[Cite as *Mackin v. Am. States Ins. Co.* , 2004-Ohio-1335.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Suzanne Mackin, et al.	Court of Appeals No. L-03-1216
Appellants	Trial Court No. CI-02-2816
v.	
American States Insurance Company	**DECISION AND JUDGMENT ENTRY**
Appellee	Decided: March 19, 2004

* * * * *

Marc J. Meister, for appellants.

William G. Kroncke and Bradley M. D'Arcangelo, for appellee.

* * * * *

LANZINGER, J.

{¶1} This accelerated appeal comes to us from a summary judgment issued by the Lucas County Court of Common Pleas involving underinsured/uninsured motorist ("UM/UIM") claims. Because we conclude that appellants could not overcome the presumption of prejudice by their failure to give prompt notice of the claims, we affirm.

{¶2} In August 1989, appellant, Suzanne Mackin, was driving the vehicle of her husband, John Mackin, to his Credit Union on her lunch hour when she was involved in an accident. She sustained injuries due to the alleged negligence of Paulette Oliver and Robert Jackson, who were uninsured motorists. At the time of the accident, Suzanne was employed by the Lucas County Department of Human Services.

{¶3} In 1990, the Mackins settled for $50,000 in UM/UIM coverage with their own automobile insurance company. The Mackins then filed a complaint against Oliver and Jackson and obtained a default judgment in the amount of $520,320.

{¶4} In March 2002, approximately 13 years after the accident, the Mackins filed claims for uninsured motorist claims, pursuant to *Scott-Pontzer v. Liberty Mut. Ins. Co.* (1999), 85 Ohio St.3d 660, with appellee, American States Insurance Company ("American States"), the insurer for employees of Lucas County.[1] American States subsequently denied the claim. The Mackins then filed suit against American States in May 2002.

{¶5} The Mackins filed a motion for summary judgment seeking coverage under the American States policy for their *Scott-Pontzer* claims. American States filed a cross-motion for summary judgment. The trial court denied the Mackins' motion but granted summary judgment in favor of American States on the basis of the Mackins' failure to provide prompt notice as required by the policy.

{¶6} The Mackins now appeal from that judgment, setting forth the following sole assignment of error:

{¶7} "Summary Judgment should not have been granted because Plaintiffs affirmatively established that Defendant did not suffer any prejudice due to the timing of Plaintiffs notice of claim."

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[1] We note that since the filing of this appeal, *Scott-Pontzer* claims have been limited to those claims by an insured acting "within the scope of employment." See *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. It appears from the facts of this case, that Suzanne Mackin was not acting within the scope of her employment, thus negating any claims for UM/UIM coverage under *Scott-Pontzer*. We decline to formally address that issue, however, since it is not properly before us on appeal.

{¶8} The standard of review of a grant or denial of summary judgment is the same for both a trial court and an appellate court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact" and, construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C). In other words, an appellate court reviews summary judgments de novo, independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711.

{¶9} The determination as to whether the breach of an insurance policy's prompt-notice provision is a condition which relieves the insurer of its obligation to provide UM/UIM coverage involves a two-step process. *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, at ¶89. First, the trial court must determine if a breach occurred because the insurer did not receive prompt notice within a reasonable time. Id. at ¶90. Whether notice is reasonable is dependent upon all the surrounding facts and circumstances of each case. Id.; *Ruby v. Midwestern Indemn. Co.* (1988), 40 Ohio St.3d 159, at the syllabus.

{¶10} Second, if a breach of the prompt-notice provision has occurred, the court must determine if the insurer was prejudiced such that UM/UIM coverage must be forfeited. *Ferrando*, supra, at ¶89. In deciding the issue of prejudice to the insurer, a

presumption arises that an unreasonable delay was prejudicial; however, the insured may rebut the presumption with contrary evidence. Id at ¶90.

{¶11} We recently addressed the issue of delayed notice and the *Ferrando* two-step process in *Erdmann v. Kobacher Co.*, 6th Dist. No. L-02-1184, 2003-Ohio-5677, and concluded that an eight year delay was unreasonable because it irreparably prejudiced an insurer's right to participate in the original suit. We noted that delayed notice is generally unexcused by ignorance of coverage where the insured fails to exercise due diligence in investigating possible coverage, especially where facts demonstrate that the insured should have looked into the matter of coverage sooner. Id. ¶23, citing to *Ferrando*, supra, at ¶96-98. Waiting for a new or favorable decision by the Supreme Court of Ohio also does not excuse a lengthy delay in giving notice of a claim under an insurance policy. *Erdmann*, supra, at ¶24. An unexcused significant delay may be unreasonable as a matter of law. Id., citing to *Ormet Primary Aluminum Corp v. Employers Ins. of Wausau* (1999), 88 Ohio St.3d 292, 300, harmonized by *Ferrando*, supra.

{¶12} In the present case, as required by *Ferrando*, the trial court considered the facts presented by the parties and determined that the notice to American States was not reasonable and that the Mackins were unable to overcome the presumption of prejudice to the insurer. The American States policy contains the standard insurance clause which provides that, in the event of "an 'accident,' 'claim,' 'suit,' or 'loss,'" that the insured must give "prompt notice of the 'accident' or 'loss'***." Our review of the record shows that it is undisputed that the Mackins delayed 13 years after the accident and three years

after *Scott-Pontzer* was released to provide notice to American States of their potential UM/UIM claims. This passage of time, which is unreasonable on its face, constitutes a breach of the notice provision and raises the presumption of prejudice to American States.

{¶13} In rebuttal, the Mackins contend that American States is not prejudiced because the tortfeasors and witnesses are still available and "conditions of the road where the accident occurred have not changed." Even presuming that the witnesses' memories have not faded and that some evidence is available for investigation, American States would be placed in a detrimental position. As we noted in *Erdmann*, the chance for American States to participate in the investigation and defend the original suit has long since passed. It was also deprived of its opportunity to prevent the default judgment upon which the UM/UIM claims are based. Thus, we agree with the trial court's determination that the Mackins failed to produce evidence which would adequately rebut the presumption of prejudice to American States.

{¶14} Since no material facts remain in dispute and American States was entitled to judgment as a matter of law, the trial court properly granted summary judgment against the Mackins. Accordingly, the Mackins' sole assignment of error is found not well-taken.

{¶15} The judgment of the Lucas County Court of Common Pleas is affirmed. Court costs of this appeal are assessed to appellants.

JUDGMENT AFFIRMED.

Richard W. Knepper, J. _____

JUDGE

Mark L. Pietrykowski, J. _____

Judith Ann Lanzinger, J. _____
CONCUR.

JUDGE

JUDGE