[Cite as *Motorists Mut. Ins. Co. v. Jones* , 2004-Ohio-4965.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

MOTORISTS MUTUAL INSURANCE COMPANY Appellee v. DARLETTA R. JONES, et al. Appellants	C.A. Nos. 03CA0106-M 03CA0108-M 03CA0109-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 01-CIV-0137

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

{¶1} Appellants/Cross-Appellees, George Eddleman, in his individual capacity and as representative of the estate of his deceased son Brian, Jamie Eddleman, and Darletta Jones appeal from the trial court's granting of summary judgment in favor of all insurance companies except Appellee/Cross-Appellants National Union Fire Insurance Company ("National Union") and Motorists Mutual Insurance Company ("Motorists Mutual") under uninsured/underinsured ("UI/UIM") provisions of the

insurance companies' respective policies. National Union appeals the trial court's granting of summary judgment in favor of George Eddleman.

{¶2} Motorists Mutual appeals from the trial court's granting of summary judgment in favor of Darletta Jones. Two of these appeals involving George and Jamie Eddleman (the "Eddleman appellants") have been consolidated. Darletta Jones' suit with Motorists Mutual was unconsolidated from the Eddlemans' appeal. This Court hereby orders the reconsolidation of the two appeals because all issues arise out of the same automobile accident.

{¶3} For the following reasons, this Court finds that the trial court's granting of summary judgment in favor of the insurance companies in all instances was proper and affirms the trial court. With respect to the trial court's granting of summary judgment in favor of George Eddleman under the National Union policy, this Court finds that he is not an insured under the terms of that policy and hereby reverses the trial court. With respect to the trial court's granting of summary judgment in favor of Darletta Jones under the Motorists Mutual policy, this Court finds that she is not an insured under the terms of that policy and hereby reverses the trial court.

I.

{¶4} The facts in this case are undisputed. On May 7, 1999, Brian Eddleman ("Brian"), age 19, and Heather McAllister were passengers in a 1998 Chevrolet Camaro driven by Larry Barker. Barker lost control of the automobile which struck another vehicle and then a concrete guardrail. All three were killed in the accident.

{¶5} At the time, Brian was residing with his father George Eddleman ("George") and sister, Jamie Eddleman ("Jamie"). He was not residing with his mother, Darletta Jones ("Jones").

{¶6} Barker was insured by a personal auto policy issued by American Select Insurance Company ("American Select"). That policy provided liability insurance coverage in the amount of $100,000 per person and $300,000 per accident. Brian's estate, administered by his father George, settled its claim against Barker for $100,000. Jones also signed a full release. The probate court approved the settlement.

{¶7} At the time of his accident, Brian was employed by Bocko, Inc. ("Bocko"). Bocko is a named insured under a commercial insurance coverage policy issued by Westfield Insurance Company ("Westfield"). Brian was also employed by Team America. Team America was insured with Lexington Insurance Company ("Lexington").

{¶8} At the time, George was employed by Republic Engineered Steels, Inc. ("Republic"). Republic is a named insured under a business auto policy issued by American Home Assurance ("American Home"). Republic is also the named insured under a commercial umbrella policy issued by National Union Fire Insurance Company ("National Union").

{¶9} At the time, Darletta Jones was employed by Wood Grocery, Inc. ("Wood"). Wood is a named insured under a business auto and a commercial general liability ("CGL") policy issued by Motorists Mutual.

{¶10} Jamie was employed by Summa Health Systems ("Summa"). Summa is a named insured under a commercial health policy issued by Westfield Insurance Company ("Westfield"), which provides auto, umbrella and CGL coverage. Summa is also a named insured under a healthcare excess liability policy issued by First Specialty Insurance Company ("First Specialty").

{¶11} For ease of understanding, the following summary is provided:

Brian:
Employed by Bocko
Bocko insured by Westfield
Also employed by Team America
Team America insured by Lexington

George:
Father of Brian Eddleman
Employed by Republic
Republic insured by American Home and National Union

Darletta Jones:
Mother of Brian Eddleman
Employed by Wood
Wood insured by Motorists Mutual

Jamie:
Sister of Brian Eddleman
Employed by Summa Health Systems
Summa insured by Westfield and First Specialty

II.

{¶12} On February 8, 2001, Motorists Mutual filed a declaratory judgment action seeking a declaration of rights and obligations under its auto policy with Wood, Jones' employer. Motorists Mutual joined as parties in the declaratory action George, Jones, and Jamie. Motorists Mutual also joined all the other insurance companies listed above, seeking declaratory relief with respect to whether UM/UIM coverage applied to the Eddlemans and Jones.[1]

{¶13} George, in his individual and representative capacity, cross-claimed against all the employers' insurers. He sought declaratory relief and requested binding arbitration.

[1] The employment status of Brian was not known until later. It was eventually resolved by stipulation of Bocko and Team America. Their respective insurers were joined later.

{¶14} Jamie, in her individual capacity, cross-claimed against all the employers' insurers seeking declaratory relief and requested binding arbitration.

{¶15} Jones counterclaimed against Motorists Mutual, her employer's insurer, seeking declaratory relief and binding arbitration.

{¶16} All parties filed motions for summary judgment on the issue of UM/UIM coverage and the Eddlemans and Jones moved for summary judgment regarding the issue of binding arbitration against Lexington, National Union, Westfield, and Motorists Mutual.

{¶17} On December 17, 2002, the Magistrate found that summary judgment was proper in favor of all insurers except Motorists Mutual and National Union. The Magistrate made no determination on the issues regarding Brian's employers' insurers because it was unclear at that time with whom Brian was employed. The Magistrate denied the Eddlemans' and Jones' request for binding arbitration against the specific insurance companies listed above.

{¶18} On February 3, 2003, the trial court affirmed the Magistrate's ruling and overruled all objections. The trial court also resolved the issue of the identity of Brian's employer. Bocko and Team America stipulated that Brian was employed by both. The trial court then found that Westfield,

insurer of Bocko, and Lexington, insurer of Team America, were entitled to summary judgment in their favor.

{¶19} On August 3, 2003, the trial court issued a final appealable order pursuant to a remand issued by this Court for lack of a final appealable order and these appeals ensued.

{¶20} For the following reasons, this Court affirms the trial court's granting of summary judgment in favor of all insurance companies. With respect to National Union, this Court reverses the trial court's granting of summary judgment in favor of George. With respect to Motorists Mutual, this Court reverses the trial court's granting of summary judgment in favor of Jones.

III.

{¶21} Appellate courts review the grant of summary judgment de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, an appellate court "review[s] the same evidentiary materials that were properly before the trial court at the time it ruled on the summary judgment motion." *Am. Energy Serv., Inc. v. Lekan* (1992), 75 Ohio App.3d 205, 208. Under Civ.R. 56(C), summary judgment is proper if:

> "(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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶22} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating the absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Any doubt is to be resolved in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶23} Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Dresher*, 75 Ohio St.3d at 293. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶24} In this case, all parties agree that there are no material issues of fact.

{¶25} For ease of discussion, this Court will consider the assignments of errors alleged by the Eddlemans and Jones for each

insurance company in a separate section. We will begin with the insurers of Brian's employers, and then proceed to the insurers of George's employers, Jones' employers, then finally Jamie's employers.

IV.

Brian Eddleman's Employers

{¶26} Brian Eddleman was employed by Bocko and Team America. Bocko was insured by Westfield. Team America was insured by Lexington.

{¶27} Westfield issued a commercial insurance coverage policy to Bocko which included auto coverage with UM/UIM coverage, umbrella coverage and CGL coverage. The trial court held that Westfield was entitled to summary judgment under the authority of *Gidley v. Cincinnati Ins. Co.* (April 17, 2002), 9th Dist. No. 20813 because George and Jones settled the estate's claim against Barker's insurer, American Select, without notification or consent of Westfield, thereby prejudicing Westfield's subrogation rights. The Eddleman appellants claim the trial court erred in several respects under the underlying auto policy, the umbrella policy and the CGL policy. Each policy will be discussed in turn.

Westfield/Bocko

A. Westfield's underlying auto policy:

FIRST ASSIGNMENT OF ERROR AS TO WESTFIELD/BOCKO

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS, BRIAN EDDLEMAN AND HIS ESTATE, GEORGE EDDLEMAN, INDIVIDUALLY, AND JAMIE EDDLEMAN, INDIVIDUALLY, BY RULING THAT THE WESTFIELD/BOCKO AUTO AND UMBRELLA COVERAGES DO NOT AFFORD UIM COVERAGE TO SAID APPELLANTS. CONSEQUENTLY, THE TRIAL COURT ERRED IN GRANTING WESTFIELD/BOCKO'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING THE MOTION FOR SUMMARY JUDGMENT OF SAID APPELLANTS ON THIS ISSUE."

{¶28} Appellants argue that the auto policy that Westfield issued to Bocko provides express UM/IUM coverage and that appellants were "insureds" under the policy.

{¶29} The policy at issue defines who is an insured. It includes:

"1. You.
"2. If you are an individual, any family member.
"3. Anyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction.
"4. Anyone for damages he or she is entitled to recover because of bodily injury sustained by another insured."

{¶30} Appellants argue that this language is identical to that contained in *Scott-Pontzer v. Liberty Mut.Fire Ins. Co.* (1999), 85 Ohio St. 3d 660, which permitted employees to be considered "insureds" when the policy was issued to a company and the definition of an insured was

ambiguous. Under this authority, they contend that Brian was an insured under Westfield's policy.

{¶31} Further, the Eddleman appellants argue that they, as family members, are also insured under the authority of *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St.3d 557.

{¶32} Under these cases, once the language in a company policy was determined to be ambiguous and the language contained both "you" and "family member," the entire family was covered for all accidents involving any of them.

{¶33} Whatever the outcome may have been under these cases, they no longer represent the law. In *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, the Ohio Supreme Court clarified the amazing disarray caused by the faulty reasoning in the S*cott-Pontzer* and *Ezawa* cases.

{¶34} In *Galatis*, the Court returned to the law in effect before these cases. Under *Galatis*, absent specific language to the contrary, an employee who is insured under his employer's policy is covered only if the employee is involved in the accident *himself*. Id. at paragraph two of the syllabus. *Galatis* also requires that the employee be within the course and scope of his employment when the employee is in the accident. Id. It is not

sufficient that the employee merely be an employee when the accident occurs. Id.

{¶35} *Galatis* requires a separate analysis for the family members. The family members are no longer considered insured merely because the employee is employed and there is language in the policy including family members. Family members are insured *only* if the employee is a *named* insured. Id. at paragraph three of the syllabus.

{¶36} *Galatis'* holding reflects a more accurate representation of the risks the insured wants to protect against and the risks the insurer intends to cover for both the employee and his family members.

{¶37} There is no dispute that Brian was not performing his job duties within the course and scope of his employment with Bocko when he was involved in the accident. Therefore, *Galatis* precludes coverage unless there is language in Westfield's policy which extends coverage to acts outside that scope. The Westfield policy, however, contains no such other "specific language to the contrary" which would include acts outside that course and scope. Consequently, Brian could not be an insured.

{¶38} Under the reasoning in *Galatis*, the Eddleman appellants as family members could not be considered "insureds." In this case, Brian was not a named insured on the policy and therefore his family members could not be "insureds."

{¶39} Appellants, however, argue that Westfield conceded that appellants were "insureds" under the policy and cannot now raise this issue on appeal. This Court is not persuaded that Westfield has conceded anything at all, especially the issue of coverage. Westfield has vigorously defended itself in all respects in this suit, including the coverage issue.

{¶40} Appellants have urged this Court to ignore the clear dictates of *Galatis*, especially because it was decided during the appeal of this case. This Court finds that it must consider *Galatis* in reviewing the trial court's order because it represents the current law in Ohio. Furthermore, this Court notes that "[t]he general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law." *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 210, appeal dismissed (1956), 352 U.S. 804, 1 L.Ed.2d 38. Appellants do not have a right to rely on authority that is no longer the law. The fact that there has been an intervening change in the law does not prevent this Court from applying the new law. This Court has already applied *Galatis* to cases on appeal. *State Auto. Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 9th Dist. No. 21853, 2004-Ohio-2508.

{¶41} The Eddleman appellants also argue that the trial court erred in not allowing them to submit additional evidence regarding new Ohio

Supreme Court case law relating to the proper analysis of prejudice with respect to claims of breach of notice and subrogation. This Court's finding with respect to the issue of whether appellants are "insureds" is dispositive with respect to all claims made under the policy. Therefore, this Court makes no determination on this matter. This Court finds that the trial court properly awarded summary judgment to Westfield with regard to the auto policy. The Eddleman appellants' assignment of error is not well taken.

B. Westfield's Umbrella policy

{¶42} Bocko also purchased umbrella coverage from Westfield which provided automobile coverage. Under the umbrella policy, UM/UIM coverage arose by operation of law. Appellants argue that, even if the "insured" language in the underlying auto policy does not apply, they are still entitled to UM/UIM coverage under the umbrella policy pursuant to *Scott-Pontzer*. The language at issue in the umbrella policy is as follows:

> "Each of the following is also an insured: Any other person or organization which is included as an insured under the insurance listed in the Schedule of Underlying Insurance but only insofar as coverage is afforded to that person or organization by that insurance."

{¶43} Appellants argue that they are insured under the foregoing language of Westfield's umbrella policy. Westfield's umbrella policy, however, only covers those insured in the underlying auto policy. As this Court held above, none of the Eddleman appellants are insured under the

underlying auto policy under *Galatis.* For the same reasons, they cannot be insureds under the umbrella policy.

C. Westfield's CGL policy

SECOND ASSIGNMENT OF ERROR AS TO WESTFIELD-BOCKO

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BRAIN EDDLEMAN AND HIS ESTATE BY RULING THAT THE WESTFIELD-BOCKO CGL COVERAGE DID NOT PROVIDE UIM COVERAGE TO BRIAN EDDLEMAN AND HIS ESTATE. CONSEQUENTLY, THE TRIAL COURT ERRED IN GRANTING WESTFIELD-BOCKO'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING THE MOTION FOR SUMMARY JUDGMENT OF BRIAN EDDLEMAN AND HIS ESTATE ON THIS ISSUE."

{¶44} Appellants argue that Westfield's CGL policy constitutes a motor vehicle liability policy which triggers the mandatory offer requirements contained in R.C. 3937.18. This Court makes no finding on the issue of whether a Westfield's CGL policy constitutes a motor vehicle liability policy or not because *Galatis* would still preclude coverage. Brian was not acting within the course and scope of his employment at the time of his accident, nor is there language in the CGL policy extending coverage to acts outside that scope. Also, Brian was not a named insured so the policy does not provide coverage to his family. This Court finds that the trial court properly awarded summary judgment with respect to UM/UIM coverage under Westfield's CGL policy is affirmed.

FIFTH ASSIGNMENT OF ERROR AS TO WESTFIELD-BOCKO[2]

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS IN RULING THAT APPELLANTS WERE NOT ENTITLED TO BINDING ARBITRATION TO RESOLVE THE ISSUES OF DAMAGES AS AGAINST WESTFIELD/BOCKO, ET AL. CONSEQUENTLY, THE TRIAL COURT ERRED IN GRANTING THE MOTIONS FOR SUMMARY JUDGMENT *** OF SAID APPELLANTS ON THIS ISSUE."[3]

{¶45} Appellants contend that the trial court erred in refusing to refer this matter to arbitration as required by the terms of Westfield's policy. The court found that the arbitration provisions were not mandatory, particularly on the coverage issues, and that appellants had not taken steps to invoke arbitration.

{¶46} The Westfield policy provides that: "[i]f we and an 'insured' disagree whether the insured is legally entitled to recover damages from the owner or driver of an 'uninsured motor vehicle' or do not agree as to the amount of damages that are recoverable by that 'insured', then the matter *may* be arbitrated." (Emphasis added).

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[2] This is appellants' 5th assignment of error. It is out of order in this Court's consideration. For purposes of clarity, this Court has organized its opinion with respect to each employer's insurer. Therefore, appellants' assignments of error will be slightly out of order, though all assignments of error will be considered.

[3] Appellants assert that the trial court erred in refusing to grant binding arbitration with respect to Westfield/Bocko, Westfield/Summa and First Specialty. Appellants argued the arbitration issue against all these insurers in one assignment of error. This Court will consider the arbitration issue separately with respect to each insurer in the section specifically addressing that insurer.

{¶47} This Court finds that the arbitration language is not mandatory. Further, as appellants admit, before arbitration is even considered, the issue of appellants' coverage under the policy must be adjudicated. That issue is being adjudicated in this appeal. This Court has found that appellants are not "insureds"; therefore, arbitration is no longer an issue.

Lexington/Team America

{¶48} The trial court found that Lexington's policy was a CGL policy under R.C. Section 3937.18(L) which precluded coverage for appellants. Appellants have not assigned any errors with respect to the trial court's determination.

V.

George Eddleman's Employer

{¶49} George Eddleman was Brian Eddleman's father. He was employed by Republic. Republic was insured by American Home and National Union.

{¶50} National Union insured Republic under a commercial umbrella policy. National Union conceded that appellants had UM/UIM coverage under its policy by operation of law. National Union, along with the other insurance companies, moved for summary judgment on the issue of UM/UIM coverage. The trial court found that only George Eddleman

was an insured under the policy and granted summary judgment in his favor and denied it for the other appellants.[4] National Union has appealed from that finding of coverage for George.

American Home

{¶51} The parties have settled their claims against American Home, Republic's underlying insurance carrier, and American Home is not part of this appeal.

National Union

ASSIGMENT OF ERROR I

"THE TRIAL COURT ERRED IN HOLDING THAT GEORGE EDDLEMAN WAS AN INSURED UNDER THE NATIONAL UNION POLICY SINCE HE WAS NOT A NAMED INSURED AND THE ACCIDENT DID NOT OCCUR WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH REPUBLIC."

{¶52} Like the other appellants, there is no dispute that George did not sustain his losses during the course and scope of his employment with Republic. There is no language in the National Union policy which extends coverage to accidents *outside* that scope; nor is George a named insured to provide coverage to his family. Therefore, the clear dictates of *Galatis* apply to preclude coverage to George.

[4] Appellants have not assigned any errors with respect to the trial court's finding of no coverage for appellants other than George.

{¶53} National Union did not waive its right to appeal by failing to file objections to the Magistrate's opinion. Appellants' right to coverage has always been at issue in this case. The trial court's finding that George Eddleman was an insured under National Union's policy with Republic is hereby reversed.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN HOLDING THAT GEORGE EDDLEMAN WAS AN INSURED UNDER THE NATIONAL UNION POLICY SINCE THERE WAS NO COVERAGE UNDER THE UNDERLYING AMERICAN HOME POLICY."

{¶54} Alternately, National Union argues that George could not be an insured under its umbrella policy because coverage is triggered only if there is coverage under American Home's underlying policy. It argues that American Home's underlying policy is not ambiguous with regard to coverage and therefore *Scott-Pontzer* is not applicable to provide coverage. Because there is no coverage under American Home's policy, National Union argues that there can be no coverage under National Union's policy.

{¶55} This Court finds that *Galatis* governs the issue of coverage under either the American Home policy as applied to National Union or under the National Union policy itself. George could not be an insured under either policy because he was not in an accident while performing his job duties. Furthermore, there is no language in either policy extending coverage to accidents Republic's employees are in beyond the course and

scope of their duties; nor is George a named insured to provide coverage to Brian. This finding provides an alternate ground for reversing the trial court's granting of summary judgment in favor of George.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN HOLDING THAT GEORGE EDDLEMAN WAS COVERED UNDER THE NATIONAL UNION POLICY SINCE THE UNDERLYING COVERAGE WAS NOT EXHAUSTED."

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED IN HOLDING THAT GEORGE EDDLEMAN WAS COVERED UNDER THE NATIONAL UNION POLICY AS THE ESTATE BREACHED ITS NOTICE AND SUBROGATION PROVISIONS."

{¶56} This Court finds that these assignments of error are rendered moot in view of its finding that George is not an insured entitled to coverage under National Union's policy with Republic.

VI.

Darletta Jones' Employer

{¶57} Darletta Jones was employed by Wood. Wood was insured under a business auto policy issued by Motorists Mutual.

{¶58} On the motions for summary judgment, the trial court found that the *Scott-Pontzer* ambiguity regarding the identity of the insureds was not present in the Motorists Mutual policy. The court found that Jones did *not* meet the definition of an insured. The court found, however, that Jones

was nonetheless an insured because Motorists Mutual did not supply the court with a specific schedule of "covered autos." This missing schedule rendered the identity of the insured ambiguous. Consequently, under *Scott-Pontzer,* both Jones and her son would be considered insured. Motorists Mutual and Jones both appealed.[5]

Motorists Mutual

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT IN FAVOR OF MOTORISTS MUTUAL INSURANCE COMPANY WHEN IT DETERMINED THAT THE POLICY ISSUED BY MOTORISTS DID NOT LIMIT UM/UIM COVERAGE TO ACCIDENTS INVOLVING 'COVERED AUTOS.'"

{¶59} Motorists Mutual assigns several sub errors under this general assignment of error in reliance on the *Galatis* case. This Court does not need to address each sub error individually. There is no dispute that Jones did not sustain her losses during the course and scope of her employment. Furthermore, she does not allege that there is any language in the Motorists Mutual policy which provides coverage for accidents that employees are involved in outside that scope. Moreover, she is not a named insured to provide coverage to Brian. Consequently, under the dictates of *Galatis,*

[5] This Court notes that Motorists Mutual reached a settlement with the other passenger's estate in Franklin County.

supra, this Court finds that Jones is not entitled to coverage under Motorists Mutual's policy.

{¶60} This Court also finds that Motorists Mutual did not waive its right to dispute coverage. Coverage for Jones on whatever grounds has always been at issue.

{¶61} The fact that Motorists Mutual did not supply the lower court with a specific schedule of covered autos does not change this Court's analysis. Even disregarding the requirement of occupancy in a "covered auto," Jones is not entitled to coverage.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT IN FAVOR OF MOTORISTS MUTUAL INSURANCE COMPANY WHEN IT FAILED TO FIND THAT DEFENDANT DARLETTA R. JONES, AS A BENEFICIARY OF THE ESTATE OF BRIAN EDDLEMAN, IS NOT ENTITLED TO COVERAGE UNDER THE MOTORISTS POLICY."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT IN FAVOR OF MOTORISTS MUTUAL INSURANCE COMPANY WHEN IT FAILED TO REDUCE THE AMOUNT OF COVERAGE UNDER MOTORISTSS POLICY."

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED IN DENYING MOTORISTS MUTUAL INSURANCE COMPANY'S MOTION FOR LEAVE TO SUPPLEMEMT THE RECORD OR, ALTERNATIVELY, MOTION FOR RECONSIDERATION PURSUANT TO CIV.R.54 (B) OR MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO CIV.R. 60 FILED FEBRUARY 7, 2003."

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED IN DENYING MOTORISTS MUTUAL INSURANCE COMPANY'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO CIV.R. 60 FILED MARCH 5, 2003."

{¶62} This Court's finding with respect to coverage is dispositive on all issues regarding the claims made against Motorists Mutual and therefore no determination on the merits of these grounds will be made.

Darletta Jones

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED TO THE PREJUDICE OF CROSS-APPELLANT IN RULING THAT CROSS-APPELLANT WAS NOT ENTITLED TO BINDING ARBITRATION TO RESOLVE THE ISSUE OF DAMAGES AS AGAINST CROSS-APPELLEE MOTORISTS. CONSEQUENTLY, THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF MOTORISTS AND IN DENYING THE MOTION FOR SUMMARY JUDGMENT OF CROSS-APPELLANT DARLETTA JONES ON THIS ISSUE."

{¶63} Jones argues that the trial court erred in refusing to send her claim against Motorists Mutual to binding arbitration. This assignment of error is moot because of this Court's finding that Jones is not an insured under Motorists Mutual's policy.

VII.

Jamie Eddleman's Employer

{¶64} Jamie Eddleman was employed by Summa. Summa is a named insured under a business auto policy issued by Westfield Insurance. Summa is also a named insured under a commercial umbrella policy issued by First Specialty.

{¶65} Westfield filed for summary judgment and the trial court found that the motion was well taken because George and Jones settled the underlying cause of action with Barker's insurance company and executed a release without following the notice and consent provisions contained in Westfield's policy, thereby prejudicing its subrogation rights. Appellants assign one error to the trial court's determination.

{¶66} First Specialty also filed for summary judgment which the trial court granted. This Court will consider appellants' assignments of errors with respect to First Specialty after Westfield.

ASSIGNMENT OF ERROR III[6]

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS, JAMIE EDDLEMAN, INDIVIDUALLY, BRIAN EDDLEMAN AND HIS ESTATE, AND GEORGE EDDLEMAN, INDIVIDUALLY, IN RULING THAT THE WESTFIELD-SUMMA AUTO COVERAGE DOES NOT AFFORD UIM COVERAGE TO SAID APPELLANTS. CONSEQUENTLY, THE TRIAL COURT ERRED IN GRANTING WESTFIELD-SUMMA'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING THE MOTION FOR SUMMARY JUDGMENT OF APPELLANT ON THIS ISSUE."

{¶67} Westfield's auto policy provides express UM/UIM coverage. The language in the policy defining an insured is much like the other policies defining an insured.[7] Appellants argue that *Scott-Pontzer* applies to resolve the ambiguity in Jamie's favor. Under *Scott-Pontzer*, Jamie and her entire family, including Brian, would be "insureds." However, as noted before, *Scott-Pontzer* is no longer the law. *Galatis* permits UM/UIM coverage to employees only if the employee is involved in an accident while acting within the course and scope of her employment or if there is

[6] This error is the only one assigned to Westfield/Summa. It is designated as the third assignment because appellants combined all their assignments of error for all insurance companies in one brief.

[7] The language defining an insured is: 1. "You; 2. If you are an individual, any 'family member', 3. Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' The covered 'auto' must be out of service because of its breakdown, repair, servicing, loss or destruction; 4. Anyone for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured.'"

language in the insurance policy expanding coverage to accidents outside that scope. There is no question that Jamie was not involved in an accident while acting within that course and scope, nor is there language in the policy expanding coverage. Therefore, *Galatis* precludes coverage for Jamie. Likewise, there is no coverage for Brian or George as family members because Jamie is not a named insured.

{¶68} Because the coverage issue is dispositive, this Court makes no finding with respect to any necessary *Ferrando* analysis. This Court find that the trial court properly awarded summary judgment in favor of Westfield.

First Specialty

{¶69} Summa was also a named insured under a healthcare excess liability policy issued by First Specialty. The trial court found that First Specialty's motion for summary judgment was well taken. The court found that the First Specialty policy expressly incorporated the underlying terms of the Westfield policy and that there was no ambiguity in the definition of "you" as defined by *Scott-Pontzer.* The terms of the underlying Westfield policy were more like those contained in the policy terms in the case of *Westfield Ins. Co. v. Galatis* (Apr. 2, 2002), 9th Dist. No. 20784. The Ninth District *Galatis* case was appealed to the Ohio Supreme Court which in turn issued its opinion overruling much of *Scott-Pontzer*. The Ohio Supreme

Court's *Galatis* decision is the basis of much of this Court's current opinion. The trial court in this case, however, did not make a specific finding regarding whether appellants were insureds.

{¶70} The trial court found that, regardless of whether appellants were insureds, the notice/consent/subrogation terms of the underlying Westfield policy would preclude coverage. On this ground, the court granted First Specialty's motion for summary judgment. Appellants appealed and assigned two errors.

FOURTH ASSIGMENT OF ERROR AS TO FIRST SPECIALTY

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPPELLANTS, JAMIE EDDLEMAN, INDIVIDUALLY, BRIAN EDDLEMAN AND HIS ESTATE, AND GEORGE EDDLEMAN, INDIVIDUALLY IN RULING THAT THE FIRST SPECIALTY EXCESS POLICY DOES NOT AFFORD UIM COVERAGE TO SAID APPELLANTS. CONSEQUENTLY, THE TRIAL COURT ERRED IN GRANTING FIRST SPECIALTY'S MOTION FOR SUMMARY JUDGMENT OF SAID APPELLANTS ON THIS ISSUE."

{¶71} Appellants argue that First Specialty's schedule of underlying insurance in its excess policy includes Westfield's auto coverage. Because the excess policy provides auto liability coverage, First Specialty was required to obtain a valid and written offer and rejection of UM coverage. First Specialty did not obtain this, resulting in UM/UIM coverage imposed as a matter of law. Appellants argue that UM/UIM coverage imposed as a matter of law in favor of Summa must include Summa's employees,

including Jamie. Therefore, Jamie is an insured under *Scott-Pontzer*. Appellants further argue First Specialty's liability language would include all appellants as family members.

{¶72} Regardless of what language is used, Jamie cannot be an insured because she did not sustain her losses within the course and scope of her employment with Summa. *Galatis* precludes coverage. Moreover, there was no language in the underlying policy expanding coverage to accidents that the employees are in beyond that scope; nor was Jamie a named insured to include her family. As such, there is no coverage for Jamie or her family.

{¶73} Appellants also argue that they were entitled to binding arbitration with respect to claims against First Specialty based on the language of Westfield's underlying policy. First Specialty's excess policy follows from and incorporates Westfield's arbitration provision.

{¶74} As this Court has noted before, arbitration is contingent on a finding of coverage. None of appellants has been found to be entitled to UM/UIM coverage under any of the Summa policies. As such, arbitration is moot. The trial court's granting of summary judgment in favor of First Specialty was proper and is affirmed.

VIII.

{¶75} This Court finds that none of the appellants are entitled to UM/UIM coverage under any of the employers' insurance policies under the dictates of *Galatis*. For the foregoing reasons, this Court affirms the trial court's granting of summary judgment in favor of all the insurance companies. This Court reverses the trial's court granting of summary judgment in favor of George Eddleman under National Union's policy and reverses the trial court's granting of summary judgment in favor of Jones under Motorists Mutual's policy. This matter is remanded to the trial court for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of

Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

Exceptions.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BOYLE, J.
CONCUR

APPEARANCES:

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