[Cite as *Fazio v. Hamilton Mut. Ins. Co.*, 2004-Ohio-2748.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MICHAEL B. FAZIO, ET AL.

Plaintiff-Appellees

-vs-

HAMILTON MUTUAL INSURANCE COMPANY, ET AL.

Defendant-Appellants

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 03CA73

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 02CV389
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 28, 2004

APPEARANCES:

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Hoffman, J.

{¶1} Defendant-appellant State Farm Mutual Automobile Insurance Company ("State Farm") appeals the February 13, 2003 Judgment Entry of the Licking County Court of Common Pleas, which granted summary judgment in favor of plaintiff-appellee, Paula MacNealy.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 25, 2001, a dune buggy struck appellee, Paula MacNealy, on the Princess Penasca Beach in Puerto Penasca, Sonoro, Mexico, located more than 50 miles from the United States border. The driver of the dune buggy did not have insurance.

{¶3} At the time of the accident, appellee held an automobile insurance policy with State Farm, which included uninsured motorist coverage.

{¶4} Appellee filed an action in the Licking County Court of Common Pleas seeking damages against State Farm for personal injuries arising out of the accident. Specifically, appellee sought uninsured motorist coverage under her State Farm policy.

{¶5} On November 12, 2002, State Farm filed a motion for summary judgment, and on November 14, 2002, appellee filed a cross-motion for summary judgment. On February 13, 2003, the trial court denied State Farm's motion for summary judgment and granted appellee's motion for partial summary judgment. On July 23, 2003, an agreed

upon Judgment Entry entered final judgment on behalf of appellee in the amount of $100,000 against State Farm only.

{¶6} It is from the trial court's February 13, 2003 Judgment Entry State Farm now appeals raising the following assignment of error:

{¶7} "I. THE TRIAL COURT ERRED IN FINDING STATE FARM'S GEOGRAPHIC LIMITATION ON COVERAGE TO BE IN VIOLATION OF R.C. 3937.18 AND THE POLICY UNDERLYING THE STATUTE."

I

{¶8} In the sole assignment of error, State Farm asserts the trial court erred in finding the geographic limitation found in the insurance policy violates of R.C. 3937.18. We disagree.

{¶9} The State Farm policy contains the following provision:

{¶10} **"Where Coverage Applies**

{¶11} The coverages you chose apply:

{¶12} 1. in the United States of America, its territories and possessions or Canada; or

{¶13} 2. while the insured vehicle is being shipped between their ports.

{¶14} The liability, medical payments and physical damage coverages also apply in México within 50 miles of the United States border. A physical damage coverage **loss** in Mexico is determined on the basis of cost at the nearest United States point.

{¶15} Death, dismemberment and loss of sight, total disability and loss of earnings coverages apply anywhere in the world.

{¶16} In the case sub judice, State Farm denied appellee coverage on the basis the accident in question took place more than 50 miles from the United States border in Mexico.

{¶17} The version of R.C. 3937.18 in effect at the time of the accident provided:

{¶18} "(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy for loss due to bodily injury or death suffered by such insureds:

{¶19} "(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage..."

{¶20} According to the statute, the uninsured motorist coverage provided to appellee by State Farm is required to be equivalent to the automobile liability coverage. Review of the policy language set forth above indicates the policy provides coverage in Mexico, albeit to a limited extent, and some coverage anywhere in the world. The policy does not specifically delineate where UM coverage applies.

{¶21} State Farm argues UM coverage is not provided in this case due to the geographical limitation on coverage. The UM Endorsement does not expressly provide any geographical limitations for UM coverage. Pursuant to the R.C. 3937.18, as a matter of law, UM coverage must be equivalent to liability coverage, and must therefore apply in Mexico. To this extent, the UM coverage offered by State Farm is not "equivalent" to the liability coverage; and therefore, must be construed as arising by operation of law.

{¶22} Based upon the above, as a matter of law, the UM coverage applies in Mexico. However, we find the restriction of 50 miles from the US border does not apply to the UM coverage. In *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, the Ohio Supreme Court, after concluding UM/UIM coverage arose by operation of law, stated:

{¶23} "... we have already found that Liberty Mutual had failed to offer underinsured motorist coverage through the umbrella policy issued to Superior Dairy. Thus, any language in the Liberty Mutual umbrella policy restricting insurance coverage was intended

to apply solely to excess liability coverage and not for purposes of underinsured motorist coverage."

{¶24} The *Pontzer* Court concluded, "any language" restricting coverage only applies to liability coverage, not UM/UIM coverage.[1] Above, we found the UM coverage offered by State Farm was not equivalent to the coverage provided under the liability section; therefore, we must view the UM coverage as arising by operation of law. Accordingly, the geographical restriction relied upon by State Farm in denying coverage is not applicable to the UM/UIM coverage. For this reason, we affirm the trial court's granting of summary judgment in favor of appellee.

{¶25} Furthermore, assuming arguendo the geographical limitation on coverage did apply to the UM portion of the policy, we find the restriction in violation of R.C. 3937.18 and the policy underlying the statute.

{¶26} The Ohio Supreme Court has determined automobile policies may not eliminate or reduce uninsured or underinsured motorist coverage, required by statute, to persons injured in a motor vehicle accident, where the claim or claims of such persons arise from causes of action recognized by Ohio tort law. *State Farm Automobile Insurance Co.v. Alexander* (1992), 62 Ohio St.3d 397; *Stanton v. Nationwide Mutual Ins. Co.* (1993), 68 Ohio St.3d 111.

[1] We note, appellee seeks coverage under her own policy of insurance under which she is a named insured, as compared to, a policy of insurance under which she would be a third-party beneficiary.

{¶27} In *Alexander*, supra, the Court framed the sole issue as whether an insurance company may, by policy definition, eliminate uninsured and underinsured motorist coverage to persons injured in a motor vehicle accident where the claim or claims of such persons arise from causes of action recognized by Ohio tort law. The Court held it may not, stating:

{¶28} "Any contractual restriction on the coverage mandated by R.C. 3937.18 must comply with the statute's purpose. *Ady v. West American Ins. Co.* (1982), 69 Ohio St.2d 593, 23 O.O.3d 495, 433 N.E.2d 547, syllabus. Policy restrictions that vary from the statute's requirements are unenforceable. *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St.2d 431, 433, 23 O.O.3d 385, 386, 433 N.E.2d 555, 558.

{¶29} "R.C. 3937.18(A)(1) and (2) are premised on the tortfeasor's *legal liability* to the injured insured. See, *Kurent v. Farmers Ins. of Columbus* (1991), 62 Ohio St.3d 242, 581 N.E.2d 533. Thus, the intent of the statute is to provide uninsured and underinsured motorist coverage for injured persons who have a legal cause of action against a tortfeasor but who are uncompensated because the tortfeasor is either (1) not covered by liability insurance or (2) covered in an amount that is less than the insured's uninsured motorist coverage.

{¶30} "State Farm's household exclusion ignores the statute's basic premise, to wit: the tortfeasor's legal liability to the insured. The State Farm policy eliminates uninsured and underinsured motorist coverage based solely on the fact that the tortfeasor is driving the

insured's automobile. By excluding coverage for torts that occur in the insured's vehicle, State Farm seeks to escape from part of the uninsured motorist coverage that R.C. 3937.18 requires it to provide.

{¶31} "In essence State Farm's exclusion is an attempt to change Ohio's tort law, by contractual definition, in order to circumvent its duty to provide uninsured and underinsured motorist coverage pursuant to R.C. 3937.18. This it cannot do. Accordingly, State Farm's exclusion is unenforceable because it conflicts with R.C. 3937.18." *Alexander,* 62 Ohio St.3d at 399-400.

{¶32} In *Stanton v. Nationwide Mutual Insurance Co.*, the Ohio Supreme Court found an exclusion in the uninsured motorist coverage of an automobile liability policy which stated uninsured motorist coverage does not apply to the use of any motor vehicle by an insured to carry persons or property for a fee unenforceable. The Court followed the syllabus in *Alexander*, supra, stating:

{¶33} "We have previously stated that R.C. 3937.18 does not displace ordinary principles of contract law and that, as a result, reasonable exclusions in the uninsured motorist coverage of automobile insurance policies do not necessarily conflict with the policy behind R.C. 3937.18 and are sometimes enforceable. However, this court has since changed its view on this matter.

* * *

{¶34} "When the syllabus law in *State Farm* is applied to the facts in this case, it is clear that appellant's "for fee" exclusion is unenforceable. Notwithstanding appellees' argument that the exclusion is ambiguous, the exclusion plainly eliminates coverage to at least those persons, like appellee, who are injured while driving vehicles that are being used for commercial purposes. In addition, appellant does not dispute that appellee has a cause of action in tort against the uninsured motorist whose car caused the accident. Thus the facts of this case fit squarely within the syllabus law in *State Farm.*" *Stanton,* 68 Ohio St.3d at 113-114.

{¶35} Upon review, Ohio case law clearly provides an insurance company, by policy definition, may not eliminate uninsured and underinsured motorist coverage to persons injured in a motor vehicle accident where the claim or claims of such persons arise from causes of action recognized by Ohio tort law. Clearly, appellee's claim arises from a cause of action recognized by Ohio tort law; and therefore, State Farm May not preclude coverage to appellee based solely upon the geographical limitation.

{¶36} Further, review of R.C. 3937.18 in effect on the date of the accident, provides:

{¶37} "(J) 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 an insured under any of the following circumstances:

{¶38} "(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;

{¶39} "(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

{¶40} "(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured and underinsured motorist coverages are provided."

{¶41} Accordingly, the legislature has specifically limited when an insurer may preclude UM/UIM coverage in a policy of insurance. We find it persuasive the legislature did not include therein a geographical limitation of coverage.

{¶42} Therefore, though we recognize our brethren from the Sixth, Eighth and Tenth Districts[2] have concluded otherwise, we find State Farm's territorial exclusion invalid pursuant to *Alexander* and *Stanton,* supra, and our reading of R.C. 3937.18.

{¶43} The February 13, 2003 Judgment Entry of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J. and

Gwin, P.J. concur.

Wise, J. dissents.

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JUDGES

WISE, J., DISSENTING

{¶44} I respectfully dissent from the majority's opinion and instead conclude that State Farm's geographical limitation on coverage does not violate R.C. 3937.18 and the policy underlying the statute.

[2] See, *Tscherne v. Nationwide Mut. Ins. Co.,* Cuyahoga App. No. 81620, Nov. 20, 2003; *Caba v. State Farm Automobile Ins. Co.*, Lucas App. No. L-94-168, March 31, 1995; *Prudential Prop. & Cas. Ins. Co. v. Gales*, Franklin App. No. 86AP-250, Aug. 7, 1986.

{¶45} The majority concludes the UM Endorsement does not expressly provide any geographical limitations for UM coverage and therefore, under the requirements of R.C. 3937.18, since liability coverage is available in Mexico, UM coverage must also be available in Mexico. Although the UM Endorsement does not specifically provide a geographical limitation for UM coverage, I find the section of the policy titled "When And Where Coverage Applies," at page 5 of State Farm's policy, applies the geographical limitation to "coverages you chose."

{¶46} This language states as follows:

{¶47} "**Where Coverage Applies**

{¶48} "The coverages ***you*** chose apply:

{¶49} "1. in the United States of America, its territories and possessions or Canada; or

{¶50} "2. while the insured vehicle is being shipped between their ports."

{¶51} "The liability, medical payments and physical damage coverage also apply in Mexico within 50 miles of the United States border. A physical damage coverage ***loss*** in Mexico is determined on the basis of cost at the nearest United States point.

{¶52} "Death, dismemberment and loss of sight, total disability and loss of earnings coverages apply anywhere in the world." (Emphasis sic.) State Farm's policy at page 5.

{¶53} Based upon this language, I conclude the geographical limitation applies to both liability coverage, as well as UM coverage. The policy language refers to the "coverages you chose" in discussing where coverage applies. The use of the word "coverages" implies that the geographical limitation applies to more than one type of coverage provided for in the policy.

{¶54} Further, State Farm specifically delineates those types of coverages to which the geographical limitation does not apply. These include coverages for death, dismemberment and loss of sight, total disability and loss of earnings. Thus, I find the geographical limitation applies to the UM coverage provided for in the policy. Further, UM coverage does not arise by operation of law since the UM coverage mirrors the liability coverage, i.e. coverage applies in Mexico within 50 miles of the United States' border.

{¶55} The majority next concludes the geographical limitation does not apply to UM coverage since UM coverage arises by operation of law. The majority relies upon the *Scott-Pontzer*[3] decision to reach this conclusion. I would not apply the *Scott-Pontzer* analysis to the facts of this case since I conclude UM coverage does not arise by operation of law as it was specifically provided for in State Farm's policy. Further, the geographical restriction applies to all types of coverages except death, dismemberment and loss of sight, total disability and loss of earnings. Therefore, I would conclude the geographical limitation

[3] *Scott-Pontzer v. Liberty Mut. Fire Ins. Co*., 85 Ohio St.3d 660, 1999-Ohio-292.

applies to the UM coverage and UM coverage would have been available to appellee had the accident occurred within 50 miles of the United States' border.

{¶56} The majority also finds that even if the 50 mile geographical restriction applies to the UM coverage, such a restriction violates R.C. 3937.18 and the policy underlying the statute. In support of this conclusion, the majority cites the case of *State Farm Auto. Ins. Co. v. Alexander* (1992), 62 Ohio St.3d 397 and *Stanton v. Nationwide Mut. Ins. Co.*, 68 Ohio St.3d 111, 1993-Ohio-75. The Sixth, Eighth and Tenth District Courts of Appeals have addressed similar arguments and concluded that geographical limitations do not violate Ohio Supreme Court law or R.C. 3937.18.

{¶57} The Eighth District Court of Appeals most recently addressed this argument in the case of *Tscherne v. Nationwide Mut. Ins. Co*., Cuyahoga App. No. 81620, 2003-Ohio-6158. The court rejected the argument explaining:

{¶58} "There is nothing in *Alexander* that would invalidate the territorial limits of the policy because those territorial limits do not purport to eliminate or reduce UM/UIM coverage for any cause of action recognized by Ohio tort law. The territorial limitation only acts to define the loci in which coverage applies." Id. at para.9.

{¶59} In addition to this analysis by the Eighth District Court of Appeals, I would also note that R.C. 4509.51 only requires that liability insurance insure the person named

therein and any other person, as insured, within the United States or the Dominion of Canada. This statute provides, in pertinent part:

{¶60} "Every owner's policy of liability insurance:

"* * *

{¶61} "(B) Shall insure the person named therein and any other person, as insured, using any such motor vehicles with the express or implied permission of the insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such vehicles within the United States or the Dominion of Canada, subject to limits exclusive of interest and costs, * * *."

{¶62} Further, in *Caba v. State Farm Auto. Ins. Co.* (Mar. 31, 1995), Lucas App. No. L-94-168, the Sixth District Court of Appeals addressed whether a 50 mile geographical limitation was void under the *Alexander* decision. The court held:

{¶63} "Whether a geographical limitation provision was enforceable was not at issue in *Alexander*. While the holding of the syllabus in *Alexander* is written in very broad language, we decline to extend *Alexander* to the present case. We do not find that the *Alexander* court intended to hold geographical limitation provisions void as against public policy underlying R.C. 3937.18." Id. at 2.

{¶64} Finally, in *Prudential Prop. & Cas. Ins. Co. v. Gales* (Aug. 7, 1986), Franklin App. No. 86AP-250, the Tenth District Court of Appeals also concluded a territorial

limitation did not violate R.C. 3937.18. In reaching this conclusion, the court explained:

{¶65} "The basic thrust of R.C. 3937.18 is that the uninsured motorist protection should be as extensive as the automobile or motor vehicle liability coverage. We find nothing in R.C. 3937.18 which would preclude application to the uninsured motorist coverage of a territorial limitation permitted with respect to the basic automobile or motor vehicle liability coverage. There are no public policy reasons to require an insurer to extend uninsured motorist coverage for accidents occurring in foreign countries." Id. at 2.

{¶66} Finally, I find it proper to enforce the 50 mile geographical limitation because an automobile liability insurance policy must be enforced as written, giving the language used in the contract its plain and ordinary meaning. *Cincinnati Indemn. Co. v. Martin*, 85 Ohio St.3d 604, 607, 1999-Ohio-322. Under the plain and ordinary language of State Farm's policy, the 50 mile geographical limitation applies to all coverages provided for in the policy except death, dismemberment and loss of sight, total disability and loss of earnings. I would also note that State Farm's policy contains the following language on the cover page:

{¶67} "IF YOU PLAN TO DRIVE AN AUTOMOBILE IN MEXICO, BE SURE TO SECURE COVERAGE IN A MEXICAN INSURANCE COMPANY AND AVOID POSSIBLE JAIL DETENTION, AUTOMOBILE IMPOUNDMENT AND OTHER COMPLICATIONS IN THE EVEN OF AN ACCIDENT."

{¶68} Accordingly, I would reverse the decision of the trial court and conclude that appellee is not entitled to UM coverage under State Farm's policy.

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JUDGE JOHN W. WISE

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MICHAEL B. FAZIO, ET AL.	:	
	:	
Plaintiff-Appellees	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
HAMILTON MUTUAL INSURANCE COMPANY, ET AL.	:	
	:	
Defendant-Appellants	:	Case No. 03CA73

For the reasons stated in our accompanying Memorandum-Opinion, the February 13, 2003 Judgment Entry of the Licking County Court of Common Pleas is affirmed.

Costs assessed to appellant.

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JUDGES