

[Cite as *Frye v. Atkins*, 2004-Ohio-237.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT  
COUNTY OF CUYAHOGA  
No. 83067

JAMES FRYE,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
MARK A. ATKINS, et al.,	:	OPINION
Defendants-Appellants	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	JANUARY 22, 2004
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court Case No. CV-444499
JUDGMENT	:	REVERSED AND REMANDED
DATE OF JOURNALIZATION	:	
APPEARANCES:		
For Plaintiff-Appellee:		STEPHEN S. VANEK JEFFREY H. FRIEDMAN Friedman, Domiano & Smith Co.
		1370 Ontario Street 600 Standard Building Cleveland, Ohio 44113-1701
For Defendant-Appellant: (Owners Insurance Company)		BRIAN T. WINCHESTER McNeal, Schick, Archibald & Biro Co.

Van Sweringen Arcade #250  
123 Prospect Avenue, West  
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ANNE L. KILBANE, P.J.

{¶1} Owners Insurance Company ("OIC") appeals from an order of Judge Joseph D. Russo that granted summary judgment to James Frye on his complaint for declaratory judgment that he was an insured under his employer's commercial liability policy and entitled to uninsured motorist ("UM") coverage. OIC claims it was error to find both that its commercial liability policy qualified as an automobile liability policy, and that Frye was an insured under that policy pursuant to *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*<sup>1</sup> Based on the Ohio Supreme Court's recent decision in *Westfield Ins. Co. v. Galatis*,<sup>2</sup> we reverse and remand.

{¶2} Frye was injured in October of 1999 when, while standing in his driveway, he was struck by a car operated by Mark Atkins. It appears this happened following an argument between the two, and that Atkins had been asked to leave before the accident occurred. Frye filed a complaint for declaratory judgment, through which he sought UM coverage under a commercial liability policy that OIC issued to his employer, All-Nu Awning, Inc. OIC responded with a

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<sup>1</sup>85 Ohio St.3d 660, [1999-Ohio-292](#), 710 N.E.2d 1116.

<sup>2</sup>100 Ohio St.3d 216, [2003-Ohio-5849](#), 797 N.E.2d 1256.

counterclaim through which it sought a declaration that Frye was not entitled to UM coverage, and both parties moved for summary judgment. The judge determined that the OIC policy was an automobile liability policy under *Selander v. Erie Ins. Group*,<sup>3</sup> and that Frye qualified as an employee insured under *Scott-Pontzer*. He granted Frye's motion for summary judgment, denied OIC's motion for summary judgment, and certified the order for appeal under Civ.R. 54(B). OIC asserts a single assignment of error, attached in an appendix to this opinion.

{¶3} We review the grant of summary judgment de novo, using the same standard as the judge, which requires that we consider the evidence in the light most favorable to the non-moving party to determine whether a material dispute of fact exists.<sup>4</sup> Although OIC first claims its commercial liability policy does not qualify as an automobile liability policy under *Selander*, we need not address that issue. Even if the policy were to qualify as one which must provide UM coverage, Frye is not an insured under the Ohio Supreme Court's recent opinion in *Westfield Ins. Co. v. Galatis*, which limited the decision in *Scott-Pontzer*.

{¶4} Under *Galatis*, "a policy of insurance that names a corporation as an insured for uninsured or underinsured motorist coverage covers a loss sustained by an employee of the corporation

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<sup>3</sup>85 Ohio St.3d 541, [1999-Ohio-287](#), 709 N.E.2d 1161.

<sup>4</sup>Civ.R. 56(C); *Stephens v. A-Able Rents Co.* (1995), 101 Ohio

only if the loss occurs within the course and scope of employment.”<sup>5</sup> Because Frye’s loss occurred on his driveway and not during the course and scope of his employment, he is not insured for UM coverage under his employer’s policy. Based on the change in Ohio law, we sustain OIC’s assignment of error.

{¶5} Judgment reversed and remanded for entry of judgment consistent with *Galatis* and for proceedings on any remaining issues.

#### APPENDIX – ASSIGNMENT OF ERROR

**“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN GRANTING PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT.”**

FRANK D. CELEBREZZE JR., and TIMOTHY E. McMONAGLE, J.,  
CONCUR.

<sup>5</sup>*Galatis*, at paragraph two of the syllabus.

It is ordered that the appellant recover from appellee costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE  
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).