[Cite as *Stask v. McEachern*, 2004-Ohio-3739.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83925

DONALD F. STASK, ET AL. :
:
Plaintiffs-Appellants :
: JOURNAL ENTRY
:
vs. : and
:
: OPINION
ANGELA M. McEACHERN, ET AL. :
:
Defendants-Appellees :

DATE OF ANNOUNCEMENT OF DECISION: July 15, 2004

CHARACTER OF PROCEEDING: Civil appeal from Court of Common Pleas Case No. CV-482695

JUDGMENT: AFFIRMED

DATE OF JOURNALIZATION: ______________________

APPEARANCES:

For Plaintiffs-Appellants: (Donald and Judy Stask)
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COLLEEN CONWAY COONEY, P.J.

{¶1} Plaintiffs-appellees, Donald and Judy Stask (the "Stasks"), appeal the trial court's granting defendant-appellee, National Indemnity Insurance Company's ("National Indemnity") motion for summary judgment and denying the Stasks' motion for summary judgment. Finding no merit to the appeal, we affirm.

{¶2} In October 2000, the Stasks were involved in a motor vehicle accident, in which Mr. Stask sustained injury. The Stasks sought underinsured motorist coverage for Mr. Stask's injuries through a commercial automobile liability policy issued by National Indemnity to Mrs. Stask's employer, Buckeye Transit, Inc. They alleged that they qualified as insureds under the insurance policy based upon the Ohio Supreme Court's decisions of *Scott-Pontzer v. Liberty Mut. Fire Co.* (1999), 85 Ohio St.3d 660 and *Ezawa v. Yasuda Fire & Marine Ins. Co. of Amer.* (1999), 86 Ohio St.3d 557.

{¶3} Both parties moved for summary judgment. National Indemnity maintained that the Stasks were not insured under the policy because they were not occupying a "covered auto" as required by the policy. The trial court granted National Indemnity's motion, basing its decision on *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849. The Stasks appeal, raising one assignment of error.

{¶4} In their sole assignment of error, the Stasks argue that the trial court erred in granting National Indemnity's motion for summary judgment based upon issues not raised

nor briefed by National Indemnity and that were not pending before the trial court. Specifically, the Stasks claim that because National Indemnity did not challenge the validity of *Scott-Pontzer* and *Ezawa*, the trial court had no legal authority to base its decision on *Galatis*.

{¶5} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. La Pine Truck Sales & Equipment* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, as follows:

> **"Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264."**

{¶6} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that

there is a genuine issue for trial." Civ.R. 56(E). *Mootispaw v. Eckstein,* 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359.

{¶7} The Stasks claim that because National Indemnity did not challenge the validity of *Scott-Pontzer* and *Ezawa* in their motion, but instead relied solely upon the "covered auto" defense, they waived all legal defenses contained in *Galatis*. This contention is without merit. National Indemnity's motion asserted that because the Stasks were not occupying a "covered auto" they were not "insureds" under the policy. Irrespective of what argument National Indemnity relied upon in its motion, the trial court was correct in granting summary judgment in favor of National Indemnity under the authority of *Galatis*.

{¶8} The Ohio Supreme Court held in *Galatis*:

> **"Absent specific language to the contrary, 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 only if the loss occurs within the course and scope of employment." Id. at paragraph two of the syllabus.**

{¶9} Overruling *Ezawa*, the *Galatis* decision further declared:

> **"Where a policy of insurance designates a corporation as a named insured, the designation of "family members" of the named insured as other insureds does not extend insurance coverage to a family member of an employee of the corporation unless that employee is also a named insured." Id. at paragraph three of the syllabus.**

{¶10} It is well settled that a decision of the supreme court is to apply retroactively, as though that law has always applied. *Moss v. Marra*, Cuyahoga App. No. 82188, 2003-Ohio-6853, citing *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210.

> **"What this means to this case is that the *Scott-Pontzer* and *Ezawa* claims that both parties thought were viable at the time the complaint had been**

> **filed, were not viable at all. Had *Galatis* been the law, [the plaintiff's] claims would have been subject to summary judgment since [she] could establish no facts that would entitle [her] to judgment.**
>
> **While we are loathe to consider arguments that were not presented to the trial court, see *Republic Steel Corp. v. Bd. of Revision of Cuyahoga Cty.* (1963), 175 Ohio St. 179, 192 N.E.2d 47, syllabus, we ought not to perpetuate bad law on the flimsy basis that the court and the parties relied on a subsequently overruled case." *Moss*, supra. See also *Kohus v. Hartford Insurance Co.*, Cuyahoga App. No. 83071, 2004-Ohio-231.**

{¶11} Additionally, even though *Galatis* was not law prior to numerous other appeals filed in this court that involved *Scott-Pontzer* and *Ezawa* issues, we have repeatedly relied upon the *Galatis* decision to resolve those cases. See *Jarvis v. Kemper*, Cuyahoga App. No. 82353, 2004-Ohio-634 ("We affirm the judgment of the trial court, albeit for another reason."); *Tipple v. Goble,* Cuyahoga App. No. 83435, 2004-Ohio-2013; *Bond v. Bell & Howell,* Cuyahoga App. No. 83352, 2004-Ohio-2545; *Meeks-Snyder v. Liberty Mut. Ins. Co.*, Cuyahoga App. No. 83338, 2004-Ohio-1457 (*Galatis* "has significantly altered the legal landscape since this appeal was filed, and is dispositive here.") For the trial court to do the same, we find no error.

{¶12} In the instant case, the named insured under National Indemnity's policy was a corporation, Mrs. Stask's employer. Since it was not alleged that Mrs. Stask was acting within the course and scope of her employment, she was not an insured for UIM purposes under the policy. Additionally, because Mrs. Stask was not a named insured under the policy, no coverage is extended to Mr. Stask as a family member.

{¶13} Accordingly, the sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover of appellants the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

TIMOTHY E. McMONAGLE, J. and

ANTHONY O. CALABRESE, JR., J. CONCUR

PRESIDING JUDGE
COLLEEN CONWAY COONEY

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).