[Cite as *Burgio v. Allstate Ins. Co.*, 2005-Ohio-387.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84254

SALVATORE BURGIO	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellant	:	OPINION
	:	
-vs-	:	
	:	
ALLSTATE INSURANCE COMPANY	:	
	:	
Defendant-appellee	:	

DATE OF ANNOUNCEMENT OF DECISION:	FEBRUARY 3, 2005
CHARACTER OF PROCEEDING:	Civil appeal from the Court of Common Pleas Case No. CV-498063
JUDGMENT:	Affirmed. Cross-appeal is Moot.
DATE OF JOURNALIZATION:	

APPEARANCES:

For Plaintiff-Appellant:	WILLIAM T. ZAFFIRO, ESQ. 5555 Mayfield Road Lyndhurst, Ohio 44124 PAUL W. FLOWERS, ESQ. PAUL W. FLOWERS CO., L.P.A. Terminal Tower, 35th Floor 50 Public Square Cleveland, Ohio 44113
For Defendant-Appellee:	TERRENCE J. KENNEALLY, ESQ.

JOHN M. BOSTWICK, ESQ.
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Rocky River, Ohio 44116

ANN DYKE, J.:

{¶ 1} Plaintiff Salvatore Burgio appeals from the order of the trial court which entered summary judgment for defendant Allstate Ins. Co. ("Allstate") on the basis that plaintiff did not commence his action for uninsured motorists benefits within the limitations period set forth in the policy. Allstate cross-appeals and challenges the trial court's rejection of its argument that plaintiff did not have independent corroborative evidence that an unidentified motorist was negligent. For the reasons set forth below, we affirm the order granting summary judgment to Allstate and we reject Allstate's cross-appeal as moot.

{¶ 2} On April 2, 2003, plaintiff filed a complaint for uninsured motorist benefits against Allstate in which he asserted that he was struck by an unidentified vehicle while walking on Mayfield Road on April 11, 2000. Allstate denied liability and asserted, inter alia, that plaintiff failed to commence his action within two years of the date of the occurrence and failed to produce independent corroborative evidence to show that the collision was due to the negligent or intentional acts of an unidentified driver. Allstate also filed a counterclaim for declaratory judgment.

{¶ 3} Allstate moved for summary judgment and maintained that it was entitled to judgment as a matter of law due to the plaintiff's failure to file this action within two years of the date of the accident and due to the absence of independent corroborative evidence to demonstrate the negligence of the alleged hit and run driver.

{¶ 4} In opposition, plaintiff argued that Allstate had waived the two year limitations period and/or was estopped from asserting it herein. According to plaintiff's counsel, he could not file suit until the recorded statement had been provided, because the policy states:

{¶ 5} "Legal Action

{¶ 6} "Any legal action against Allstate must be brought within two years of the date of the accident. **No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions.**

{¶ 7} "* * *

{¶ 8} "What To Do If There Is A Loss

{¶ 9} "* * *

{¶ 10} "2. **We may require any person making a claim to file with us a sworn proof of loss**. We may also require that person to submit to examinations under oath, separately and apart from others, and to sign the transcript." (Emphasis added).

{¶ 11} Plaintiff's counsel also averred that the parties "agreed that it would make sense to conduct this session once Mr. Burgio had stopped treating and the pertinent medical records and bills had been assimilated." He also noted that Allstate never sent him correspondence to indicate that it intended to invoke the limitations period of the policy. He further noted that Allstate first mentioned the limitations period after it expired. Finally, plaintiff's counsel noted that Allstate sent him additional correspondence on June 11, 2002 which stated:

{¶ 12} "Thank you for continuing to work with Allstate Insurance Company on this uninsured motorist claim.

{¶ 13} "Currently:

{¶ 14} "1. Our investigation of the loss is continuing."

{¶ 15} On May 31, 2003, Allstate sent him additional correspondence which indicated, in relevant part, as follows:

{¶ 16} "Thank you for continuing to work with Allstate Insurance Company on this uninsured motorist claim.

{¶ 17} "Currently:

{¶ 18} "1. We are waiting for the completion of the court action."

{¶ 19} The trial court entered summary judgment for Allstate. Plaintiff now appeals and assigns a single error for our review. Allstate cross-appeals and also assigns one error.

PLAINTIFF'S APPEAL

{¶ 20} Plaintiff's assignment of error states:

{¶ 21} "The trial judge erred as a matter of law by granting summary judgment in the favor of defendant-appellee upon the basis of the statute of limitations and time to sue clause in the policy."

{¶ 22} An appellate court's review of summary judgment is conducted under a de novo standard. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, 641 N.E.2d 265; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41, 654 N.E.2d 1327. Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are 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 its favor. Civ.R. 56(C); *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 65-66, 1993-Ohio-195, 609 N.E.2d 144; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221, 677 N.E.2d 343.

{¶ 23} Recovery under an uninsured motorist policy arises in contract, not in tort. *Motorists Mut. Ins. Co. v. Tomanski* (1971), 27 Ohio St.2d 222, 223, 271 N.E.2d 924. The limitations period for such action is therefore dictated, in the absence of a valid

contractual provision to the contrary, by the 15-year statute of limitations of R.C. 2305.06.

{¶ 24} In *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 623, 1994-Ohio-160, 635 N.E.2d 317, the Ohio Supreme Court held that an insurance policy may set forth a shorter limitations period than that prescribed in a general statute of limitations, if such shorter period is reasonable.

{¶ 25} Further, the *Miller* court explained:

{¶ 26} "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 or proceeding for payment of benefits under the uninsured or underinsured motorist provisions of an insurance policy."

{¶ 27} This court has upheld and enforced similar two-year limitations periods. See *Veloski v. State Farm Mut. Auto Ins. Co.* (1998), 130 Ohio App.3d 27, 30, 719 N.E.2d 574. See, also, *Marsh v. State Auto Mut. Ins. Co.* (1997), 123 Ohio App.3d 356, 704 N.E.2d 280; *McDonald v. State Farm Mut. Auto. Ins. Co.* (Aug. 10, 2000), Cuyahoga App. No. 76808.

{¶ 28} A limitations period may be rendered inapplicable, however, due to waiver or estoppel. See *Payton v. Rehberg* (1997), 119 Ohio App.3d 183, 694 N.E.2d 1379; *Kosa v. Pruchinsky* (1992), 82 Ohio App.3d 649, 612 N.E.2d 1291.

{¶ 29} With regard to the issue of waiver, the Ohio Supreme Court held in *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, 424 N.E.2d 311 at syllabus, as follows:

{¶ 30} "An insurance company may be held to have waived a limitation of action clause in a fire insurance policy by acts or declarations which evidence a recognition of liability, or acts or declarations which hold out a reasonable hope of adjustment and which acts or declarations occasion the delay by the insured in filing an action on the insurance contract until after the period of limitation has expired."

{¶ 31} In *Hounshell,* the court relied upon a factual scenario in which the insurer had made offers which implicitly led the plaintiffs to believe their claim would be paid, and that this conduct had induced the plaintiffs' delay in filing their action. Emphasizing that not all offers of settlement by the insurer would be construed as waivers, the court stated that "waiver comes into existence upon an offer that is an express or implied admission of liability." Id. at 433.

{¶ 32} With regard to the issue of equitable estoppel, we note that equitable estoppel precludes a party from asserting certain facts where the party, by his conduct, has induced another to change his position in good faith reliance upon that conduct. See *Kosa v. Pruchinsky,* supra. An essential element of such an estoppel is a misrepresentation by a defendant or his agent which

misleads the plaintiff so that he fails to commence his action within the statutory period. *Chesler v. Gigliotti* (Feb. 27, 1997), Cuyahoga App. No. 71125, citing *Bryant v. Doe* (1988), 50 Ohio App.3d 19, 21-22, 552 N.E.2d 671. See, also, *Schrader v. Gillette* (1988), 48 Ohio App.3d 181, 183, 549 N.E.2d 218 ("to invoke this doctrine, the party must show that he reasonably relied upon a misleading statement").

{¶ 33} In *Payton v. Rehberg*, supra, this court considered the issues of waiver and estoppel, and stated:

{¶ 34} "Construing the evidence most strongly in favor of plaintiff herein, there is no evidence that defendants' conduct caused plaintiff to reasonably and justifiably fail to timely refile her lawsuit. Assuming that defense counsel indicated that defendants would be willing to negotiate a resolution of plaintiff's claim once all her medical bills were received, plaintiff, as a matter of law, would not be justified in reasonably relying on those representations in not refiling her complaint before the statute of limitations had run, or, as in this case, the savings statute had expired. * * * *."

{¶ 35} In *Minnick v. Lee* (Feb. 12, 1999), Lucas App. No. L-98-1221, the Court held that an adjuster's request for medical information which does not mention a settlement of the claim, does not constitute a factual misrepresentation that the insurer intended to waive the limitations period. The Court stated:

{¶ 36} "On appeal, appellant alleges that the following facts create a question of fact on the issue of equitable estoppel. Appellant claims his attorney was misled into believing that appellee would not assert the defense of the statute of limitations because: (1) appellee's insurer paid appellant's property damage claim; (2) attorney Godbey testified that the insurance adjuster requested a 'settlement package' five days before the limitations period expired; and (3) it is "common knowledge" that State Farm does not review a settlement package in less than seven days.

{¶ 37} "An insurer's repeated requests for medical documents, the payment of a property damage claim, engaging in settlement negotiations or even a promise to pay medical expenses if agreement can be reached are not evidence of the fact that a defendant misrepresented his or her position thereby allowing a plaintiff to, in reasonable reliance on those misrepresentations, untimely commence his or her lawsuit against the defendant. [Citations ommitted.]

{¶ 38} "A review of attorney Godbey's testimony reveals that the request made by State Farm approximately five days before the expiration of the two year statute of limitations was a request for medical information. The term 'settlement' is not mentioned. Of greater importance is the fact that Godbey admitted that the statute of limitations was never mentioned by either himself or the insurance adjuster. * * * *. "

{¶ 39} In *Tabler v. Miller* (Dec. 4, 1990), Gallia App. No. 89 CA 27, the court held that the insured's claim of estoppel failed where the insured failed to present any evidence that the insurer induced him to believe that the policy period would not apply to their negotiations. The court stated:

{¶ 40} "There is no allegation that appellants were induced to change their position; no allegation that the suit was not filed on time because of any act or suggestion by appellee. Construing the evidentiary matters most strongly in favor of appellant, one could only conclude that Nationwide indicated that it would probably pay the claim, but that it thought that amount claimed was excessive. There is absolutely nothing in the record to show why counsel did not file on time, only that there were negotiations during the two year period.

{¶ 41} "Appellant argues that Nationwide's 'persistent' requests for documentation on medical bills and lost wages constituted a waiver of the statute of limitation on which they could rely. We do not find that a jury could reasonably so construe such conduct as a waiver. Indeed we are loathe to establish a rule which holds that an attempt by an insurer to get documentation on a claim might constitute an admission of liability or that a claimant may rely on this conduct alone to presume the insurance company will not assert all available defenses."

{¶ 42} Likewise, in this matter, the record fails to support plaintiff's claims of waiver or estoppel. Plaintiff's counsel averred that the parties "agreed that it would make sense to conduct this session once Mr. Burgio had stopped treating and the pertinent medical records and bills had been assimilated." The documentary evidence indicates that Allstate sent plaintiff's counsel a letter on July 19, 2001 which stated in relevant part:

{¶ 43} "It is requested that a recorded statement be obtained from Mr. Burgio. I understand that he is hearing impaired. * * * I would gladly conduct this at your office or Mr. Burgio's home. Whenever it is convenient for him and his family. * * * [P]lease contact Mr. Burgio * * * to obtain some tentative dates and times. * * * *."

{¶ 44} On November 2, 2001, Allstate sent plaintiff's counsel a letter which stated:

{¶ 45} "I am still requesting a statement from Mr. Burgio * * *."

{¶ 46} This evidence fails to establish waiver of the limitations period as a matter of law. The record is entirely devoid of any evidence that Allstate expressed or implied a recognition of liability, or engaged in acts, or made declarations which held out a reasonable hope of adjustment. Further, the record is devoid of evidence that Allstate engaged in acts or made declarations which occasioned the delay by the plaintiff in filing

an action on the insurance contract until after the period of limitation has expired. The adjuster's requests for records, which do not mention the limitations period or settlement, do not constitute a waiver. *Minnick v. Lee,* supra. To the contrary, Allstate's correspondence to plaintiff's counsel repeatedly reminded counsel of the necessity of providing the statement and under no interpretation constitute a waiver of the limitations period. Moreover, the letters which Allstate sent to plaintiff's counsel following the expiration of the limitations can in no way be interpreted as a waiver of the limitations period. The first letter simply indicated that investigation of the loss is continuing. As noted previously, this is insufficient to constitute a waiver. See *Minnick v. Lee,* supra. Similarly, the later letter cannot be interpreted as a waiver since it provided that Allstate was waiting for completion of the court action.

{¶ 47} Likewise, the plaintiff's claim that Allstate is estopped from asserting the limitations period must fail as a matter of law. There is no evidence of a misrepresentation by a defendant or his agent which misleads the plaintiff such that he failed to commence his action within the statutory period. Although plaintiff's counsel averred that parties "agreed that it would make sense to conduct this session once Mr. Burgio had stopped treating and the pertinent medical records and bills had been assimilated" this contention falls short of a misrepresentation that caused plaintiff

to change his position and refrain from filing the action with in the limitations period. To the contrary, the record indicates that Allstate repeatedly requested the recorded statement from plaintiff during the limitations period.

{¶ 48} In accordance with the foregoing, plaintiff's assignment of error is without merit.

ALLSTATE'S CROSS-APPEAL

{¶ 49} Allstate's cross-appeal challenges the trial court's denial if its motion for summary judgment in connection with Allstate's contention that plaintiff did not have independent corroborative evidence to support his allegation that an uninsured motorist was negligent in this matter. A denial of a motion for summary judgment neither determines an action nor prevents a judgment; therefore, it generally does not constitute a final order in accordance with R. C. 2505.02. *Nayman v. Kilbane* (1982), 1 Ohio St.3d 269, 271, 439 N.E.2d 888; *Balson v. Dodds* (1980), 62 Ohio St.2d 287, 289, 405 N.E.2d 293. Based on our disposition of plaintiff's appeal, however, the cross-appeal is moot. App.R. 12(A)(1)(c).

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

DIANE KARPINSKI, J., CONCURS.

PATRICIA ANN BLACKMON, P.J., CONCURS IN JUDGMENT ONLY

ANN DYKE
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).