[Cite as *Frisch v. CNA Commercial Ins.*, 2003-Ohio-1574.]

COURT OF APPEALS
THIRD APPELLATE DISTRICT
SENECA COUNTY

NICHOLAS FRISCH, ET AL. **CASE NUMBER 13-02-36**

PLAINTIFFS-APPELLANTS

v. **O P I N I O N**

CNA COMMERCIAL INSURANCE, ET AL.

DEFENDANTS-APPELLEES

NICHOLAS FRISCH, ET AL. **CASE NUMBER 13-02-40**

PLAINTIFFS-APPELLANTS

v. **O P I N I O N**

CNA COMMERCIAL INSURANCE, ET AL.

DEFENDANTS-APPELLEES

CHARACTER OF PROCEEDINGS: Civil Appeals from Common Pleas Court.

JUDGMENTS: Judgments affirmed.

DATE OF JUDGMENT ENTRIES: March 31, 2003.

ATTORNEYS:

CRAIG A. DYNES
Attorney at Law

Reg. #0000724
P.O. Box 250
Arcanum, OH 45304
For Appellants.

ATTORNEYS:

CHRISTOPHER L. LARDIERE
Attorney at Law
Reg. #0020482
88 West Mound Street
Columbus, OH 43215
For Appellants.

DAVID T. PATTERSON
Attorney at Law
Reg. #0007454
JENIFER J. MURPHY
Attorney at Law
Reg. #0070926
88 East Broad Street, Suite 1750
Columbus, OH 43215
For Appellees, Continental Casualty Company And Continental Insurance Company.

BRIAN A. MEEKER
Attorney at Law
Reg. #0063543
CLIFFORD C. MASCH
Attorney at Law
Reg. #0015737
MICHAEL F. SCHMITZ
Attorney at Law
113 St. Clair Avenue, NE, #700
Cleveland, OH 44114
For Appellee, Travelers Property Casualty.

SHAW, J.

{¶1} This is an appeal from the judgments of the Seneca County Court of Common Pleas which granted summary judgment to Defendants-Appellees Continental Casualty Company, Continental Insurance Company and Travelers Property Casualty Company, in a case filed by Plaintiffs-Appellants, Nicholas, Judy and Chris Frisch ("Frisch").

{¶2} On March 29, 2000, Nathaneal Heiser was driving his car with Nicholas Frisch riding as a passenger in the front seat. The car was traveling at a high rate of speed when Nathanael lost control of the car and the car flipped landing on its top. Both Nathanael and Nicholas were ejected from the vehicle. Nicholas sustained severe, sustained injuries. At the time of the accident, Nicholas lived with his parents, Judy and Chris Frisch. Chris Frisch was employed by Norton Manufacturing Company, Inc. which was insured by Travelers Property Casualty Company. Judy Frisch was employed by Fostoria Community Hospital which was insured by Continental Casualty Company.

{¶3} As a result of the accident, the Frisch's filed a complaint against several parties including Travelers Property Casualty Company ("Travelers"), Continental Casualty Company ("Casualty")[1], and Continental Insurance Company ("Continental"). In their complaint, Frisch asserted that they were entitled to collect underinsured motorist ("UIM") coverage from Norton

[1] The original complaint listed CNA Commercial Insurance as Fostoria Community Hospital's insurer. However the name was changed to Continental Casualty Company in the amended complaint.

Manufacturing Company's commercial auto and umbrella policy issued by Travelers, from Fostoria Community Hospital's Commercial Auto Policy issued by Casualty, and from Frisch's Homeowner's policy issued by Continental. Travelers, Continental and Casualty each filed a motion for summary judgment which the court granted.

{¶4} Frisch now appeals asserting three assignments of error. However, Frisch subsequently filed in this court, a notice of dismissal of its first assignment of error, which we grant at this time. The second and third assignments of error read as follows, (1) "The trial court erred in failing to find that UM/UIM coverage was available to Plaintiffs under the commercial auto policy and umbrella policy issued by Travelers Property Casualty Company to Norton Manufacturing Company, Inc."(2) "The trial court erred in failing to find that UM/UIM coverage was available to the plaintiffs under the commercial auto policy issued by Continental Casualty Company to 'Fostoria Hospital Association,' a corporation."

{¶5} Our review of the record reveals that the trial court has thoroughly addressed all of the relevant factual and legal issues pertaining to this appeal in its judgment entries granting summary judgment to Travelers and Casualty. Accordingly, upon considering the trial court's entries and our recent decision in *Rice v. Buckeye*, Logan App. No. 8-02-24, 2003 Ohio 390, we hereby adopt the

final judgment entries of the trial court dated September 4 and September 6, 2002, incorporated and attached hereto as exhibits A and B, as our opinion in this case.

{¶6} Upon motion of the appellant, the first assignment of error is dismissed. For the reasons stated in the final judgment entries of the trial court attached and incorporated herein as Exhibits A and B, the plaintiff's second and third assignments of error are overruled and the judgments of the Seneca County Common Pleas Court are affirmed.

Judgments affirmed.

WALTERS and CUPP, JJ., concur.

IN THE COURT OF COMMON PLEAS, SENECA COUNTY, OHIO

NICHOLAS FRISCH, et al, : Case No. 53727

Plaintiffs

v.

CNA COMMERCIAL INSURANCE, et al. : JUDGE MICHAEL P. KELBLEY

Defendants

OPINION AND JUDGMENT ENTRY ON MOTION FOR SUMMARY JUDGMENT OF DEFENDANT TRAVELERS INSURANCE

This matter is before the Court on the Motion for Summary Judgment of Defendant Travelers Property Casualty Company [hereinafter "Travelers"] on the Second Amended Complaint of Plaintiffs Nicholas Frisch, Chris Frisch, and Judy Frisch. All affected parties responded to the motion. Upon review of the file and the law, the Court makes the following finding in granting summary judgment to Defendant Travelers.

STANDARD FOR SUMMARY JUDGMENT AND EVIDENCE

Before summary judgment may be granted, the Court must determine that no genuine issue as to any material fact remains to be litigated. Upon reviewing the evidence most strongly in favor of the party against whom the motion is made, and if it appears from the evidence that reasonable minds can come to but one conclusion, the moving party is entitled to judgment as a matter of law. *See* Ohio Rules of Civil Procedure 56(C) (Anderson 2002).

APPENDIX B

Further, Civil Rule 56(C) provides that summary judgment is to be granted only on the basis of the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact." *Id.* The Court has examined all evidentiary material for this case. For the purposes of this motion the applicable evidentiary material used by the Court consists, in part, of the transcripts of the depositions of Plaintiff Nicholas Frisch (*see* Frisch Dep.) and Defendant Nathanael T. Heiser (*see* Heiser Dep.), and a copy of insurance contracts issued to Norton Manufacturing Company by Defendant Travelers, specifically, a commercial auto policy number Y-810-994G0010-TIL-99 (*see* Traveler Prop. Cas. Co. Mot. for S. J., Ex. A.) [hereinafter "Travelers' Mot."] and a commercial umbrella policy number YSM-CUP-994G001-0-TIL-99 (*See id.*, Ex.. B.). It is upon this evidence, "construed most strongly in the [non-moving] party's favor," Civ R. 56(E), and upon concessions made for the purpose of this motion for summary judgment, that the Court makes the following recitation of the case as it pertains to the parties concerned in the Defendant's motion and upon which the Court bases its decision.

STATEMENT OF THE CASE

On March 29, 2000, just about midnight, Defendant Nathanael T. Heiser was driving his 1985 Chevrolet Camaro with Nicholas Frisch riding as a passenger in the front seat. (Frisch Dep. at 27, 29, 31; Heiser Dep. at 15.) The car was traveling at a high speed (*id.* at 30-31); Plaintiff Nicholas Frisch says it was traveling at a speed greater than seventy-five (75) miles per hour westbound on County Road 226 in Hancock County, Ohio near Fostoria. (Pls' 2nd Am. Compl., at ¶ 1..) Nathanael lost control of his vehicle after running a stop sign. (*Id.* at ¶ 2.) The vehicle flipped and ended up on its top in a field. (*Id.* at.. ¶ 3.) Both Nathanael and Nicholas were ejected from the vehicle. (*Id.* at ¶ 4.) At the time of the accident, Nathanael was a minor of seventeen years and Nicholas was eighteen years old. (*See* Frisch Dep. at 7.)

Associated with injuries caused by this accident, Nicholas made both inpatient and outpatient hospital visits related to injuries to his neck and back. (*See generally* Frisch Dep. at 33-40.) He has had surgery grafting two of his vertebrae together. (*Id.*) His treatment and rehabilitation is continuing. (*Id.*) He complains of sleeping difficulty,

loss of memory and slowed speech. (*Id.*) The graft is disintegrating and may require further medical attention. (*Id.*) He claims to have been forced to change his career plans due to the injuries he has suffered. (*Id.*)

At the time of the accident Nicholas lived with his parents, Plaintiffs Chris and Judy Frisch, at 830 Eastwood Drive, Fostoria, Ohio. (*Id.* at 93..) Plaintiff Chris Frisch, Nicholas' father, was an employee of Norton Manufacturing Company, Inc. (*See* Frisch Dep. at 94; Travelers Mot. at 1.) Norton Manufacturing Company, Inc., Richard & Terrell Norton individually, and several other corporations were the named insured under two insurance policies issued by the Travelers' commercial auto policy number Y-810-994G0010-TIL-99 (*See* Travelers' Mot., at 1, Ex. A.) and umbrella policy number YSM-CUP-994G001-0-TIL-99. (*See* Travelers' Mot. at 1, Ex. B.) "Both policies were issued for the period from 7/1/99 to 7/1/00." (Travelers' Mot. at 1,Ex. A, Ex. B.) Thus, it was in effect at the time of the March 29, 2000 accident.

Nicholas, his mother, Plaintiff Judy Frisch, and father, Plaintiff Chris Frisch filed this suit against Traveler's Insurance, another insurance carrier, and Nathanael and David Heiser. In addition, the Frisch Plaintiffs included their homeowners' insurance carrier and several other individuals, each of whom have been subsequently dismissed by grants of summary judgment.

ARGUMENTS

The issues at hand are whether the Plaintiffs are insured under the Travelers policy issued to Norton Manufacturing and whether they are entitled to compensation for damages derived from the March 29, 2000 accident. Plaintiffs argue that "at all times applicable hereto, Plaintiff Nicholas Frisch was insured with Defendant Travelers Property Casualty by virtue of Plaintiff Chris Frisch's employment with Norton Manufacturing, Inc. in Fostoria, Ohio." (Pls' 2nd Am. Compl., at ¶ 16.) Plaintiffs attached "portions" of the Travelers policy to the complaint. (*See id.*; *see also* Pls' Mem. Contra to Travelers Prop. Cas. Co.'s Mot. for S. J. at 5.) [hereinafter "Pls' Mem. Contra"] In support of their motion for summary judgment, Defendant Travelers attached as exhibits the applicable insurance policies. (*See* Travelers' Mot.)

Citing Civil Rule 56(E), Plaintiffs argue that the copies of the policies attached to

Travelers' motion "are not permissible evidence within the definition . . ." of the rule. (Pls' Mem. Contra at 5.) Plaintiffs point out that the Defendants "place their entire Summary Judgment argument" on the two insurance contracts attached to the Defendant's motion. (*Id.*) "Without an affidavit authenticating the policy . . .. the policy and endorsement attached to Defendant's Motion for Summary Judgment as Exhibits . . . [do not] "merit any consideration . . . ." Were the Court to accept this request, there would be no contract to interpret. The contracts attached to Plaintiffs' 2nd Amended Complaint should rightly be rejected from consideration as well; it has none of the authenticating affidavits the Plaintiffs insist Defendants must provide. The Plaintiffs, too, rest much of their argument upon interpretation of the contracts they wish the Court to ignore.

The Plaintiffs correctly assert Civil Rule 56(E): "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." (*Id.*, *quoting* Ohio Civ. R. 56(E), Anderson, 2002.) Without a contract to interpret and given that the Defendant has stipulated, for the purposes of their motion, to the facts surrounding the accident and the related injuries, the Plaintiff would be left with only their pleadings in their 2nd Amended Complaint. A further reading of Rule 56(E) says:

> When a motion for summary judgment is made and supported as provided in this rule, *an adverse 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. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Civ R. 56(E) (emphasis added). Without the insurance contracts, there would be no evidence that there were any insurance contracts except that Travelers' has so admitted. (*See* Ans. of Travelers Prop. Cas. to 2nd Amend. Compl., at ¶ 3; Travelers' Mot. at 1.)

Plaintiffs lament that the contracts attached to the Defendant's motion do not provide "answers to" some of their questions or "enough information" for them to tell if

endorsements are valid and so on. (*See* Pls' Mot. Contra, at 5-6.) Plaintiffs have neither provided the Court with evidence of any request for documents nor petitioned the Court to compel production of alleged lacking information. All parties have had ample opportunity to make timely submissions in support of every motion made to this Court. Thus, for the purposes of this motion, the Court considers the language contained in insurance contracts issued to Norton Manufacturing Company by Travelers, specifically, the commercial auto policy number Y-810-994G0010-TIL-99 (*see* Travelers' Mot., Ex. A.) and the commercial umbrella policy number YSM-CUP-994G001-0-TIL-99 (*See id.*, Ex. B.) as alleged by and attached to the Plaintiffs' 2nd Amended Complaint (*see* Pls' 2nd Amend. Compl.) and admitted to by this defendant (*see* Ans. of Travelers Prop. Cas. to 2nd Amend. Compl., ¶ 3.) and attached to their motion for summary judgment (*see* Travelers' Mot., Ex. A, Ex. B.).

BACKGROUND AND LEGAL HISTORY

The Plaintiffs have the burden of proving that they are insureds under the Travelers' policies issued to Norton Manufacturing, Inc. They hang their argument on the decision of the Ohio Supreme Court in *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St.3d 660 (1999). In *Scott-Pontzer*, the Ohio Supreme Court was faced with the issue of whether the employee of a corporate insured qualified as an "insured" under two policies of insurance issued by the defendant-insurers. The decedent was driving his wife's car at the time of the accident, and was not engaged in any work-related activities. *Id.*

One of the policies expressly provided UM/UIM coverage while the other did not. In addition, the one with the coverage did not contain a "scope of employment" exception while the policy without express coverage did include this exception. *Id.* The policy containing the UM/UIM coverage named decedent's employer as the named insured, and defined "who is an insured" as:

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 . . . . [and]

> 4. Anyone for damages he or she is entitled to recover because of bodily injury sustained by another insured.

Id. at 663. The defendant insurance company argued that "you" referred to the named insured, in other words, to the corporation. Thus, they asserted, the decedent did not qualify as an insured under the policy.

The Court agreed with the plaintiff's assertion that the policy language was ambiguous and reasonably susceptible to the determination that, as an employee of the named insured, the decedent was also an insured under the policy. The Court concluded that:

> It would be nonsensical to limit protection solely to the corporate entity, since the corporation, itself, cannon occupy an automobile, suffer bodily injury or death, or operate a motor vehicle. Here, naming the corporation as the insured is meaningless unless the coverage extends to some person or persons - including to the corporation's employees.

Id. at 664. The Court therefore construed the policy against the insurer and held that the decedent was insured by the policy at the time of the accident because there was no contractual language restricting coverage to employees who were acting within the scope of their employment. On the authority of *Scott-Pontzer* the Ohio Supreme Court extended similar coverage to minor children of employees where they are injured in an automobile accident by a non-employee while riding in a non-covered vehicle and whose injuries were not related to the corporation's business. *See Ezawa v. Yasuda Fire & Marine Ins. Co.*, 86 Ohio St.3d 557 (1999). Travelers argues that the present case is distinguishable from the combined effect of *Scott-Pontzer* and *Ezawa* because its policy "extend[s] coverage to certain specified individual natural persons . . . ." as opposed to *Scott-Pontzer* where the coverage extends only to the named corporation. (Travelers' Mot. at 2.) In addition, their policy "include[s] UM/UIM coverage within the umbrella coverage . . . ." which is opposite to the situation in *Scott-Pontzer* where the "coverage was imposed by operation of law and thus without the benefit of any contract language." (*Id.*) Accordingly, the claims of "the teenage son of an employee of the insured who was injured in an accident having no relationship whatsoever to his father's employment" should not be covered. (*Id.*)

Correspondingly, the Plaintiffs counter by insisting that "[i]nsuring specific individuals, in addition to the corporation does not make *Scott-Pontzer* inapplicable . . . ." (Pls' Mem. Contra at 1, emphasis in original.) Citing unreported cases, largely trial court decisions, from courts outside Ohio's Third Appellate District, the Plaintiffs argue that simply listing individuals in addition to the corporation does not remove the *Scott-Pontzer* ambiguity.

ANALYSIS

Plaintiffs cite three cases emanating from two separate Ohio courts of appeal supporting their position that listing specific individuals does not remove the *Scott-Pontzer* ambiguity (*See* Pls. Mem. Contra at 1-2.) They list two from of the Second Appellate District, *Still v. Indiana Ins. Co.*, 2002 Ohio App. LEXIS 1122 (2002) and *Shropshire v. EMC/Hamilton Mut. Ins. Co.*, 2001 Ohio App. LEXIS 4493 (2001) *cert. denied*, 94 Ohio St.3d 1452 (2002). The latter does not serve the purpose desired by the plaintiffs; it specifically was not decided on whether naming individuals as well as the corporation escaped *Scott-Pontzer* or not. The court there said, "[w]e need not decide the effect of those differences on the issues before us . . . ." *Id.*, at *9. The former said that including individuals did not distinguish the case "in that the ambiguity still exists." *Still*, 2002 Ohio App. LEXIS 1122 at *7. *Still* was appealed to the Ohio Supreme Court but without opinion has been subsequently dismissed upon petition of the appellant. *See Still v. Indiana Ins. Co.*, 95 Ohio St.3d 1493 (2002). Plaintiffs cite a case from the Fifth Appellate District as an additional authority in support of their position, "*Burkett V. CNA Insurance*, 2000 Ohio App LEXIS 894." No such case exists. The Court must assume Plaintiffs meant to cite *Burkhart v. CNA Ins. Co.*, 2002 Ohio App. LEXIS 894 (2002). *Burkhart* maintains that the *Scott-Pontzer* ambiguity remains even if individuals are also listed in the policy as insureds. None of these cases have any precedential value for this Court. At best they can be used persuasively. The persuasive value is diminished, when they are cited to represent more than they actually do, as in *Shropshire*..

Plaintiffs' disagree with Travelers' "bold assertion that a 'majority of trial courts that have considered . . . [the] issue' have found that adding specific individuals cures the 'you is ambiguous' objection . . ." (Pls' Mem. Contra at 1.)(*quoting* Travelers' Mot.

at 5.) In attempt to demonstrate that Ohio "courts are continuing this trend," (Pls' Mem. Contra at 6..) they cite cases from the common pleas courts of Lucus County of the Sixth District, Franklin County of the Tenth District, Lake County of the Eleventh District, and a Fifth District Common Pleas Court from Stark County. *See Kasson v. Goodman*, Lucas C.P. No C100-1682, unreported (Sept. 21, 2001); *Taylor v. Universal Underwriters Ins. Co.*, Franklin C.P. No 00CVH07-6409, unreported, (July 10, 2001); *Miller v. The Hartford*, Lake C.P. No. 00CV001234, unreported, (June 14, 2001); *Rimel v. Chube Group of Ins. Co.*, Stark No: 1999CV02413, unreported (Oct. 31, 2000)..

Though *Kasson* holds that the ambiguity remains, it says that if the insurance contract in question defined "a named insured as employees of the corporation in the scope of their employment, or anyone, e.g. a human being, that operates a covered vehicle" the ambiguity may disappear. *Kasson*, Lucas C.P. No C100-1682 at 10. The Travelers policy in the present case, as is outlined below, goes beyond the *Kasson* requirement and is easily distinguished from the other cases cited by the Plaintiffs. However, as to the particular question of individuals being listed on the declarations page along with corporate entities, all else being equivalent to the *Scott-Pontzer* policies, clearly several courts have declared that the ambiguity in the definition of the word "you" still exists. Plaintiffs have demonstrated that indeed, their position is supported in at least two appellate districts and two counties in two other districts.

On the other hand, Travelers has shown that trial courts in at least eleven counties (Butler, Clarmont, Coshocton, Cuyahoga, Franklin, Holmes, Lake, Licking, Miami, and Summit) including our sister county of Crawford, representing seven appellate districts (2nd, 3rd, 5th, 8th, 9th, 11th, and 12th) have come to the opposite conclusion. Courts within both Franklin and Lake Counties have come to opposite conclusions. Only the Second Appellate District seems to have entirely made up its mind. If there is a "trend," as the Plaintiffs argue, it would appear to run counter to their assertions. There appears to be far more cases supporting Travelers' argument than that of the Plaintiffs. The Court recognizes that it would be a monumental task to provide every case in every county; and by no means is it assumed that the foregoing list provided by the parties is comprehensive. In the end it is not a matter which party has found the most cases to support their argument; none of these cited have any precedential value in this Court.

8

Travelers attempts to invoke the ruling of the Ohio Third Appellate Court by claiming that *Reinholt v. Gloor*, Henry App. No. 7-01-05, (3rd Dist. Sept. 10, 2001) controls the out come in the present case. The insurance policy in *Reinholt* was issued to a partnership. *See id.* The court held that naming the insured as a sole proprietor with a business name and defining the named insured as an individual created no ambiguity. *See id.* An employee of the sole proprietorship was not insured while riding as a passenger in a friend's vehicle and while outside the scope of his employment. *See id.*

Plaintiffs rightfully claim that "*Reinholt* did not involve an employee/insured that was a corporation without any individual identity as is the case here as well as in *Scott-Pontzer*." (Pls' Mem. Contra at 3.) They argue that there was no corporation and that "with a sole proprietorship, the definition portion of the policy stating that the named insured is 'you' is not ambiguous but refers to an actual, identifiable person who happens to be the sole proprietor." (*Id.*) This Court agrees with the Plaintiffs that *Reinholt* is "inapplicable here" because it does not involve an employer that is a corporation, but, rather an individual doing business under a business name.

At the time of the hearing on this motion, neither party had available to them an opinion that would have controlling authority over this Court. The Third Appellate Court, however, recently held that the inclusion of an individual among the named insured removed the *Scott-Pontzer* ambiguity. *See Houser v. Motorists Ins. Co.*, No. 2-02-02, 2002 WL 1299778 (3rd Dist. June 4, 2002). In *Houser*, "the named insured . . .. was not just the corporation . . . . Its majority shareholder, Dan Burden, was also a named insured. There is no ambiguity with the words 'you' and 'your' referring to Dan Burden. Nor is there ambiguity with the words 'you' and 'your' referring to . . . ." the corporation. *Id.*, at *3.

The Plaintiffs argue that in the case at hand the Travelers policies are otherwise similar to the policy in *Scott-Pontzer* and that this Court should find that Nicholas Frisch is entitled to benefits as an insured. The language in Travelers' policies do bear some similarity to the one in *Scott-Pontzer*, but there are other differences that further distinguish it from the *Scott-Pontzer* policies. The Travelers policy does define '[t]he words 'you' and 'your' [to] refer to the Named Insured in the Declarations of the policy." (Travelers' Mot., Ex. A, at TA0014.) However, here the named insureds are Norton

Manufacturing Co., Inc., Callies Performance Products, Inc., NMC, Inc., Aviation Manufacturing Company, Inc., and Richard and Terrell Norton individually.

Plaintiffs make no attempt to separate the two Travelers' policies for the purpose of finding coverage. But, both policies contain UM/UIM coverage. The commercial auto policy extends UM/UIM coverage to specific employees, namely, Richard Norton and Heath Norton. In *Scott-Pontzer* there was no such listing. This alone would seem to distinguish the policy here from the policies in *Scott-Pontzer*. The *Scott-Pontzer* court "recognize[d] that insurers can draft policy language that provides varying arrays of coverage to any number of individuals." *Scott-Pontzer*, 86 Ohio St.3d at 664.

The Travelers umbrella policy is significantly different from the one in *Scott-Pontzer*. There UM/UIM coverage was not explicitly provided, here it is. (Traveler's Mot., Ex. B, at TU0020.) In *Scott-Pontzer* the failure to offer coverage resulted in the imposition of coverage by operation of law. Since umbrella coverage for UM/UIM exists in the present policy, the policy terms govern the coverage. The Travelers policy defines who is an insured:

Section II - WHO IS AN INSURED.

1. If you are designated in the Declarations page as:
   a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
   b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
   c. An organization other than a partnership or joint venture, you are an insured.
2. Each of the following is also an insured:
   a. As respects the "auto hazard":
      (1) Anyone using and "auto" you own, hire or borrow including any person or organization legally responsible for such use provided it is with your

10

permission; and

(2) Any of your executive officers, directors, partners, employees or stockholders, operating an "auto" you do not own, hire or borrow while it is being used in your business.

(Travelers Mot., Ex. B, at TU0005.)

There is no evidence in the record that Nicholas Frisch was an employee, stockholder, partner, officer, director of, or participant in a joint ventureship with Norton Manufacturing or any of the other entities or individuals listed on the declarations page. The Camaro he was riding in that night was not one of the covered autos in either of the Travelers policies issued to Norton Manufacturing et al. nor was it hired, borrowed, or in any way used with the permission, knowledge, or direction of a named insured. There is no evidence that either the driver, Nathanael Heiser, or Plaintiff Judy Frisch fit or have fit into any of the above categories at any time.. Only Plaintiff Chris Frisch can claim status as an employee but nothing more. There is no evidence, and no argument has been presented, that the late-night frolic of Mr. Heiser and Plaintiff Nicholas Frisch had any connection to any business interest, concern, or purpose of Norton Manufacturing. In short, neither Norton Manufacturing nor its insurer has any liability for the damages resulting for the accident of March 29, 2000.

It is therefore **ORDERED** that the Travelers Property Casualty Company's Motion for Summary Judgment with respect to the commercial auto and umbrella policies issued to Norton Manufacturing in the matter of Frisch v. CNA Commercial Insurance, et al. is **GRANTED**. Accordingly, Plaintiffs' motion to stay this ruling has been rendered moot and is therefore **DENIED**. As to all other matters, this case is continued.

Michael P. Kelbley

JUDGE MICHAEL P. KELBLEY

TO THE CLERK: Please furnish a copy of the foregoing to the parties by regular U. S. Mail.

11

IN THE COURT OF COMMON PLEAS, SENECA COUNTY, OHIO

NICHOLAS FRISCH, et al, Plaintiffs v. Continental Casualty Company, et al. Defendants	:	Case No. 53727 JUDGE MICHAEL P. KELBLEY

OPINION AND JUDGMENT ENTRY ON MOTION FOR SUMMARY JUDGMENT OF DEFENDANT CONTINENTAL CASUALTY COMPANY

This matter is before the Court on the Motion for Summary Judgment of Defendant Continental Casualty Company [hereinafter "Continental"] on the Second Amended Complaint of Plaintiffs Nicholas Frisch, Chris Frisch, and Judy Frisch. All affected parties responded to the motion. Upon review of the file and the law, the Court makes the following finding in granting summary judgment to Continental.

STANDARD FOR SUMMARY JUDGMENT AND EVIDENCE

Before summary judgment may be granted, the Court must determine that no genuine issue as to any material fact remains to be litigated. Upon reviewing the evidence most strongly in favor of the party against whom the motion is made, and if it appears from the evidence that reasonable minds can come to but one conclusion, the moving party is entitled to judgment as a matter of law. *See* Ohio Rules of Civil Procedure 56(C) (Anderson 2002).

Further, Civil Rule 56(C) provides that summary judgment is to be granted only on the basis of the "pleadings, depositions, answers to interrogatories, written

APPENDIX A

admissions, affidavits, transcripts of evidence, and written stipulations of fact." *Id.* The Court has examined all evidentiary material for this case. For the purposes of this motion the applicable evidentiary material used by the Court consists, in part, of the transcripts of the depositions of Plaintiff Nicholas Frisch (*see* Frisch Dep.) and Nathanael T. Heiser (*see* Heiser Dep.), and a certified copy of the insurance contract issued to Fostoria Hospital Association [hereinafter "Fostoria"] by Defendant Continental, specifically, the business auto policy number B 2024212769. (*See* Affidavit of Robert Sublet, Mot. for S. J. of Def. Continental Cas. Co., Ex 1 [hereinafter "Continental Mot."].) It is upon the pleadings, admission, written submissions, and the sole insurance contract, "construed most strongly in the [non-moving] party's favor," Civ R. 56(E), and upon concessions made for the purpose of this motion for summary judgment, that the Court makes the following recitation of the case as it pertains to the parties concerned in the Defendant's motion and upon which the Court bases its decision.

STATEMENT OF THE CASE

On March 29, 2000, just about midnight, Nathanael T. Heiser was driving his 1985 Chevrolet Camaro with Nicholas Frisch riding as a passenger in the front seat. (Frisch Dep. at 27, 29, 31; Heiser Dep. at 15.) The car was traveling at a high speed (*id.* at 30-31); Nicholas says it was traveling at a speed greater than seventy-five (75) miles per hour westbound on County Road 226 in Hancock County, Ohio, near Fostoria. (Pls' 2nd Am. Compl., at ¶ 1..) Nathanael lost control of his vehicle after running a stop sign. (*Id.* at ¶ 2.) The vehicle flipped and ended up on its top in a field. (*Id.* at. ¶ 3.) Both Nathanael and Nicholas were ejected from the vehicle. (*Id.* at ¶ 4.) At the time of the accident, Nathanael was a minor of seventeen years and Nicholas was eighteen years old. (*See* Frisch Dep. at 7.)

Associated with injuries caused by this accident, Nicholas made both inpatient and outpatient hospital visits related to injuries to his neck and back. (*See generally* Frisch Dep. at 33-40.) He has had surgery grafting two of his vertebrae together. (*Id.*) His treatment and rehabilitation is continuing. (*Id.*) He complains of sleeping difficulty, loss of memory and slowed speech. (*Id.*) The graft is disintegrating and may require further medical attention. (*Id.*) He claims to have been forced to change his career plans due to the injuries he has suffered. (*Id.*)

At the time of the accident Nicholas lived with his parents, Plaintiffs Chris and Judy Frisch, at 830 Eastwood Drive, Fostoria, Ohio. (*Id.* at 93.) Plaintiff Judy Frisch, Nicholas' mother, was employed by Fostoria Community Hospital (Fostoria) (*See* Frisch Dep. at 88; Continental Mot. at 2..) The named insured is "Fostoria Hospital Association," a corporation. (Continental Mot., Ex 1.) The policy was "the first insurance policy issued by Continental Casualty Company to Fostoria Hospital Association." (Aff. of Robert Sublet.) The policy was issued for the "period from January 1, 2000 to January 1, 2001" and was therefore in effect at the time of the March 29, 2000 accident. (*Id.*; Continental Mot., at 2.)

Nicholas, his mother, Plaintiff Judy Frisch, and father, Plaintiff Chris Frisch filed this suit against Continental, and another "John Doe" insurance carrier. In addition, the Frisch Plaintiffs included, as defendants, their homeowners' insurance carrier, the insurance carrier of Chris Frisch's employer, and several other individuals, each of whom have been subsequently dismissed by grants of summary judgment, and the driver, Nathanael Heiser and his father, David Heiser who have settled and are no longer litigants in these proceedings. (*See* Mem. in Support of Joint Mot. for Continuance of Trial Date.)

ARGUMENTS

The issues at hand are whether the Plaintiffs are insured under the Continental policy issued to Fostoria; if they are, then, whether they are entitled to compensation for damages derived from the March 29, 2000 accident. Plaintiffs argue that "[a]t all times applicable hereto, Plaintiff Nicholas Frisch was insured with Defendant Continental Casualty Company by virtue of Judy Chris Frisch's employment with Fostoria Community Hospital in Fostoria, Ohio." (Pls' 2nd Am. Compl., at ¶ 16.) Plaintiffs attach as, "Exhibit B," a copy of Continental's policy to their Second Amended Complaint. (*See* Pls' 2nd Amend. Compl., Ex. B.)

The Plaintiffs have the burden of proving that they are insureds under the Continental policy issued to Fostoria. They hang their argument on the decision of the Ohio Supreme Court in *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St.3d 660 (1999). (*See* Pls' Mem. Contra to Mot. for S. J. of Def. Continental Cas. Co., at 2 [hereinafter "Pls' Mem. Contra"].) In *Scott-Pontzer*, the Ohio Supreme Court was faced

with the issue of whether the employee of a corporate insured qualified as an "insured" under two policies of insurance issued by the defendant-insurers. The decedent was driving his wife's car at the time of the accident, and was not engaged in any work-related activities. *Id.*

One of the policies in *Scott-Pontzer* expressly provided UM/UIM coverage, while the other did not. In addition, the one with the coverage did not contain a "scope of employment" exception while the policy without express coverage did include this exception. *Id.* The policy containing the UM/UIM coverage named decedent's employer as the named insured, and defined "who is an insured" as:

> 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 . . . . [and]
> 4. Anyone for damages he or she is entitled to recover because of bodily injury sustained by another insured.

Id. at 663. The defendant insurance company argued that "you" referred to the named insured, in other words, to the corporation. Thus, they asserted, the decedent did not qualify as an insured under the policy.

The Court agreed with the plaintiff's assertion that the policy language was ambiguous and reasonably susceptible to the determination that, as an employee of the named insured, the decedent was also an insured under the policy. The Court concluded that:

> It would be nonsensical to limit protection solely to the corporate entity, since the corporation, itself, cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle. Here, naming the corporation as the insured is meaningless unless the coverage extends to some person or persons - including to the corporation's employees.

Id. at 664. The Court therefore construed the policy against the insurer and held that the decedent was insured by the policy at the time of the accident because there was no contractual language restricting coverage to employees who were acting within the scope of their employment. On the authority of *Scott-Pontzer* the Ohio Supreme Court

extended similar coverage to minor children of employees where they are injured in an automobile accident by a non-employee while riding in a non-covered vehicle and whose injuries were not related to the corporation's business. *See Ezawa v. Yasuda Fire & Marine Ins. Co.*, 86 Ohio.St.3d.557 (1999).

Continental argues that the present case is distinguishable from the combined effect of *Scott-Pontzer* and *Ezawa* because its policy "will apply only to those autos shown as Covered Autos." (Continental Mot., at 4, Ex. 1.) Furthermore, they argue that the Continental policy "does not contain the same definition that was found to be ambiguous in *Scott-Pontzer* and *Ezawa*." (*Id.* at 6.)

The "Ohio Uninsured Motorist Coverage - Bodily Injury" endorsement defines who is an insured:

B. Who Is An Insured

1. If the Named Insured is designated in the Declarations as:
   a. An individual, then the following are "insureds":
      (1) The Named Insured and any "family members".
      (2) 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.
      (3) Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured."
   b. A partnership, limited liability company, corporation or any other form of organization, then the following are "insured":
      (1) Anyone 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.
      (2) Anyone for damages he or she is entitled to

recover because of "bodily injury" sustained by another "insured".

(Continental Mot., Ex. 1.) The Declarations page lists only "Fostoria Hospital Association" as the named insured and also declares that "the Named Insured is a Corporation." (*Id.*) So, paragraph B(1)(b) of the UM endorsement defines who is covered. Furthermore, to make it clear the policy expressly states:

C. Exclusions

This insurance does not apply to:

5. Anyone occupying or using an auto which is not a covered "auto" while outside the scope of the Named Insured's business.

(*Id.*) This language is very different from the language ruled ambiguous by the *Scott-Pontzer* court.

Plaintiffs contend that the ambiguity remains because the "Business Auto Coverage Form," where it lists the descriptions of the various designation symbols representing different categories of vehicles for coverage, it uses the word "you." (*See* Pls' Mem. Contra, at 2.) As applied to uninsured motorists coverage the policy lists "6" and "2." (*See* Continental Mot., Ex 1.) Symbol "2," representing "Owned 'Autos' Only," means "[o]nly those 'autos' you own . . . [and] includes those "autos" you acquire ownership of after the policy begins." (*Id.*) Symbol "6," representing "Owned 'Autos' Subject To A Compulsory Uninsured Motorists Law," means "[o]nly those 'autos' you own . . . ." (*Id.*) Plaintiffs insist that "there is nothing in this play on words that corrects the 'you is ambiguous' objection which gave rise to UM coverage in *Scott-Pontzer*." (Pls' Mem. Contra, at 2)

The *Scott-Pontzer* court "recognize[d] that insurers can draft policy language that provides varying arrays of coverage to any number of individuals." *Scott-Pontzer*, 86 Ohio St.3d at 664. In the present policy, here Continental has clearly crafted language that is unambiguous as to who is an insured - those injured in accidents involving "covered vehicles," vehicle "owned" by Fostoria.

The law surrounding the issue of construction of insurance contracts is well-settled. It requires the Court to read an insurance contract as a whole. *See German Fire Ins. Co. v. Roost*, 55 Ohio St. 581, 45 N.E. 1097 (1897); *Stickel v. Excess Ins. Co.*, 136

Ohio St. 49, 23 N.E.2d 839 (1939). In addition, all insurance contracts are subject to "the statutory law in effect at the time of the contracting or renewal . . . . ." *Ross v. Farmers Ins. Group*, 82 Ohio St.3d 281, 287, 695 N.E.2d 732, 736 (1998). As regards to UM/UIM coverage the law, however has been in flux in recent years.. It is necessary, therefore that the parties be careful what law they ask the Court to apply.

Before proceeding, it is necessary to determine which law must be applied. The Continental policy was "the first policy issued" to Fostoria. (*See* Aff. of Robert Sublet.) The effective date of the policy was January 1, 2000. (*Id.*) So the law that was in effect on the first day of January, 2000, is the law underlies and controls the terms in the Continental policy.

Plaintiffs contend that Judy Frisch and her family are not precluded from coverage under the Continental policy because the "non-covered vehicle" exclusion "lacks merit when you consider . . . [that] **UM coverage is to protect the person, not the vehicle.**" (Pls. Mot. Contra, at 3.) They would be citing very good authority for their position if the accident had taken place before September 1997. It had been long established in Ohio that "uninsured motorists coverage, mandated by law pursuant to R.C. 3937.18, was designed by the General Assembly to protect persons, not vehicles." *Scott-Pontzer*, 85 Ohio St.3d at 664. *See also Bagnoli v. Northbrook Prop. & Cas. Ins. Co.*, 86 Ohio St.3d 314 (1999); *Dillard v. Liberty Mut. Ins. Co.*, 86 Ohio St.3d 316 (1999); *Ezawa v. Yasuda Fire & Marine Ins. Co. of America*, 86 Ohio St.3d 557 (1999). Each of these cases, however, involved Ohio law that was in effect prior to the passage of House Bill 261 in the Ohio General Assembly, effective September 3, 1997.

In its wisdom, the General Assembly amended Ohio Revised Code section 3937.18 to read as follows:

> (L) As used in this section, "automobile liability or motor vehicle liability policy of insurance" means either of the following: (1) Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles *specifically identified* in the policy of insurance . . . .

Am.Sub.H.B. No. 261, 147 Ohio Laws, Part II, 2377 (emphasis added). Once the

legislature has changed the statutes, the case law interpreting the earlier statute is rendered obsolete. Both the accident and the initial implementation of the Continental policy occurred after the Revised Code was amended. The Continental insurance contract is subject to the statutory constraints of the current section 3937.18(L), not under the old version as insisted by the Plaintiffs.

The Continental policy explicitly lists four vehicles, none of which is a Camaro, owned by Fostoria. (*See* Continental Mot., Ex 1.) There is no evidence that the Camaro, driven by Nathanael Heiser and occupied by Nicholas Frisch, was hired, borrowed, leased or in any way used with the permission, knowledge, or direction of the named insured, Fostoria. Neither is there evidence that the auto was owned by one of Fostoria's employees or family members. In fact, it was owned by Nathanael Heiser. (*See* Pls' 2nd Amend. Compl., at ¶ 1; Frisch Dep. at 27, 29, 31; Heiser Dep. at 15.)

CONCLUSION

Nicholas Frisch, Chris Frisch, and Judy Frisch are not insureds under the Continental policy issued to Fostoria. The ambiguity found by the Supreme Court in *Scott-Pontzer* does not exist in the language Continental has crafted. Though corporations "cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle . . . ." *Scott-Pontzer*, 85 Ohio St.3d at 664, they certainly can own one. The legislature of Ohio made the policy decision that corporations and their insurers are permitted to "specifically" identify the vehicles and the coverage that people in them, using them, or being hit by them, will have. Therefore, the car belonging to a friend of the son of an employee of Fostoria Community Hospital is not covered by the Continental Policy issued to Fostoria Hospital Association, and neither are its occupants. *Scott-Pontzer* and its progeny may have opened "Pandora's Box," *see Ezawa*, 86 Ohio St.3d at 559 (Lundberg Stratton J., dissenting); *Selander v. Erie Ins. Group*, 85 Ohio St.3d 541, 548 (Moyer, C.J., dissenting), but, with the assistance of the General Assembly, maybe two parties in contracting for commercial auto insurance have found a way to put the lid back on.

It is therefore **ORDERED** that the Motion for Summary Judgment of Defendant Continental Casualty Company in the matter of Frisch v. Continental Casualty Company, et al. is **GRANTED**. Accordingly, motion to stay this ruling has been rendered moot and is therefore **DENIED**. Being that all parties have either settled or been dismissed, this order serves as the final, appealable, order.

Michael P. Kelbley

JUDGE MICHAEL P. KELBLEY

TO THE CLERK: You are instructed to serve a copy of the foregoing upon parties by regular U.S. mail.

TO THE CLERK:

You are directed to serve upon all parties not in default for failure to appear, notice of the judgment and its date of entry upon the journal.

Michael P. Kelbley

Judge Michael P. Kelbley