

[Cite as *Nationwide Mut. Ins. Co. v. Guerard*, 2008-Ohio-2281.]

COURT OF APPEALS  
HOLMES COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

NATIONWIDE MUTUAL	:	JUDGES:
INSURANCE COMPANY	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 07CA010
LINDA F. GUERARD, ET AL.	:	
	:	
Defendants-Appellants	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,  
Case No. 06CV007

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 25, 2008

APPEARANCES:

For Plaintiff-Appellee

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*Farmer, P.J.*

{¶1} On August 28, 2003, James Ivan Guerard, age 4, went outside and became stuck in a window of a vehicle parked in his driveway. The child died as a result of his injuries.

{¶2} The vehicle was owned by the child's great grandmother, Louella Pyers. At the time of the accident, the vehicle was insured under a policy issued by appellee, Nationwide Insurance Company. On January 19, 2006, appellee filed a declaratory judgment action against Linda Guerard, the child's mother, and appellant, Thomas L. Mason, Administrator of the Estate of James Ivan Brady Parker-Guerard, Deceased, for a determination as to whether Ms. Guerard was entitled to automobile liability insurance coverage under the policy. On February 1, 2007, appellee filed a motion for summary judgment. By order filed March 28, 2007, the trial court granted said motion.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶4} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING SUMMARY JUDGMENT ON THE ISSUE OF WHETHER OR NOT A CHILD'S DEATH FROM AN AUTOMOBILE AROSE OUT OF THE OWNERSHIP, MAINTENANCE, USE, LOADING, OR UNLOADING OF THE VEHICLE."

I

{¶5} Appellant claims the trial court erred in finding no coverage under the Nationwide policy for the accident sub judice. Specifically, appellant claims the child's

death arose out of the ownership, maintenance, use, loading, or unloading of a motor vehicle. We disagree.

{¶6} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶7} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶8} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶9} This matter arose out of a declaratory judgment complaint seeking a "declaration of the rights, status, and other legal obligations between the parties." Judgment was granted pursuant to a summary judgment motion. There were basically no contested or disputed facts; the matter for review involved an interpretation of the insurance contract.

{¶10} The uncontested facts and those construed most favorably to appellant were as follows:

{¶11} 1) The vehicle in question was insured by appellee.

{¶12} 2) The vehicle's owner, Ms. Pyers, gave Ms. Guerard permission to use the vehicle. L. Guerard depo. at 18-19.

{¶13} 3) The vehicle was parked in a private driveway. L. Guerard depo. at 33-35; J. Guerard depo. at 33.

{¶14} 4) The child wandered out into the yard unsupervised by either parent/stepparent. J. Guerard depo. at 22. The child was discovered with his head stuck in the window of the vehicle with his feet dangling off the ground. J. Guerard depo. at 13-14. The child's body was outside the vehicle with his head inside the vehicle. J. Guerard depo. at 13-14.

{¶15} 5) The vehicle was not running, being used or occupied, being loaded or unloaded, and the keys were not in the ignition. L. Guerard depo. at 30, 33-34; J. Guerard depo. at 33.

{¶16} The Nationwide policy, attached to the complaint as Exhibit 2, provided the following under Auto Liability:

{¶17} **"PROPERTY DAMAGE AND BODILY INJURY LIABILITY COVERAGE**

{¶18} "1. **We** will pay for damages for which **you** are legally liable as a result of an accident arising out of the:

{¶19} "a. ownership;

{¶20} "b. maintenance or use; or

{¶21} "c. loading or unloading;

{¶22} "of **your auto**. A relative also has this protection. So does any person or organization who is liable for the use of **your auto** while used with **your** permission."

{¶23} Appellee argues the facts place the incident outside the coverage of the policy. The question is whether an unsupervised child who is injured while either playing on or attempting to enter the vehicle fits within the policy language.

{¶24} Appellee argues the cause of the child's injury/death was broken by the intervention of an event unrelated to the use of the vehicle. *Kish v. Central National Insurance Group of Omaha* (1981), 67 Ohio St.2d 41.

{¶25} Automobiles are instrumentalities only when they are operating. A stationary, unattended vehicle, that somehow became a playground for the child, does not constitute "ownership, maintenance or use, or loading or unloading." Playing in and around the vehicle was not an event related to the use of the vehicle.

{¶26} Upon review, we concur with the trial court's decision to grant summary judgment to appellee.

{¶27} The sole assignment of error is denied.

{¶28} The judgment of the Court of Common Pleas of Holmes County, Ohio is hereby affirmed.

By Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

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JUDGES

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