[Cite as *Smitley v. Republic-Franklin Ins. Co.*, 2004-Ohio-5568.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RAY DEAN SMITLEY, et al.

Plaintiffs-Appellants

-vs-

REPUBLIC FRANKLIN INSURANCE CO., et al.

Defendants-Appellees

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. John F. Boggins, J.

Case No. 2003CA00433

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2001-CV-03428
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	OCTOBER 12, 2004

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee Wayne Mutual Ins.
GEORGE C. ROGERS 6884 State Route 110 Napoleon, Ohio 43535	JAMES MATTHEWS 400 S. Main Street North Canton. Ohio 44720

For Defendant-Appellee American States Preferred Inc. Co.

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Boggins, J.

{¶1} Appellants Joy Smitley and Christina Derrow appeal the July 29, 2003, decision of the Stark County Court of Common Pleas which granted summary judgment on behalf of Appellees Wayne Mutual Insurance Company ("Wayne Mutual") and American States Preferred Insurance Company ("American States").

STATEMENT OF THE FACTS AND CASE

{¶2} The following facts are pertinent to this appeal:

{¶3} The accident giving rise to this case occurred on September 1, 1995, when Michael J. Smitley was killed in automobile accident caused by Thomas J. Fife, an uninsured motorist. Michael Smitley was riding in the open bed of Thomas Fife's pick-up truck when Fife failed to negotiate a left-hand curve, causing the vehicle to go off the road, throwing Michael Smitley from the bed of the truck wherein he struck a utility pole and sustained fatal injuries.

{¶4} Thomas Fife was charged with and convicted of vehicular homicide.

{¶5} Michael J. Smitley was survived by among others, two sisters: appellants Christina L. Derrow and Joy Anne Smitley.

{¶6} At the time of the accident, Appellant Christina Derrow had in effect an automobile insurance policy through American States Preferred Insurance Company, with UM coverage of $300,000.00.

{¶7} Appellant Joy Smitley was insured under an automobile policy of insurance issued by Wayne Mutual Insurance with limits of $100,000.00.

{¶8} Both Appellants submitted claims as wrongful death beneficiaries to their respective insurance companies. Each was denied.

{¶9} On December 12, 2001, appellants filed a complaint against Wayne Mutual and American States seeking a declaration of coverage. This complaint also contained claims by Ray Smitley, Michael Smitley's father, against Republic-Franklin Insurance Company, however such is not a subject of the instant appeal.

{¶10} On April 22, 2002, Appellants filed a Joint Motion for Partial Summary Judgment.

{¶11} Both Wayne Mutual and American States each filed a motion in opposition as well as a cross-motion for summary judgment, arguing entitlement to judgment because appellants failed to protect subrogation rights and failed to provide prompt notice of the accident.

{¶12} The trial court held a hearing in accordance with *Ferrando v. Auto-Owners Mut. Ins. Co.* (2002), 98 Ohio St.3d 186.

{¶13} The trial court, in a judgment entry filed on July 29, 2003, granted summary judgment in favor of American States and Wayne Mutual.

{¶14} Appellants timely filed a notice of appeal and set forth the following assignments of error for our consideration:

ASSIGNMENTS OF ERROR

{¶15} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO AMERICAN STATES PREFERRED INSURANCE COMPANY AGAINST ITS

NAMED INSURED, CHRISTINA DERROW, DETERMINING THAT THE NOTICE AND SUBROGATION PROVISIONS OF THE POLICY WERE ENFORCEABLE, AND FURTHER THAT THE PRESUMPTION OF PREJUDICE ARISING FROM A BREACH OF SUCH PROVISIONS WAS NOT REBUTTED BY THE EVIDENCE CHRISTINA DERROW SUBMITTED.

{¶16} "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO WAYNE MUTUAL INSURANCE COMPANY AGAINST ITS NAMED INSURED, JOY SMITLEY, DETERMINING THAT THE NOTICE AND SUBROGATION PROVISIONS AND TIME LIMITATION WERE ENFORCEABLE AND VIOLATED, AND FURTHER THAT THE PRESUMPTION OF PREJUDICE ARISING FROM A BREACH OF SUCH PROVISIONS WAS NOT REBUTTED BY THE EVIDENCE JOY SMITLEY SUBMITTED.

{¶17} "III. THE TRIAL COURT ERRED IN DENYING CHRISTINA DERROW'S MOTION FOR SUMMARY JUDGMENT AGAINST HER INSURER, AMERICAN STATES PREFERRED INSURANCE COMPANY, WHEN SHE FILED HER UNINSURED MOTORIST CLAIM FOR THE DAMAGES SHE SUFFERED AS A WRONGFUL DEATH BENEFICIARY OF HER BROTHER, MICHAEL SMITLEY, WITHIN THE FIFTEEN YEAR CONTRACTUAL STATUTE OF LIMITATIONS PERIOD, AND SUBMITTED EVIDENCE THAT THE CLEARLY LIABLE PARTY WHO ADMITTED HIS LIABILITY WAS UNINSURED, AND INDIGENT, WITHOUT SIGNIFICANT ASSETS, SHOWING THAT SUBROGATION RIGHTS WERE WORTHLESS, AND LATE NOTICE TO INVESTIGATE THE ACCIDENT WAS NOT PREJUDICIAL.

{¶18} "IV. THE TRIAL COURT ERRED IN DENYING JOY SMITLEY'S MOTION FOR SUMMARY JUDGMENT AGAINST HER INSURER, WAYNE MUTUAL INSURANCE COMPANY, WHEN SHE FILED HER UNINSURED MOTORIST CLAIM FOR THE DAMAGES SHE SUFFERED AS A WRONGFUL DEATH BENEFICIARY OF HER BROTHER, MICHAEL SMITLEY, WITHIN THE FIFTEEN YEAR CONTRACTUAL STATUTE OF LIMITATIONS PERIOD, AND SUBMITTED EVIDENCE THAT THE CLEARLY LIABLE PARTY WHO ADMITTED HIS LIABILITY WAS UNINSURED, AND INDIGENT WITHOUT SIGNIFICANT ASSETS, SHOWING THAT SUBROGATION RIGHTS WERE WORTHLESS, AND LATE NOTICE TO INVESTIGATE THE ACCIDENT WAS NOT PREJUDICIAL."

{¶19} SUMMARY JUDGMENT STANDARD

{¶20} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. As such, we must refer to Civ.R. 56 which provides, in pertinent part:

{¶21} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * *

{¶22} A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for

summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * *"

{¶23} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, (1996), 75 Ohio St.3d 280.

{¶24} It is based upon this standard that we review appellant's assignments of error.

I, III.

{¶25} Appellant Christina Derrow, in the first and third assignments of error argues that the trial court erred in when it denied her motion for summary judgment and granted American State's Motion for Summary Judgment. We disagree.

{¶26} The UM/UIM portion of the American State's insurance policy reads in relevant part:

{¶27} "PART C- UNINSURED/UNDERINSURED MOTORIST COVERAGE in its entirety, is deleted and the following substituted:

{¶28} "INSURING AGREEMENT

{¶29} "a. If a limit for this coverage is displayed on the declarations, we will pay compensatory damages which an "insured" is legally entitled to recover because of:

{¶30} "1. "Bodily injury" sustained by an "insured" and caused by an accident."

{¶31} As correctly stated by the trial court, the Ohio Supreme Court in *Moore v. State Auto Mutual Insurance Co.*, 88 Ohio St.3d 27, 2000-Ohio-264, held that under R.C. §3937.18, a "bodily injury" requirement to an insured is invalid and unenforceable. See, also, *Martin v. Midwestern Group Insurance Co.*, 70 Ohio St.3d 478, 1994-Ohio-407; *State Farm Automobile Insurance Co. v. Alexander* (1992), 62 Ohio St.3d 397.

{¶32} Appellant Derrow argues based upon these cases and the philosophy therein, the policy sub judice did not contain uninsured/underinsured motorist coverage and therefore is created by operation of law and as such, the existing notice and subrogation provisions are invalid.

{¶33} As this Court has previously held in *Shook v. Cincinnati Ins. Co.*, (Oct. 7, 2002), Stark App. No. 2002CA00067, 2002-Ohio-5481, we disagree with this rationale.

{¶34} In *Shook*, supra, we held that while the clear language of these opinions supports the fact that if there is an invalid and unenforceable exclusion, only that exclusion is negated and not the entire uninsured/underinsured motorist policy. We concluded that such did not involve uninsured/underinsured motorist coverage by operation of law, but an uninsured/underinsured motorist contract that has valid and enforceable contractual limitations.

{¶35} Appellant further argues that even if such notice and subrogation provisions are enforceable, her notice was given within a reasonable time and/or that

the trial court erred in finding that Appellee American States was prejudiced by the breach of such provisions by Appellant Derrow.

{¶36} In the case *of Ferrando v. Auto Owners Mut. Ins. Co*., 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, the Ohio Supreme Court held as follows: "When an insurer's denial of underinsured motorist coverage is premised on the insured's breach of a prompt-notice provision in a policy of insurance, the insurer is relieved of the obligation to provide coverage if it is prejudiced by the insured's unreasonable delay in giving notice. An insured's unreasonable delay in giving notice is presumed prejudicial to the insurer absent evidence to the contrary."

{¶37} "When an insurer's denial of underinsured motorist coverage is premised on the insured's breach of a consent-to-settle or other subrogation-related provision in a policy of insurance, the insurer is relieved of the obligation to provide coverage if it is prejudiced by the failure to protect its subrogation rights. An insured's breach of such a provision is presumed prejudicial to the insurer absent evidence to the contrary." *Ferrando* at paragraphs one and two of the syllabus.

{¶38} *The Ferrando* Court also articulated a two-step approach for determining whether the prompt notice and subrogation-related provisions were breached, and, if so, whether the breach resulted in prejudice to the extent that UIM coverage is then 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.' " *Ruby [v. Midwestern Indem. Co*. (1988), 40 Ohio St.3d 159, 532 N.E.2d 730], syllabus. If the insurer did receive notice within a

reasonable time, the notice inquiry is at an end, the notice provision was not breached, and UIM coverage is not precluded. *Ferrando* at 208. If the insurer did not receive reasonable notice, the next step is to inquire whether the insurer was prejudiced. Id. Unreasonable notice gives rise to a presumption of prejudice to the insurer, which the insured bears the burden of presenting evidence to rebut. Id.

{¶39} Based on *Ferrando*, supra, the trial court found, and we concur, that a delay of over five (5) years is unreasonable and therefore a presumption of prejudice arose which Appellant failed to rebut with the tortfeasor's affidavit.

{¶40} Appellants' first and third assignments of error are denied.

II., IV.

{¶41} In the Second and Fourth Assignments of Error, Appellant Joy Smitley, argues that the trial court erred in when it denied her motion for summary judgment and granted Wayne Mutual's Motion for Summary Judgment. We disagree.

{¶42} The Wayne Mutual policy, like the American States policy, attempted to limit UM coverage to those insureds who suffered "bodily injury". The relevant portion of said policy reads:

{¶43} "PART C – UNINSURED MOTORISTS COVERAGE INSURING AGREEMENT

{¶44} "We will pay damages which a covered person is legally entitled to recover from an uninsured motorist because of bodily injury sustained by a covered person and caused by a motor vehicle accident."

{¶45} As stated previously, such a requirement is invalid and unenforceable, See *Moore*, supra.

{¶46} Appellant Smitley makes the same argument as Appellant Derrow, claiming that the notice and subrogation provisions contained in the policy should be held to be invalid an unenforceable.

{¶47} For the same reason as heretofore stated, we find that the subrogation and notice provisions contained in the Wayne Mutual policy are enforceable.

{¶48} We likewise find that Appellant Smitley failed to commence her lawsuit against Wayne Mutual within the twenty-four month period as required by the policy, to-wit:

{¶49} "LEGAL ACTION AGAINST US

{¶50} "No suit or action whatsoever or any proceeding requested, instituted or processed in arbitration may be brought against us for the recovery fo any claim under this Part unless such suit action or proceeding in arbitration against us is commenced within 24 months next after the date of the accident."

{¶51} The Ohio Supreme Court, in *Miller v. Progressive Cas. Ins. Co.,* 69 Ohio St.3d 619, 635 N.E.2d 317, held that an insurer's one-year contractual limitation on an insured's right to present a UM/UIM claim violated public policy. However, the Supreme Court of Ohio further stated, "Consistent with our analysis, a two-year period, such as that provided for bodily injury actions in R.C. 2305.10, would be a reasonable and appropriate period of time for an insured who has suffered bodily injuries to commence an action of proceeding for payment of benefits under the uninsured or underinsured motorists provisions of an insurance policy." *Id.* at 624, 635 N.E.2d 317. See, also, *Sarmiento v. Grange Mut. Ins. Co.* (Dec. 4, 2003), Cuyahoga App. No. 82807; *State Automobile Mut. Ins. Co. v. Lewis* (Jan. 23, 2003), Cuyahoga App. No. 81209; *Veloski*

v. State Farm Mut. Auto Ins. Co. (1998), 130 Ohio App.3d 27, 719 N.E.2d 574. "To Permit an unending period of time (or even to limit the period to fifteen years as appellant argued orally) would allow policy holders to sit on their claims indefinitely while waiting for the law to change." *Veloski,* supra, at 30, 719 N.E.2d 574.

{¶52} We therefore find that an insurance contract may lawfully limit the time with which a suit may be brought if the period fixed in the policy is not unreasonable.

{¶53} Appellants' second and fourth assignments of error are denied

{¶54} Accordingly, for the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed

By: Boggins, J.

Gwin, P. J., and

Wise, J., concur.

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JUDGES

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RAY DEAN SMITLEY, et al	:
	:
Plaintiffs-Appellants	:

-vs-	:	JUDGMENT ENTRY
REPUBLIC FRANKLIN INSURANCE CO., et al.	:	
Defendants-Appellees	:	Case No. 2003CA00433

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

Costs assessed to Appellants.

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JUDGES