

[Cite as *Herbert v. St. Paul Guardian Ins. Co.*, 2004-Ohio-4991.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

AMANDA HERBERT, Individually and)	CASE NO. 03 MA 133
As Administratrix of the Estate of)	
LESLEE HERBERT, Deceased)	
)	
PLAINTIFF-APPELLANT)	
)	
VS.)	OPINION
)	
ST. PAUL GUARDIAN INSURANCE)	
COMPANY)	
)	
DEFENDANT-APPELLEE)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 01 CV 1100
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellant:	Atty. Thomas R. Wright Atty. Gregg A. Rossi Rossi & Rossi 26 Market Street, 8 th Floor P.O. Box 6045 Youngstown, Ohio 44501
For Defendant-Appellee:	Atty. Paul D. Eklund Davis & Young 101 Prospect Avenue, West 1700 Midland Building Cleveland, Ohio 44115-1027

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: September 17, 2004

WAITE, P.J.

{¶1} This is an appeal of summary judgment granted to an insurance company in a case involving a claim for underinsured motorist (“UIM”) benefits. The claim was pursued by family members of an employee who was allegedly covered by his employer’s automobile policy. UIM coverage was premised on the holding of *Scott-Pontzer v. Liberty Mut. Fire Ins., Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116, which has recently been overruled in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, decided on November 5, 2003. Family members of an employee can no longer claim UIM coverage under a business automobile insurance policy unless the employee is a named insured on the policy. *Galatis* at paragraph three of the syllabus. The employee, Chad Herbert, is not a named insured on the policy. Therefore, there is no UIM coverage for his family members. The judgment of the Mahoning County Court of Common Pleas is affirmed.

{¶2} On May 5, 1999, Chad Herbert was operating an automobile on S.R. 183 near Alliance, Ohio, when he was involved in a traffic accident. At the time of the accident Chad Herbert was employed by Mac Trailer Manufacturing, Inc. (“Mac Trailer”), which owned an automobile insurance policy (the “St. Paul Policy”) issued by Appellee St. Paul Guardian Insurance Co. Appellant Amanda Herbert was a passenger in the car. She was pregnant at the time. Appellant was injured in the accident and her unborn fetus did not survive. Amanda was later appointed as administratrix of the estate of Leslee Herbert, the stillborn fetus. Appellant, both individually and as administratrix, filed a declaratory judgment complaint against

Appellee. (3/6/02 Amended Complaint.) The complaint alleged that Amanda Herbert and the estate of Leslee Herbert qualified for UIM benefits under the St. Paul Policy based on the holding of *Scott-Pontzer*. Briefly, *Scott-Pontzer* held that a corporate UIM policy which used the ambiguous word “you” to define who was insured by the policy also covered employees of the corporation. *Scott-Pontzer*, 85 Ohio St.3d at 664, 710 N.E.2d 1116. In the later case of *Ezawa v. Yasuda Fire & Marine Ins. Co.* (1999), 86 Ohio St.3d 557, 715 N.E.2d 1142, the Ohio Supreme Court afforded UIM coverage for bodily injury to family members of an insured employee.

{¶3} On September 19, 2002, Appellee filed a motion for summary judgment. Appellee argued, inter alia, that the St. Paul Policy did not contain the same ambiguity as existed in the *Scott-Pontzer* policy. Appellee asserted that the UIM provision of the St. Paul Policy covered the people actually named in the policy, as well as those persons occupying covered automobiles and anyone else entitled to collect damages suffered by another protected person. Appellee concluded the Chad Herbert was not an insured under the policy, and that Amanda Herbert and Leslee Herbert could not be insured as family members of an employee who was not covered by the policy.

{¶4} Appellant filed a cross-motion for summary judgment on January 21, 2003.

{¶5} On June 20, 2003, the trial court granted summary judgment to Appellee. This timely appeal followed on July 18, 2003.

{¶6} Appellant asserts a single assignment of error:

{¶7} “THE TRIAL COURT ERRED IN GRANTING APPELLEE’S MOTION FOR SUMMARY JUDGMENT AND OVERRULING APPELLANT’S MOTION FOR SUMMARY JUDGMENT.”

{¶8} Appellant argues that the definition of the term “insured” in the St. Paul Policy is not materially different than the language contained in the policies at issue in the *Scott-Pontzer* case. Appellee, on the other hand, argues that Appellant could not be covered by the UIM provisions of the St. Paul Policy in light of the *Galatis* opinion. According to *Galatis*:

{¶9} “Where a policy of insurance designates a corporation as a named insured, the designation of ‘family members’ of the named insured as other insureds does not extend insurance coverage to a family member of an employee of the corporation, unless that employee is also a named insured. (*Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* [1999], 86 Ohio St.3d 557, 715 N.E.2d 1142, overruled.)” *Galatis* at paragraph three of the syllabus.

{¶10} Nowhere in the St. Paul policy is Chad Herbert listed as a named insured. Nothing else in the policy extends coverage specifically to Amanda or Leslee Herbert. Therefore, the UIM provision of the St. Paul Policy do not cover family members of Chad Herbert even though Mr. Herbert is an employee of Mac Trailer. Appellee’s argument is correct, and the judgment of the Mahoning County Court of Common Pleas is affirmed.

Donofrio, J., concurs.

Vukovich, J., concurs.