

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JANICE DEAN

Plaintiff-Appellant

-vs-

GRANGE MUTUAL CASUALTY CO.,
et al.

Defendants-Appellees

JUDGES:

Hon. W. Scott Gwin, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2004CA00133

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 2001CV00557

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

February 28, 2005

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee American

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Wise, J.

{¶1} Appellant Janice Dean appeals the decision of the Stark County Court of Common Pleas on the basis that it improperly applied the *Galatis*¹ decision to preclude coverage under an umbrella policy issued by Appellee American National Fire Insurance Company (“American National”) to her employer, North Canton Medical Foundation. The following facts give rise to this appeal.

{¶2} On March 1, 2001, pursuant to the Ohio Supreme Court’s decision in *Scott-Pontzer*,² Appellant Janice Dean initiated a declaratory judgment action, against American National and other insurance companies, solely on the issue of coverage. In a judgment entry filed on December 12, 2002, and in a nunc pro tunc judgment entry filed on December 20, 2002, the trial court granted summary judgment in favor of appellant. The trial court concluded American National’s umbrella policy provided UIM coverage to appellant. The trial court also concluded appellant was entitled to coverage under a CGL policy issued by American Alliance. The trial court did not address the issues of setoff or arbitration.

{¶3} American National and American Alliance appealed to this court. On November 3, 2003, we affirmed the trial court’s decision, as it pertained to American National’s Umbrella policy, and reversed the trial court as to the finding of coverage under American Alliance’s CGL policy. We remanded the matter to the trial court for further proceedings consistent with our opinion. See *Dean v. Royal Ins. Co.*, Stark App. No. 2003CA00020, 2003-Ohio-5915. On November 5, 2003, two days following our affirmance, the Ohio Supreme Court issued the *Galatis* decision. On November 10,

¹ *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849.

² *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292.

2003, American National filed a motion for reconsideration arguing that *Galatis* is dispositive of the insurance coverage issues presented under its umbrella policy. We denied the motion for reconsideration on November 24, 2003.

{¶4} Thereafter, American National appealed to the Ohio Supreme Court challenging our affirmance of the trial court's decision and refusal to apply *Galatis* upon reconsideration. On March 24, 2004, the Court declined jurisdiction. Subsequently, on April 1, 2004, American National filed a motion for hearing and/or leave to file a motion for summary judgment in the trial court. On April 13, 2004, the trial court filed a judgment entry in which it applied *Galatis* and denied appellant coverage under American National's umbrella policy. Appellant timely filed a notice of appeal and sets forth the following assignment of error for our consideration:

{¶5} "I. THE TRIAL COURT ERRED BY REFUSING TO FOLLOW THE FINAL DECISION OF THE APPELLATE COURT ON THE LEGAL QUESTION OF INSURANCE COVERAGE, IN VIOLATION OF THE LAW OF THE CASE AND RES JUDICATA."

I

{¶6} Appellant maintains, in her sole assignment of error, the trial court erred when it refused to follow our decision, which found UIM coverage under American National's umbrella policy, in contravention of the doctrines of res judicata and the law of the case. We disagree.

A. The Law-of-the-Case Doctrine

{¶7} In support of her assignment of error, appellant first contends that when the Ohio Supreme Court declined jurisdiction in this matter, the decision of this court

issued on November 3, 2003, became the law of the case on the legal question of appellant's right to coverage under American National's umbrella policy. In support of this argument, appellant cites *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 1996-Ohio-174, wherein the Ohio Supreme Court explained that "[w]here this court refuses jurisdiction following the issuance of an opinion by a court of appeals, the court of appeals opinion becomes the law of the case." Thus, appellant concludes the trial court's application of *Galatis* directly contravenes the Ohio Supreme Court's decision as well as this court's prior decision.

{¶8} In *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, the Ohio Supreme Court discussed the law-of-the-case doctrine and stated as follows:

{¶9} "The law of the case is a longstanding doctrine in Ohio jurisprudence. '[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.' *Nolan v. Nolan*, 11 Ohio St.3d at 3, 11 OBR 1, 462 N.E.2d 410. The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32, 13 O.O.3d 17, 391 N.E.2d 343. It is considered a rule of practice, not a binding rule of substantive law. *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404, 659 N.E.2d 781." *Hopkins* at ¶ 15.

{¶10} The Court also explained, in *Hopkins*, that it has previously recognized an exception to the doctrine of the law of the case in *Jones v. Harmon* (1930), 122 Ohio St. 420, wherein it held that an inferior court must take notice of an intervening decision, by

a superior court, that is inconsistent with the law of the case. *Id.* at ¶ 16. The Court found the facts of *Hopkins* similar to those considered by *Jones*. Thus, the Court held that the decision, in *Galatis*, constituted extraordinary circumstances that created an exception to the law-of-the-case doctrine because *Galatis* constituted an intervening decision by a superior court that was inconsistent with the law of the case. *Id.* at ¶ 18.

{¶11} Appellant argues the only exception to the law-of-the-case doctrine, an intervening decision by the Ohio Supreme Court, is not applicable in the case sub judice because the *Galatis* decision does not qualify as an intervening decision since it was decided before a court of final review passed upon the case sub judice (i.e. the Ohio Supreme Court declined to accept jurisdiction over American National's appeal over four months after the *Galatis* decision.)

{¶12} Specifically, appellant attempts to narrow the application of an intervening decision by arguing that a decision is intervening only when it is decided after the court of final review decides the case but before the trial court applies the reviewing court's mandate. Appellant further maintains that in the case sub judice, the Ohio Supreme Court clearly had the opportunity to apply *Galatis* but chose not to do so when it refused to accept jurisdiction.

{¶13} In support of this assignment of error, appellant cites the case of *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320. In *Transamerica*, the Ohio Supreme Court denied further appeal and the case was remanded to the trial court. *Id.* at 321. There were no additional issues to be resolved. *Id.* However, due to an administrative oversight, the trial court did not enter judgment upon remand and the matter remained pending on the trial court's docket. *Id.* While the case was pending,

the Ohio Supreme Court issued a decision in *Derr v. Westfield Cos.* (1992), 63 Ohio St.3d 537. Id. Plaintiffs filed a motion for judgment in their favor based upon the *Derr* decision. Id. The trial court denied plaintiffs' motion and entered a nunc pro tunc judgment entry in favor of the insurance companies. Id. The court of appeals affirmed. Id.

{¶14} On appeal to the Ohio Supreme Court, the Court held:

{¶15} “* * * [T]he law of the case was established by the court of appeals, and the trial court was required to act accordingly. A subsequent decision by this court should have had no bearing on the trial court's duty to comply with the decision of the court of appeals. This is true where, as here, an administrative oversight necessitated the use of a *nunc pro tunc* entry.” Id. at 324.

{¶16} We find the *Transamerica* decision distinguishable from the facts of the case sub judice. First, the Ohio Supreme Court held that the case remained active when *Derr* was decided solely due to an administrative oversight and therefore, the subsequent supreme court decision should not apply. Further, unlike in *Transamerica*, *Galatis* became the controlling law, on November 5, 2003, prior to the Ohio Supreme Court's decision to decline jurisdiction over this matter on March 24, 2004. Thus, *Galatis* was the controlling law when the trial court had the first opportunity to enter a final judgment in this matter pursuant to our mandate of November 3, 2003.

{¶17} Accordingly, we decline to adopt the narrow application of what constitutes an intervening decision proposed by appellant. The Ohio Supreme Court has defined an “intervening decision” not in terms of application, but rather substance. Thus, according to the Ohio Supreme Court, an “intervening decision” is one which states a

rule of law in conflict with the earlier mandate. *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna* (1995), 73 Ohio St.3d 180, 183, 1995-Ohio-98. Clearly, *Galatis* is an intervening decision as it narrows the application of *Scott-Pontzer*, overrules *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, 86 Ohio St.3d 557, 1999-Ohio-124 and conflicts with our prior decision of November 3, 2003.

{¶18} Further, in *Pillo v. Stricklin*, Stark App. No. 2003CA00212, 2004-Ohio-1570, we recently declined to apply the law-of-the-case doctrine and recognized *Galatis* as an intervening decision. In *Pillo*, after the Ohio Supreme Court declined jurisdiction in an appeal, the trial court appointed an arbitration chairperson and ordered that arbitration occur within sixty days of the trial court's order. *Id.* at ¶ 11. Continental Casualty Company appealed the trial court's order of arbitration. *Id.* at ¶ 14. On appeal, we applied *Galatis* and explained:

{¶19} "We find that, due to the intervening decision issued by the Ohio Supreme Court in *Galatis*, supra. (sic), the law of the case doctrine is inapplicable and that our previous decision in this matter holding that appellees were entitled to UM/UIM coverage under both policies must be re-examined. * * * We find that the Ohio Supreme Court *Galatis* case was an 'intervening decision' that created extraordinary circumstances justifying such re-examination. * * * Clearly, it would be unjust to allow appellees to recover despite the recent *Galatis* case simply because they had a previous appeal to this and to the Ohio Supreme Court, which declined jurisdiction, when we currently are applying *Galatis* to cases that are up on appeal for the first time." *Id.* at ¶ 25.

{¶20} We also reject appellant's argument that the Ohio Supreme Court's refusal to allow Ohio Casualty's discretionary appeal meant that *Galatis* should not be applied. It is well settled that one may not draw any conclusions from the Ohio Supreme Court's decision to accept or decline a discretionary appeal. *Swetland Co. v. Evatt* (1941), 139 Ohio St. 6, 18.

{¶21} The Second District Court of Appeals issued a decision in *Wright v. Cincinnati Ins. Co.*, Montgomery App. No. 20640, 2004-Ohio-5932, that we find persuasive. Although the procedural history is not identical to the facts presented in the case sub judice, the opinion addresses many of the same arguments raised by appellant.

{¶22} In *Wright*, appellant filed a complaint, on June 29, 2001, against Cincinnati Insurance Company ("Cincinnati") seeking *Scott-Pontzer* coverage. *Id.* at ¶ 5. On February 3, 2003, the trial court granted Cincinnati's motion for summary judgment and denied plaintiff's motion for summary judgment. *Id.* at ¶ 12. On August 8, 2003, the court of appeals sustained appellant's appeal and remanded the matter to the trial court. *Id.* at ¶ 13. Cincinnati filed a notice of appeal, with the Ohio Supreme Court, on September 20, 2003. *Id.*

{¶23} The Ohio Supreme Court issued its decision, in *Galatis*, on November 5, 2003. *Id.* On December 24, 2003, the supreme court declined to hear Cincinnati's appeal. *Id.* at ¶ 14. Thereafter, on remand, Cincinnati filed a motion with the trial court to return the case to the active docket. *Id.* The trial court granted Cincinnati's motion and both parties filed motions for summary judgment. *Id.* The trial court granted Cincinnati's motion and denied plaintiff's motion for summary judgment finding *Galatis*

to be an intervening decision. Id. at ¶ 16. On appeal, the court of appeals affirmed the decision of the trial court. Id. at ¶ 32.

{¶24} The court of appeals considered many of the same arguments set forth by appellant in the case sub judice. Namely, that the law of the case was established on December 24, 2003, when the Ohio Supreme Court declined jurisdiction over Cincinnati's appeal; that because Cincinnati did not file a motion for reconsideration with the supreme court, Cincinnati waived its right to raise *Galatis*; and that *Galatis* is not an "intervening decision" because it was rendered before the supreme court denied Cincinnati's appeal. Id. at ¶ 28-31.

{¶25} In addressing the above arguments, the court of appeals made the following observations. First, the *Transamerica* case, supra, was distinguishable because "[u]nlike in *Transamerica*, *Galatis* became the controlling law prior to remand, and it was applicable to pending cases at the time that this action was remanded to the trial court, i.e. in December 2003. Thus, * * *, *Galatis* was the controlling law at the time that the trial court could have first taken any action based on *Wright I*." Id. at ¶ 28.

{¶26} Second, the court of appeals stated that it agreed with appellant that *Wright I* became the controlling law of the case when the supreme court declined jurisdiction. Id. at ¶ 29. However, the court of appeals recognized that the law-of-the-case doctrine is a rule of practice which should not be applied to achieve unfair results. Id. The court concluded it would be unjust to allow plaintiff to recover UIM benefits, despite the fact that *Galatis* had been rendered while the case remained pending and particularly when *Galatis* was rendered between the issuance of *Wright I* and the remand to the trial court. Id. Thus, the court concluded that, "[b]ecause our decision in

Wright I was rendered prior to *Galatis* and because Cincinnati's appeal came to naught, we have no difficulty finding that *Galatis* was an 'extraordinary circumstance' which warranted disregarding *Wright I* upon remand." *Id.*

{¶27} Third, the court of appeals concluded that Cincinnati was not required to seek reconsideration by the Ohio Supreme Court on the basis of *Galatis* in order to preserve the issue. *Id.* at ¶ 30. The court stated that because the supreme court's denial of jurisdiction was not a decision on the merits of Cincinnati's appeal, it was reasonable for Cincinnati to raise *Galatis* before the trial court upon remand. *Id.*

{¶28} Fourth, the court of appeals rejected plaintiff's argument that her rights vested when the supreme court declined to accept Cincinnati's appeal. *Id.* at ¶ 31. Specifically, plaintiff argued *Wright I* was a final declaratory judgment on coverage and the trial court could not reopen that judgment to apply a case decided before the judgment was final. *Id.*

{¶29} The court of appeals disagreed and instead held that in *Wright I*, it did not enter judgment in favor of plaintiff. *Id.* Instead, the court of appeals "remanded for further proceedings consistent with this opinion." *Id.* Thus, on remand, the trial court still had to apply *Wright I* to the facts before it and enter judgment. *Id.* The court of appeals also noted the stacking issue remained pending. *Id.* Accordingly, the case had not yet been finally resolved and no judgment had been issued because a right cannot vest until a judgment is secured. *Id.*

{¶30} The matter currently under consideration differs from the *Wright* case on several procedural facts. First, in the case sub judice, American National sought reconsideration in this court prior to filing its notice of appeal with the Ohio Supreme

Court. Second, when American National filed its notice of appeal, with the Ohio Supreme Court, *Galatis* had been decided, unlike in *Wright*, where the appeal was already pending before the Ohio Supreme Court when it issued the *Galatis* decision. However, despite these factual differences, we find the court of appeals' reasons, in *Wright*, for concluding that *Galatis* is an intervening decision that abrogates the law-of-the-case doctrine persuasive and therefore, dispositive of the matter currently before the court.

{¶31} Finally, in *Shirley v. Republic-Franklin Ins. Co.*, 104 Ohio St.3d 638, 2005-Ohio-182, a recent decision from the Ohio Supreme Court, the Court reversed our decision, pursuant to *Hopkins v. Dyer*, supra, and remanded the matter to the trial court for the application of *Galatis*. The *Shirley* case is significant because the Court concluded the doctrine of the law of the case was not applicable even where the trial court's prior decision was challenged in a motion for relief from judgment, pursuant to Civ.R. 60(B)(5), on issues not directly addressed but disposed of in an earlier unappealable decision.

{¶32} Accordingly, for the foregoing reasons, we conclude the trial court properly applied *Galatis* as an intervening decision of the Ohio Supreme Court and thus, the doctrine of the law of the case is inapplicable.

{¶33} Appellant's First Assignment of Error is overruled.

II

B. Res Judicata Doctrine

{¶34} Appellant next argues, in support of her sole assignment of error, that when the Ohio Supreme Court declined jurisdiction in this matter res judicata attached

and the decision of this court issued on November 3, 2003, became the law of the case on the legal question of appellant's right to coverage under American National's umbrella policy.

{¶35} Appellant claims the doctrine of res judicata barred the trial court from applying the *Galatis* decision to the case sub judice. The doctrine of res judicata is defined as “[a] valid, final judgment rendered upon the merits [that] bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, syllabus, 1995-Ohio-331. The doctrine is a substantive rule of law that applies to a final judgment. [Citations omitted.] *Hopkins v. Dyer*, supra, at ¶ 22.

{¶36} Appellant maintains the judgment in this case became final when the Ohio Supreme Court declined jurisdiction to hear American National's discretionary appeal. Specifically, appellant argues our decision on November 3, 2003, finding appellant entitled to UIM coverage, was a determination of law which left the trial court with nothing to do upon remand. Appellant also maintains American National cannot rely upon a change in the law to justify its attempt to relitigate the issue of coverage.

{¶37} Appellant cites three cases in support of her assignment of error. The first case appellant cites is *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408-1994-Ohio-389. In *Phung*, the Ohio Supreme Court held “* * * the trial court was precluded from considering on remand the plaintiff's wrongful-discharge claim where that claim had been dismissed and the dismissal had been affirmed on appeal. Although Phung's claim for intentional infliction of emotional distress remained pending, * * * [the Court] held that dismissal of the wrongful-death claim constituted a final judgment on that

particular cause of action, and res judicata applied to bar relitigation.” *Hopkins*, supra, at ¶ 21, citing *Phung* at 412-413.

{¶38} The second case appellant refers to is this court's recent decision in *Sheaffer v. Westfield Ins. Co.*, Holmes App. No. 03CA006, 2004-Ohio-6755. Sheaffer involved a complaint for wrongful death and coverage under various insurance policies. Id. at ¶ 2. All parties eventually filed motions for summary judgment regarding the issue of coverage. Id. In a judgment entry dated August 15, 2003, the trial court found in favor of plaintiffs determining they were entitled to coverage under the commercial general liability and umbrella policies. Id. Westfield appealed and this court affirmed in part and reversed in part the trial court's decision. Id. at ¶ 3. Specifically, we found plaintiffs were not entitled to coverage under the commercial general liability policy, but were covered under the umbrella policy. Id. The case was remanded to the trial court for further proceedings. Id.

{¶39} Upon remand, the trial court filed a judgment entry, on October 15, 2003, finding appellees to be covered under the umbrella policy and entitled to \$525,000. Id. at ¶ 4. On October 24, 2003, Westfield filed an appeal with the Ohio Supreme Court. Id. at ¶ 5. On November 5, 2003, the Ohio Supreme Court issued its decision in *Galatis*. Id. On January 21, 2004, the supreme court declined to hear Westfield's appeal. Id.

{¶40} Thereafter, on appeal to this court, we applied the doctrine of the law of the case and found *Galatis* inapplicable. In doing so, we found the trial court's judgment of August 15, 2003, was in effect throughout the entirety of the original appeal and

therefore, appellees had a vested right which could not be abrogated by the *Galatis* decision. Id. at ¶ 17.

{¶41} The third case appellant refers to is *Morton Internatl., Inc. v. Continental Ins. Co.* (1995), 104 Ohio App.3d 315, which held as follows:

{¶42} When, in a declaratory judgment action to determine whether property damage was covered or was excluded under either a pollution exclusion or a petroleum exclusion, the court of appeals affirmed summary judgment for the insureds on the pollution-exclusion issue, and this insurer did not appeal this issue to the supreme court, judgment on this issue became final. Id. at 320. When nothing was remanded to the trial court on the pollution exclusion, no justifiable controversy remained on this issue; the trial court was obliged to accept the pollution-exclusion issue as finally decided, notwithstanding an intervening decision of the supreme court on the same subject. Id. On remand, the trial court thus erred in entertaining new motions for summary judgment on the pollution exclusion.

{¶43} In response to appellant's argument and the above-cited case law, American National contends a final judgment had not been entered, in favor of appellant, prior to the trial court's judgment entry of April 13, 2004, and therefore, the doctrine of res judicata did not bar the trial court's application of *Galatis*. In support of this conclusion, American National cites the Ohio Supreme Court's recent decision in *Hopkins v. Dyer*, supra.

{¶44} In *Hopkins*, plaintiff filed suit against the alleged tortfeasor and various insurance companies asserting claims for underinsured motorist coverage pursuant to *Scott-Pontzer*. Id. at ¶ 8. Lumbermens Mutual Casualty Company ("Lumbermens") filed

a declaratory judgment action with respect to coverage issues. *Id.* The cases were consolidated. *Id.* The trial court awarded summary judgment to Lumbermens concluding plaintiff was not entitled to UM/UIM coverage because she was not an insured under the Lumbermens policies. *Id.* at ¶ 17.

{¶45} Plaintiff appealed to this court. On appeal, we reversed the judgment of the trial court finding Lumbermens had been obligated to offer UM/UIM coverage but failed to do so. *Id.* at ¶ 10. Thus, we concluded coverage arose by operation of law under former R.C. 3937.18. *Id.* We also held that pursuant to *Scott-Pontzer*, plaintiff was an insured for purposes of UM/UIM coverage under both Lumbermens policies. *Id.* Accordingly, we remanded the cause to the trial court for the court to decide issues of stacking, pro rata coverage, exposure and other potential affirmative defenses that the trial court had not considered. *Id.* at ¶ 11.

{¶46} Upon remand, the trial court held, as a matter of law, that plaintiff was insured under the Lumbermens policies and that both policies provided coverage by operation of law pursuant to *Scott-Pontzer*. *Id.* at ¶ 12. The trial court also concluded none of the terms, conditions or exclusions in the Lumbermens liability coverage applied because UIM coverage was imposed by operation of law. *Id.* The trial court allowed a setoff for \$15,000 previously recovered by the tortfeasor's insurer. *Id.*

{¶47} The case was again appealed to this court. *Id.* at ¶ 13. On appeal, we affirmed the decision of the trial court. *Id.* Lumbermens moved for reconsideration based upon *Galatis*, which had been decided twelve days before our affirmance of the second appeal. *Id.* We denied reconsideration ruling that the law-of-the-case doctrine

precluded the application of *Galatis*. *Id.* Lumbermens appealed to the Ohio Supreme Court. *Id.* at ¶ 14.

{¶48} On appeal, the Ohio Supreme Court concluded the doctrine of the law of the case applied, not *res judicata*, because there was no final judgment as to insurance coverage in that the trial court still had to decide various defenses, including prejudice from the long delay in notifying Lumbermens of plaintiff's UIM claim. ¶ 22.

{¶49} For the reasons set forth in *Hopkins*, we conclude the doctrine of *res judicata* does not apply, in the case sub judice, because the trial court had not issued a final judgment. The trial court never rendered a final judgment in this matter prior to its decision of April 13, 2004. Further, unlike the *Sheaffer* case, upon remand from the court of appeals, the trial court did not enter judgment pursuant to our mandate. Rather, the trial court stayed our mandate while American National filed a notice of appeal with the Ohio Supreme Court.

{¶50} We also find the *Phung* decision factually distinguishable because it involved a final judgment and therefore, *res judicata* applied to bar relitigation of the wrongful-discharge claim. Finally, *Morton* is also distinguishable from our case because, in *Morton*, nothing was remanded to the trial court about the pollution-exclusion. Therefore, when no appeal was taken to the Ohio Supreme Court, the court of appeals' decision became final. "In the absence of a remand, the fact that a subsequent decision of the supreme court is handed down on the same subject is immaterial to issues which have been finally resolved." *Morton*, *supra*, at 321.

{¶51} In the matter currently before this court, appellant maintains our remand to the trial court amounted to nothing more than performing an administrative or ministerial

act because our finding that appellant was entitled to coverage was a determination of law. Thus, appellant concludes the remand was solely for the trial court to apply this court's mandate which had become final when the Ohio Supreme Court refused to accept American National's appeal. As such, appellant maintains the trial court was not permitted to reconsider the coverage issue in light of *Galatis*.

{¶52} We disagree with this argument. As explained by the Ohio Supreme Court in *Cleveland Elec. Illuminating Co. v. Pub. Utilities Comm. of Ohio* (1976), 46 Ohio St.2d 105, 110, a "remand" is:

{¶53} " * * * to send back to the original tribunal for further proceedings, generally upon orders or directions from the higher court. When a court acts to remand a cause, it is not itself finally determining the outcome of the cause, nor is it executing a judgment in favor of one of the parties. The judgment is given legal effect when it is executed by the lower tribunal, and the judgment as rendered is that of the tribunal to which the cause had been remanded. [Citation omitted.]"

{¶54} Further, in *Frate v. Al-Sol, Inc.* (Nov. 24, 1999), Cuyahoga App. No. 76526, the Eighth District Court of Appeals stated the importance of a trial court's entry of judgment upon remand from the trial court. The court explained "[t]he filing of a mandate is not a final appealable order of the common pleas court but is a directive from this court [court of appeals] to the common pleas court to 'proceed as if the final order, judgment, or decree had been rendered in it.' Any other conclusion would allow this court [court of appeals] to review its own decision, an obviously improper result." *Id.* at 3.

{¶55} As noted above, the trial court, in the case sub judice, never entered a final judgment pursuant to our mandate upon remand. Instead, the trial court stayed our mandate while American National appealed this matter to the Ohio Supreme Court. Therefore, until the trial court executed the judgment, pursuant to our remand, the judgment was not final and the doctrine of res judicata inapplicable.

{¶56} Appellant's sole assignment of error is overruled.

{¶57} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

JUDGES

JANICE DEAN

-VS-

Defendant-Appellant

JUDGMENT ENTRY

Case No. 2004CA00133

Costs assessed to Appellant.

JUDGES