[Cite as *Lamneck v. Lacy*, 2003-Ohio-5455.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARK LAMNECK, et al.

Plaintiffs-Appellants

-vs-

THOMAS LACY, II, et al.

Defendants-Appellees

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 03 CA 12

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 01 CV 773
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 8, 2003

APPEARANCES:

For Plaintiffs-Appellants	For Defendant-Appellee Erie
JAMES B. BLUMENSTIEL LAURA C. BLUMENSTIEL 261 West Johnstown Road Columbus, Ohio 43230	DABVID A. CABORN CABORN & BUTAUSKI CO., LPA 765 South High Street Columbus, Ohio 43206

Wise, J.

{¶1} Appellants Mark and Judy Lamneck appeal the decision of the Fairfield County Court of Common Pleas that determined a policy issued by Appellee Erie Insurance Exchange ("Erie"), to Appellant Mark Lamneck, d.b.a. Mark's Lawn-Tree Care, was not a motor vehicle policy subject to the requirements of R.C. 3937.18. The following facts give rise to this appeal.

{¶2} On January 22, 1999, Appellant Mark Lamneck was involved in a motor vehicle accident with Thomas Lacy, II. As a result of the accident, appellant and his wife filed a lawsuit claiming they sustained injuries due to the negligence of Lacy. In their lawsuit, appellants sought UIM coverage under three separate policies of insurance. The first policy is a personal automobile liability insurance policy issued to Mark and Judy Lamneck by Erie Insurance Company. The second policy is a commercial automobile insurance policy issued by Erie Insurance Company to Mark Lamneck, d.b.a. Mark's Lawn-Tree Care. The third policy, which is the subject of this appeal, is a CGL policy issued by Appellee Erie to Mark Lamneck, d.b.a. Mark's Lawn-Tree Care.

{¶3} Appellee Erie contested appellants' right to present UIM claims under the terms of the commercial auto policy and CGL policy. Subsequently, on August 12, 2002, Erie Insurance Company filed a motion for partial summary judgment, on behalf of Appellee Erie, concerning the CGL policy. Erie Insurance Company argued that the CGL policy was not a motor vehicle liability policy as defined in R.C. 3937.18(L), which became effective on September 3, 1997. Appellants opposed the motion for summary judgment on the basis that the CGL policy provides coverage for "hired" or "non-owned"

vehicles and such coverage is sufficient to transform the CGL policy into a motor vehicle liability policy of insurance.

{¶4} On December 19, 2002, the trial court issued its judgment entry granting Erie Insurance Company's motion for summary judgment as it pertained to the CGL policy. The trial court concluded the inclusion of coverage for "hired" and "non-owned" vehicles did not transform the CGL policy into a motor vehicle liability policy subject to the mandatory requirements of R.C. 3937.18. Appellants timely filed a notice of appeal and set forth the following sole assignment of error for our consideration:

{¶5} "I. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANTS WERE NOT ENTITLED TO UIM COVERAGE UNDER THE ERIE INSURANCE EXCHANGE 'FIVESTAR COMMERCIAL GENERAL LIABILITY POLICY.' "

"Summary Judgment Standard"

{¶6} 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. As such, we must refer to Civ.R. 56 which provides, in pertinent part:

{¶7} "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."

{¶8} Pursuant to the above rule, a trial court may not enter 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*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing D*resher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶9} It is based upon this standard that we review appellants' sole assignment of error.

I

{¶10} In their sole assignment of error, appellants maintain the trial court erred when it concluded they were not entitled to UIM coverage under Erie's CGL policy. We disagree.

{¶11} Appellants contend the inclusion of coverage for "hired" and "non-owned" vehicles transformed the CGL policy into a motor vehicle liability policy subject to the mandatory requirements of R.C. 3937.18. Further, since Erie did not offer UM/UIM

coverage, as required by statute, such coverage arose, under the CGL policy, by operation of law.

{¶12} In support of this argument, appellants rely upon the Ohio Supreme Court's decision in *Selander v. Erie Ins. Grp*., 85 Ohio St.3d 541, 1999-Ohio-287. In *Selander*, the decedent's spouse sought UM/UIM coverage under a Fivestar General Business Liability Policy issued by Erie to the decedent's business. Id. at 542. Erie refused to pay the claim on the basis that the Fivestar policy did not provide automobile liability coverage or UM/UIM coverage. Id. The trial court and the court of appeals found UM/UIM coverage under the Fivestar policy on the basis that the policy was a motor vehicle liability policy subject to R.C. 3937.18. Id. On appeal to the Ohio Supreme Court, the Court affirmed the decision of the court of appeals finding UM/UIM coverage under the Fivestar policy. Id.

{¶13} In reaching this conclusion, the court held that "the type of policy is determined by the type of coverage provided, not by the label affixed by * * * the insurer." Id. at 546, citing *St. Paul Fire & Marine Ins. Co. v. Gilmore* (1991), 168 Ariz. 159, 165, 812 P.2d 977, 983. The Court further concluded that where motor vehicle liability coverage is provided, even in limited form, UM/UIM coverage must be provided. Id. at 544, citing *Goettenmoeller v. Meridian Mut. Ins. Co.* (June 25, 1996), Franklin App. No. 95APE11-1553; *House v. State Auto. Mut. Ins. Co.* (1988), 44 Ohio App.3d 12. Because the policy provided liability coverage, in the limited circumstance for "non-owned" and "hired" vehicles, R.C. 3937.18 applied to the Fivestar policy and Erie was required to offer UM/UIM coverage. Id. at 544-545. Since Erie did not offer UM/UIM coverage, such coverage arose by operation of law. Id. at 546.

{¶14} In reaching its decision, the Court declined to apply the H.B. 261 version of R.C. 3937.18 to Erie's Fivestar policy. In footnote one, the Court specifically stated that it would not apply the H.B. 261 version of R.C. 3937.18, to the Fivestar policy, because that version of the statute was not in effect at the time of the Selander's accident. Id. Therefore, we conclude, according to the Ohio Supreme Court's decision in *Selander*, that it is the law in effect, on the date of the accident, that determines what version of R.C. 3937.18 applies for purposes of determining the type of coverage. The accident in the case sub judice occurred on January 22, 1999. The H.B. 261 version of R.C. 3937.18 was in effect on this date.

{¶15} In *Bowles v. Utica Natl. Ins. Grp*., Licking App. No. 02 CA 68, 2003-Ohio-254, we determined the inclusion of liability coverage for "hired" and "non-owned" vehicles did not transform a commercial auto policy into a motor vehicle liability policy of insurance. We made this determination relying upon the H.B. 261 version of R.C. 3937.18. See, also, *Dancy v. Citizens Ins. Co.*, Tuscarawas App. No. 2002 AP 11 0086, 2003-Ohio-2858; *Heidt v. Fed. Ins. Co*., Stark App. No. 2002CA00314, 2003-Ohio-1785; *Jett v. State Auto. Mut. Ins. Co*., Stark App. No. 2002CA00183, 2002-Ohio-7211.

{¶16} Accordingly, we find the *Selander* case requires us to apply the law in effect, on the date of the accident, in order to determine the type of coverage. As noted above, the law in effect on the date of the accident was the H.B. 261 version of R.C. 3937.18. Section (L) of the statue specifically defines what is a motor vehicle liability policy of insurance. This court has previously determined that the inclusion of "hired" and "non-owned" provisions in a policy of insurance does not transform the policy into a

motor vehicle liability policy under the H.B. 261 version of R.C. 3937.18. Thus, Erie's CGL policy is not a motor vehicle liability policy and it was therefore not required to offer UM/UIM coverage to Mark's Lawn-Tree Care when it issued said policy.

{¶17} Appellants' sole assignment of error is overruled.

{¶18} For the foregoing reasons, the judgment of the Court of Common Pleas, Fairfield County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., concurs.

Farmer, J., concurs separately.

Farmer, J., concurring

{¶19} I concur with the majority that H.B. 261, effective September 3, 1997, is applicable sub judice. However, I write separately to clarify my position on the controlling date.

{¶20} I believe the date of the policy controls in order to determine the type of coverage, not the date of the accident. *Bowles,* supra. This does not affect the result in this case as the date of the CGL policy is June 15, 1998 and November 19, 1998 (amended declarations), after the effective date of H.B. 261. See, Fivestar Contractors' Policy, attached to Appellant's Brief as Exhibit A.

{¶21} I also note an individual is named in the declarations, Mark Lamneck as a d.b.a. As I have stated previously, because the declarations include a named individual, I would find the policy language is not ambiguous and therefore *Scott-Pontzer* does not apply. See, *Westfield Insurance Co. v. Galatis,* Summit App. No.

CA20784, 2002-Ohio-1502; *White v. American Manufacturers* (August 9, 2002), Montgomery App. No. 19206.

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Judge Sheila G. Farmer