[Cite as *Allender v. Nationwide Mut. Fire Ins. Co.*, 2004-Ohio-1323.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GEORGE ALLENDER, et al.	:	JUDGES:
	:	Hon William B. Hoffman, P.J.
Plaintiffs-Appellees	:	Hon. John W. Wise, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 03-CA-13
RANDALL L. LARRICK	:	
	:	
Defendant	:	O P I N I O N
	:	
and	:	
	:	
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY	:	
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Civil appeal from Guernsey County Court of Common Pleas, Case No. 02-PI-286
JUDGMENT:	Affirmed in part; reversed in part and remanded
DATE OF JUDGMENT ENTRY:	MARCH 18, 2004

APPEARANCES:

For Plaintiffs-Appellees	For Defendant-Appellant
JAY F. VINSEL 523 Cambridge Avenue Zanesville, Ohio 43701	TIMOTHY D. JOHNSON JEFFREY G. PALMER 2500 Terminal Tower 50 Public Square Cleveland, Ohio 44113-2241

Boggins, J.

{¶1} Appellant Nationwide Mutual Fire Insurance Company appeals the May 15, 2003, decision of the trial court granting Appellee's Motion for Summary Judgment.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 16, 2001, Appellee George Allender was operating his Massey F 35 Deluxe farm tractor on US 22 in Guernsey County, when he was struck by a vehicle being operated by tortfeasor Randall Larrick. Defendant Larrick carried liability insurance through State Farm with the limits of $50, 000 per person and $100,000 per occurrence. Appellee was insured through Nationwide Mutual Fire Insurance Company with a policy which carried UIM limits of $300,000.

{¶3} As per its Answer, Nationwide denied UIM coverage to Appellee finding that Appellee "was not covered under the underinsured motorists provisions of the Nationwide policy at the time of the accident because he was occupying a motor vehicle that was not listed on the Nationwide policy and coverage is excluded under the "Other Owned Vehicle Exclusion."

{¶4} The "Other Owned Vehicle Exclusion" contained in the policy provides as follows:

{¶5} "Endorsement 2352A

{¶6} "[UIM] COVERAGE AGREEMENT

{¶7} ***

{¶8} "COVERAGE EXCLUSIONS

{¶9} "This coverage does not apply to:

{¶10} ***

{¶11} “3. Bodily injury suffered while occupying a motor vehicle:

{¶12} “ a) owned by;

{¶13} “ b) furnished to; or

{¶14} “ c) available for the regular use of;

{¶15} " you or a relative, but not insured for Auto Liability coverage under this policy.

{¶16} The Nationwide policy declaration pages list a 1984 Dodge 250 and a 1989 Oldsmobile Regency. The Massey tractor is not listed as a covered vehicle.

{¶17} It is undisputed that Appellee Allender owned the Massey tractor he was operating.

{¶18} The Nationwide policy, Endorsement 2251(B), contained the following definition of a “motor vehicle”:

{¶19} “7. “Motor vehicle” means a land motor vehicle designed primarily to be driven on public roads…Other motorized vehicles designed for use mainly off public roads shall be included within the definition of motor vehicle when used on public roads.”

{¶20} The trial court, however, found that the farm tractor was not a “motor vehicle” under R.C. §4511.01(B), that the “other owned vehicle exclusion” did not apply and that Appellees were entitled to UIM coverage under said policy.

{¶21} R.C. 4511.01(B) reads: “Motor vehicle means every vehicle…except…farm machinery…and agricultural tractors and machinery used in production of horticultural, floricultural, agricultural, and vegetable products.”

{¶22} It is from this decision that Appellant Nationwide now appeals, assigning the following errors:

ASSIGNMENTS OF ERROR

{¶23} "I. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING NATIONWIDE'S MOTION FOR SUMMARY JUDGMENT, BY DECLARING THAT THE NATIONWIDE POLICY PROVIDES UNDERINSURED MOTORISTS COVERAGE TO THE APPELLEES.

{¶24} "II. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING NATIONWIDE'S MOTION FOR SUMMARY JUDGMENT, REGARDING THE APPELEE'S BAD FAITH CLAIM.

{¶25} "Summary Judgment Standard"

{¶26} 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. Civ.R. 56(C) provides, in pertinent part:

{¶27} "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."

{¶28} 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*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

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

I.

{¶30} In its first assignment of error, Appellant Nationwide argues that the trial court erred in finding that the definition of "motor vehicle" contained in the policy was ambiguous and in finding that the "other owned vehicle exclusion" did not apply. We disagree.

{¶31} The definition of "motor vehicle" contained in the Nationwide policy, herein listed previously, does not address farm tractors, agricultural machinery or equipment. As such, the trial court found such definition to be ambiguous as to such farm tractors

and looked to the Revised Code for guidance and found that R.C. §4511.01(B) specifically addresses such and excludes farm tractors from the definition of motor vehicles.

{¶32} The UIM statute, R.C. §3937.18, in effect at the time of the accident did not contain a definition of “motor vehicle”. However, the Ohio Supreme Court has held that the definition of “motor vehicle” as used in the version of R.C. §3937.18 in effect at the time the appellant entered into the insurance contract, is the definition found in R.C. §4511.01(B). *Delli Bovi v. Pacific Indem. Co.* (1999), 85 Ohio St.3d 343, 1999-Ohio-380; See also *Chase v. Westfield Ins. Co.*, Eighth District App. No 80770, 2002-Ohio-5471.

{¶33} Based on the foregoing, we find that the trial court did not err in applying the motor vehicle definition as contained in the Revised Code, thereby allowing UM/UIM coverage to Appellees.

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

II.

{¶35} In its second assignment of error, Appellants claim that the trial court erred in granting appellee's motion for summary judgment arguing that appellees failed to present evidence that appellant acted in bad faith in denying appellees' claim.

{¶36} Appellees specifically contend that they presented evidence to the trial court that appellant was "not reasonably justified" in denying such claim.

{¶37} In *Zoppo v. Homestead Ins. Co.,* 71 Ohio St.3d 552, 1994-Ohio-461*,* 644 N.E.2d 397 the Ohio Supreme Court determined that an insurer "fails to exercise good faith in processing a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." Id at

paragraph one of the syllabus. A lack of reasonable justification exists where an insurer refuses to pay a claim in an arbitrary or capricious manner. *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185, 188.

{¶38} Upon review of the trial court's Judgment Entry granting Appellee's motion for summary judgment, we find that the trial court did not address appellees' bad faith argument. We therefore find that remand is necessary to determine whether Nationwide acted in baid faith in denying coverage to Appellees on the basis of the "other owned auto exclusion".

{¶39} Appellant's second assignment of error is sustained.

{¶40} We therefore affirm the judgment of the trial court in part, reverse the judgment in part and remand the case to it for further proceedings consistent with this opinion

By: Boggins, J.

Wise, J. concurs and

Hoffman, P.J. concurs separately

Hoffman, P.J., concurring

{¶41} I concur in the majority's analysis and disposition of appellant's second assignment of error.

{¶42} I further concur in the majority's disposition of appellant's first assignment of error. Unlike the majority and the trial court, I do not find the definition of "motor vehicle" contained in the policy to be ambiguous. However, it is not the use of the term in the policy definition which controls, but rather the use of the term in R.C. 3937.18.

{¶43} Accordingly, I concur in the majority's decision to affirm the finding of coverage using the definition of "motor vehicle" found in R.C. 4511.01(B).

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JUDGE WILLIAM B. HOFFMAN