[Cite as *Longly v. Thailing*, 2010-Ohio-5012.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94354

LILIAN LONGLY, ET AL.

PLAINTIFFS-APPELLEES

vs.

MICHELLE THAILING, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV 627563

BEFORE: Blackmon, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: October 14, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellants Lilian and Matthew Longley[1] appeal the trial court's granting of summary judgment in favor of appellee State Farm Insurance Company. ("State Farm").[2] They assign the following error for our review:

> **"I. The trial judge erred, as a matter of law, by granting summary judgment in favor of defendant-appellee, State Farm Mutual Automobile Insurance Company, on the basis of a time to sue clause."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

Facts

{¶ 3} Lilian Longley was involved in three rear-end motor vehicle accidents within a two-year period, the first on October 11, 2005, the second on December 30, 2005, and the third on January 12, 2007. The Longleys filed a complaint on June 9, 2007 in which they alleged negligence against all three drivers.

{¶ 4} The second accident involved Ms. Longley and a motor vehicle being operated by Officer Willis Cuevas in the course and scope of his

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[1] We note the appellants' last name is spelled differently throughout the record. It is sometimes spelled "Longly" and sometimes "Longley." Because the prior appeal used the spelling "Longley" for consistency we will do so, also.

[2] Michelle Thailing and Gail Kerzner were also named as defendants; however, their accidents were separate from the one at issue on appeal; therefore, they are irrelevant to the resolution of this appeal.

employment with the city of Cleveland as a police officer. This is the accident that is the subject of this appeal.

{¶ 5} Lilian Longley was traveling on Interstate 480 near the Ridge Road exit. Officer Willis Cuevas had finished helping a motorist parked on the berm. As he attempted to reenter the freeway, his car struck the rear of Longleys' vehicle as she traveled in the right lane.

{¶ 6} In their joint answer, the officer and the City asserted the defense of sovereign immunity. They asserted this defense again in their motion for summary judgment. The trial court granted the motion for summary judgment as to the Longleys' claims against the officer as an individual, but denied the motion as to the Longleys' claims against the City.

{¶ 7} The City appealed from the trial court's denial pursuant to R.C. 2744.02(C). This court on March 20, 2009 reversed the trial court's denial of summary judgment and concluded that sovereign immunity protected the City from liability. *Longley v. Thailing*, Cuyahoga App. No. 91661, 2009-Ohio-1252.

{¶ 8} As a result, the Longleys amended their complaint on June 4, 2009 and added a claim for uninsured motorist coverage against their automobile insurance company, State Farm. State Farm filed a motion for summary judgment in which it argued that pursuant to the automobile policy, the Longleys had to bring their claim within three years after the

accident. The latest that the complaint could have been filed was December 30, 2008. Because the Longleys' complaint was filed more than three years after the accident, State Farm argued the Longleys were contractually barred from bringing the claim.

{¶ 9} The Longleys opposed the motion arguing that they could not have brought the claim earlier because the policy specifically states that uninsured coverage did not apply to government vehicles unless the vehicle was protected by sovereign immunity. The Longleys argued that they could not file their UM claim until the appellate court determined that the City was protected by sovereign immunity. The trial court agreed with State Farm and granted its motion for summary judgment stating in pertinent part:

> **"This matter is more akin to *Angel v. Reed* (2008), 119 Ohio St.3d 73, as plaintiff had full control over her case management and could have amended her complaint prior to the three year statute of limitations since immunity existed at the time of the accident. The Eighth District Court only interpreted and enforced the existing law. Further, plaintiff knew that defendants City of Cleveland and Cuevas were claiming immunity as an affirmative defense and was therefore on notice of the possible UM claim. This differs from *Kraly v. Vannewkirk* (1994), 69**

Ohio St.2d 67, in which plaintiff had no notice, or could [not] have known, of the insurer's insolvency that occurred after the two year statute of limitations period has run. Defendant State Farm's motion for summary judgment is granted. No just cause for delay." Journal Entry, November 10, 2009.

Summary Judgment

{¶ 10} In their sole assigned error, the Longleys argue the trial court erred by granting summary judgment in favor of State Farm.

{¶ 11} We review an appeal from summary judgment under a de novo standard of review. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 746 N.E.2d 618, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212; *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 699 N.E.2d 534. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion that is

adverse to the non-moving party. We conclude that State Farm was entitled to judgment as a matter of law.

{¶ 12} At the time of the accident, the Longleys were insured with State Farm. The policy provided in pertinent part:

> **"b. Any suit brought against us will be barred unless the suit is filed before the later of:**
>
> **"(1) 60 days after the date we refuse to consent to a written demand for arbitration, provided that the written demand for arbitration is submitted to us within three years after the date of the accident.**
>
> **"(2) three years after the date of the accident, or**
>
> **"(3) one year after the date the insured receives notice of insolvency if the insurer of the insured motorist is declared insolvent."**

{¶ 13} There is no dispute that the UM claim against State Farm was not filed until over three years after the accident. The Longleys contend, however, summary judgment was improper because the insurance policy required a determination of whether immunity applied to a government vehicle involved in the accident, prior to seeking UM coverage. The policy states as follows:

> **"An uninsured motor vehicle does not include a land motor vehicle:**
>
> **"* * *"**
>
> **"3. owned by any government or any of its political subdivisions or agencies unless the operator of the land**

motor vehicle has an immunity under Chapter 2744 of the Ohio Revised Code."

{¶ 14} The Longleys also cite to the insurance clause that states:

"2. Suit against us.

"There is no right of action against us:

"a. until all terms of this policy have been met."

{¶ 15} Pursuant to these provisions, the Longleys argue that they were not aware the City was immune until this court determined on March 20, 2009, in the prior appeal, that immunity applied. Thus, they contend the three year time period to bring a UM claim did not commence until the date of our prior opinion.

{¶ 16} The faulty logic in the Longleys' argument is their contention that the City was not immune until this court deemed it so. The City, however, was always immune under the facts of this case; the City did not become immune by virtue of our opinion. Our prior opinion, as the trial court noted, merely "interpreted and enforced the existing law."

{¶ 17} In *Angel v. Reed*, 119 Ohio St.3d 73, 2008-Ohio-3193, 891 N.E.2d 1179, the tortfeasor had misled the plaintiff, claiming that he had been insured under a policy with Nationwide Insurance Company. Upon discovering that the tortfeasor had not been insured, the plaintiff filed a UM claim under her own policy with Allstate Insurance Company. Although the

UM claim with Allstate had been filed beyond the contractual limitation period, the plaintiff claimed that she had been unaware that the tortfeasor had been an uninsured motorist and that the limitations period in the Allstate policy should have been tolled. The Supreme Court of Ohio rejected that argument, holding that it was the insured's duty to inquire of the tortfeasor's alleged insurer whether the tortfeasor had been insured.

{¶ 18} Thus, *Angel* concerns the situation where the tortfeasor has always been uninsured, but the plaintiff does not discover this until the time to sue under the policy has elapsed. The *Angel* Court held that the discovery rule does not apply to uninsured coverage and that the date of the limitations period starts on the date of the accident and not when the plaintiff discovers the tortfeasor is uninsured. See, also, *Greismer v. Allstate Ins. Co.*, Cuyahoga App. No. 91194, 2009-Ohio-125; *D'Ambrosia v. Hensinger*, 10th Dist. No. 09AP-496, 2010-Ohio-1767.

{¶ 19} This is the precise situation we have before us. The City was immune on the day of the accident; it did not become immune by virtue of our decision. Moreover, the Longleys were aware of the possibility that the City was protected by sovereign immunity because the defense was raised in the answer well before the three-year expiration time for the Longleys to bring their suit. At that time, to preserve their claim, the Longleys should have amended their complaint and named State Farm as a party.

{¶ 20} The cases relied on by the Longleys to support their argument in favor of coverage are distinguishable. *Mowery v. Welsh*, 9th Dist. No. 22849, 2006-Ohio-1552, *Bradford v. Allstate Ins. Co.*, 5th Dist. No. 04CA9, 2004-Ohio-5997, and *Barbee v. Allstate*, 9th Dist. No. 09CA009594, 2010-Ohio-2016, all concern the requirement that available insurance coverage must be exhausted prior to bringing a claim for underinsured motorist coverage. In those cases, the claim for underinsured motorist coverage could not commence until all of the insurance available had been exhausted. Thus, in those circumstances, it is impossible to determine whether an underinsured motorist claim exists until all of the available insurance is exhausted. Here, in spite of the trial court's initial erroneous conclusion, the City was always immune. Our decision merely enforced the law.

{¶ 21} The Longleys also relied on the Ohio Supreme Court's decision in *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 635 N.E.2d 323. *Kraly* presents a unique circumstance. In *Kraly*, the tortfeasor at the time of the claim was originally insured. However, thereafter, the tortfeasor's insurance company became insolvent, thereby changing the tortfeasor's status to uninsured. The Ohio Supreme Court held that the contractual time limitation did not apply because the plaintiff could not have known that the tortfeasor's insurance company would become insolvent while the action was

pending; the court, instead, allowed the plaintiff one year from the date of insolvency to bring the uninsured motorists claim.[3]

{¶ 22} That case is different from the instant case, because in that case, the tortfeasor's status was as an insured at the time of the accident; the tortfeasor's status changed after the claim was filed. Here, the City was always immune, and although the Longleys claim they could not file suit against State Farm until the immunity of the City was established, once the City raised immunity as a defense, nothing prevented the Longleys from naming State Farm as a party to protect their uninsured claim. In fact, it was especially important for them to do so given State Farm's contractual limitation requiring a claim to be brought within three years.

{¶ 23} Additionally, contrary to the Longleys' argument, the language in the policy did not prevent them from bringing an action until it was determined whether sovereign immunity applied. While the policy does state that "There is no right of action against us * * * until all terms of this policy have been met," the absence of the court's determination whether sovereign immunity applied would not prevent the filing of a claim for uninsured coverage.

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[3]In fact, the legislature amended R.C. 3937.18(H) to allow the insured to bring an uninsured claim within one year of the insurance company's insolvency, in spite of a contractual statute of limitations commencing from the date of the accident.

{¶ 24} The sovereign immunity provision provided: "An uninsured motor vehicle does not include a land motor vehicle * * * owned by any government or any of its political subdivision or agencies unless the operator of the land motor vehicle has an immunity under Chapter 2744 of the Ohio Revised Code." However, this provision must be read in context with the opening clause of the section regarding uninsured coverage, which provides:

{¶ 25} "We will *pay* damages for bodily injury an insured:

{¶ 26} "* * *

{¶ 27} "2. would have been legally entitled to collect except for the fact that the owner or driver of the uninsured motor vehicle has an immunity under Chapter 2744 of the Ohio Revised Code * * *." (Emphasis added.) Policy at page 12.

{¶ 28} Thus, the determination of whether immunity applies pertains to the payment of the claim, not the bringing of a suit. Cf. *Chalker v. Steiner*, 7th Dist. No. 08-MA-137, 2009-Ohio-6533 (requirement that conditions of policy be met prior to bringing an action did not prevent the plaintiffs from filing a suit within the contractual time limit as the condition to exhaust remedies applied to the payment of the claim). Accordingly, we overrule the Longleys' sole assigned error.

Judgment affirmed.

It is ordered that appellees recover from appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR