[Cite as *Moore v. Hartford Fire Ins. Co.*, 2003-Ohio-2037.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
ROBERT J. MOORE	:	Hon. William Hoffman, P.J.
	:	Hon. Sheila Farmer, J.
Plaintiff-Appellee	:	Hon. Julie Edwards, J.
	:	
-vs-	:	
	:	Case No. 02CAE-10-048
HARTFORD FIRE INSURANCE	:	
COMPANY, et a.	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from Delaware County Court of Common Pleas Case 01-CV-C-09-470

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY: April 22, 2003

APPEARANCES:

For Plaintiff-Appellee

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Edwards, J.

{¶1} Defendant-appellant Hartford Fire Insurance Company appeals from the September 5, 2002, Judgment Entry of the Delaware County Court of Common Pleas denying its Motion for Summary Judgment.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 1, 1999, appellee Robert Moore, who was operating his own vehicle, was injured when he was involved in a traffic accident with another vehicle operated by Terry Dye. At the time of the accident, Dye carried automobile insurance with Nationwide Insurance Company in the amount of $50,000.00 per person/$100,000.00 per accident and appellee was an insured under a policy issued by State Farm Mutual Automobile Insurance Company.

{¶3} Subsequently, on September 19, 2001, appellee filed a complaint against both Dye, the alleged tortfeasor, and State Farm in the Delaware County Court of Common Pleas. Thereafter, on February 14, 2002, appellee, with leave of court, filed an amended complaint adding appellant Hartford Fire Insurance Company as a defendant. Appellee specifically sought UM/UIM coverage under a commercial insurance policy that appellant had issued to the Dana Corporation, appellee's employer, pursuant to *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.,*85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 1116. Appellee, in his amended complaint, sought a declaration of his rights under the policy issued by appellant to Dana Corporation, which had an effective date of June 1, 1998. Such policy, which has a $3 Million Dollar liability limit (with a Million Dollar deductible), expressly provides UM/UIM coverage in the amount of $25,000.00 per accident.

{¶4} On April 4, 2002, appellee filed a notice of voluntary dismissal of State Farm. Thereafter, on June 28, 2002, appellant filed a Motion for Summary Judgment. After

appellee filed a memorandum in opposition to the same, appellant filed a reply brief on August 1, 2002.

{¶5} As memorialized in a Judgment Entry filed on September 5, 2002, the trial court denied appellant's Motion for Summary Judgment. The trial court, in its entry, expressly found that appellee was an insured under the policy that appellant Hartford had issued to Dana Corporation and that such policy provided UM/UIM coverage up to Three Million Dollars. After appellant, on September 20, 2002, filed a motion for reconsideration/motion for Civ. R. 54(B) certification, the trial court, pursuant to a Judgment Entry filed on October 1, 2002, stated, in relevant part, as follows:

{¶6} "The Court has reviewed the Defendant's motion and finds it well-taken to the extent that it requests a Civ. R. 54(B) certification. The Court denies the Defendant's motion in all other respects.

{¶7} "Therefore, the Court hereby determines that its September 5, 2002, judgment entry denying the Defendant's motion for summary judgment should include the following language: "The Court hereby expressly determines that no just reason for delay exists. This is a final appealable order."

{¶8} It is from the trial court's September 5, 2002, and October 1, 2002, Judgment Entries that appellant now appeals, raising the following assignment of error:

{¶9} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ENTERING DECLARATORY JUDGMENT THAT PLAINTIFF-APPELLEE WAS ENTITLED TO OHIO UNINSURED/UNDERINSURED MOTORISTS ("UM/UIM") COVERAGE FROM DEFENDANT-APPELLANT HARTFORD FIRE INSURANCE COMPANY."

STANDARD OF REVIEW

{¶10} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The*

Wedding Party, *Inc*. (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. Civil Rule 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 ... A summary judgment shall not be rendered unless it appears from such 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." Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support is claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 295, 662 N.E.2d 264.

{¶11} It is based upon this standard we review appellant's sole assignment of error.

I

{¶12} Appellant Hartford, in its sole assignment of error, argues that the trial court erred in entering a declaratory judgment that appellee was entitled to UM/UIM coverage

under the commercial insurance policy that appellant had issued to Dana Corporation, appellee's employer.

{¶13} Appellant, in its brief, initially argues that appellee is not entitled to UM/UIM coverage under the Hartford policy since he does not qualify as an insured under the same. The named insured under the policy is Dana Corporation, appellee's employer. The policy also contains an Ohio uninsured motorists coverage form that defines an "insured" for purposes of underinsured motorist coverage as follows:

{¶14} "B. Who Is An Insured

{¶15} "1. You.

{¶16} "2. If you are an individual, any 'family member'.

{¶17} "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.

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

{¶19} The same language was contained in the uninsured motorist coverage form in *Scott-Pontzer,* supra. In *Scott-Pontzer*, the decedent was employed by Superior Diary at the time of his death. In holding that the decedent was an insured under a commercial automobile liability policy issued to Superior Dairy and that, therefore, the decedent's surviving spouse was entitled to underinsured motorist benefits under the same, the Ohio Supreme Court held as follows: "it would be reasonable to conclude that "you," while referring to Superior Dairy, also includes Superior's employees, since a corporation can act only by and through real live persons. It would be nonsensical to limit protection solely to the corporate entity, since a 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.

{¶20} However, appellant Hartford contends that because the policy issued by appellant to Dana Corporation contains a "Drive Other Car Coverage - Broadened Coverage for Named Individuals" endorsement, the above language in the uninsured motorists coverage form is not ambiguous and, therefore, *Scott-Pontzer* does not apply. Such endorsement states, in relevant part, as follows:

{¶21} "C. Changes in Auto Medical Payments And Uninsured And Underinsured Motorists Coverages. The following is added to Who Is An Insured: Any individual named in the Schedule and his or her 'family members' are 'insured' while 'occupying' or while a pedestrian when being struck by any 'auto' you don't own except: Any 'auto' owned by that individual or by any 'family member'." (The individuals named in the Schedule are "ALL EMPLOYEES".)

{¶22} Appellant specifically argues that "[u]nder such circumstances, *Scott-Pontzer* cannot be applied to expand the term 'you' to include all of Dana's employees at any time without completely eviscerating the DOC Endorsement - that is, the DOC Endorsement would be rendered meaningless under *Scott-Pontzer* because broader coverage would already be provided under the UM/UIM Endorsement." We disagree with appellant. The Dana Corporation remains an insured under the UM/UIM endorsement even after the addition of the DOC endorsement language. "You" is an insured under the UM/UIM endorsement, and appellant concedes that "you" is the corporation. As determined by the Ohio Supreme Court in *Scott-Pontzer*, UM/UIM coverage must apply to individuals and, therefore, "you" was determined to apply to the corporate named insured's employees. And, it must do so in the case sub judice. We conclude that "you" in the UM/UIM endorsement includes the employees of the corporation. Reference only to the corporation

remains ambiguous and is unaffected by the DOC endorsement.

{¶23} To the extent that all employees are covered in one section of the UM/UIM endorsement, but in another section of the UM/UIM coverage the employees are only covered in limited circumstances, the policy is ambiguous. Ambiguity must be construed against the drafter of the contract and in favor of coverage.

{¶24} In addition, it is axiomatic that by adding broadened coverage to the definition of "Who is an Insured" for UIM purposes, the drive other car coverage-broadened coverage for named individuals endorsement cannot serve to reduce or restrict "Who is an Insured" under the UIM endorsement in the policy itself.

{¶25} Based on the foregoing, we find that appellee is an insured under the policy issued by appellant Hartford to Dana Corporation, appellee's employer.

{¶26} The next issue for consideration is whether the policy issued by appellant Hartford to Dana Corporation, appellee's employer, qualifies as an automobile liability or motor vehicle liability policy under R.C. 3937.18. Appellant specifically contends that since the policy does not qualify as an automobile liability or motor vehicle liability policy under R.C. 3937.18, the policy "cannot provide UM/UIM coverage greater than that expressly contracted for," which, as stated above, is $25,000.00 per accident.

{¶27} As is stated above, the subject policy had an effective date of June 1, 1998. "For the purpose of determining the scope of coverage of an underinsured motorist claim, the statutory law in effect at the time of entering into a contract for automobile liability insurance controls the rights and duties of the contracting parties." *Ross v. Farmer's Ins. Group of Companies*, 82 Ohio St.3d 281, 1998-Ohio-381, 695 N.E.2d 732, syllabus. Thus, the version of R.C. 3937.18 in effect on June 1, 1998, is applicable.

{¶28} The relevant version of R.C. 3937.18, which is the version as amended by H.B. 261 (effective September 3, 1997), provides, in pertinent part, 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; (2) Any umbrella liability policy of insurance." (Emphasis added). As noted by the Court in *Selander v. Erie Ins. Group*, 85 Ohio St.3d 541, 546, 1999-Ohio-287, 709 N.E.2d 1161 "the type of policy is determined by the type of coverage provided, not by the label affixed by the insurer." Thus, even if a policy is labeled an automobile policy, it does not qualify as an automobile liability or motor vehicle liability policy if it does not meet the requirements contained in R.C. 3937.18(L). See, for example, *Bowles v. Utica National Ins. Group*, Licking App. No. 02 CA 68, 2003-Ohio-254.

{¶29} In the case sub judice, the Hartford policy does not specifically identify any motor vehicles. Rather, as noted by appellant in its brief, the policy, in the "Schedule of Coverages and Covered Auto", provides automobile coverage to "any auto". While appellee argues that recent cases out of this Court have not "restrict[ed] automobile liability policies to only those that specifically identify a particular vehicle", we note that such cases are distinguishable. The cases cited by appellant involved the pre-H.B. 261 version of R.C. 3937.18 that did not include the language of subsection (L), cited above, defining "automobile liability or motor vehicle liability insurance." The cases cited by appellee are, therefore, not applicable.

{¶30} For the above reasons, we find that the policy issued by appellant Hartford to Dana Corporation is not an automobile liability or motor vehicle liability policy under R.C. 3937.18(L). Thus, appellant Hartford was not required to offer UM/UIM coverage as part of the policy and such coverage does not arise by operation of law. See *Bowles*, supra. As noted by appellant, "the Hartford policy cannot provide UM/UIM coverage by operation of

law in excess of $25,000.00 because[1] it is not an 'automobile liability or motor vehicle liability policy insurance.' Thus, the maximum amount of UM/UIM coverage potentially available to appellee is $25,000.00.

{¶31} However, we find that appellee is not entitled to UM/UIM coverage since Dye, the tortfeasor, does not qualify as an underinsured motorist. As is set forth above, the policy issued by Nationwide to Dye provides coverage in the amount of $50,000.00 per person. In turn, the Hartford policy expressly provides UM/UIM coverage in the amount of $25,000.00 per accident. As noted by appellant, "[b]ecause 'the amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured' exceed the UM/UIM coverage provided by the Hartford policy, Dye does not qualify as 'underinsured motorist(s)' under either the Hartford Policy or R. C. 3937.18(A)(2)." See *Littrell v. Wiggleswoth*, 91 Ohio St.3d 425, 2001-Ohio-87, 746 N.E.2d 1077. In short, Dye is not underinsured since the $50,000.00 per person limit of liability contained in Dye's insurance policy is more than the $25,000.00 in UM/UIM coverage contained in the policy issued by appellant Hartford to Dana Corporation.[2]

{¶32} Appellant's sole assignment of error is, therefore, sustained.

{¶33} Accordingly, the judgment of the Delaware County Court of Common Pleas is reversed.

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[1] As is stated above, the policy issued by appellant Hartford to Dana Corporation expressly provides for UM/UIM coverage in the amount of $25,000.00 per accident.

[2] Appellee, in his brief, argues that Dye is underinsured with respect to the Hartford policy. Appellee specifically contends that Hartford's reduction of UIM coverage to $25,000.00 was invalid pursuant to the *Linko v. Indem. Ins. Co.*, 90 Ohio St.3d 445, 2000-Ohio-92, 739 N.E.2d 338, and that, therefore, "the full amount of coverage" is available to appellee.

However, since, as is stated above, the Hartford policy does not qualify as an automobile liability or motor vehicle liability policy of insurance pursuant to R.C. 3937.18, *Linko* is not applicable.

By Edwards, J.

Hoffman, P.J. concurs

Farmer, J. concurs in judgment only

In Re: Summary Judgment