[Cite as *Kline v. Federal Ins. Co.*, 2004-Ohio-6704.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

DENNIS LEE KLINE, FATHER AND NATURAL GUARDIAN OF BRIAN KLINE, A MINOR, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2003-A-0054**
- vs -	:	
FEDERAL INSURANCE COMPANY, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2001 CV 594.

Judgment: Affirmed.

William E. Riedel, 134 West 46th Street, P.O. Box 2300, Ashtabula, OH 44004-2300 (For Plaintiffs-Appellants).

Jay Clinton Rice and *Julie L. Juergens*, Seventh Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115-2108 (For Defendants-Appellees).

JUDITH A. CHRISTLEY, J.

{¶1} Appellants, Dennis Lee Kline, as father and natural guardian of Brian Kline ("Brian"), a minor; Dennis Kline, individually ("Dennis"); and Jannette Kline, appeal from a judgment of the Ashtabula County Court of Common Pleas, denying their motion for partial summary judgment and granting summary judgment in favor of appellees,

Federal Insurance Company ("Federal") and American Alternative Insurance Corporation ("American"). For the reasons set forth below, we affirm the judgment of the trial court.

{¶2} This matter arises from injuries sustained by Brian after he was struck by a hit and run motorist on July 24, 2000, while he was walking along Myers Road in Geneva, Ohio. Brian was returning home from a friend's house at approximately 9:00 p.m. when he was struck, and Brian's leg was amputated as a result of the accident.

{¶3} At the time of the accident, appellants were insured for personal automobile liability by Grange Mutual Casualty Company ("Grange"), with limits of underinsured/uninsured motorist coverage ("UM/UIM") in the amount of $50,000. As a result of the accident, appellants asserted a UM claim with Grange. On or about February 21, 2001, Grange paid the policy limits of $50,000 to appellants.

{¶4} Lincoln Electric Holdings, Inc. ("Lincoln Electric") employed Dennis at the time of the accident. Dennis did not have use of any vehicle owned or used by Lincoln Electric. At the time of the accident, Lincoln Electric was insured by Federal through a commercial automobile policy, number (99) 7323-85-30, and by American through a commercial umbrella policy, number 01A2UM000013900.

{¶5} The commercial automobile policy issued by Federal provided for UM/UIM coverage with a limit of $1 million. The policy listed Lincoln Electric as the named insured, and the declarations page indicated that the policy provided UM/UIM coverage for "covered autos." The policy also contained a corresponding "Ohio Uninsured Motorists Coverage-Bodily Injury" endorsement which further provided that UM/UIM

coverage was available only for covered autos. The Business Auto Coverage Form defined "covered autos" as "[o]nly those 'autos' you own ***."

{¶6} The commercial umbrella policy issued by American to Lincoln Electric provided for UM/UIM coverage in excess of any underlying insurance. The policy also stated that this coverage was not applicable if the underlying insurance did not apply. The policy contained the following pertinent language:

{¶7} "EXCLUSIONS

{¶8} "The exclusions applicable to the Underlying Insurance also apply to this insurance. Additionally, the following exclusions apply ***:

{¶9} "***

{¶10} "B. COVERAGE ONLY

{¶11} "This policy will NOT apply if there is no applicable Underlying Insurance."

{¶12} Appellants filed a complaint against Federal and Lincoln Electric on August 13, 2001, in connection with the business auto policy issued by Federal to Lincoln Electric. Appellants requested a declaratory judgment to establish UM coverage for Brian under the policy. The complaint demanded, inter alia, the limits of the UM coverage. Federal filed a timely answer.

{¶13} Appellants amended their complaint on October 17, 2001, adding American as a defendant. Appellants realleged their claims against Federal and also requested a declaratory judgment to establish UM motorist coverage for Brian under the umbrella policy issued by American. The complaint demanded, inter alia, the limits of the UM coverage. Federal and American both timely answered.

{¶14} Federal, individually and on behalf of Lincoln Electric, moved for summary judgment on August 23, 2002. On August 26, 2002, American moved for summary judgment, and appellants moved for partial summary judgment. Various replies were filed.

{¶15} The trial court issued a March 28, 2003 judgment entry, denying appellants' motion and granting summary judgment to appellees. The court first found that Dennis was an insured under the Federal policy, pursuant to *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292. The court then considered whether Dennis and Brian were entitled to coverage under the terms of the policy. The court construed the policy language as providing coverage to Dennis only for an auto he owned. The trial court concluded, "[i]n the present case, the auto involved in the occurrence was not owned by [Dennis], an employee of Lincoln Electric, rather the auto was owned by another person, which hit a pedestrian." Thus, the court held that there was no coverage for Brian under the Federal policy.

{¶16} The court then addressed the underlying policy through Federal. The court concluded that "there is no UM/UIM coverage available to the Plaintiffs under the Federal underlying policy, and therefore, there exists no coverage available to Plaintiffs under the American commercial umbrella policy, which would provide excess coverage over any underlying coverage in the Federal policy, and would apply only if Federal coverage applied." Accordingly, the trial court denied appellants' motion for partial summary judgment and granted summary judgment in favor of Lincoln Electric and appellees.

{¶17} From this judgment, appellants appeal and set forth the following assignment of error:

{¶18} "[1.] The trial court erred to the Kline's prejudice in denying the Kline's motion for partial summary judgment and granting the motion for summary judgment of [Federal] and [American]."[1]

{¶19} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. Pursuant to Civ.R. 56, summary judgment is appropriate when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can reach only one conclusion, which is adverse to the party against whom the motion is made, such party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389; *Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 268, 1993-Ohio-12; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146.

{¶20} Material facts are those facts that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner*, 67 Ohio St.3d 337, 340, 1993-Ohio-176, citing *Anderson v. Liberty Lobby, Inc*. (1986), 477 U.S. 242, 248. To determine what constitutes a genuine issue, the court must decide whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. *Turner* at 340.

{¶21} A party seeking summary judgment on the grounds that the nonmoving party cannot prove its case bears the initial burden of informing the trial court of the

1. After the appellate briefs were filed in this matter, appellees each supplemented their briefs with new authority.

basis for the motion and of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107. Accordingly, the moving party must specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claim. Id. If the moving party satisfies its initial burden under Civ.R. 56(C), the nonmoving party has the reciprocal burden to respond, by affidavit or as otherwise provided in the rule, so as to demonstrate that there is a genuine issue of fact. Id. However, if the nonmoving party fails to do so, then the trial court may enter summary judgment against that party. Id.

{¶22} Turning to the instant matter, appellants argue that Brian was entitled to coverage under the policies issued by appellees to Lincoln Electric, and, thus, the trial court erred by granting summary judgment to appellees. Specifically, appellants put forth three arguments, to wit: (1) the trial court's ruling that the auto driven by a hit-and-run motorist who strikes an insured pedestrian must be a "covered auto" is not supported by the facts, the terms and conditions of the Federal policy, or the law of Ohio; (2) Federal's covered auto argument has no applicability to the facts of this case; and (3) if the Klines are entitled to UM/UIM coverage under the Federal policy, then they are also entitled to UM/UIM coverage under the American policy.

{¶23} After the parties filed their appellate briefs, the Supreme Court of Ohio issued its decision in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.2d 216, 2003-Ohio-5849. This court had stayed the proceedings in this matter on September 15, 2003, pending a

decision in *Galatis*. A decision was issued in *Galatis* on December 24, 2003. On April 5, 2004, this court dissolved the stay and ordered this matter to proceed.

{¶24} *Galatis* dramatically departed from the decision in *Scott-Pontzer.* Appellants brought their claims for coverage pursuant to *Scott-Pontzer.* However, we must apply current law and examine this matter under the logic of *Galatis*, and appellants' arguments are not well-taken under current law.

{¶25} In *Galatis*, the Court stated, "[t]he general intent of a motor vehicle insurance policy issued to a corporation is to insure the corporation as a legal entity against liability arising from the use of motor vehicles." Id. at ¶20, citing *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 211. "It is settled law in Ohio that a motor vehicle operated by an employee of a corporation in the course and scope of employment is operated by and for the corporation and that an employee, under such circumstances, might reasonably be entitled to uninsured motorist coverage under a motor vehicle insurance policy issued to his employer." *Galatis* at ¶20, citing *King* at 213. Further, "*** an employee's activities outside the scope of employment are not of any direct consequence to the employer as a legal entity. An employer does not risk legal or financial liability from an employee's operation of a non-business-owned motor vehicle outside the scope of employment. Consequently, uninsured motorist coverage for an employee outside the scope of employment is extraneous to the general intent of a commercial auto policy." *Galatis* at ¶20.

{¶26} The Court then construed the policy's ambiguity in favor of the policy holder, the employer. In doing so, the Court noted that "[t]he purpose of a commercial auto policy is to protect the policy holder." Id. at ¶37, citing *King*. The Court determined

that "[p]roviding uninsured motorist coverage to employees who are not at work or, for that matter, to every employee's family members is detrimental to the policy holder's interests." *Galatis* at ¶37, citing *Cook v. Kozell* (1964), 176 Ohio St. 332, 336.

{¶27} The Court determined that "*Scott-Pontzer* ignored the intent of the parties to the contract. Absent contractual language to the contrary, it is doubtful that either an insurer or a corporate policy holder ever conceived of contracting for coverage for off-duty employees occupying noncovered autos, let alone the family members of the employees." Id. at ¶39.

{¶28} Accordingly, *Galatis* overruled *Scott-Pontzer*. Pursuant to *Galatis*, absent contractual language otherwise, UM/UIM coverage extends only to an employee in the scope of employment and never to employees outside the scope of employment or to family members of employees. Id. at syllabus.

{¶29} In the matter sub judice, the parties do not dispute that Dennis was not acting within the scope of employment at the time of the accident. As such, Brian was not covered at the time of the accident. See, e.g., *Galatis.* Even if Dennis was in the scope of employment at that time and thus covered, Brian would only be entitled to coverage under a *Scott-Pontzer* theory of liability. However, current law under *Galatis* precludes any coverage extending to Brian. Brian was not an insured at the time of the accident, and the trial court correctly determined that Brian was not entitled to any coverage through the policies issued by appellees to Lincoln Electric.

{¶30} The supplemental authority filed by appellees supports this conclusion. See, e.g., *Piciorea v. Genesis Ins. Co.,* 8th Dist. No. 82097, 2003-Ohio-3955, at ¶13-14; *Edmonson v. Premier Indus. Corp.*, 8th Dist. No. 81132, 2002-Ohio-5573, at ¶26.

{¶31} Accordingly, the trial court properly granted summary judgment to appellees. Appellants' assignment of error is without merit. We hereby affirm the judgment of the trial court.

WILLIAM M. O'NEILL, J.,

DIANE V. GRENDELL, J.

concur.