* (tasks of student injured while working on a farm as part of a school work program were directed by farmer; student was therefore an "employee" subject to the employee exclusion in the farm's liability policy). Billy was neither a leased worker, temporary worker, nor volunteer as defined by the Grange policy. He was not an independent contractor – he brought no particular skills to Laughlin's business; was furnished all of his tools and equipment; and the details of his work were under the control and direction of his uncle. *See, e.g., Bostic v. Connor,* 37 Ohio St.3d 144 (1988); *Gillum v. Industrial Commission,* 141 Ohio St. 373 (1943). The parties stipulated that Billy was performing tasks in the course of employment or related to the conduct of Patrick's business at the time of his death, and it was undisputed that he was paid for those services in an amount and as the business could afford to do so.

Neither the familial relationship, nor Patrick's desire to help his nephew learn a trade, nor the fact that Patrick was unable to pay Billy more than $750 for an eight-week period (enabling Billy to dictate his own hours), affects Billy's status as an employee. Laughlin Custom engaged the services of Billy Laughlin and was obligated to provide workers' compensation for him. Neither Patrick nor his business paid a premium to Grange for workers' compensation coverages and neither is entitled to such coverages under the plain and unambiguous language of the CGL policy.

Workers' compensation statutes may also provide guidance in the construction of employee exclusions. *See, e.g., Brown v. Indiana Ins. Co.*, 184 S.W.3d 528, 537 (Ky. 2005), quoting *State Farm Mut. Auto Ins. Co. v. Roe*, 573 N.W.2d 628, 632 (Mich. App. 1997) ("The purpose of such policy exclusions and exceptions can be ascertained by reference to corresponding provisions of the Workers' Compensation Act, because 'it [is] apparent that the exclusion was crafted in consideration of workers' compensation law'"). An examination of the definition of "employee" under Ohio's Workers' Compensation Act further demonstrates Billy's employee status at the time of his death.

R.C. 4123.01(A)(1)(b) provides that every person acting in the service of another, including casual workers who earn "one hundred sixty dollars or more in cash in any calendar quarter from a single employer," meets the definition of "employee" under the statute. (App. Op., ¶ 25.) That definition alone is determinative, since it is undisputed that Billy made far more than $160 in only eight weeks. In addition, R.C. 4123.01(A)(1)(c) defines "employee" as every person "who performs labor or provides services pursuant to a construction contract, as defined in section 4123.79 of the Revised Code," when 10 of 20 enumerated factors are satisfied. (App. Op., ¶ 20.) The statute is not directly applicable here, since Billy was not performing services under a construction contract as defined in R.C. 4123.79. But courts have recognized that the statute "appears to be an attempt to codify the various factual matters courts have considered when deciding if an

employee relationship * * * exists." *Slauter v. Klink*, 2d Dist. No. 1850 (Aug. 18, 2000), 2000 WL 1162041, at *4.

Billy's services easily meet 10 of the 20 enumerated factors – he was required to comply with instructions from Patrick regarding the manner or method of performing services; he was hired, supervised, or paid by Laughlin Custom; he was required to perform the work on the premises of Laughlin Custom; his expenses were paid for by Patrick; his tools and materials were furnished by Patrick; he was provided with the facilities used to perform services; he did not realize a profit or suffer a loss as a result of the services provided; he was not performing services for a number of employers at the same time; Patrick had a right to discharge Billy; and Patrick had the right to end the relationship without incurring liability pursuant to an employment contract or agreement. *See* R.C. 4123.79(A)(1)(c)(i), (v), (viii), (ix), (xiii), (xiv), (xv), (xvi), (xix), (xx).[3]

When, as here, the undisputed facts establish an employment relationship under either the plain and common understanding of "employee" or the definitions of employee under Ohio's Workers' Compensation Act, the coverage question is a question of law. The trial and appellate courts erred by failing to enter a declaratory

[3] The arrangement also satisfied subsections (iii) (Billy's services were integrated into the regular functioning of Laughlin Custom); (iv) (Billy was required to perform the services personally); (vi) (a continuing relationship existed that contemplated continuing or recurring work even though the work was not full time); (x) (Billy was required to follow the order of work set by Patrick); and (xi) (Billy was required to make oral or written reports of progress to Patrick).

judgment finding no coverages for the wrongful death claim asserted against Patrick Laughlin and Laughlin Custom Building and Cabinet Making.

IV. CONCLUSION

For all of the reasons set forth above, Grange Mutual Insurance Company respectfully requests that this Court accept jurisdiction, reverse the decisions below, and remand with instructions for the entry of a declaratory judgment in its favor.

Respectfully submitted,

James E. Featherstone (0066520)
610 South Front Street
Columbus, Ohio 43215
Tel: (614) 449-5982
Fax: (614) 449-5980
featherstonej@grangeinsurance.com

Irene C. Keyse-Walker (0013143)
(COUNSEL OF RECORD)
Benjamin C. Sassé (0072856)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
Tel: (216) 696-3982
Fax: (216) 592-5009
ikeyse-walker@tuckerellis.com
benjamin.sasse@tuckerellis.com

Attorneys for Appellant Grange Mutual Insurance Company

PROOF OF SERVICE

A copy of the foregoing was served on November 21, 2013 pursuant to S.Ct.Prac.R. 3.11(B) by mailing it by United States mail to:

Sean Harris
KITRICK, LEWIS & HARRIS CO., LPA
445 Hutchinson Avenue, Suite 100
Columbus, OH 43235

Attorney for Appellee Louis Borowicz, Administrator of the Estate of William Laughlin, Deceased

Gus Shihab
SHIHAB & ASSOCIATES
65 E. State Street, Suite 1550
Columbus, OH 43215

Attorney for Appellees Deborah and Patrick Laughlin

Glenn A. White
MORROW GORDON & BYRD, LTD.
33 West Main St.
P.O. Box 4190
Newark, OH 43058

Attorney for Appellees Laughlin Custom Building & Cabinet Making and Patrick Laughlin

Elaine C. Keyse-Walker

One of the Attorneys for Appellant Grange Mutual Insurance Company

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APPENDIX

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED

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GARY R. WALTERS

GRANGE MUTUAL CASUALTY COMPANY

Plaintiff-Appellant

-vs-

PATRICK LAUGHLIN, ET AL.

Defendants-Appellees

JUDGMENT ENTRY

CASE NO. 12-CA-0089

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is affirmed. Costs to appellant.

Hon. Sheila G. Farmer

Hon. William B. Hoffman

Hon. Patricia A. Delaney

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COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GRANGE MUTUAL CASUALTY COMPANY Plaintiff-Appellant -vs- PATRICK LAUGHLIN, ET AL. Defendants-Appellees	:	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 12-CA-0089 OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 11 CV 01490

JUDGMENT: Affirmed

DATE OF JUDGMENT:

APPEARANCES:

For Plaintiff-Appellant

JAMES E. FEATHERSTONE
610 South Front Street
Columbus, OH 43215

For Defendants-Appellees

SEAN HARRIS
445 Hutchinson Avenue, Suite 100
Columbus, OH 43235

GUS M. SHIHAB
65 East State Street, Suite 1550
Columbus, OH 43215

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Farmer, J.

{¶1} Appellee, Patrick Laughlin, owned a business building wood furniture and cabinets. On March 19, 2010, appellee's nineteen year old nephew, William "Billy" Laughlin, was working with appellee, spraying a lacquer spray material on doors. The two were overcome by the fumes of the lacquer spray. Patrick survived and Billy passed away.

{¶2} On February 7, 2011, Billy's estate, appellee herein, filed a wrongful death action and negligence claims against appellee Patrick and his business, claiming Billy was an independent contractor as opposed to an employee. At the time of the incident, appellee Patrick was insured under three policies of insurance, a fire policy, a homeowner's policy, and a business owner's policy, issue by appellant, Grange Mutual Casualty Company.

{¶3} On November 7, 2011, appellant filed a complaint for declaratory judgment, asking the trial court to interpret and construe the insurance contracts. Appellees filed motions for summary judgment, asking the trial court to declare that Billy was an independent contractor. By judgment entry filed August 29, 2012, the trial court declared there was no coverage under the fire and homeowner's policies, but there were genuine issues regarding coverage under the business owner's policy.

{¶4} A trial on the remaining issue of coverage commenced on September 17, 2012. By judgment entry filed September 26, 2012, the trial court determined Billy was not an employee at the time of his death, and appellant's business owner's policy provided liability coverage to satisfy any potential verdict obtained in the wrongful death action. Findings of fact and conclusions of law were filed on November 1, 2012.

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{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FAILED TO GRANT DECLARATORY JUDGMENT IN FAVOR OF GRANGE MUTUAL CASUALTY COMPANY AND AGAINST ITS INSURED, PATRICK LAUGHLIN, ON CROSS-MOTIONS ASSERTING 'NO GENUINE DISPUTE AS TO ANY MATERIAL FACT.'"

II

{¶7} "AFTER A BENCH TRIAL, THE TRIAL COURT ERRED AS A MATTER OF LAW RENDERING ITS CONCLUSIONS OF LAW."

III

{¶8} "THE TRIAL COURT'S FINDINGS OF FACT (NUMBERED 1-15) RECITE FOR THE MOST PART FINDINGS THAT ARE NOT RELEVANT TO AN ANALYSIS OF THE EMPLOYER VS. INDEPENDENT CONTRACTOR QUESTION UNDER *BOSTIC V. CONNER* OR UNDER THE CRITERIA AT R.C. 4123(A)(1)(c)(i-xx)."

I

{¶9} Appellant claims the trial court erred in denying its motion for declaratory judgment as there were no disputed questions of fact. Given the fact pattern in this case, we disagree.

{¶10} Appellant argues pursuant to *Bostic v. Connor*, 37 Ohio St.3d 144 (1988), when issues of fact are not in dispute, it is the duty of the trial court to rule on the existence of an employee relationship as a matter of law.

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{¶11} In its judgment entry filed August 29, 2012, the trial court found genuine issues of material fact existed to warrant a trial on coverage under the business owner's policy. In its reply in support for declaratory judgment filed July 10, 2012, appellant relied on the factors set forth in R.C. 4123.01(A)(1)(c), the definition of "employee" under the workers' compensation statutes. Appellant claimed fifteen or sixteen factors out of twenty weighed in favor of Billy having been an employee.

{¶12} As the Supreme Court of Ohio held in *Bostic* at 145-146, "Whether someone is an employee or an independent contractor is ordinarily an issue to be decided by the trier of fact. The key factual determination is who had the right to control the manner or means of doing the work." The *Bostic* court at 146 went on to state, "The determination of who has the right to control must be made by examining the individual facts of each case."

{¶13} Per *Bostic*, we find appellees advanced sufficient evidence to rebut the presumptions argued by appellant. The deposition of appellee Patrick raised genuine issues regarding Billy's work: appellee Patrick and his wife gave aid and assistance to their nephew Billy because they wanted to help him get started in a business, and Billy controlled when, where, and what he wanted to do for his uncle.

{¶14} Upon review, we find the trial court did not err in denying appellant's motion for declaratory judgment.

{¶15} Assignment of Error I is denied.

II, III

{¶16} Appellant claims the trial court erred in finding that Billy was not an employee as it met the statutory test of R.C. 4123.01, and the trial court's findings of facts were not relevant to the decision. We disagree.

{¶17} On review for manifest weight, the standard in a civil case is identical to the standard in a criminal case: a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury [or finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52; *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179.

{¶18} On September 17, 2012, the parties filed a stipulation regarding trial on the issue of insurance coverage. The stipulation narrowed the issue "for determination by the finder of fact whether, at the time of his death, William Laughlin, is considered an 'employee' of Patrick Laughlin as defined under the insurance policy and Ohio law."

{¶19} In its Conclusions of Law Nos. 3 and 4 filed November 1, 2012, the trial court answered the sole issue in the negative:

> 3. Weighing all the factors, Patrick Laughlin did not have the right to control Billy Laughlin at Patrick's business. Billy Laughlin was, therefore, not an employee of Patrick Laughlin. At best, Billy was an independent contractor.

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4. However, under either the common law right to control test or the statutory test, Billy Laughlin was not an employee of Patrick Laughlin.

{¶20} In support of its position that Billy was an employee, appellant relies on the definition of "employee" under the workers' compensation statutes, R.C. 4123.01(A)(1)(c), to substantiate its position:

> As used in this chapter:
>
> (A)(1) "Employee" means:
>
> (c) Every person who performs labor or provides services pursuant to a construction contract, as defined in section 4123.79 of the Revised Code, if at least ten of the following criteria apply:
>
> (i) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services;
>
> (ii) The person is required by the other contracting party to have particular training;
>
> (iii) The person's services are integrated into the regular functioning of the other contracting party;
>
> (iv) The person is required to perform the work personally;
>
> (v) The person is hired, supervised, or paid by the other contracting party;

(vi) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time;

(vii) The person's hours of work are established by the other contracting party;

(viii) The person is required to devote full time to the business of the other contracting party;

(ix) The person is required to perform the work on the premises of the other contracting party;

(x) The person is required to follow the order of work set by the other contracting party;

(xi) The person is required to make oral or written reports of progress to the other contracting party;

(xii) The person is paid for services on a regular basis such as hourly, weekly, or monthly;

(xiii) The person's expenses are paid for by the other contracting party;

(xiv) The person's tools and materials are furnished by the other contracting party;

(xv) The person is provided with the facilities used to perform services;

(xvi) The person does not realize a profit or suffer a loss as a result of the services provided;

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(xvii) The person is not performing services for a number of employers at the same time;

(xviii) The person does not make the same services available to the general public;

(xix) The other contracting party has a right to discharge the person;

(xx) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

{¶21} It is conceded by appellant that R.C. 4123.01 is but a template for consideration in determining the issue of employment status. See, Appellant's Brief at 15; November 1, 2012 Conclusions of Law No. 2. We concur because R.C. Chapter 4123 sets forth Ohio's statutory scheme for workers' compensation; therefore, R.C. 4123.01 defines an "employee" for purposes of workers' compensation.

{¶22} As cited above, the *Bostic* court at 146 quoted the following from *Gillum v. Industrial Commission*, 141 Ohio St. 373, paragraph two of the syllabus (1943):

"Whether one is an independent contractor or in service depends on the facts of each case. The principal test applied to determine the character of the arrangement is that if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant, while if the manner or means of doing the work or

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job is left to one who is responsible to the employer only for the result, an independent contractor relationship is thereby created."

{¶23} The *Bostic* court at 146 went on to explain:

> The factors to be considered include, but are certainly not limited to, such indicia as who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools and personnel used; who selects the routes travelled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts.

{¶24} Despite appellant's consistent reliance on the workers' compensation statute, appellant argues the trial court's Findings of Fact Nos. 1-15 were irrelevant to the subject issue. We find the trial court's findings mirror the evidence presented at trial, and are substantiated in the record.

{¶25} The trial consisted of the testimony of Billy's father (Frank Laughlin), uncle (appellee Patrick), and aunt (appellee Patrick's wife, Deborah Laughlin). The thrust of appellant's position is that the facts of the case undisputedly lead to a conclusion contra to the trial court's decision, that Billy was an employee. Appellant argues that because appellee Patrick paid Billy more than $160.00 in a calendar quarter, he was in fact an employee under R.C. 4123.01(A)(1)(b) which states the following:

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> b. Every person in the service of any person, firm, or private corporation, including any public service corporation, that (i) employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single household and casual workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single employer, or (ii) is bound by any such contract of hire or by any other written contract, to pay into the state insurance fund the premiums provided by this chapter.

{¶26} Deborah Laughlin described the money as "pocket money" not compensation. T. at 70. Some of the money included a payment to get Billy's taxes done. T. at 34.

{¶27} Although appellant correctly cites the workers' compensation law of Ohio, this argument completely disregards the nature of the agreement between Billy and appellee Patrick. The nature of the family's relationship, the very specific reason for taking in Billy, was best stated by appellee Patrick: "Well, he was my nephew, and I loved him, and I was trying to help him out. He had been in some trouble, so." T. at 53. Appellee Patrick described the issue of payment as follows (T. at 60):

Q. At that time that we're talking about, when you and Billy worked together, did the needs of your business require that you have additional work?

A. No.

Q. So you didn't bring Billy on to help you get more work done?

A. No.

Q. You brought him on to teach him a trade?

A. Yes.

Q. For his benefit?

A. Yes.

Q. In fact, if you were going to hire somebody, either as an employee or an independent contractor, it would have been somebody who had some experience already?

A. Yes.

{¶28} Appellee Patrick did not require Billy to work any set days or hours. T. at 45, 58. If Billy felt like working, he could work. T. at 45, 58-59. Appellee Patrick explained, "I expected him to apply himself and try to learn and work what he could, but if you can't afford to pay someone X amount of dollars, you can't expect X amount of work." T. at 46.

{¶29} It would be error to disregard this relationship. Accepting appellant's position with blinders on would place every family relationship i.e., grandparent/grandchild, under the harsh light of employment status when in fact it is a

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gift generated by love to help those who need it or a "bribe" to get a child to do chores or accept responsibility.

{¶30} The "quid pro quo" of the arrangement was also described by Deborah. She explained, "[w]e loved him," and because Billy was having problems, she and her husband decided to help him so he could survive in the world. T. at 65, 66. This help was pre-conditioned upon Billy accompanying Deborah to Bible study class every Thursday night. T. at 66. Billy could work when he wanted and "was to come and go as he wanted to go, and in the meantime, Patrick would teach him his skills." T. at 67.

{¶31} By assessing the circumstances as a whole and in particular, the obvious lack of control over Billy's comings and goings, we cannot say that the trial court erred as a matter of law in finding no employment relationship. Whether Billy was a volunteer or at best an independent contractor was not germane to the issue sub judice.

{¶32} Assignments of Error II and III are denied.

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{¶33} The judgment of the Court of Common pleas of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

Hon. Sheila G. Farmer

Hon. William B. Hoffman

Hon. Patricia A. Delaney

SGF/sg 918

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