

[Cite as *Shanabarger v. Hartford Ins. Co.*, 2003-Ohio-1912.]

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

GEORGE SHANABARGER

CASE NUMBER 5-02-61

PLAINTIFF-APPELLANT

v.

O P I N I O N

**HARTFORD INSURANCE COMPANY,
ET AL.**

DEFENDANTS-APPELLEES

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court.**

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: April 16, 2003.

ATTORNEYS:

**SAMUEL G. BOLOTIN
Attorney at Law
Reg. #0014727
4349 Talmadge Road
Toledo, OH 43623
For Appellant.**

**THOMAS ANTONINI
Attorney at Law
Reg. #0040468
SCOTT A. HASELMAN
Attorney at Law**

**Reg. #0064809
Ninth Floor, Four SeaGate
Toledo, OH 43604
For Appellee, Hartford Insurance Company.**

Bryant, PJ.

{¶1} This appeal is brought by Plaintiff-Appellant George Shanaberger from the judgment of the Court of Common Pleas, Hancock County, granting summary judgment to Defendant-Appellee Hartford Insurance Company. For the reasons set forth in the opinion below, we affirm trial court’s decision.

{¶2} The record presents the following undisputed facts. On July 16, 2000, Appellant George Shanaberger was operating his motor vehicle on County Road 26 in Union Township, Hancock County, Ohio, when he was struck from behind by a vehicle operated by Justin Heitmeyer. Appellant sustained serious injury as a result of this collision. Accordingly, Appellant recovered \$25,000 from Heitmeyer’s automobile liability insurance carrier and \$75,000 from his personal uninsured/underinsured motorists (“UM/UIM”) policy of insurance. Additionally, at all times pertinent, there was in effect a Commercial Auto Policy issued to Appellant’s employer, Consolidated Biscuit Company (“Consolidated”) by Appellee Hartford Insurance Company (“Hartford”).

{¶3} On October 15, 2001, Appellant filed a complaint in the Hancock County Court of Common Pleas, alleging entitlement to \$1,000,000 of UM/UIM

coverage pursuant to the Commercial Auto Policy issued to Consolidated. Appellant later amended his complaint to add Auto Owner's Insurance Carrier, his homeowner's insurance carrier, as a defendant. On January 9, 2002, Appellant filed a motion for summary judgment, arguing that he was entitled to coverage under the Hartford Policy as a matter of law pursuant to the Ohio Supreme Court's holding in *Scott-Pontzer v. Liberty Mut. Ins. Co.* (1999), 85 Ohio St.3d 660, 661. On October 24, 2002, the trial court rejected Appellant's argument, denied summary judgment and dismissed Hartford from this action. It is from this order that Appellant now appeals.

{¶4} Appellant asserts the following assignment of error:

The trial court erred in holding that Appellant is excluded from uninsured/underinsured motorist coverage under the Hartford Commercial Auto Policy by the operation of the "other owned vehicle" exclusion.

Summary Judgment Standard

{¶5} In considering an appeal from the grant or denial of summary judgment, we review the motion independently and do not give deference to the trial court's determination. *Schuch v. Rogers* (1996), 113 Ohio App.3d 718, 720, 681 N.E.2d 1388. Accordingly, we apply the same standard for summary judgment as did the trial court. *J.A. Industries, Inc. v. All Am. Plastics, Inc.* (1999), 133 Ohio App.3d 76, 82, 726 N.E.2d 1066. Summary judgment is proper when, looking at the evidence as a whole (1) no genuine issue of 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, construed most strongly in favor of the nonmoving party, that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C); *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686-687. To make this showing the initial burden lies with the movant to inform the trial court of the basis for the motion and identify those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264.

{¶6} In his motion for summary judgment, Appellant argued that he was entitled to UM/UIM coverage as a matter of law based upon the Ohio Supreme Court's holding in *Scott-Pontzer v. Liberty Mut. Ins. Co.* (1999), 85 Ohio St.3d 660, 661. In *Scott-Pontzer*, the court held, *inter alia*, that where a commercial auto policy issued to a corporation defines the named insured as "you" and "[i]f you are an individual, any family member," the policy language is ambiguous and therefore will be construed as extending insured status to the corporation's employees. *Id.* at 665. The *Scott-Pontzer* court determined, with respect to the specific language of the UM/UIM policy in that circumstance, that it would be nonsensical to limit protection solely to a corporate entity, which cannot occupy or operate an automobile or suffer bodily injury or death. *Id.* at 664.

{¶7} Similarly, Appellant asserts that he is entitled to UM/UIM coverage pursuant to the policies issued by Hartford to his employer based upon the ambiguous language in the policy. The trial court, in rendering its decision, observed that the language of the policy at bar was identical to that in *Scott-Ponzter*, and therefore found the language ambiguous. Consequently, construing the policy language in favor of the insured, the trial court determined that Appellant was insured under the Hartford policy. The parties do not dispute this finding and, moreover, we concur with the trial court's reasoning. Therefore, we arrive at the same conclusion: Appellant is an insured for purposes of UM/UIM coverage under the policy issued by Hartford to Consolidated. Next, the trial court looked at the terms of UM/UIM coverage as stated within the policy and, by applying an "other owned auto" exclusion, determined that Appellant was not entitled to coverage for his particular accident. Appellant disputes this finding, arguing first, that the exclusion does not apply to him. We disagree.

{¶8} The "other owned auto" exclusion, contained in Section C of the UM/UIM policy states:

"C. EXCLUSIONS

"This insurance does not apply to:

"5. 'Bodily injury' sustained by:

"a. You while [occupying] or when *** struck by any vehicle owned by you that is not a covered 'auto' for Uninsured Motorist Coverage under [this] Coverage Form;"

{¶9} Appellant’s argument focuses on the interpretation of the word “you” in Section C(5)(a). Specifically, Appellant states that as an employee of Consolidated, he should be included within the meaning of the first “you”, but not the second “you”. Appellant admits that the “you” in the exclusion refers to the “named insured,” which by this court’s liberal interpretation in favor of him includes the employees of Consolidated. Nevertheless, Appellant asks this court is to interpret the second “you” as solely Consolidated, and *not* its employees. We have had occasion to consider this reasoning in *Niese v. Magg*, Putnam App. No. 12-02-06, 2002-Ohio-6986. In *Niese*, we determined that once the term "you" is interpreted to include employees of the corporate insured, it shall be consistently applied as such throughout the policy. *Id* at ¶11. See, also, *Shaw v. State Farm Insurance*, Cuyahoga, App. No. 80471, 2002-Ohio-5330, at ¶ 35; *United Ohio Company v. Bird* (May 18, 2001), Delaware App. No. 00-CA-31. Accordingly, Appellant’s first argument in support of his sole assignment of error is not well taken.

{¶10} Next, Appellant argues alternatively that even if we conclude that the “other owned auto” exclusion applies to him, the exclusion violates R.C.3937(J)(1) and is therefore, unenforceable. Specifically, Appellant alleges that R.C.3937(J)(1) only allows UM/UIM policies to exclude coverage for automobiles owned by the named insured and not included in a list of “covered

autos.” We fail to see the distinction between the exclusion permitted by R.C.3937(J)(1) and the exclusion in this case. Once again, Appellant’s argument relies on our interpretation of “you” as the named insured and once again, Appellant asks this court to interpret the “you” as Consolidated and not its employees. As stated above, we will apply the liberal interpretation of the term “you” consistently throughout the policy, and therefore, the exclusionary language in the instant case complies with R.C.3937(J)(1).

{¶11} Finally, Appellant argues that upon our determination that the “other owned auto” exclusion is applicable to him and valid under Ohio law, the exclusion still does not apply to him since he was indeed driving a “covered auto” as defined by the policy. Amazingly, Appellant’s argument relies on the consistent interpretation of the term “you” throughout the policy, a concept he argues against in his first two arguments. Nevertheless, Appellant’s argument is flawed.

{¶12} The business auto policy issued by Hartford to Consolidated defines “covered autos” for purposes of UM/UIM coverage as “owned autos only.” Thereafter, the policy contains a schedule of “covered autos you own”, in which several motor vehicles are listed. Appellant’s 1982 Ford Thunderbird is not among those listed. Appellant does not address the absence of his vehicle from the

schedule of covered auto's, but instead asserts that our holding in *Good v. Krohn*, Allen App. No. 1-02-18, 2002-Ohio-4001 is controlling. We disagree.

{¶13} In *Good*, we considered an “other owned auto” exclusion identical to the one at bar and determined that the appellant was in fact driving a “covered auto”, and therefore UM/UIM coverage was not excluded. *Id.* at ¶26. However, the facts in *Good* are distinguishable from the facts now before this court. The UM/UIM policy in *Good* defined a “covered auto” for purposes of UM/UIM coverage as “*** [a]ny owned auto except 1991 United Trailer, S# 01479; 1981 Monon Trl, S# 3223; 1981 Monon Trl, S# 3204; 1972 Trailmobile Trl, S# 1084; 1979 International Truck, S# 13483.” The appellant’s vehicle was not among the list of excepted autos and therefore, was deemed to be a “covered auto”. There was no “schedule of autos you own” in the *Good* case and therefore, the holding in that matter is not controlling here.

{¶14} In conclusion, we find that for purposes of UM/UIM coverage, Appellant is an insured. However, based upon the exclusionary language of Section C(5)(a) of the UM/UIM policy, he is not entitled to coverage as matter of law. The “other owned auto” exclusion is applicable to the Appellant and is not contrary to Ohio law. Furthermore, Appellant was not driving a covered auto at the time of his accident. Summary judgment is therefore not appropriate as to the

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Appellant and therefore, the dismissal of Appellee from this matter was proper.

Accordingly, Appellant's sole assignment of error is overruled.

{¶15} For the reasons stated, it is the order of this Court that the judgment of the Court of Common Pleas, Hancock County is hereby, **AFFIRMED**.

Judgment affirmed.

SHAW and CUPP, JJ., concur.