[Cite as *Pearson v. Jurgens*, 2004-Ohio-2522.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Linda Pearson,	:	
Plaintiff-Appellee,	:	
v.	:	No. 03AP-1109 (C.P.C. No. 01CVC10-10746)
Jo Ann Jurgens et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
St. Paul Mercury Insurance Company,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 13, 2004

Scott W. Schiff & Associates Co., L.P.A., Jay Hurlbert and *Scott W. Schiff*, for plaintiff-appellee.

Lindhorst & Dreidame, James F. Brockman and *David E. Williamson*, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas.

BOWMAN, J.

{¶1} Defendant-appellant, St. Paul Mercury Insurance Company, appeals from a September 2003 decision of the Franklin County Court of Common Pleas which

denied its motion for summary judgment in this action by plaintiff-appellee, Linda Pearson, seeking uninsured/underinsured ("UM/UIM") benefits under a commercial automobile insurance policy.

{¶2} The parties do not dispute that, at the time of the January 2001 accident, appellee was employed by appellant's insured, Doctor's Hospital North, but that appellee was not in the scope of her employment. Appellee's claim for UM/UIM coverage was based upon *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, the holding of which has since been sharply limited in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. The court, in *Galatis*, held, at paragraph two of the syllabus:

> 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. (*King v. Nationwide Ins. Co.* [1988], 35 Ohio St.3d 208, 519 N.E.2d 1380, applied; *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* [1999], 85 Ohio St.3d 660, 710 N.E.2d 1116, limited.)

{¶3} Appellant now assigns one error:

> THE TRIAL COURT ERRED IN DENYING ST. PAUL'S MOTION FOR SUMMARY JUDGMENT.

{¶4} Appellant's position is that, because appellee was not in the scope of her employment at the time of the accident, she is not entitled to coverage under her employer's policy. In addition, appellant argues that UM/UIM coverage under the policy did not arise by operation of law, pursuant to *Linko v. Indemn. Ins. Co. of N. Am.* (2000), 90 Ohio St.3d 445, and related cases.

{¶5} Appellee's response, while acknowledging that *Scott-Pontzer* is no longer controlling, claims her asserted basis for coverage was and continues to be that appellant's evidence failed to establish that the policy's UM/UIM coverage was provided in an amount equal to liability coverage, and, thus, coverage arose under operation of law such that appellant was unable to limit coverage to those driving an owned auto, but, rather, must now provide UM/UIM coverage to anyone driving "any auto." For authority, appellee relies, inter alia, upon this court's decision in *Riggs v. Motorists Mut. Ins. Co.*, Franklin App. No. 02AP-876, 2003-Ohio-1657, as it interpreted *Linko,* supra.

{¶6} Pursuant to *Galatis*, appellee is not entitled to UM/UIM coverage under appellant's policy because, at the time of the accident, she was not in the course and scope of her employment. Moreover, we interpret the holding of *Riggs* to be no longer viable because, post-*Galatis,* the Ohio Supreme Court reversed *Riggs*' finding of coverage under the business automobile liability policy, then dismissed the pending cause of *Lumbermens Mut. Cas. Co. v. Xayphonh*, Summit App. No. 21217, 2003-Ohio-1482, which had been certified to the court as being in conflict with *Riggs. In re Uninsured & Underinsured Motorist Coverage Cases*, 100 Ohio St.3d 302, 2003-Ohio-5888, at ¶17; *01/29/2004 Case Announcements,* 2004-Ohio-345. Finally, we conclude we need not reach the question of whether coverage arose by operation of law because, following *Galatis*, appellee was not in the scope of her employment, and, thus, could not be considered an insured under the policy. Without a finding that the party seeking coverage qualifies as an insured, *Linko* issues do not arise. See, e.g., *Elliston v. Nationwide Ins. Co.*, Wayne App. No. 03CA0024, 2004-Ohio-1597; *Sweeney v. Natl.*

Union Fire Ins. Co., Cuyahoga App. No. 82143, 2004-Ohio-624; *Murphy v. Thornton*, Jackson App. No. 03CA18, 2004-Ohio-1459.

{¶7} Based upon these considerations, appellant's sole assignment of error is sustained and the judgment of the Franklin County Common Pleas Court is reversed.

Judgment reversed.

WATSON and SADLER, JJ., concur.
