COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BILLY R. GRIFFITH, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT L. GRIFFITH, DECEASED, AND THE ESTATE OF RUTH E. GRIFFITH, DECEASED

Plaintiff-Appellee

vs.

BUCKEYE UNION INSURANCE COMPANY, ET AL.

Defendants-Appellants

: JUDGES:
: Hon. W. Scott Gwin, P.J.
: Hon. Sheila G. Farmer, J.
: Hon. Julie A. Edwards, J.
:
: Case No. 2001CA00410
:
: OPINION

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2001CV00027
JUDGMENT:	Affirmed in part and reversed in part
DATE OF JUDGMENT ENTRY:	July 14, 2003

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
JOHN S. KOURY Suite 717 Courtyard Centre 116 Cleveland Avenue, N.W. Canton, OH 44702	JOHN T. MURPHY MELINDA B. TRENTA Seventh Floor – Bulkley Building 1501 Euclid Avenue Cleveland, OH 44115

Farmer, J.

{¶1} On December 31, 1993, Ruth E. Griffith was operating her personal vehicle and her husband, Robert L. Griffith, was a passenger in the front seat. The Griffith vehicle was involved in an accident caused by the negligence of Veronica Goley who was operating her personal vehicle. The Griffiths were killed.

{¶2} At the time of the accident, their resident son, appellee, Billy R. Griffith, was employed by Fisher Foods, insured under a comprehensive business policy which included commercial automobile coverage, commercial general liability coverage and commercial catastrophic liability coverage issued by appellants, Buckeye Union Insurance Company and CNA Insurance Company.

{¶3} On January 25, 2001, appellee, individually and in his capacity as administrator of the estates of Robert L. Griffith and Ruth E. Griffith, deceased, filed a complaint against appellants for uninsured motorist benefits.[1]

{¶4} All parties filed motions for summary judgment. By judgment entry filed November 30, 2001, the trial court found appellee, individually and as administrator, was entitled to coverage under the commercial automobile coverage part and the commercial catastrophic liability coverage part, but not the commercial general liability coverage part. The trial court filed a nunc pro tunc judgment entry on December 20, 2001 to correct an error.

{¶5} Appellants filed an appeal. Upon remand by this court in light of *Ferrando v. Auto-Owners Mut. Ins. Co.,* 98 Ohio St.3d 186, 2002-Ohio-7217, the trial court found

---

[1]Ms. Goley was uninsured. Appellee settled with his insurance company and his parents' insurance company.

appellee gave timely notice, but breached the subrogation provision of the commercial automobile policy however, appellee "rebutted any presumption of prejudice due to said breach of the subrogation provision." See, Judgment Entry filed May 19, 2003.

{¶6} This matter is now before this court for consideration. Appellants assigned the following errors:

I

{¶7} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF-APPELLEES AS TO THE COVERAGE UNDER BUCKEYE UNION INSURANCE COMPANY'S COMMERCIAL AUTO COVERAGE PART AND AS TO BUCKEYE UNION INSURANCE COMPANY'S COMMERCIAL CATASTROPHIC LIABILITY COVERAGE PART."

II

{¶8} "THE TRIAL COURT ERRED IN DECLINING TO GRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES AS TO THE COVERAGE UNDER THE BUCKEYE UNION INSURANCE COMPANY COMMERCIAL AUTO COVERAGE PART AND AS TO THE BUCKEYE UNION INSURANCE COMPANY COMMERCIAL CATASTROPHIC LIABILITY COVERAGE PART."

{¶9} Appellee filed a cross-appeal in his individual capacity and assigned the following errors:

CROSS-ASSIGNMENT OF ERROR I

{¶10} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS/CROSS-APPELLEES AS TO UNINSURED MOTORIST COVERAGE UNDER BUCKEYE UNION'S COMMERCIAL GENERAL LIABILITY

COVERAGE AS IT RELATES TO CROSS-APPELLANT BILLY R. GRIFFITH, IN HIS INDIVIDUAL CAPACITY."

CROSS-ASSIGNMENT OF ERROR II

{¶11} "THE TRIAL COURT ERRED IN DECLINING TO GRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF/CROSS-APPELLANT BILLY R. GRIFFITH IN HIS INDIVIDUAL CAPACITY, AS IT RELATES TO UNINSURED MOTORIST COVERAGE UNDER BUCKEYE UNION'S COMMERCIAL GENERAL LIABILITY COVERAGE."

{¶12} Because the parties stipulated to the facts in the trial court on August 31, 2001, both the appeal and cross-appeal argue the trial court's judgment was inappropriate on the undisputed facts. All the assignments of error and cross-assignments of error challenge the trial court's granting of summary judgment to either appellants or appellee. For this reason, we will address all the assignments together.

I, II, CROSS-ASSIGNMENT OF ERROR I, CROSS-ASSIGNMENT OF ERROR II

{¶13} Appellants argue the trial court erred in finding coverage to appellee under the commercial automobile coverage part and the commercial catastrophic liability coverage part. Appellee argues the trial court erred in finding no coverage under the commercial general liability coverage part.

{¶14} Summary judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶15} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be

litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶16} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

COMMERCIAL AUTOMOBILE COVERAGE PART

{¶17} The commercial automobile coverage part under the comprehensive business policy issued to Fisher Foods contained express uninsured/underinsured motorist coverage. The trial court found said coverage provisions were ambiguous in defining an "insured" and therefore coverage existed by operation of law pursuant to *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.,* 85 Ohio St.3d 660, 1999-Ohio-292.

{¶18} The uninsured/underinsured motorist provisions define an "insured" as follows:

{¶19} "1. You.

{¶20} "2. If you are an individual, any 'family member.'

{¶21} "3. Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.'***

{¶22} "4. Anyone else for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured.'" See, Section B of the Ohio Uninsured Motorists Coverage, CA 21 33 04 91, attached to Stipulations filed August 31, 2001 as Exhibit 10.

{¶23} The policy states "the words 'you' and 'your' refer to the Named Insured shown in the Declarations." See, Business Auto Coverage Form, CA 00 01 12 90, attached to Stipulations filed August 31, 2001 as Exhibit 10. The named insured listed in the declarations page is "Fishers Food of Canton." See, Named Insured, attached to Stipulations filed August 31, 2001 as Exhibit 10. This definition of an "insured" is similar to the definition in *Scott-Pontzer*. However, the policy contains an endorsement titled "Drive Other Car Coverage - Broadened Coverage for Named Individuals" adding individuals as named insureds, namely "Herbert Fisher, Jack Fisher & Jeffrey Fisher." See, Endorsement No. CA 99 10 12 90, attached to Stipulations filed August 31, 2001 as Exhibit 10.

{¶24} Section C of the endorsement adds the following to "Who Is An Insured" under uninsured/underinsured motorists coverage:

{¶25} "Any individual named in the Schedule and his or her 'family members' are 'insured' while 'occupying' or while a pedestrian when being struck by any 'auto' you don't own except:

{¶26} "Any 'auto' owned by that individual or by any 'family member.'"

{¶27} According to this definition, underinsured motorists coverage is broadened to include the Griffiths except for when occupying any vehicle they own. It is undisputed

the “1995 Chevy Monte Carlo” involved in the accident “was owned by Ruth E. Griffith.” Stipulations filed August 31, 2001, at ¶5.

{¶28} Pursuant to Section C of the endorsement, we find appellee, individually and as administrator, is not entitled to coverage under the commercial automobile coverage part. See, *Miller v. Grange Mutual Casualty Company,* Stark App. No. 2002CA00058, 2002-Ohio-5763.

COMMERCIAL GENERAL LIABILITY COVERAGE PART

{¶29} In its judgment entry of November 30, 2001, the trial court found the commercial general liability coverage part was a motor vehicle policy, but found appellee, individually and as administrator, was not an “insured” under said coverage.

{¶30} Appellee, individually, argues he is an insured under the commercial general liability coverage part. We find this issue to be irrelevant because said coverage part is not a motor vehicle policy subject to R.C. 3937.18. See, *Szekeres v. State Farm Fire and Cas. Co.,* Licking App. No. 02CA00004, 2002-Ohio-5989, at ¶31-45; *Dalton v. The Travelers Insurance Co.* (December 23, 2002), Stark App. Nos. 2001CA00380, 2001CA00393, 2001CA00407 & 2001CA00409, at 9-11.

{¶31} Given the fact the commercial general liability coverage part is not a motor vehicle policy, we find appellee, individually and as administrator, is not entitled to coverage under the commercial general liability coverage part.

COMMERCIAL CATASTROPHIC LIABILITY COVERAGE PART

{¶32} At the outset, we note uninsured/underinsured motorist coverage arises under the commercial catastrophic liability coverage part by operation of law as there was no valid rejection of such.

{¶33} The definition of "Who Is An Insured" states as follows in pertinent part:

{¶34} "4. Except with respect to the ownership, maintenance, operation, use, 'loading or unloading', or entrustment to others of 'autos' or aircraft, if you are designated in the Declarations as:

{¶35} "***

{¶36} "c. An organization other than a partnership or joint venture, your executive officers, your directors, your stockholders and your employees are insureds while acting within the scope of their duties as such." See, Section II(4) of the Commercial Catastrophic Liability Coverage Form, attached to Stipulations filed August 31, 2001 as Exhibit 10.

{¶37} Based upon this definition, appellee, being an employee, is an insured "while acting within the scope of their duties as such." Does this restriction apply sub judice? We answer in the negative for the following reasons.

{¶38} In *Scott-Pontzer,* the Supreme Court of Ohio reviewed an umbrella/excess policy which included "scope of employment" language. The court found uninsured/underinsured motorist coverage by operation of law and disregarded any restrictions therein:

{¶39} "On the other hand, Liberty Mutual's umbrella/excess insurance policy did restrict coverage to employees acting within the scope of their employment. However, we have already found that Liberty Mutual had failed to offer underinsured motorist coverage through the umbrella policy issued to Superior Dairy. Thus, any language in the Liberty Mutual umbrella policy restricting insurance coverage was intended to apply solely to excess *liability* coverage and not for purposes of underinsured motorist

coverage. See, *e.g., Demetry v. Kim* (1991), 72 Ohio App.3d 692, 698, 595 N.E.2d 997, 1001. Therefore, there is no requirement in the umbrella policy that Pontzer had to be acting during the scope of his employment to qualify for underinsured motorist coverage. Therefore, appellant is entitled to underinsured motorist benefits under the Liberty Mutual umbrella policy as well." *Scott-Pontzer* at 666.

{¶40} The policy sub judice contains a very similar restriction. Clearly, the *Scott-Pontzer* court held such a restriction would not be read into an operation of law uninsured/underinsured motorist coverage scenario and found the restriction to be inapplicable.

{¶41} Using the Supreme Court of Ohio's reasoning in *Scott-Pontzer,* we find appellee, individually, is entitled to coverage under the commercial catastrophic liability coverage part issued by appellants, but only in excess of the commercial automobile coverage part limits of $1,000,000, based upon the following pertinent language in the coverage part:

{¶42} "1. Insuring Agreement.

{¶43} "a. We will pay 'net loss' in excess of the 'retained limit' that the insured becomes legally obligated to pay as damages because of 'injury' to which this insurance applies. But, the amount of 'net loss' we will pay for damages is limited as described in RETAINED LIMIT AND LIMITS OF INSURANCE (SECTION III).***" See, Section I, Coverage A(1)(a) of the Commercial Catastrophic Liability Coverage Form, attached to Stipulations filed August 31, 2001 as Exhibit 10.

{¶44} "Retained limit" is defined in the policy as follows:

{¶45} “When an ‘underlying insurance’ aggregate limit has been exhausted by the payment of ‘net loss’, the insurance afforded by this Coverage Part will drop down and apply in excess of that exhausted aggregate limit. Any ‘net loss’ payment we make in excess of an exhausted aggregate limit is included within, and is not in addition to, the Limits of Insurance for this Coverage Part.

{¶46} ”In any instance other than the above, our liability for ‘injury’ to which this insurance applies shall be only for the ‘net loss’ in excess of the applicable ‘retained limit’.” See, Section III(a) of the Commercial Catastrophic Liability Coverage Form, attached to Stipulations filed August 31, 2001 as Exhibit 10.

{¶47} We find coverage under the commercial catastrophic liability coverage part in excess of the commercial automobile coverage part limits to appellee in his individual capacity only. Appellee as administrator is not entitled to coverage under the commercial catastrophic liability coverage part as Robert and Ruth Griffith were not “employees” and do not meet any of the other definitions under “Who Is An Insured.”

{¶48} Assignments of Error I and II are granted in part. Cross-Assignments of Error I and II are denied.

{¶49} The judgment of the Court of Common Pleas of Stark County, Ohio, is hereby affirmed in part and reversed in part.

By Farmer, J. and

Gwin, P.J. concur.

Edwards, J. dissents.

_____

_____

_____

JUDGES

SGF/jp 0523

EDWARDS, J., CONCURRING IN PART AND DISSENTING IN PART

{¶50} At issue in this matter is whether any or all of the appellees are entitled to uninsured motorist coverage under the comprehensive business policy issued by appellant Buckeye Union to Fisher Foods. The comprehensive business policy is comprised of commercial auto coverage, commercial general liability coverage, and catastrophic liability coverage.

{¶51} The first issue for consideration is whether appellees are entitled to uninsured motorist coverage under the commercial auto coverage issued by appellant Buckeye Union Insurance Company to Fisher Foods. I dissent from the majority=s disposition with respect to the commercial auto coverage and would find that appellees are insureds under appellant Buckeye Union=s Commercial auto coverage for the following reasons.

{¶52} The commercial auto coverage part lists Fisher Foods, a corporation, as the named insured. The commercial auto coverage part contains an Ohio Uninsured Motorist Coverage endorsement, which contains express UM/UIM coverage. Pursuant to the Ohio Uninsured Motorist Coverage endorsement, appellant Buckeye Union agrees, A[w]e will pay all sums the >insured= is legally entitled to recover as compensatory damages from the owner or driver of an >uninsured motorist vehicle= because of >bodily injury= caused by an >accident.=@ The AWho is An Insured@ section of the endorsement reads as follows:

{¶53} 1. You.

{¶54} 2. If you are an individual, any Afamily member.@

{¶55} 3. Anyone else Aoccupying@ a covered Aauto@ or temporary substitute for

a covered Aauto@. The covered Aauto@ must be out of service because of its breakdown, repair, servicing, loss or destruction.

{¶56} 4. Anyone for damages he or she is entitled to recover because of Abodily injury@ sustained by another Ainsured.@

As noted by appellant Buckeye Union, A[t]his is identical to the language in the Ohio uninsured motorist coverage form that was present in *Scott-Pontzer*.@[2]

{¶57} The majority, in its opinion, finds that appellee, both individually and as administrator, is not entitled to coverage under the commercial auto coverage because of Section C of the ADrive Other Car [DOC] Coverage - Broadened Coverage for Named Individuals.@

{¶58} However, I would still find that the policy is ambiguous. By virtue of the word Ayou@, contained in the UM/UIM endorsement, Fisher Foods, and therefore its employees, remain as insureds under the same even after the addition of the DOC endorsement language. As we noted in *Moore v. Hartford Ins. Co.*, Delaware App. No. 02CAE-10-048, 2003-Ohio-2037:

{¶59} ATo the extent that all employees are covered in one section of the UM/UIM endorsement, but in another section of the UM/UIM coverage the employees are only covered in limited circumstances, the policy is ambiguous. Ambiguity must be construed against the drafter of the contract and in favor of coverage.

{¶60} AIn addition, it is axiomatic that by adding broadened coverage to the definition of AWho is an Insured@ for UIM purposes, the drive other car coverage-

---

[2] The complete case citation is *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St.3d, 660, 1999-Ohio-292, 710 N.E.2d 1116.

broadened coverage for named individuals endorsement cannot serve to reduce or restrict AWho is an Insured@ under the UIM endorsement in the policy itself.@ Id. at 4.

{¶61} I would find, therefore, that the rationale announced by the Ohio Supreme in *Scott-Pontzer* is applicable and that appellee Billy Griffith, as an employee of Fisher Foods, is an insured under the uninsured motorist endorsement of the commercial auto coverage. Since the definition of Ainsured@ in the uninsured motorist endorsement contains the Aif you are an individual, any family member@ language found in the *Scott-Pontzer* policy, I would further find that appellees, the Estates of Robert L. Griffith and Ruth E. Griffith, are insureds under appellant Buckeye Union=s commercial auto coverage=s uninsured motorist endorsement issued to Fisher Foods. See *Scott-Pontzer*, supra.[3]

{¶62} The next issue for consideration is whether appellees are entitled to uninsured motorist coverage under the Buckeye Union catastrophic liability coverage part. The catastrophic liability coverage policy part provides excess liability coverage over and above the underlying Buckeye Union auto coverage and commercial general liability coverage. Since, in the case sub judice, appellant Buckeye Union did not have a valid and enforceable offer and rejection of coverage, UM/UIM coverage under the catastrophic liability coverage part arises by operation of law. See *Burkhart,* supra. and *Gyori v. Johnston Coca-Cola Bottling Group*, 76 Ohio St.3d 565, 567, 1996-Ohio-358, 669 N.E.2d 824.

---

[3] See also *Walton v. Continental Casualty Co.*, Holmes App. No. 02CA002, 2002-Ohio-3831. In *Walton,* this court held that since an insurance policy did not contain the >if you are an individual, any family member= language found in the *Scott-Pontzer* policy, an employee=s child was not an insured under the same.

{¶63} The catastrophic liability coverage part includes within the definition of AWho is an Insured@ the named insured on the declarations page. As is stated above, Fisher Foods, a corporation, is the named insured. Thus, pursuant to *Scott-Pontzer*, supra. appellee Billy Griffith is an insured under uninsured/underinsured motorist coverage which arose by operation of law. In addition, the catastrophic liability part states, in part, as follows: AAny other person or organization is an insured, who is included as an additional insured in >underlying insurance=,...@ Since the Estates of Ruth and Robert Griffith are insureds under the underlying commercial auto coverage, I would find that they are entitled to UM/UIM coverage under the catastrophic liability part.

{¶64} Thus, I would hold that appellee Billy Griffith and the Estates of Ruth Griffith and Robert Griffith are entitled to UIM coverage under the commercial catastrophic coverage part, but only in excess of the commercial automobile coverage part limits of $1,000,000.00.

{¶65} The final policy for consideration is the commercial general liability (CGL) policy. I concur with the majority=s decision that appellee Billy Griffith, both individually and as administrator, is not entitled to coverage under the CGL policy.

{¶66} The CGL policy contains both Avalet parking@ and Amobile equipment provisions.@ Thus, the issue for determination is whether, in view of the Avalet parking@ and Amobile equipment@ provisions, the CGL part is a motor vehicle policy subject to R. C. 3937.18.

{¶67} I concur with the majority=s conclusion that the Avalet parking@ provision does not make the CGL policy pursuant to *Szekeres,* supra. In addition, I would find

that the Amobile equipment@ provision in such policy does not make the CGL a motor vehicle policy subject to R.C. 3937.18 for the reasons set forth in our recent decision in *Heidt v. Federal Ins. Co.*, Stark App. No. 2002CA00314, 2003-Ohio-1785.

{¶68} To conclude, I dissent from the majority=s conclusion that appellee, neither individually nor as Administrator, is entitled to coverage under the commercial auto coverage part. In turn, I concur with the majority=s determination that the commercial general liability coverage part is not a motor vehicle policy and that appellee Billly Griffith, therefore, is not entitled to coverage under the same either individually or as administrator of the Estate. While I concur with the majority=s conclusion that appellee Billy Griffith, in his individual capacity, is entitled to coverage under the commercial catastrophic liability coverage part in excess of the commercial automobile coverage part limits of $1,000,000.00, I respectfully dissent from the majority=s conclusion that appellees, the Estates of Ruth and Robert Griffith, are not covered under the catastrophic coverage. I would find coverage for such appellees under the UM/UIM coverage which arose by operation of law under the catastrophic coverage.

_____

Julie A. Edwards, J.

JAE/mec

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

BILLY R. GRIFFITH, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT L. GRIFFITH, DECEASED, AND THE ESTATE OF RUTH E. GRIFFITH, DECEASED	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
-vs-	:	
BUCKEYE UNION INSURANCE COMPANY, ET AL.	:	
Defendants-Appellants	:	CASE NO. 2001CA00410

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed in part and reversed in part. Appellee, individually and as administrator, is not entitled to coverage under the commercial automobile coverage part and the commercial general liability coverage part. Appellee, individually, is entitled to coverage under the commercial catastrophic liability coverage part, in excess of the commercial automobile coverage limits of $1,000,000. Appellee, as administrator, is not entitled to coverage under the commercial catastrophic liability coverage part. Costs accessed equally to all parties.

_____

_____

_____

JUDGES