[Cite as *Starks v. Fed. Ins. Co.*, 2003-Ohio-4383.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LEROY STARKS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARIE STARKS	:	JUDGES:
	:	Hon W. Scott Gwin, P.J.
Plaintiffs-Appellees	:	Hon. Julie A. Edwards, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case Nos. 2003CA00102
	:	
FEDERAL INSURANCE COMPANY, et al.	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING: Civil appeal from Stark County Common Pleas Court, Case No. 2001 CV 00700

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 18, 2003

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN S. COURY 717 Courtyard Centre 116 Cleveland Avenue, N.W. Canton, Ohio 44702	THOMAS L. ROSENBERG CARL A. ANTHONY 88 East Broad Street, Suite 1980. Columbus, Ohio 43215

Boggins, J.

{¶1} This is an appeal by Defendant-Appellant Regent Insurance Company from the trial court's February 6, 2003 Judgment Entry granting Plaintiff-Appellee's

Motion for Summary Judgment as to the Regent commercial automobile policy and the Federal Umbrella Policy coverage “A”.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 28, 2000, Plaintiff’s decedent, Marie Starks, was killed in a single car accident. The accident occurred in the State of New York. The automobile in which Ms. Starks was a passenger was a vehicle rented by her daughter Beverly Kirksey. The tortfeasor, Jarrin Kirksey, Marie Starks’ grandson, was the driver of the vehicle and allegedly fell asleep at the wheel and lost control of the vehicle resulting in Ms. Starks’ death.

{¶3} Jarrin Kirksey was insured by Progressive Insurance Company with liability coverage of $50,000.00.

{¶4} Plaintiff-Appellee settled with and released the tortfeasor for policy limits with notice and consent to Defendants-Appellants.

{¶5} At the time of her death, Marie Sparks was married to and living with Plaintiff-Appellee Leroy Starks, who was an employee of Alliance Midwest Tubular Products Company (Alliance Tube).

{¶6} Alliance Tube was insured by Regent Insurance Company with a business automobile policy with liability coverage limits of $1,000,000.00 and $1,000,000.00 in UM/UIM coverage, and a comprehensive general liability policy (CGL) with limits of $1,000,000.00.

{¶7} Alliance Tube also was insured under an umbrella policy issued by Federal Insurance Company with limits of $20,000,000.00. The umbrella policy

contained excess follow form liability coverage under “Coverage A’ and umbrella liability coverage under “Coverage B”.

{¶8} Plaintiff-Appellee brought separate declaratory action suits against Regent and Federal seeking a determination of UM/UIM coverage for damages sustained in the accident which resulted in the death of his wife.

{¶9} Motions and cross-motions for summary judgment were filed by Plaintiff and Defendants.

{¶10} The trial court, in its decision entered February 6, 2003, held that the Starks were insured under the Regent Business Auto policy and the Federal Umbrella policy under “Coverage A”.

{¶11} It is from this decision which Appellant Federal Insurance Company appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶12} “I. THE TRIAL COURT ERRED IN FINDING THAT REGENT INSURANCE COMPANY POLICY NO. CBA 0065323 PROVIDES UM/UIM COVERAGE TO PLAINTIFFS/APPELLEES. (TRIAL COURT’S JUDGMENT ENTRY FEBRUARY 6, 2003 AT PAGES 2-3)”

{¶13} “II. THE TRIAL COURT ERRED IN FINDING THAT ANY AWARD TO PLAINTIFFS/APPELLEES IS NOT SUBJECT TO A SET OFF BY A PRO-RATA PORTION OF COVERAGE AVAILABLE TO PLAINTIFFS/APPELLEES UNDER NATIONWIDE INSURANCE COMPANY POLICY NO. 92 34 A 937113. (TRIAL COURT’S JUDGMENT ENTRY FEBRUARY 6, 2003 AT PAGE 3).”

{¶14} SUMMARY JUDGMENT STANDARD

{¶15} Civ.R. 56(C) states, in pertinent part:

{¶16} "Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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 therefrom, 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, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

{¶17} 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 its 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* (1997), 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶18} It is based upon this standard we review appellants' assignments of error.

I.

{¶19} In its first assignment of error, Appellant claims that the trial court erred in finding that that its business auto policy provided UM/UIM coverage to Plaintiffs-Appellees. We disagree.

{¶20} More specifically, Appellant argues that Appellees are not entitled to UM/UIM coverage because Plaintiff's decedent was not occupying a "covered auto" at the time of the accident.

{¶21} The Ohio UM endorsement contained in the Regent business auto insurance policy contained the following "Who is an Insured" language:

{¶22} "B. WHO IS AN INSURED

{¶23} "1. You;

{¶24} "2. If you are individual, any family member;

{¶25} "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.

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

{¶27} In *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.* (1999), 85 Ohio St.3d 660, and its progeny, the Ohio Supreme Court found the word "you" to be "ambiguous" in a policy insuring a corporation and providing UM/UIM coverage because a corporate entity could not itself occupy or operate an automobile, nor could it suffer bodily injury or death. The word "you" was characterized as ambiguous when the named insured was a corporation and bodily injury coverage was referenced, since "a corporation can act only by and through real live persons." As a result, the policy providing UM coverage was

interpreted to cover the corporation's employees rather than, as traditionally supposed, merely the corporation itself.

{¶28} We find the language in the case sub judice, to be identical to that contained in *Scott-Pontzer*, supra. Under B(1) and B(2), Appellee Leroy Sparks would be the “you” and his wife Marie Sparks, Appellee’s decedent, would be “any family member”.

{¶29} We find that the “covered auto” restriction contained in B(3) is not present in B(1) or B(2) and therefore does not apply to such.

{¶30} Appellant further argues that the its “Broadened Coverage for Named Individual Endorsement” removed the Scott-Pontzer ambiguity. This Court has previously held the listing of individuals as additional insured does not eliminate such ambiguity. See *Still v. Indiana Ins. Co.* (February 25, 2002) Stark App. No. 2001CA00300, 2002-Ohio-1004, *Pahler v. Motorists Mutual* (October 21, 2002), Stark App. No. 2002CA00022, 2002-Ohio-5762.

{¶31} We therefore find that the trial court did not err in finding Appellees to be insureds under the Regent business auto policy.

{¶32} Appellant’s first assignment of error is denied.

II.

{¶33} In its second assignment of error, Appellant argues that the trial corut erred in holding that it was not entitled to a set-off for the pro rata share of UM/UIM coverage under the Nationwide Insurance Company Policy No. 92 34 A 937113.

{¶34} Upon review, we find that Nationwide Insurance Company is not a party to this action. We further find that the Regent policy contains language stating that it will "pay all sums" to its insured for damages under the UM/UIM endorsement coverage.

{¶35} Appellant has the option of initiating an action for contribution against Nationwide as it deems necessary.

{¶36} Appellant's second assignment of error is denied.

{¶37} The decision of the Stark County Court of Common Pleas is affirmed.

By: Boggins, J.

Gwin, P.J. and

Edwards, J. concur