

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SHANNA BUMGARDNER

Plaintiff-Appellee

-VS-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Defendant-Appellant

JUDGES:

: Hon: W. Scott Gwin, P.J.
: Hon: Julie A. Edwards, J.
: Hon: John F. Boggins, J.
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: Case No. 2003CA00203
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: OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of
Common Pleas, Case No. 2002CV04188

JUDGMENT: Reversed and Final Judgment Entered

DATE OF JUDGMENT ENTRY: February 9, 2004

APPEARANCES:

For Defendant-Appellant

JAMES P. HANRATTY
ANDREA K. ZIARKO
400 South Main St.
North Canton, OH 44720

For Plaintiff-Appellee

DIMITRIOS S. POUSOULIDES
931 North Main Street, Ste. 201
North Canton, OH 44720

For Lumbermens Mutual Casualty Co.
RANDY L. TAYLOR
RONALD A. RISPO
2500 Terminal Tower
50 Public Square
Cleveland, OH 44113

Gwin, P.J.

{¶1} Defendant State Farm Mutual Automobile Insurance Company appeals a summary judgment of the Court of Common Pleas of Stark County, Ohio, which found State Farm's underinsured motorist coverage is primary, and defendant Lumbermens Mutual, which is not a party to this appeal, is excess. Appellant assigns a single error to the trial court:

{¶2} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE LUMBERMENS MUTUAL CASUALTY COMPANY POLICY ISSUED TO APPELLEE'S EMPLOYER IS EXCESS TO STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S COVERAGE."

{¶3} The facts in this case are undisputed. On December 8, 2000, appellee was operating her own vehicle when she was struck by a tortfeasor whom she alleges was underinsured. Appellant settled with the tortfeasor's insurance for the limit of the policy, and then brought a declaratory judgment action against State Farm Mutual Automobile Insurance Company which insured the vehicle she was driving, and her mother's employer's insurance company, Lumbermens.

{¶4} The trial court found appellee's personal insurance policy with State Farm was primary, and Lumbermens' business auto policy was excess.

{¶5} In *Bumgardner v. State Farm*, Stark Appellate No. 2003CA00206, 2004-Ohio-____, this court found appellee's claim against Lumbermens did not survive the Supreme Court's holding in *Westfield Insurance Company v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E. 2d 1256.

{¶6} Appellant's assignment of error is overruled as moot.

{¶7} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed as to the court's holding that State Farm provides UIM coverage of up to \$100,000 subject to the tortfeasor's setoff, but reversed and vacated regarding Lumbermens.

By Gwin, P.J.,

Edwards, J., and

Boggins, J., concur