[Cite as *D'Ambrosia v. Hensinger*, 2010-Ohio-1767.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ruth D'Ambrosia,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-496 (C.P.C. No. 07CVC-02-2627)
David J. Hensinger et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 22, 2010

Margaret Blackmore and *Siobhan R. Boyd*, for appellant.

Caborn & Butauski Co., LPA, and *Joseph A. Butauski*, for appellee Erie Insurance Company.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Ruth D'Ambrosio ("appellant"), appeals the decision of the Franklin County Court of Common Pleas granting summary judgment to defendant-appellee, Erie Insurance Company ("appellee"). For the following reasons, we affirm the judgment of the trial court.

{¶2} On September 2, 2001, appellant was a passenger in a vehicle that was struck by a vehicle operated by David J. Hensinger. At the time of the accident, appellant

held an automobile insurance policy issued by appellee, which included uninsured/underinsured motorist ("UM/UIM") coverage. On August 13, 2003, appellant filed a complaint asserting a negligence claim against Hensinger. In the suit, Hensinger was the only named defendant. On March 3, 2006, appellant voluntarily dismissed her suit, before refiling it again on February 27, 2007. On June 6, 2008, after having ascertained Hensinger's liability limits, appellant amended her complaint to assert a claim for UM/UIM coverage against appellee.

{¶3} On October 6, 2008, appellee filed a motion for summary judgment based upon the two-year contractual limitation period specified in the policy. Appellant filed a memorandum contra, and appellee filed a reply. On February 9, 2009, the trial court granted appellee's motion because appellant had initiated her UM/UIM claim six-years and nine-months after the date of the accident, which was well beyond the two-year contractual limit. Appellant has appealed and raises the following assignment of error:

> I. The Trial Court erred by granting Defendant-Appellee's Motion for Summary Judgment as there remained genuine issues of material fact and the Defendant-Appellee was not entitled to a judgment as a matter of law.

{¶4} Appellate courts review decisions on summary judgment motions de novo. *Helton v. Scioto Cty. Bd. Of Commrs*. (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶5} Summary judgment is proper only when the party moving for summary judgment demonstrates that (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183. Additionally, a moving party cannot discharge its burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id.

{¶6} "An insurance policy is a contract, and the relationship and rights of the insurer and insured are contractual in nature; therefore, a claim for UM/UIM coverage sounds in contract, not in tort." *Sarmiento v. Grange Mutual Cas. Co*., 106 Ohio St.3d 403, 2005-Ohio-5410, ¶8, citing *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 480, 2001-Ohio-100. In accordance with R.C. 2305.06, the statutory limitation period for a written contract is 15 years. However, the parties to a contract may reduce this limit, provided that the shorter period is reasonable. *Sarmiento* at ¶11, citing *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 624, 1994-Ohio-160. Further, a provision that reduces the statutory limitation period must be written in words that are clear and unambiguous. Id. To be clear and unambiguous, a policy provision must tell policyholders the amount of time they have to file suit in addition to informing

policyholders when that time begins to run. *Lane v. Grange Mut. Cos.* (1989), 45 Ohio St.3d 63, 64. As a result, our initial inquiry must focus on the insurance policy's contractual language. *Sarmiento* at ¶9, citing *Gomolka v. State Auto Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-68.

{¶7} The policy defines an underinsured motor vehicle as:

> [A] motor vehicle that has liability insurance in effect, but the sum of the applicable limits of liability * * * is less than the applicable limit shown on the Declarations for Uninsured/Underinsured Motorists Coverage for one auto.

Under the policy, appellee promised to:

> [P]ay damages for bodily injury that the law entitles you or your legal representative to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle.

The section "Other Insurance" provides:

> When the accident involves underinsured motor vehicles, we will not pay until all other forms of insurance * * * have been exhausted by payment of their limits.

Finally, the section "Lawsuits Against Us" provides:

> You must comply with the terms of the policy before you may sue us.
>
> Legal action to recover under Uninsured/Underinsured Motorists Coverage must be initiated within two years from the date of the accident.

(Motion for Summary Judgment, exhibit No. A-1.)

{¶8} In this appeal, appellant cites the foregoing policy provisions in support of her argument that the two-year limitation period is unreasonable and ambiguous. First, appellant argues that her UM/UIM claim accrued when she first learned of Hensinger's underinsured status, which occurred in November 2008. Additionally, appellant argues

that the policy is ambiguous because other policy provisions render meaningless the reference to the date of the accident specified in the limitation period. Further, appellant argues that the policy required her to raise her UM/UIM claim before she could prove it. Accordingly, appellant argues the trial court erred by enforcing the two-year limitation period.

{¶9} The Supreme Court of Ohio has generally upheld as reasonable UM/UIM provisions with two-year contractual limitation periods. See *Sarmiento*, paragraph one of syllabus ("two-year contractual limitation period for filing uninsured– and underinsured–motorist claims is reasonable and enforceable"). Indeed, the Supreme Court of Ohio has expressly provided:

> [A] two-year limitation period would be a "reasonable and appropriate" period of time in which to require an insured who has suffered bodily injury to commence an action under the uninsured/underinsured-motorist provisions of an insurance policy. [Miller at 625]; *Sarmiento* [at ¶16].
>
> Our precedent controls, and the two-year limitation period in the Allstate policy is enforceable.

Angel v. Reed, 119 Ohio St.3d 73, 2008-Ohio-3193, ¶12-13.

{¶10} In the instant matter, appellant argues that the case law does not establish a per se rule on the reasonableness of a two-year limitation period, but rather a court must consider the unique facts and circumstances of each individual case. While we agree that courts typically engage in this type of analysis, appellant has given us no reason to conduct such an analysis. Indeed, appellant has failed to present any relevant facts or circumstances demonstrating that the provision is unreasonable. Instead, appellant merely argues that her UM/UIM claim accrued when she first discovered

Hensinger's status as an underinsured motorist. When presented with this same argument in *Angel*, the Supreme Court of Ohio held:

> [T]his case presents a standard uninsured-motorist claim in which the tortfeasor was uninsured at the time of the accident. No subsequent event rendered Reed uninsured; he already was uninsured. Consistency with precedent requires the application of the unambiguous language in the Allstate policy. Appellee failed to make her uninsured-motorist claim within the limitations period designated in the Allstate policy.

Id. at ¶19.

{¶11} Similarly, we find that the instant matter presents a standard underinsured motorist claim. Appellant offers no explanation as to why it took more than six years to determine Hensinger's underinsured status. Further, she fails to explain why she was unable to obtain information regarding Hensinger's policy limits during the two years following the accident. Inasmuch as appellant references Hensinger's failure to timely respond to discovery requests sent in July 2005, we see this fact to be irrelevant. Indeed, these discovery requests were first served four years after the date of the accident. Whether Hensinger timely responded to these discovery requests had no bearing on appellant's ability to meet the two-year contractual limit. Indeed, she had already missed the deadline.

{¶12} Accordingly, we see no reason why it should have taken appellant more than six years to determine that Hensinger was underinsured. Id. at ¶17, quoting *Angel v. Reed*, 11th Dist. No. 2005-G-2669, 2007-Ohio-1069, ¶27 ("There is no reason why it should have taken Angel three years to realize Reed was uninsured"); see also *Pottorf v. Sell*, 3d Dist. No. 17-08-30, 2009-Ohio-2819, ¶15 ("At any time [the tortfeasor's] insurance company could have been contacted to determine the policy limits."); see also *Lynch v.*

Hawkins, 175 Ohio App.3d 695, 2008-Ohio-1300, ¶60 ("Plaintiff's contention that he was not aware of the tortfeasor's limited liability coverage * * * in the original suit that he filed simply indicates that he had not used the discovery tools available to him in that suit to have discovered the tortfeasor's insurance coverage earlier.").

{¶13} As a result, we find that the two-year contractual limitation period set forth in appellant's policy is reasonable. The trial court did not err in reaching this same finding.

{¶14} With regard to appellant's argument that the policy is ambiguous, we again note that the policy provides that a UM/UIM claim "must be initiated within two years from the date of the accident." (Motion for Summary Judgment, exhibit No. A-1.) Appellant argues that this provision is ambiguous when read in conjunction with the exhaustion provision and the provision requiring her to fully comply with the terms of the policy before filing suit. We disagree.

{¶15} Ohio courts have considered and rejected this same argument. See *Lynch*; see also *Chalker v. Steiner*, 7th Dist. No. 08 MA 137, 2009-Ohio-6533. In this regard, we agree with the well-reasoned analysis set forth in *Chalker*. In that case, the Seventh Appellate District described the trends in deciding issues regarding the enforceability of limitations provisions. Id. at ¶9-19. In response to the insured's argument that the exhaustion provision created an ambiguity in the policy, the *Chalker* court held that the exhaustion provision was a condition precedent to an insurer's duty to make UM/UIM payments, rather than being a condition precedent to an insured's right to commence a legal action for UM/UIM coverage. Id. at ¶50-51, citing *Regula v. Paradise*, 119 Ohio St.3d 1413, 2008-Ohio-7141, ¶49. Consequently, the court held that the full compliance provision similarly did not render the policy unenforceable. Id. at ¶51. Based upon these

analyses, the court held that the policy, even when considering the contractual limitation in conjunction with these other provisions, was not ambiguous. Id. at ¶64.

{¶16} We similarly find that the exhaustion provision and the full compliance provision did not render the policy ambiguous. Nothing prevented appellant from filing suit within two years from the date of the accident. See *Chalker* at ¶21, citing *Regula* at ¶49. The policy clearly and unambiguously established the time appellant had to file suit in addition to informing her when that time began to run. See *Lane* at 64.

{¶17} Based upon the foregoing analysis, we find that the two-year contractual limitation period was reasonable and was unambiguous. As a result, the two-year contractual limitation period was enforceable. Because appellant undisputedly failed to file her UM/UIM claim within this time frame, we find that the trial court did not err in granting summary judgment. As a result, we overrule appellant's only assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.