

[Cite as *Lewis v. Kizer*, 2003-Ohio-4253.]

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

ROY D. LEWIS, JR.

CASE NUMBER 17-03-05

PLAINTIFF-APPELLANT

v.

OPINION

RICKY L. KIZER, ET AL.

DEFENDANTS-APPELLEES

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part and reversed in part and cause remanded.

DATE OF JUDGMENT ENTRY: August 11, 2003.

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BRYANT, P.J.

{¶1} Plaintiff-appellant Roy D. Lewis, Jr. (“Lewis”) brings this appeal from the judgment of the Court of Common Pleas of Shelby County granting summary judgment to defendants-appellees Ricky L. Kizer (“Kizer”) and Commerce and Industry Insurance Co. (“CIC”).

{¶2} On September 16, 1990, Kizer, an uninsured driver, crossed the center line and struck a vehicle driven by Lewis. Lewis filed suit against Kizer and obtained a default judgment against Kizer on June 2, 1993. At the time of the accident, Lewis was employed by Ramsey Laboratories (“Ramsey”). Ramsey maintained a business automobile policy, a commercial general liability policy and a commercial umbrella liability policy, all issued by CIC.

{¶3} On October 31, 2001, Lewis filed a lawsuit against Kizer, Ramsey, and CIC for the 1990 automobile accident. Ramsey was dismissed from the suit on May 21, 2002. On November 1, 2002, Lewis filed a motion for summary judgment against CIC as to the claim for declaratory relief that Lewis was an insured under the policies. Lewis also filed a motion for default judgment against Kizer. CIC filed its motion for summary judgment on November 1, 2002, as well. Both CIC and Lewis filed motions contra to the other's motion for summary judgment. On November 19, 2002, the trial court overruled the motion for a default judgment against Kizer on the basis of res judicata. On January 3, 2003, the trial court granted CIC's motion for summary judgment and overruled Lewis's motion for summary judgment, finding that CIC was prejudiced by the delay in providing notice of the claim. It is from these judgments that Lewis raises the following assignments of error.

The trial court erred to the prejudice of [Lewis] in granting summary judgment in favor of [CIC] and denying [Lewis's] motions for summary judgment on his claims for declaratory relief on [CIC's policies].

The trial court erred to the prejudice of [Lewis] in denying his motion for default judgment against [Kizer].

{¶4} In the first assignment of error, Lewis claims that the trial court erred in granting summary judgment to CIC and in denying summary judgment to himself. The basis for Lewis's argument is that CIC did not show that it was prejudiced by the delay in notice and that there was no notice that the delay in

notice was unreasonable. The automobile accident occurred in 1990. The first notice of the accident received by CIC was in 2002, more than a decade later.

{¶5} The Supreme Court of Ohio dealt with the question of delay in notice in *Ferrando v. Auto-Owners Mut. Ins.* 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927. In *Ferrando*, the trial court held the following.

Based on our discussion thus far, a court evaluating whether a prompt-notice or consent-to settle (or other subrogation-related) provision in a UIM policy was breached, and, if so, the effects of the breach, must conduct a two-step inquiry as described in further detail below. The first step is to determine whether a breach of the provision at issue actually occurred. The second step is, if a breach did occur, was the insurer prejudiced so that UIM coverage must be forfeited. * * *

The two-step approach in late-notice cases requires that the court first determine whether the insured's notice was timely. This determination is based on asking whether the UIM insurer received notice "within a reasonable time in light of all the surrounding facts and circumstances." * * * If the insurer did receive notice with a reasonable time, the notice inquiry is at an end, the notice provision was not breached, and UIM coverage is not precluded. If the insurer did *not* receive reasonable notice, the next step is to inquire whether the insurer was prejudiced. Unreasonable notice gives rise to a presumption of prejudice to the insurer, which the insured bears the burden of presenting evidence to rebut.

In cases involving the alleged breach of a consent-to-settle or other subrogation-related clause, the first step is to determine whether the provision actually was breached, the second step is to determine whether the UIM insurer was prejudiced. If a breach occurred, a presumption of prejudice to the insurer arises, which the insured party bears the burden of presenting evidence to rebut.

Id. at ¶ 89-91 (citations omitted). The Court found that the question of reasonableness of notice was one of fact. Id. at ¶ 93.

{¶6} In its motion for summary judgment, CIC claimed that Lewis had breached the notice provision of the policies. The basis for the granting of summary judgment was that Lewis violated the notice provision and prejudiced CIC by doing so. However, the question of whether the notice was reasonable given the circumstances is one of material fact that cannot be resolved on summary judgment. The first assignment of error is sustained.

{¶7} In the second assignment of error, Lewis argues that the trial court incorrectly applied the doctrine of res judicata. Res judicata is the doctrine by which “a final judgment by a court of competent jurisdiction is conclusive upon the parties in any subsequent litigation involving the same cause of action.” Barron’s Law Dictionary (3 Ed. 1991) 416. Lewis claims that since his prior lawsuit against Kizer resulted in a default judgment against Kizer, the doctrine of collateral estoppel does not apply. The statement that the doctrine of collateral estoppel does not apply is correct. However, the doctrine of res judicata is different. It does not depend upon whether an issue was litigated but rather whether a final judgment was issued.

{¶8} In the case before this court, the court of competent jurisdiction entered a final judgment in favor of Lewis against Kizer for damages sustained in the 1990 automobile accident. The complaint in the 2001 case claims that Kizer caused injury to Lewis in the same automobile accident. Since Lewis already has a judgment against Kizer for damages from that accident, no new suit can be brought upon the same claim and Lewis is not entitled to a second successive

judgment on the same claim. Thus, the trial court did not err in dismissing the claim against Kizer. The second assignment of error is overruled.

{¶9} The judgment of the Court of Common Pleas of Shelby County is affirmed in part and reversed in part. The cause is remanded for further proceedings.

*Judgment affirmed in part and
reversed in part and cause
remanded.*

**SHAW, J., concurs.
CUPP, J., dissents.**

CUPP, J., dissenting.

{¶10} I must respectfully dissent. I believe that the trial court reached the correct result based on the facts and the law applicable to this case.

{¶11} The initial inquiry is whether there was a breach of the policy's prompt notice requirement. A prompt notice requirement is breached if the delay on the part of the insured in providing the required notice is unreasonable; that is, the required notice was not given "within a reasonable time in light of all the surrounding facts and circumstances." *Ferrando v. Auto-Owners Mutual Insurance Company*, 98 Ohio St.3d 186, 2002-Ohio-7217, ¶ 90; quoting *Ruby v. Midwestern Indemn. Co.*, (1988), 40 Ohio St.3d 159, syllabus.

{¶12} Although the question of whether notice is provided within a reasonable time "is usually a question of fact for the jury, an unexcused significant delay may be unreasonable as a matter of law." *Ormet Primary Aluminum Corp.*

v. Employers Ins. of Wausau (1999), 88 Ohio St.3d 292, 300. The delay in this case is indeed significant. Although the accident occurred in September, 1990, appellee was not notified of appellant's claim until it received its service of summons in this lawsuit in April, 2003. A child entering kindergarten in the year of the accident would have become old enough to obtain a driver's license when notice was finally given. Also, within this span of more than 11.5 years, Ohio has been served by three different governors; George H.W. Bush served his final two years as President of the United States; Bill Clinton served two full terms as President; and President George W. Bush was half way through a term. Thus, it cannot be disputed that a very significant amount of time has passed between the date of the accident and the giving of the required "prompt" notice.

{¶13} The question remaining to be answered in determining whether the delay was unreasonable as a matter of law, then, is whether this significant delay is excusable. Appellant argues that the delay was occasioned by the Supreme Court's failure to articulate the law governing this matter until that Court's June, 1999, decision in *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.* (1999), 85 Ohio St.3d 660. Appellant asserts he had no ability to make a claim until that time. In this regard, I must agree with the reasoning of the Ninth District Court of Appeals that "awaiting a favorable supreme court decision is not a reasonable excuse" for such significant delay. *Smith v. Liberty Mutual Ins. Co.*, Summit App. No. 21311, 2003-Ohio-3160, ¶ 62; citing *Gidley v. Cincinnati Ins. Co.*, Summit App. No. 20813, 2002-Ohio-1740, ¶ 9. See also, *Kerwood v. Cincinnati Ins. Co.*, Franklin

App. No. 02AP-575, 2002-Ohio-7024, ¶ 27, discretionary appeal not allowed, 98 Ohio St.3d 1540, 2003-Ohio-1946, reconsideration denied 99 Ohio St.3d 1439, 2003-Ohio-2902.¹

{¶14} I would hold, therefore, that the delay in providing the “prompt notice” in the case before us was unreasonable as a matter of law. The interests of justice are not served by inviting into the courts of this state scores and scores of stale claims.

{¶15} Under the Supreme Court’s holding in *Ferrando*, the appellee-insurer is presumed to be prejudiced by the failure of the appellant-claimant to provide prompt notice. *Ferrando*, 98 Ohio St.3d at ¶ 90. This presumption does not preclude appellant from succeeding on his claims. But to do so, he must rebut the presumption with credible evidence showing that appellee, in fact, has not been prejudiced by appellant’s failure to promptly notify appellee.

{¶16} Appellant asserts in his brief, as he did at oral argument, that a judgment was obtained against the tortfeasor in this case and that such judgment is assignable to appellee. Appellant concludes that this establishes a lack of prejudice to appellee, or, at least, presents an issue of material fact in that regard, and, for that reason, summary judgment in favor of appellee is not appropriate.

{¶17} Under Civ. R. 56(E), “ * * * an adverse party may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s response, by

¹ In *Smith, id.*, the plaintiff provided notice to the insurer eight years after the accident. The delay was four years in *Gridley, id.*, and in *Kerwood* it appears to be between four and six years.

affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Appellant has not provided sufficient facts, by affidavit or otherwise, to create a genuine issue of material fact as to whether appellee has not been prejudiced by the failure to provide timely notice.

{¶18} Appellant’s legal arguments do not overcome the presumption of prejudice to appellee. The judgment to which appellant refers was a default proceeding. Appellee had no notice of the litigation, no opportunity to participate, no opportunity to examine plaintiff or his injuries, and no opportunity to examine the tortfeasor on liability issues. Moreover, the default judgment obtained in that proceeding is now, by the passage of time, dormant. Construing the evidence most strongly in favor of appellant, nothing appellant has presented creates a genuine issue of material fact tending to rebut the presumption of prejudice resulting from the untimely notice.

{¶19} For the foregoing reasons, I would sustain the trial court’s grant of summary judgment for appellee in this matter.