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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED

SEP 18 2001

Kenneth J. Murphy, Clerk
Columbus, Ohio

DEBRA L. MORGENSTERN,

Plaintiff,

v.

CASE NO. C2-00-1284

JUDGE EDMUND A. SARGUS, JR.

MAGISTRATE JUDGE MARK ABEL

NATIONWIDE INSURANCE COMPANIES,

Defendant.

OPINION AND ORDER

This declaratory judgment action is before the Court on cross Motions for Summary Judgment. (Doc. ## 4,5). The Motions present an issue of underinsured motorist insurance coverage that arises under the Supreme Court of Ohio's decision in Scott-Pontzer v. Liberty Mut. Fire Ins. Co., 85 Ohio St. 3d 660 (1999). For the reasons that follow, the Court **GRANTS** the Plaintiff's Motion and **DENIES** the Defendant's Motion.

I.

This case was removed from the Court of Common Pleas for Delaware County, Ohio. The Court has jurisdiction under 28 U.S.C. §1332.

The facts in this matter are undisputed. On July 2, 1999, Steven Morgenstern, while driving his motorcycle, was fatally injured when he was struck by a van driven by James Norman. At the time of the accident, Steven Morgenstern was covered by a policy of insurance with Allstate. The underinsured motorist limits for the Allstate policy were \$12,500 for each person, \$25,000 for each accident.

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Plaintiff Debra Morgenstern, mother and representative of Steven Morgenstern, has also filed suit against Norman in state court. Norman was insured under two policies of insurance with State Farm, an automobile liability policy and a personal umbrella policy. The liability policy contained coverage in the amount of \$100,000 for each person, \$300,000 for each loss. The umbrella policy contained a single limit of \$1,000,000.

At the time of the accident, Steven Morgenstern resided with his mother who was employed by Big Walnut Local School District ("Big Walnut"). Big Walnut had underinsured motorist coverage under a policy (the "Policy") issued by Defendant Nationwide Agri Business Insurance Company (hereinafter "Nationwide"). (See Doc. # 4, Exh. 6). The applicable limit of underinsured motorist coverage is \$1,000,000. (Doc. #13, Exh. A, at 2).

The central issue of this case, which is presented by the parties' cross Motions for Summary Judgment, is whether the Steven Morgenstern's injuries are covered under the Policy.

II.

The procedure for considering whether summary judgment is appropriate is set forth in Federal Rule of Civil Procedure 56(c), which provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, 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.

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment will not lie if the dispute about a

material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Matsushita Electronic Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex, and Matsushita have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). The court in Street identifies a number of important principles in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. Id. at 1479.

In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." Id. (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must adduce more than a mere scintilla of evidence in order to overcome the summary judgment motion. Id. It is not sufficient for the nonmoving party to merely "show that there is some metaphysical doubt as to the material facts." Id. (quoting Matsushita, 475 U.S. at 586). Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Id. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to

rely to create a genuine issue of material fact.

III.

Each party seeks summary judgment in its favor relating to the coverage issue raised in this matter. The primary issue before the Court is whether, under the Supreme Court of Ohio's decision in Scott-Pontzer v. Liberty Mut. Fire Ins. Co., 85 Ohio St. 3d 660 (1999), the insurance policy Nationwide issued to Big Walnut provides underinsured motorist coverage for the injuries and death of Steven Morgenstern. This Court's jurisdiction is based upon the diversity of the parties' citizenship and there is no dispute that the Court must apply the law of Ohio, as interpreted by the Supreme Court of Ohio. See Northland Ins. Co. v. Guardsman Prods., Inc., 141 F.3d 612, 617 (6th Cir. 1998); Miller v. State Farm Mut. Auto. Ins. Co., 87 F.3d 822, 824-25 (6th Cir. 1996). Specifically, this Court must apply the substantive law of Ohio "in accordance with the then-controlling decision of the highest court of the state." Imperial Hotels Corp. v. Dore, 257 F.3d 615, 620 (6th Cir. 2001); (quoting Pedigo v. UNUM Life Ins. Co., 145 F.3d 804, 808 (6th Cir.1998).) "To the extent that the state supreme court has not yet addressed the issue presented, it is [the federal courts'] duty to anticipate how that court would rule." Id. (quoting Bailey Farms, Inc. v. NOR-AM Chem. Co., 27 F.3d 188, 191 (6th Cir.1994)).

A. The Language of the Policy.

The Policy language at issue is found in The Ohio Uninsured Motorists Coverage – Bodily Injury Form, which defines an "insured" as follows:

B. Who is Insured:

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." The covered "auto" must be out of service because of its breakdown, repair, servicing loss or destruction.

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

(Doc. # 13, Exh. A).

The Defendant argues that the Plaintiff is not covered as an insured because (1) under subsection 1, "You" is defined as the Named Insured and the Named Insured is Big Walnut Local School District; (2) Big Walnut is not an individual so the family member clause cannot be invoked, (3) Steven Morgenstern was not driving a covered auto, and (4) is not applicable. The Plaintiff essentially relies on the Scott-Pontzer doctrine to refute the Defendant's position.

B. The Scott-Pontzer Doctrine.

In Scott-Pontzer, the widow of an employee who was killed in a traffic accident while driving the widow's car, sued to recover under the employer's underinsured motorist insurance policy. The Supreme Court of Ohio held that a commercial automobile insurance policy, issued to the private employer, provided underinsured motorist coverage to an employee injured while driving a privately owned vehicle outside the scope of his employment. 85 Ohio St.3d at 663.

The Supreme Court of Ohio first concluded that, despite the fact that a corporation was named as the insured, an employee of that corporation also qualified as an insured. The

Court found an ambiguity in the insurance policy's definition of an "insured," a definition which is identical to the definition in the Policy at issue in this case. The "insured" was defined as "you," which referred to the named insured. This definition was ambiguous, reasoned the Court, because O.R.C. § 3937.18 – which makes uninsured and underinsured motorist coverage mandatory – was designed to protect persons and not property; therefore, according to the Court, it would be non-sensical to limit coverage to a corporation without regard to persons. *Id.* at 664. The Court observed that a corporation cannot suffer a bodily injury and that a corporation can act only through the actions of persons. *Id.* Consequently, the Court concluded that the definition of insured could reasonably be interpreted to include both the corporation and the corporation's employees. Because ambiguous insurance policy language must be construed against the insurer, the Court reasoned that the employee of a corporation was also included within the definition of "insured." *Id.* at 664-65.

Next, the Ohio Supreme Court considered whether an employee of the corporation was covered even if the employee's injury occurred outside of the scope of employment. *Id.* at 666. In concluding that coverage arose, the Court stated that "in the construction of insurance contracts, where exceptions, qualification, or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof." *Id.* at 665-66 (quoting King v. Nationwide Ins. Co., 35 Ohio St.3d 208, 214 (1988).) Based on this statement, the Court found that because the policy contained no scope of employment limitation, none would be read into the policy.

In a subsequent case, the Court extended Scott-Pontzer to cover family members

of employees. See Ezawa v. Yasuda Fire & Marine Ins. Co. of Am., 86 Ohio St. 3d 557 (1999).

In Ezawa, the Supreme Court of Ohio determined that a company employee's son who was injured while riding in a privately-owned, non-covered auto was entitled to underinsured motorist coverage under the holding of Scott-Pontzer.

Recently, Judge Joseph P. Kinneary, a member of this Court, held that an employee of a school district, injured while riding in a privately-owned vehicle on vacation, was covered under her employer's uninsured motorist policy. See Wausau Bus. Ins. Co. v. Childester, No. C-2-00-297, 2001 WL 506520 (S.D. Ohio, May 11, 2001). In addition, at least one Ohio court has concluded that, under the Scott-Pontzer doctrine, the family member of a school board employee is entitled to uninsured motorist coverage for injuries suffered while riding in a privately owned vehicle. See Cosgrove v. Wausau Ins. Cos., Case No. 2000-CI-006, slip opinion (Pickaway County Ct. Comm Pls. Oct. 2, 2000) (Doc. #5, Ex.);¹ but see Mizen v. Utica Nat'l Ins. Group, Consolidated Case Nos. 408130, 408131, slip opinion (Cuyahoga County Ct. Comm. Pls. April 20, 2001).

C. Application of The Scott-Pontzer Doctrine.

Nationwide argues that the Scott-Pontzer doctrine does not apply to this case because the named insured in this case is a school board and not a private company. Nationwide contends that Big Walnut's status as a political subdivision is significant because various Ohio

¹In an example of professionalism, counsel for Nationwide has attached a copy of this slip opinion to its Motion for Summary Judgment. The Court acknowledges Nationwide's point that the Cosgrove decision is not a final judgment, but nonetheless treats it as persuasive authority.

statutes restrict Big Walnut's authority to purchase the coverage mandated by the Scott-Pontzer doctrine in this case. See O.R.C. §§ 9.83, 3313.201, 3327.09. In addition, Nationwide argues that the policies of fiscal responsibility underlying these statutes weigh in favor of denying coverage. Judge Kinneary rejected similar arguments in Wausau and this Court rejects them here. Wausau, 2001 WL 506520 at *4 ("Holding Wausau accountable to the strict terms of a policy it drafted does not translate into a violation of state statutory law.")

There is no doubt that Big Walnut was authorized to purchase uninsured motorist coverage under O.R.C. §3313.201,² and that the policy it purchased has the identical language interpreted by the Scott-Pontzer doctrine. Indeed, because there is no dispute that Big Walnut has already paid for the coverage defined by the insurance policy, any public policy favoring

² At the time the Policy was issued, Ohio Revised Code section 3313.201 provided as follows:

The board of education of each school district shall procure a policy or policies of insurance insuring officers, employees and pupils of the school district against liability on account of damage or injury to persons and property, including insurance on vehicles operated under a course in drivers education certified by the state department of education and including liability on account of death or accident by wrongful act, occasioned by the operation of a motor vehicle, motor vehicles with auxiliary equipment, or all self-propelling equipment or trailers owned or operated by the school district. Each board of education may supplement said policy or policies of insurance with collision, medical payments, comprehensive, and uninsured motorists insurance. Before procuring such insurance each board of education shall adopt a resolution setting forth the amount of insurance to be purchased, the necessity thereof, together with a statement of the estimated premium cost thereon. Insurance procured pursuant to this section shall be from one or more recognized insurance companies authorized to do business in this state.

(emphasis added). The emphasized language makes clear that Big Walnut had the authority to purchase the Policy in this case. The Court notes that this statutory language was amended in a manner that is not relevant to the current issue. See 2001 Ohio Laws 12 (H.B. 94).

fiscal responsibility on the part of Big Walnut is not implicated here. Wausau, 2001 WL 506520 at * 4.

With respect to the language of the Policy, this Court concludes that the Supreme Court of Ohio's analysis in Scott-Pontzer applies to the circumstances of this case, despite the fact that Big Walnut is a political subdivision. First, the definition of "insured" is ambiguous for the same reasons the Scott-Pontzer Court found it ambiguous where the named insured was a corporation. Given that uninsured motorist coverage is designed to protect persons and not property,³ the Ohio Supreme Court held, under the terms of an identical policy, that such coverage may not be limited without regard to persons as opposed to corporations, or, in this case, political subdivisions. As with a corporation, a political subdivision cannot suffer bodily injury and a political subdivision can only act through the actions of persons.

Second, there is no scope of employment limitation in the policy issued to Big Walnut. In accord with the Scott-Pontzer analysis, this Court will not read such a limitation into the Policy.

Nationwide asserts that Ohio statutes defining an "employee" of a political subdivision and authorizing a political subdivision to purchase insurance for employees contain scope of employment limitations. See O.R.C. §§ 2744.01(F), 2744.01(B), 2744.07, 2744.08.

³Nationwide also argues that because O.R.C. §3937.18 does not apply to political subdivisions, the policy underlying O.R.C. §3937.18 also does not apply to this case. According to Nationwide, because O.R.C. §3937.18 requires uninsured motorist coverage in automobile insurance policies, it would conflict with the provisions that merely permit but do not require a board of education to purchase uninsured motorist coverage. The Court rejects this argument because, in fact, Big Walnut has purchased an uninsured motorist coverage. Therefore, the policy underlying O.R.C. §3937.18 identified by the Scott-Pontzer Court -- that uninsured motorists coverage was intended to protect persons and not property -- is applicable here.

Therefore, asserts Nationwide, even if the policy in question does not expressly limit uninsured motorists and underinsured motorists coverage to the scope of employment, such a limitation should be applied by operation of law.

Statutory definitions containing the limitations cited by Nationwide are expressly limited to the provisions of subchapter 2744 of the Ohio Revised Code in the context of tort liability against the political subdivision. Sec O.R.C. §§2744.01 (expressly limiting definition of "employee" to "as used in this chapter"). This case does not involve a tort claim against Big Walnut and the provisions of subchapter 2744 are wholly inapplicable to this case. Instead this case involves the interpretation of a contract. Further, a person is an "employee," in the term's ordinary meaning, at all times during the term of employment. Nationwide's argument conflates the notion of employee with the question of whether an admitted employee is acting within the scope of employment. The latter issue is wholly unaddressed by the Policy language.

Finally, Nationwide argues that even if Steven Morgenstern qualifies as an insured, the Plaintiff is not entitled to coverage because the decedent's injuries were excluded under Exclusion 5b in the Ohio Uninsured Motorist Coverages-Bodily Injury. (Doc. # 5 at p. 14).⁴ Exclusion 5b is expressly authorized by statute⁵ and states as follows:

⁴ Because Ohio law on the enforceability of this type of 'other owned vehicle' exclusion has changed over the past decade, and because the parties original briefs did not address this exclusion in detail, the Court directed the parties to submit additional briefs on the issue of the enforceability of this exclusion as applied to this case including the impact, if any, the Scott-Pontzer doctrine had on this issue.

⁵O.R.C. 3937.18(J) provides in pertinent part as follows:

The coverages offered under division (A) of this section or selected in accordance with division (C) of this section may include terms and conditions that preclude coverage for bodily injury or death suffered by

This Insurance does not apply to:

5. "Bodily Injury" sustained by:

b. Any "family member" while "occupying" or when struck by any vehicle owned by that "family member" that is not a covered "auto" for Uninsured Motorists Coverage under this Coverage form.

(Id.) Thus, excluded from the insurance is any bodily injury sustained by a family member while that family member was occupying a vehicle owned by the family member and not a covered auto.

Essentially, the Defendant argues that this exclusion is satisfied here because Steven Morgenstern was the family member of an alleged insured, who was injured while driving a motorcycle that he owned and that was not a covered auto. The Plaintiff argues that the Scott-Pontzer Court ruled that the "covered auto" exclusion was unenforceable.

For the purposes of Exclusion 5b, there is no doubt that Steven Morgenstern is a "family member" and that his fatal injuries occurred while he was "occupying" a "vehicle owned by that family member," not covered under the Policy i.e., while he was driving the motorcycle he owned. Thus, the only remaining issue is whether the motorcycle was the "covered auto"

an insured under any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided;

limitation prevents coverage in this case.

As stated above, this Court's duty in resolving this matter is to apply the state law as determined by the Supreme Court of Ohio. If the Supreme Court of Ohio has not addressed this issue, this Court must anticipate the decision which it believes would be made by the Supreme Court of Ohio. It is not for this Court to judge the wisdom of any the decisions rendered by the Supreme Court of Ohio.

First, the Scott-Pontzer decision itself suggests that Supreme Court of Ohio has considered and rejected the application of the language in question as urged by Nationwide. In Scott-Pontzer, the trial court determined that Pontzer was not entitled to coverage because he was not a named insured, was not operating a "covered auto" and was not an insured who had suffered a "bodily injury." 85 Ohio St.3d at 660-61. The Court of Appeals affirmed on different grounds finding that although Pontzer was an insured as an employee, the underinsured motorist coverage under a corporate policy was only available to employees acting within the scope of their employment. Although the issues considered by the Supreme Court of Ohio were limited to the Court of Appeals' reasoning, the Supreme Court had the trial court's opinion before it, including the portion that concluded the Plaintiff was not in a "covered auto." Nonetheless, the Supreme Court of Ohio concluded that coverage existed.

Next, the Scott-Pontzer Court emphasized that the policy underlying the UM/UM coverage is to ensure persons not property. Thus, the focus should be on the person and not the auto. Moreover, there is further indication in the Scott-Pontzer decision that the covered auto provision should not be used to limit coverage. See 85 Ohio St. 3d at 666. This position finds further support in a subsequent Supreme Court of Ohio decision. In Ezawa v. Yasuda Fire &

Marine Ins. Co. of Am., 86 Ohio St. 3d 557 (1999), the Court held, in a one line opinion, that coverage existed under a corporation's UIM policy for an employee's minor son who was injured while riding in a non-covered auto owned by a third party.

In addition, there are number of cases, cited by the Plaintiff in which the Supreme Court of Ohio and other courts have rejected the covered auto provision as a bar to coverage in other contexts. See Headley v. Ohio Gov't Risk Management Plan, 1998 Ohio App. LEXIS 1965 (Muskingum Cty. Mar. 20, 1998); Headley v. Ohio Gov't Risk Management Plan, 1998 Ohio App. LEXIS 3039 (Muskingum Cty. June 24, 1998); Headley v. Ohio Gov't Risk Management Plan, 86 Ohio St.3d 64 (1999); Estate of Dillard v. Liberty Mut. Ins. Co., 1998 Ohio App. LEXIS 6536 (Stark Cty. Dec. 21, 1998); Estate of Dillard v. Liberty Mut. Ins. Co., 86 Ohio St.3d 316 (1999); Bagnoli v. Northbrook Property & Cas. Ins. Co., 86 Ohio St.3d 314 (1999); See Wausau Bus. Ins. Co. v. Childester, No. C-2-00-297, 2001 WL 506520 (S.D. Ohio, May 11, 2001). The Courts which have issued these opinions have at least tacitly concluded that, given the same issue, the Ohio Supreme Court would find coverage.

For all of these reasons the Court concludes if the Supreme Court of Ohio would find in favor of coverage under the circumstances of this case. Accordingly, this Court must also conclude that the covered auto provision should not be a bar to coverage for the decedent's injuries.

For all the reasons stated above, the Court hereby **GRANTS** the Plaintiff's
Motion for Summary Judgment and **DENIES** the Nationwide's Motion for Summary Judgment.

IT IS SO ORDERED.

9-14-2001

DATED



EDMUND C. SARCUS, JR.
UNITED STATES DISTRICT JUDGE