[Cite as *Galayda v. Progressive Ins. Agency, Inc.*, 2007-Ohio-2749.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

MICHAEL GALAYDA

Plaintiff

v.

PROGRESSIVE INSURANCE AGENCY, INC.

Defendant

and

ST. PAUL TRAVELERS INSURANCE COMPANY

Defendant/Third-Party Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Third-Party Defendant

Case No. 2006-07708-PR

Judge Clark B. Weaver Sr.

DECISION

{¶1} On December 27, 2006, third-party defendant, Ohio Department of Transportation (ODOT), filed a motion to dismiss the third-party complaint pursuant to Civ.R. 12(B)(6). On January 17, 2007, defendant/third-party plaintiff, St. Paul Travelers Insurance Company (Travelers), filed a response. Plaintiff filed a brief in opposition to the motion on January 16, 2007. ODOT moved the court for leave to file a reply on January 31, 2007. For good cause shown, the motion for leave is GRANTED, instanter. An oral hearing was held on ODOT's motion to dismiss on March 22, 2007.

{¶2} In construing a complaint upon a motion to dismiss for failure to state a claim, the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co*.

(1988), 40 Ohio St.3d 190. Then, before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242.

{¶3} On January 7, 2004, plaintiff was a passenger in a vehicle operated by his brother-in-law Rob Cola. The vehicle was owned by Lillian Aldrich and insured by Travelers under a policy that included uninsured motorist coverage. The vehicle ran out of gas on U.S. 6, in Geauga County, whereupon plaintiff and Cola began walking to the nearest gas station. According to the complaint, plaintiff was struck and injured by an "unidentified vehicle" that failed to yield the right-of-way and the operator of the unidentified vehicle "continued to drive without stopping to check on the condition of the Plaintiff."

{¶4} Plaintiff alleges that the driver of the vehicle that struck him was an uninsured motorist. In Count One of his complaint, plaintiff seeks uninsured motorist benefits pursuant to the policy issued by Travelers. Plaintiff also filed an action against ODOT in this court alleging that it was an ODOT snowplow that struck plaintiff.[1]

{¶5} In its third-party complaint, Travelers alleges that the unidentified vehicle referred to in plaintiff's complaint was, in fact, an ODOT vehicle. Travelers further alleges that if it is determined that an ODOT vehicle struck plaintiff and that Travelers is required to pay uninsured motorist benefits to plaintiff pursuant to its policy with Aldrich, then ODOT should be liable to Travelers for indemnification in that Travelers' negligence was passive or secondary, whereas ODOT's negligence was active or primary.

{¶6} As an alternative theory of relief, Travelers alleges that the negligence of the driver of another "unidentified vehicle," combined with the negligence of the driver of the ODOT vehicle, produced plaintiff's injury. Under this alternative theory, if Travelers is required to provide uninsured motorist coverage to plaintiff, then Travelers may recover

[1] *Michael Galayda v. Ohio Department of Transportation, et al.*, Case No. 2006-01068.

from ODOT in contribution should it be proven that the driver of the ODOT vehicle and the driver of the unidentified vehicle were joint tortfeasors.

{¶7} In its motion to dismiss, ODOT argues that the third-party complaint sets forth a cause of action against ODOT based solely upon a theory of subrogation. As such, ODOT contends that Travelers failed to file its action within the two-year statute of limitations.

{¶8} Travelers maintains that its action sounds in indemnity and/or contribution, not subrogation. A cause of action for indemnity arises when a court finds the indemnitee to be liable, and a cause of action for contribution arises when a joint tortfeasor pays more than its proportionate share of plaintiff's damages.[2] In this instance, plaintiff has not yet recovered uninsured benefits from Travelers. Thus, Travelers argues, its action is timely filed.

{¶9} For the reasons that follow, the court finds that Travelers' third-party complaint fails to state a claim for relief against ODOT under a theory of either indemnity or contribution.

{¶10} Travelers' indemnity claim is premised upon its allegation that the ODOT vehicle is an uninsured vehicle. Such a premise is faulty, as a matter of law.

{¶11} R.C. 3937.18 provides in relevant part:

{¶12} "(A) Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state that insures against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, may, but is

[2]As a general rule, an action based on an implied right of indemnity does not accrue until the party seeking indemnity actually suffers a loss. *Ross v. Spiegel, Inc.* (1977), 53 Ohio App.2d 297. Similarly, liability for contribution arises only when a joint tortfeasor has paid more than a proportionate share of the common liability. *National Mutual Ins. Co. v. Whitmer* (1982), 70 Ohio St.2d 149.

not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.

{¶13} "***

{¶14} "(B) *** *An 'uninsured motorist' does not include the owner or operator of a motor vehicle that is self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered*." (Emphasis added.)

{¶15} R.C. 9.822 states:

{¶16} "(A) The department of administrative services through the office of risk management shall establish an insurance plan or plans that may provide for self-insurance or the purchase of insurance, or both, for any of the following purposes: ***

{¶17} "(2) Insuring the state and its officers and employees against liability resulting from any civil action, demand, or claim against the state or its officers and employees arising out of any act or omission of an officer or employee in the performance of official duties ***."

{¶18} R.C. 2743.16 provides in relevant part:

{¶19} "(B) If a person suffers injury, death, or loss to person or property from the operation of an automobile, truck, motor vehicle with auxiliary equipment, *** by an officer or employee of the state while engaged in the course of his employment or official responsibilities for the state, the person or the representative of that person or of the estate of that person shall attempt, prior to the commencement of an action based upon that injury, death, or loss, to have the claim based upon that injury, death, or loss compromised by the state or satisfied by the state's liability insurance."

{¶20} Because ODOT is self-insured, as a matter of law, Travelers will have no obligation to pay uninsured benefits to plaintiff if it is determined that the negligent operation of an ODOT vehicle was the sole proximate cause of plaintiff's damages. Thus, to the extent that the third-party complaint alleges a cause of action for indemnity against ODOT, there is no set of facts upon which Travelers could obtain such relief.

{¶21} Travelers' alternate theory of contribution is premised upon the contention that another "unidentified vehicle" was involved in this accident.

{¶22} R.C. 3937.18 states:

{¶23} "(B) For purposes of any uninsured motorist coverage included in a policy of insurance, an 'uninsured motorist' is the *owner or operator of a motor vehicle* if any of the following conditions applies:

{¶24} "***

{¶25} "(3) *The identity of the owner or operator cannot be determined* ***."

{¶26} Based upon the language of the statute and the allegations of the third-party complaint, Travelers maintains that the negligence of the operator of an uninsured vehicle, combined with the negligence of the driver of the ODOT vehicle, produced plaintiff's injury. As such, Travelers alleges that the allegations of the third-party complaint state a claim for relief in contribution. The court disagrees.

{¶27} Under Ohio law, an insurer who pays uninsured motorist benefits to its insured cannot bring an action in contribution. See, e.g., *St. Paul Fire and Marine Ins. Co. v. Cassens Trans. Co.* (6th Cir. Jan. 26, 2004), 86 Fed. Appx. 869 (applying Ohio law); *Essad v. Cincinnati Cas. Co.*, Mahoning App. No. 00 CA 207, 2002-Ohio-1947; *Westfield Ins. Co. v. Jeep Corp.* (1988), 55 Ohio App.3d 109; *Lehrner v. Safeco Ins. Co.*, Montgomery App. Nos. 21324, 21325, 2007-Ohio-795. The rationale underlying such case law is that the right of contribution is a legal concept which applies to joint tortfeasors. To make a claim in contribution, an insurer "must have paid benefits on behalf of a tortfeasor because the contribution statutes allow only a tortfeasor to make a claim for contribution to the extent that the tortfeasor has paid more than its share of liability." See *Lehrner*, supra at ¶85, quoting *St. Paul*, supra.

{¶28} Because neither plaintiff nor Travelers is a tortfeasor, Travelers cannot have a right of contribution against ODOT. The proper procedure for an insurance company such as Travelers is to recover through subrogation. Id.

{¶29} Consistent with the above-cited case law, R.C. 3937.18(J) provides:

{¶30} "(J) In the event of payment to any person under the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, and subject to the terms and conditions of that coverage, the insurer making such payment is entitled, to the extent of the payment, to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery *of that person* against any person or organization legally responsible for the bodily injury or death for which the payment is made ***." (Emphasis added.)

{¶31} Upon review of the facts alleged in the third-party complaint, and drawing all reasonable inferences in favor of Travelers, the third-party complaint states nothing more than a claim for subrogation. However, as stated above, ODOT maintains that Travelers' subrogation claim was untimely filed.

{¶32} R.C. 2743.16 provides in relevant part:

{¶33} "(A) Subject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties."

{¶34} Plaintiff's negligence claim against ODOT accrued on January 7, 2004, the date that plaintiff was allegedly struck by the ODOT vehicle. Under Ohio law, a subrogated insurer stands in the shoes of the insured-subrogor and has no greater rights than those of its insured-subrogor. *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 42. Where the insured's claim against a tortfeasor is based on negligence, the insurer's subrogated claim is also necessarily based on negligence. *Ohio Mut. Ins. Assn., United Ohio Ins. Co. v. Warlaumont* (1997), 124 Ohio App.3d 473, 475. Consequently, where an insured's tort claim is subject to a statute of limitations, so too is the insurer's subrogation claim. See *Montgomery v. John Doe 26* (2000), 141 Ohio App.3d 242; *Westfield Ins. Co. v. Huls Am., Inc.* (1998), 128 Ohio App.3d 270.

{¶35} Because plaintiff's negligence claim arose on January 7, 2004, Travelers' claim against ODOT also arose on January 7, 2004; thus, Travelers had until January 8, 2006, to file its third-party complaint. Travelers did not file its third-party complaint until December 11, 2006, more than 11 months after the time had passed for the filing of such a claim.

{¶36} A motion to dismiss a complaint under Civ.R. 12(B)(6) based upon the running of the statute of limitations may be granted only if the face of plaintiff's complaint conclusively establishes such a bar. *Scheer v. Air-Shields, Inc.* (1979), 61 Ohio App.2d 205. The allegations of the third-party complaint conclusively establish that Travelers' claim against ODOT is barred by the statute of limitations.

{¶37} As an alternative basis for dismissal, ODOT contends that Travelers' claim is barred by R.C. 2743.02(D) and the Supreme Court of Ohio's opinion in *Community Ins. Co. v. Ohio Dept. of Transp.*, 92 Ohio St.3d 376, 379, 2001-Ohio-208.

{¶38} In *Community Ins. Co.*, supra, the Supreme Court held that an insurer who has been granted the right of subrogation by a person on whose behalf the insurer has paid medical expenses that were incurred as the result of the negligent conduct of the state is subject to the statute which mandates reduction in recoveries against the state by the "aggregate of insurance proceeds, disability award or other collateral recovery received by the claimant." R.C. 2743.02(D). In a subsequent opinion, the Supreme Court determined that claims for indemnity and/or contribution that are brought against the state on behalf of an insurer who has paid a judgment against its insured are not barred either by R.C. 2743.02(D) or the holding in *Community Ins. Co.*, supra. See, *Heritage Ins. Co. v. Ohio Dept. of Transp.*, 104 Ohio St.3d 513, 2004-Ohio-6766,

{¶39} As stated above, Travelers' claim against ODOT sounds in subrogation rather than indemnity or contribution. Therefore, the claim is barred by the application R.C. 2743.02(D) and the holding in *Community Ins. Co.*, supra. Thus, even if the claim were to have been timely filed, Travelers would not be entitled to relief.

{¶40} For the foregoing reasons, ODOT's motion to dismiss shall be granted and the third-party complaint shall be dismissed.

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JUDGMENT ENTRY

On March 22, 2007, the court held an oral hearing on third-party defendant's motion to dismiss and for the reasons set forth in the decision filed concurrently herewith, the motion is GRANTED. The third-party complaint is hereby DISMISSED.

For purposes of judicial economy, the case will be scheduled in the normal course for a jury trial to be conducted jointly with the trial in Case No. 2006-01068. Accordingly,

any pleadings to be filed in this case shall be designated by a single case number and case caption as set out above. The clerk may refuse to file any pleadings that do not conform to the conditions set forth in this order.

_____

CLARK B. WEAVER SR.
Judge

cc:

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