

[Cite as *Moye v. Am. & Foreign Ins. Co.*, 2004-Ohio-608.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DAVID W. MOYE, SR.

Plaintiff-Appellee
Cross-Appellant

-vs-

AMERICAN & FOREIGN INSURANCE CO., ET AL.

Defendant-Appellant

And

Federal Insurance Company

Defendant-Appellee
Cross-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case Nos. 2003CA00216
2003CA00211

OPINION

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas, Case No. 2002CV01359

JUDGMENT: Affirmed in Part and Reversed in Part

DATE OF JUDGMENT ENTRY: February 9, 2004

APPEARANCES:

For Plaintiff-Appellee

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Defendant-Appellant

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Hoffman, P.J.

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{¶1} Defendants-appellants American Foreign Insurance Company (“AFIC”) and Federal Insurance Company (“Federal”) appeal the May 23, 2003 Judgment Entry of the Stark County Court of Common Pleas which found, in part, plaintiff-appellee David W. Moye, Sr. is entitled to UM/UIM coverage by operation of law under AFIC’s commercial automobile liability policy, and is entitled to UM/UIM coverage by operation of law under Federal’s commercial umbrella liability policy. As it relates to appellee’s cross-appeal against AFIC, the trial court found AFIC’s commercial general liability policy does not entitle appellee to UM/UIM coverage and the \$1.5 million deductible under AFIC’s commercial automobile policy applies to the UM/UIM coverage provided by that policy. As it relates to appellee’s cross-appeal against Federal, even though the trial court found UM/UIM coverage by operation of law under Federal’s commercial umbrella liability policy Coverage A, it did not rule whether UM/UIM coverage was also provided under Coverage B of that same policy.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 17, 1996, appellee was operating a motor vehicle which was involved in an accident with another motor vehicle driven by Michelle Levensgood. The

accident was due to the negligence of Ms. Levensgood. Ms. Levensgood was insured by Grange Insurance Company, with whom appellee settled for \$100,000 in exchange for a release.

{¶3} On the date of the accident, appellee was employed by The Timken Company (“Timken”). Appellee concedes he was not in the course and scope of employment with Timken at the time of the accident.

{¶4} Timken was a named insured under the three policies of insurance noted supra. Appellee filed a complaint for declaratory judgment against AFIC and Federal, seeking a declaration he was entitled to UM/UIM coverage under the three policies.

{¶5} Following summary judgment motions by all parties, the trial court issued its findings as set forth above in a Judgment Entry filed May 23, 2003. It is from that judgment entry AFIC prosecutes this appeal assigning as error:

{¶6} “I. THE TRIAL COURT ERRED IN DENYING AFIC’S MOTION FOR SUMMARY JUDGMENT, INsofar AS THE COURT HELD THAT AFIC OWES UM/UIM COVERAGE TO DAVID MOYE, SR., UNDER THE BUSINESS AUTOMOBILE POLICY ISSUED TO THE TIMKEN COMPANY.

{¶7} “II. BECAUSE TIMKEN IS SELF-INSURED IN THE PRACTICAL SENSE, THE TRIAL COURT ERRED BY HOLDING THAT THE AFIC BUSINESS AUTOMOBILE POLICY IS SUBJECT TO RC 3937.18, THAT TIMKEN’S REJECTION OF UM/UIM COVERAGE IS INVALID AND THAT UM/UIM COVERAGE IS IMPLIED BY OPERATION OF LAW INTO THE BUSINESS AUTO POLICY ABOVE THE \$1.5 MILLION DEDUCTIBLE.

{¶8} “III. THE COURT ERRED IN HOLDING THAT TIMKEN’S REJECTION OF UM/UIM COVERAGE UNDER ITS BUSINESS AUTO POLICY IS INVALID.

{¶9} “IV. EVEN IF UM/UIM COVERAGE IS IMPLIED BY OPERATION OF LAW INTO THE AFIC BUSINESS AUTOMOBILE POLICY ISSUED TO TIMKEN, BECAUSE DAVID MOYE, SR., IS NOT AN INSURED FOR LIABILITY COVERAGE UNDER THAT POLICY, THE TRIAL COURT ERRED IN HOLDING THAT HE IS ENTITLED TO UM/UIM COVERAGE UNDER THAT POLICY.

{¶10} “V. THE TRIAL COURT ERRED BY HOLDING THAT THE PROMPT NOTICE AND SUBROGATION PROVISIONS CONTAINED IN THE AFIC BUSINESS AUTO POLICY AND COMMERCIAL GENERAL LIABILITY POLICY ISSUED TO THE TIMKEN COMPANY DO NOT APPLY TO DAVID MOYE’S CLAIMS FOR UM/UIM COVERAGE BY OPERATION OF LAW.

{¶11} “VI. THE TRIAL COURT ERRED BY HOLDING THAT DAVID MOYE, SR., IS ENTITLED TO UM/UIM COVERAGE DESPITE THE FACT THAT HE BREACHED THE PROMPT NOTICE AND SUBROGATION PROVISIONS OF THE POLICY AND FAILED TO REBUT THE PRESUMPTION OF PREJUDICE RESULTING THEREFROM.

{¶12} “VII. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF IS ENTITLED TO UM/UIM COVERAGE UNDER THE AFIC COMMERCIAL AUTO POLICY DESPITE THE FACT THAT THE PLAINTIFF IS NOT LEGALLY ENTITLED TO RECOVER DAMAGES FROM A TORTFEASOR, A PRECONDITION TO UM/UIM COVERAGE UNDER RC 3937.18.

{¶13} “VIII. THE TRIAL COURT ERRED IN FAILING TO HOLD THAT AFIC IS ENTITLED TO A \$100,000 SET-OFF.”

{¶14} As it relates to AFIC, appellee cross-appeals, assigning as error:

{¶15} “I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN PART IN FAVOR OF CROSS-APPELLEE AMERICAN & FOREIGN INSURANCE COMPANY (AFIC) AND IN DENYING SUMMARY JUDGMENT IN PART AGAINST CROSS-APPELLANT BY RULING THAT AFIC’S \$1.5 MILLION LIABILITY DEDUCTIBLE APPLIES TO CROSS-APPELLANT’S UIM CLAIM UNDER AFIC’S AUTO POLICY.

{¶16} “II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN PART IN FAVOR OF CROSS-APPELLEE AMERICAN & FOREIGN INSURANCE COMPANY (AFIC) AND IN DENYING SUMMARY JUDGMENT IN PART AGAINST CROSS-APPELLANT IN RULING THAT AFIC’S CGL POLICY DID NOT PROVIDE UIM COVERAGE TO CROSS-APPELLANT.”

{¶17} From that same trial court judgment entry, Federal appeals, assigning as error:

{¶18} “I. THE TRIAL COURT ERRED IN FINDING PLAINTIFF DAVID W. MOYE, SR. IS ENTITLED TO UNDERINSURED MOTORIST COVERAGE UNDER FEDERAL’S COMMERCIAL UMBRELLA POLICY NO. 7973-29-18 ISSUED TO THE TIMKEN COMPANY BECAUSE HE IS NOT ENTITLED TO SUCH COVERAGE UNDER AFIC’S PRIMARY POLICIES.

{¶19} “II. THE TRIAL COURT ERRED IN HOLDING THAT TIMKEN’S REJECTIONS OF UM/UIM COVERAGE UNDER ITS BUSINESS AUTO AND UMBRELLA POLICY ARE INVALID.

{¶20} “III. THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF QUALIFIES AS AN “INSURED” ENTITLED TO UM/UIM COVERAGE IMPOSED BY OPERATION OF

LAW UNDER AFIC'S PRIMARY BUSINESS AUTO POLICY AND UNDER FEDERAL'S COMMERCIAL UMBRELLA POLICY.

{¶21} "IV. THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF IS ENTITLED TO UM/UIM COVERAGE IN SPITE OF PLAINTIFF'S LATE NOTICE OF HIS CLAIM/ACCIDENT AND HIS FAILURE TO PRESERVE SUBROGATION RIGHTS IN VIOLATIONS OF THE TERMS AND CONDITIONS OF POLICY COVERAGE.

{¶22} "V. THE TRIAL COURT ERRED IN FAILING TO ISSUE AN ORDER SPECIFICALLY DECLARING THAT ANY UM/UIM COVERAGE IMPOSED BY OPERATION OF LAW ON FEDERAL'S COMMERCIAL UMBRELLA POLICY IS EXCESS OF THE \$5 MILLION LIMITS OF UNDERLYING INSURANCE, INCLUDING ANY SELF-INSURANCE/DEDUCTIBLE APPLICABLE TO THE SCHEDULED UNDERLYING INSURANCE OF AFIC.

{¶23} "VI. THE TRIAL COURT ERRED IN FAILING TO HOLD THAT FEDERAL IS ENTITLED TO A \$100,000.00 SET-OFF."

{¶24} Finally, as it relates to Federal, appellee cross-appeals, assigning as error:

{¶25} "I. THE TRIAL COURT ERRED IN FAILING TO RULE THAT CROSS-APPELLANT IS ENTITLED TO UIM BENEFITS UNDER COVERAGE B OF THE FEDERAL'S UMBRELLA POLICY IN THE EVENT CROSS-APPELLANT IS NOT ENTITLED TO UIM COVERAGE UNDER AFIC'S PRIMARY POLICIES AND COVERAGE A OF FEDERAL'S UMBRELLA POLICY."

AFIC'S APPEAL

{¶26} Appellee's complaint for declaratory judgment was premised upon the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty Mutual Fire Ins.* (1999), 85 Ohio St.3d

660, 1999-Ohio-292. Likewise, the trial court's decision was based upon application of *Scott-Pontzer*.

{¶27} Subsequent to the trial court's decision, but prior to oral argument of this appeal, the Ohio Supreme Court decided *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849, and *In re Uninsured & Underinsured Motorist Coverage Cases*, (2003), 100 Ohio St.3d 302, 2003-Ohio-5888. The *Galatis* decision limited the application of *Scott-Pontzer* “. . . by restricting the application of uninsured and underinsured motorist coverage issued to a corporation to employees only while they are acting within the course and scope of their employment, unless otherwise specifically agreed.” *Galatis* at 2. Because it is undisputed appellee was not within the course and scope of his employment with Timken at the time of the accident, we find the trial court's finding of UM/UIM coverage was in error based upon the Supreme Court's subsequent decision in *Galatis* and *In re Uninsured and Underinsured Motorist Coverage Cases*.¹ Accordingly, we find it unnecessary to address each individual assignment of error asserted by AFIC.

APPELLEE'S CROSS-APPEAL TO AFIC

{¶28} Based upon *Galatis* and *In re Uninsured and Underinsured Motorist Coverage Cases*, appellee's cross-appeal is overruled.

FEDERAL'S APPEALS

{¶29} For the same reasons we sustained AFIC's appeal, we sustained Federal's appeal and find the trial court's finding of UM/UIM coverage was in error.

APPELLEE'S CROSS-APPEAL TO FEDERAL

¹ We find it unnecessary to address appellee's argument based upon *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, in light of the Supreme Court's denial of reconsideration in *Galatis* and *In re Uninsured and Underinsured Motorist Coverage Cases* wherein that same argument was raised but rejected.

{¶30} It was unnecessary for the trial court to decide whether UM/UIM coverage was provided under Coverage B of Federal's commercial umbrella liability policy given its finding coverage was provided under Coverage A of that same policy. Nevertheless, because appellee's claim of entitlement to UM/UIM coverage under Coverage B of the umbrella policy is also based upon *Scott-Pontzer*, we find no coverage is provided thereunder pursuant to the authority of *Galatis* and *In re Uninsured and Underinsured Motorist Coverage Cases*. Accordingly, appellee's cross-appeal is overruled.

{¶31} The judgment of the Stark County Court of Common Pleas is affirmed with respect to its finding no coverage exists under AFIC's commercial general liability policy, but reversed with respect to its finding of coverage under AFIC's commercial automobile liability policy and Federal's commercial umbrella liability policy.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur