[Cite as *Gooden v. Natl. Union Fire Ins. Co.*, 2004-Ohio-5569.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NAOMI GOODEN, EXECUTRIX OF THE ESTATE OF KENNETH C. GOODEN, DECEASED

Plaintiffs-Appellants

-vs-

NATIONAL UNION FIRE INSURANCE COMPANY, ET AL

Defendant-Appellee

JUDGES:
: Hon: W. Scott Gwin, P.J.
: Hon: William B. Hoffman, J.
: Hon: Sheila G. Farmer, J.
:
:
: Case No. 2004CA00011
:
:
: O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 2001CV02112
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 18, 2004

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
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Gwin, P.J.

{¶1} Plaintiff Naomi Gooden, Executrix of the estate of Kenneth C. Gooden, deceased, Terrie L. Kilgore and Brian C. Gooden appeal a judgment of the Court of Common Pleas of Stark County, Ohio, which dismissed their complaint against defendants National Union Fire Insurance Company of Pittsburg, Pennsylvania, Lexington Insurance Company, and Argonaut-Great Central Insurance Company. Appellants assign four errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN GRANTING APPELLEE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S MOTION FOR SUMMARY JUDGMENT.

{¶3} "II. THE TRIAL COURT ERRED IN GRANTING APPELLEE LEXINGTON INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT.

{¶4} "III. THE TRIAL COURT ERRED IN GRANTING APPELLEE ARGONAUT-GREAT CENTRAL INSURANCE CO., F.N.A., GREAT CENTRAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT.

{¶5} "IV. THE TRIAL COURT ERRED IN APPLYING THE *GALATIS* DECISION TO THIS SPECIFIC CASE IN VIOLATION OF THE OHIO AND UNITED STATES CONSTITUTIONS AND STATE STATUTORY LAW."

{¶6} The record indicates on May 23, 1988, decedent Kenneth C. Gooden was operating his personal automobile on personal business in Stark County, Ohio. Sean M. Solon, a 16 year old juvenile, failed to stop for a stop sign and crashed into the decedent's vehicle at a high rate of speed. Decedent was severely injured in the crash, and survived for approximately 3 months before succumbing to his injuries on August 26, 1988.

{¶7} Appellant Naomi Gooden is decedent's widow and the executrix of his estate. Appellants Terrie Kilgore and Brian Gooden are decedent's children.

{¶8} Appellants settled with the tortfeasor's liability carrier for the full limit of his policy.

{¶9} At the time of the accident, decedent was employed by Motor Wheel Corporation. Motor Wheel Corporation was insured by appellee National Union with a business automobile liability policy. Motor Wheel Corporation also owned an insurance policy issued by appellee Lexington Insurance for umbrella/excess liability coverage.

{¶10} On May 23, 1988, appellant Naomi Gooden was an employee of Hartville Foods, Inc., and was at work at the time of her husband's car crash. Appellee Great Central Insurance insured Hartville Foods, Inc. with a commercial general liability policy containing a stop-gap endorsement for automobile liability coverage.

{¶11} Appellants notified Hartville Foods, Inc. and Motor Wheel Corporation of the accident, but did not notify any of the insurance companies of their claim or their settlement with the tortfeasor until 2001.

{¶12} Appellants' brief fails to comply with App. R. 9 (A)(1), in that they have failed to attach the judgment entry from which they appeal to their brief. They have

complied with Loc. App. R. 9 (A)(4) regarding appeals from summary judgments. Appellants' statement pursuant to the rule asserts the judgment was inappropriate as a matter of law on the undisputed facts.

{¶13} Civ. R. 56 (C) states in pertinent part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶14} Our review of a trial court's entry of summary judgment is de novo, see e.g., *Podner v. Northeast Adjusting Services, Inc.* (2000), 137 Ohio App. 3d 712, 739 N.E. 2d 878. We review a summary judgment using the same standard as the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35.

{¶15} The trial court's judgment entry of December 11, 2003, granted summary judgment for a reason not raised by any of the parties. The trial court found appellants' action was brought pursuant to the cases of *Scott-Pontzer v. Liberty Mutual Fire*

Insurance (1999), 85 Ohio St. 3d 660 and *Ezawa v. Yasuda Fire & Marine Insurance Company of America* (1999), 86 Ohio St. 3d 557. The trial court noted in *Westfield Insurance Company v. Galatis,* 100 Ohio St. 3d 216, 2003-Ohio-5849, the Ohio Supreme Court limited the application of the *Scott-Pontzer* case and overruled *Ezawa.* The trial court found *Scott-Pontzer* is applicable only to situations where the employee of the insured corporation is injured within the course and scope of his employment, and if a policy of insurance designates a corporation as a named insured, the designation of family members of the named insureds as other insureds does not extend coverage to a family member of an employee of the corporation, unless the employee is also a named insured on the policy. The trial court found because decedent's injuries did not occur within the scope of his employment, the *Galatis* decision precluded appellants' claims against appellees.

{¶16} The *Galatis* case was decided after the motions for summary judgment were filed, and none of the parties briefed the issue.

IV

{¶17} In her fourth assignment of error, appellant urges the application of *Galatis,* to this case is unconstitutional and denies appellants their rights to due process and equal protection of law, impairs their vested contractual and statutory rights, and impermissibly restricts their recovery of wrongful death damages in violation of the Ohio Constitution, R.C. 2125, and R.C. 3937.18. Appellants also urge the retro-active application of *Galatis* is improper.

{¶18} Setting aside the problem this argument was not raised in the trial court, we find it is inappropriate for this court to pass on the constitutionality of a Supreme

Court decision. Courts are often called upon to review the application of a statute to the particular facts of a case to determine whether it is constitutional as applied. Here, however, appellants urge the *Galatis* case violates the wrongful death statute and the uninsured motorists statute. The Supreme Court has the right and the obligation to construe statutes to determine their constitutionality in general and as applied. The converse is not true.

{¶19} We find *Galatis* does not run contrary to R.C. 2125 or R.C. 3937.18. *Galatis* does not mean a policy of auto insurance does not have to offer uninsured/underinsured motorist coverage; it does not mean a wrongful death claimant is not entitled to damages. *Scott Pontzer* and *Galatis* both present rules of construction to determine how to construe language in insurance policies. The Ohio Supreme Court applied *Galatis* retroactively and so must we.

{¶20} The fourth assignment of error is overruled.

I

{¶21} In their first assignment of error, appellants urge the trial court was incorrect in finding *Galatis,* precluded their recovery from appellee National Union Fire Insurance Company's policy.

{¶22} National Union's business auto liability policy contains a schedule of coverages and covered autos. The liability insurance coverage designates any auto as a covered auto. The uninsured motorist insurance coverage designates any autos you own which are required to have and cannot reject uninsured motorist insurance because of the law of the state in which they are licensed. The schedule of covered

autos you own contains a notation there is a schedule on file. *Galatis* defines "you" as the named insureds unless policy language provides otherwise.

{¶23} The endorsement for uninsured motorist insurance states it excludes bodily injury sustained by you or any family member while occupying or struck by any vehicle owned by you or any family member which is not a covered auto. The endorsement defines an insured as you, any family member, or anyone else occupying a covered auto.

{¶24} The policy does not address underinsured motorist coverage.

{¶25} The policy does not include any express waiver of uninsured/underinsured motorist coverage, as required by *Linko v. Indemnity Insurance Company of North America* (2000), 90 Ohio St. 3d 445, 739 N.E. 2d 338.

{¶26} Appellants cites us to *Ross v. Clark* (July 31, 2003), Franklin Appellate No. 02AP-222, 2003-Ohio-4056. In *Ross,* the Tenth District Court of Appeals found because the declarations page indicated liability coverage was available for any auto, but UM/UIM coverage was only available for owned autos, and because the limits of coverage were not the same, the insurer must demonstrate the insured validly rejected coverage pursuant to *Linko.* If an insurer fails to do so, coverage arises by operation of law, *Clark,* paragraph 5.

{¶27} *Ross v. Clark* was decided before the Supreme Court announced its opinion in *Galatis.*

{¶28} This court has previously looked to language in the auto liability policy to determine who is an insured when UM/UIM coverage arises by operation of law, *Szekeres v. State Farm & Casualty Company,* Licking Appellate No. 02-CA-0004, 2002-

Ohio-5989. The *Galatis* case refers us to the "named insured" on the policy, and instructed us to construe the policy according to the intent of the parties to the contract. Although *Galatis* itself dealt with express uninsured/underinsured provisions, the Supreme Court applied it to cases where coverage arose as a matter of law, see *In Re: Uninsured & Underinsured Motorist Coverage Cases*, 100 Ohio St. 3d 302, 2003-Ohio-5888, 798 N.E. 2d 1077. We find it appropriate to continue to look to the liability portion of the insurance policy to determine who is an insured, keeping in mind the caveat of *Galatis.*

{¶29} While appellants may very well be correct in asserting UM/UIM motorist coverage arises as a matter of law in this policy, nevertheless, this in and of itself does not mean appellants' claims are covered by this policy. The named insured on the policy is Motor Wheel Corporation. The policy contains an endorsement which defines the named insured as the person or organization first named in the declarations, as well as any other person or organization named in the declarations, any subsidiary corporations or corporations acquired or formed during the policy as a subsidiary of any of the named insureds. Pursuant to *Galatis,* we must find because there is no specific language including employees of the corporations as additional named insureds, this insurance policy does not apply to this claim because decedent was not within the course and scope of his employment when he was injured.

{¶30} Appellants also cite us to the MCS-90 endorsement, which they contend removes this case from the scope of the *Galatis* opinion.

{¶31} In the case of *Jeter v. Ramos* (October 1, 2003), Richland Appellate No. 03-CA-14, 2003-Ohio-5242, this court had the opportunity to review an MCS-90

endorsement in the context of a UM/UIM claim made pursuant to *Scott-Pontzer*. This court looked to *Lynch v. Rob,* 95 Ohio St. 3d 441, 2002-Ohio-2485 for guidance. In the *Lynch* case the Ohio Supreme Court explained the effect of an MCS-90 endorsement. Under the Multiple Carrier Act of 1980, certain commercial motor carriers who engage in interstate commerce must register with the United States Department of Transportation, complying with minimum financial responsibility requirements established by the Department. The regulations require a specific endorsement form in order to satisfy the financial responsibility requirements. The MCS-90 endorsement requires the insurer to indemnify the insured for any damages, subject to underlying insurance. The court found the endorsement should be read to eliminate any limiting clauses in the underlying policy restricting the scope of coverage. In *Lynch,* the driver of the tractor-trailer was the tortfeasor. The insurer of the tractor-trailer denied coverage, arguing the driver was not covered under the policy. The Supreme Court found the insurer could not exclude the driver because the purpose of the MCS-90 clause was to protect the public by assuring insurance would be available. The *Lynch* court found the U.S. Congress has mandated the trucking industry to take ultimate responsibility for persons who are injured by a carrier's operation.

{¶32} In *Jeter,* we found the rationale does not extend to *Scott-Pontzer* cases because the injured party does not make the claim under the liability portion of the policy. Thus, the necessity of having insurance to protect the public who are injured by the trucking concerns is not present.

{¶33} We find decedent was not an insured under National Union's policy of insurance. The insurance policy excepts from coverage persons using automobiles not

owned by the company, and excepts employees even in the course and scope of employment. *Galatis* requires specific language including employees in order to extend coverage to employees.

{¶34} The first assignment of error is overruled.

II

{¶35} In their second assignment of error, appellants argue decedent's employer's excess/umbrella policy issued by Lexington Insurance Company provides coverage for this claim.

{¶36} In the Lexington policy, the named insured again is the corporation. The policy does not comply with the requirements of *Linko,* supra. It contains only automobile liability coverage, and no UM/UIM coverage.

{¶37} The definitional section defines the term "persons insured" as the named insured, any subsidiary, owned, or controlled companies either in existence at the time the policy began or acquired subsequently. The policy also defines as "insured persons" partners, executive officers, directors, stockholders, or employees acting within the scope of their duties, except with respect to ownership, maintenance, or use of any auto, aircraft or watercraft.

{¶38} As in I, supra, we find UM/UIM coverage arises as a matter of law in this policy. However, we find appellant was not an insured under the policy pursuant to the language of the policy and *Galatis.*

{¶39} The second assignment of error is overruled.

III

{¶40} In their third assignment of error, appellants challenge the trial court's ruling they cannot recover from appellee Great Central Insurance Company's policy with appellant Naomi Gooden's employer.

{¶41} We have reviewed the record, and we find appellant Naomi Gooden brought this suit only in her capacity as executrix of the decedent's estate, and not in her individual capacity. This in and of itself bars her recovery as an employee.

{¶42} Great Central's commercial general liability policy contains a "stop-gap" endorsement which gives liability coverage to the named insured for any employee who sustains bodily injury by accident or disease. It does not comply with requirements of *Linko,* supra.

{¶43} The "stop-gap" endorsement specifies the liability only applies for damages sustained by an employee of the named insured arising out of and in the course of employment. The named insured on the declaration page is Hartville Foods, Inc. and Olzeski Properties, a partnership. An additional declaration sheet adds McClain Grocery Company, Cooper Management, and R.L. Hornberger. The additional declaration sheet specifies these parties are insured only with respect to the property leased to the named insureds.

{¶44} Appellants also argue appellant Naomi Gooden was actually at work when the accident occurred. We find this is not sufficient to meet the requirement that her damages arise in the course of and the scope of her employment. Appellant's damages did not arise out of the course of her employment.

{¶45} We find the trial court did not err in granting summary judgment on behalf of Arganit-Great Central Insurance Company.

{¶46} The third assignment of error is overruled.

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

By Gwin, P.J., and

Farmer, J., concur

Hoffman, J., concurs

separately

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JUDGES

WSG:clw 0916

Hoffman, J., concurring

{¶48} I concur in the majority's analysis and disposition appellants' fourth assignment of error.

{¶49} I further concur in the majority's disposition of appellants' first, second and third assignments of error. However, I do so for different reasons.

{¶50} As to appellants' first assignment of error, I find the majority's application of *Galatis* based upon the fact Kenneth Gooden was not a "named insured" under the

National Union Fire Insurance policy to support its conclusion no UIM coverage exists is misplaced. Although it is undisputed Gooden was not a "named insured," unlike *Galatis,* there exists specific policy language otherwise qualifying Gooden as an insured apart from the *Scott-Pontzer* ambiguity of the word "you" in the definition of an insured. As such, the *Galatis* rationale limiting *Scott-Pontzer's* extension of coverage to employees of the "named insured" provided the employee was within the course and scope of employment, is not applicable in the case sub judice. The fact Gooden was not a "named insured" does not defeat appellants' claim because, unlike *Galatis*, there exists specific policy language which defines Gooden as an insured.

{¶51} The liability portion of the policy includes within the definition of insured "any- one else occupying a covered auto." The class of people who could comprise "anyone else" is infinite. The only limitation is that "anyone else" must be in a "covered auto." As noted by the majority, the liability policy designates a "covered auto" as "any auto." Although the UM endorsement may limit covered autos to those the named insured owns and as contained on a schedule on file, there is no similar limitation with respect to what autos are covered under the liability portion of the policy. Because there was no valid rejection of comparable coverage for anyone else occupying a covered auto [any auto], such coverage for UM/UIM purposes necessarily arises by operation of law. This is the rationale the Tenth District employed in *Ross v. Clark* (Jul. 31, 2003), Franklin App. No. 02AP222, 2003-Ohio-4056. The majority apparently finds *Ross* unpersuasive because it was decided before *Galatis* and the Ohio Supreme Court also applied *Galatis* to cases in which UM/UIM coverage arose by operation of law.

{¶52} I believe the majority wrongfully applies *Galatis* to the situation herein. In the case sub judice, appellant does not rely upon the *Scott-Pontzer* ambiguity to find Gooden to be an insured. Rather, appellant relies upon the aforementioned specific language in the liability policy to support the argument Gooden is an insured. While the UM endorsement may limit who qualifies as an insured and does not specifically include employees, the liability definition of who qualifies as an insured is not likewise so limited. Therefore, I find the majority's conclusion, pursuant to *Galatis* there is no UM/UIM coverage because Gooden is not the "named insured," unpersuasive and fails to address appellants' argument. Coverage exists not because of a *Scott-Pontzer* ambiguity which *Galatis* thereafter limited, but rather because of the specific policy language in the liability policy which then creates comparable UM/UIM coverage by operation of law.

{¶53} That being said, I nevertheless concur in the majority's decision to reject appellants' argument. As noted supra, to accept it would mean everyone occupying any vehicle is covered under this policy. There would not only be no "course and scope of employment" limitation, there would be no employment relationship limitation. In fact, there would be no limitation whatsoever as to whom could claim coverage under the policy as long as their claim arose out of an automobile accident. Such extension is irrationale.

{¶54} As noted in the majority opinion, *Galatis* also instructs us to construe the policy according to intent of the parties. "Although, as a rule, a policy of insurance that is reasonably open to different interpretation will be construed most favorably for the insured, that rule will not be applied as to provide an unreasonable interpretation of the

words of the policy." *Morfoot v. Steake* (1963), 174 Ohio St. 506, para. 1 of the syllabus. I find the possible interpretation of the subject insurance contract to include anyone occupying any auto unreasonable. Looking to the intent of the parties, the only reasonable interpretation of the policy language would be to limit coverage to employees of the named insured provided they were in the course and scope of employment. Despite the inartful specific policy language drafted by the insurer, and regardless of who was the "named insured" in the policy, the underlying intent of the parties must be considered to give reasonable interpretation to the specific language. When doing so, I find it unreasonable to believe the parties intended coverage to extend to the named insured's employees when not in the course and scope of employment absent specific evidence of a contrary intent.

{¶55} I further concur in the majority's analysis and disposition of appellants' separate argument concerning the MCS-90 Endorsement.

{¶56} As to appellants' second assignment of error, I concur in the majority's disposition. I do so because the Lexington Insurance Co. policy is an excess policy. Having found Gooden was not entitled to coverage under the National Fire Union policy, he likewise is not entitled to coverage under Lexington's excess policy. *See, Shook v. Cincinnati Ins. Co.* (Oct. 7, 2002), Stark App. No. 2002CA0067, unreported. Accordingly, it does not matter whether Gooden qualifies as an insured under the Lexington policy or pursuant to *Galatis* (i.e., within the course and scope of employment).

{¶57} As to appellants' third assignment of error, I concur in the majority's disposition, but would limit my reason for doing so because Naomi Gooden did not sue in her individual capacity.

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

NAOMI GOODEN, EXECUTRIX OF THE ESTATE OF KENNETH C. GOODEN, DECEASED	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
NATIONAL UNION FIRE INSURANCE COMPANY, ET AL	:	
Defendant-Appellee	:	CASE NO. 2004CA00011

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed. Costs to appellants.

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JUDGES