

[Cite as *Zerby v. State Farm Auto Ins. Co.*, 2004-Ohio-3434.]

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 2002CV01182

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 28, 2004

APPEARANCES:

For Plaintiffs-Appellants

STACIE L. ROTH
ALLEN SCHULMAN, JR.
236 Third Street, SW
Canton, OH 44702
Farmer, J.

For State Farm Automobile Insurance Co.

JAMES R. GALLAGHER
471 East Broad Street
19th Floor
Columbus, OH 43215-3872

{¶1} On April 1, 1999, appellant, David Zerby, was injured in a motor vehicle accident caused by the negligence of another. At the time of the accident, appellant was acting within the scope of his employment as a police officer with the Perry Township Police Department, and was a member of the Fraternal Order of Police (hereinafter "FOP"). The FOP was insured under a commercial automobile policy issued by State Farm Automobile Insurance Company.

{¶2} On April 4, 2002, appellant, together with his wife, filed a complaint for declaratory judgment seeking underinsured motorist benefits under the policy. All parties filed motions for summary judgment. By judgment entry filed September 12, 2003, the trial court found in favor of State Farm, finding coverage under the policy did not extend to appellant as a union member.

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

I

{¶4} "THE TRIAL COURT ERRED IN HOLDING THAT DAVID ZERBY IS NOT AN INSURED UNDER THE STATE FARM POLICY ISSUED TO THE FOP/OHIO LABOR COUNCIL, POLICY NO. 570 5924-A15-35F."

I

{¶5} Appellants claim the trial court erred in determining Officer Zerby was not entitled to coverage under the FOP policy issued by State Farm. We agree with the trial court's decision, but for a different reason.

{¶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} We note the genesis of this claim is premised upon a claim for uninsured/underinsured motorists coverage pursuant to *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*, 85 Ohio St.3d 660, 1999-Ohio-292, and *Ezawa v. Yasuda Fire and Marine Ins. Co.*, 86 Ohio St.3d 557, 1999-Ohio-124. However, the policy sub judice is distinguishable from the policies in said cases.

{¶10} In this case, the State Farm policy defines an "insured" as follows in pertinent part:

{¶11} "*Insured* – means the *person* or *persons* covered by uninsured motor vehicle coverage.

{¶12} "This is:

{¶13} "1. the first *person* named in the declarations;

{¶14} "2. his or her *spouse*;

{¶15} "3. their *relatives*; and

{¶16} "4. any other *person* while *occupying*:

{¶17} "a. *your car*, a *temporary substitute car*, a *newly acquired car* or a trailer attached to such *car*. Such vehicle has to be used within the scope of the consent of *you* or *your spouse*; or

{¶18} "b. a *car* not owned by *you*, *your spouse* or any *relative*, or a trailer attached to such a *car*. It has to be driven by the first *person* named in the declarations

or that *person's spouse* and within the scope of the owner's consent." See, Section III of the Uninsured Motor Vehicle – Coverage U, attached to Appellants' Brief as Exhibit A.

{¶19} The term "person" is defined in the policy as "a human being." See, Defined Words, attached to Appellants' Brief as Exhibit A. Unlike the ambiguous "you" definition of *Scott-Pontzer*, the State Farm policy specifically insures human beings only. Therefore, *Scott-Pontzer* does not apply. Officer Zerby is not the first person named in the declarations and as such, is not an insured under the first definition of an insured.

{¶20} The fourth definition extends coverage to any other person while occupying a car owned by the FOP. At the time of the accident, Officer Zerby was operating a police cruiser which was not owned by the FOP. Therefore, Officer Zerby does not qualify as an insured under the fourth definition.

{¶21} The trial court granted summary judgment to State Farm, finding *Scott-Pontzer* applied, but coverage under the policy was not extended to union members. Upon review, we find the trial court was correct in granting summary judgment to State Farm albeit for a different reason, *Scott-Pontzer* does not apply and Officer Zerby is not an insured under the policy.

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

By Farmer, J.

Gwin, P.J. and

Hoffman, J. concur.

SGF/db 0604

JUDGES

Gwin, J., concurring

{¶23} I agree with the result reached by the majority, but not in its reasoning. I believe the appellant is an insured under the policy but excluded under the “other owned vehicle” provision.

{¶24} The policy in this case defines the word “person” to mean only actual human beings, and not corporate entities. The policy then goes on to define an insured as the “first person named in the declarations”.

{¶25} There are no human beings named in the declarations. The only person listed is the FOP. This leads to a similar ambiguity as that first identified in *Scott-Pontzer*. Who are the persons insured by this policy, if the definitions themselves do not identify persons capable of needing insurance? Who are the human beings who make up the FOP?

{¶26} In *Westfield v Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, the Ohio Supreme Court explained where a corporation is the named insured, an employee is covered by the policy while in the course and scope of employment, although the employee’s family is not unless the employee is actually a named insured. It is usually easy to determine when a person is acting as an employee. Here, we have a different twist.

{¶27} *Scott-Pontzer* and *Galatis* hinge on the basic concept a corporation acts through and is composed of its employees, and those persons, not the corporation, are the ones who suffer bodily injury. It is those persons for whom a corporation purchases UM/UIM insurance. However, when dealing with a union, it can be said with equal

accuracy a union is composed of its membership, through whom it acts and for whose welfare the union is concerned.

{¶28} While it may be relatively easy to determine when a person is an employee, does a person stop being a union member after work hours?

{¶29} Appellee attempts to gloss over the ambiguity by asserting the only definition that can ever apply to persons other than the FOP's employees is the fourth definition, which is "any one else while occupying your car". But if the FOP is composed of its membership, then coverage extends to the members under the first definition. As the Supreme Court held in *Galatis*, the persons who compose the corporate entity do not have to be named in the policy in order to be covered, although coverage does not necessarily extend to their families.

{¶30} I would find pursuant to *Galatis, supra* the contract is ambiguous, and logically includes union members as the persons who constitute the FOP.

{¶31} Nevertheless, I would find appellant cannot recover for his injuries under these circumstances because he is excluded under the "other owned vehicle" exception which this court has previously found enforceable.

JUDGE W. SCOTT GWIN

THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DAVID ZERBY, ET AL.

Plaintiffs-Appellants

-vs-

STATE FARM MUTUAL INSURANCE
COMPANY, ET AL.

Defendants-Appellees

:
:
:
:
:
:
:
:
:
:
:
:

JUDGMENT ENTRY

CASE NO. 2003CA00341

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed.

JUDGES