

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

JOHN McGRATH, et al.,	:	OPINION
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2005-L-002
INDIANA INSURANCE,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 03 CV 000864.

Judgment: Reverse and remand.

Robert J. Foulds, 5843 Mayfield Road, Mayfield Heights, OH 44124 (For Plaintiffs-Appellants).

Shawn W. Maestle, Ronald A. Rispo and Therese P. Joyce, 2500 Terminal Tower, 50 Public Square, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, John McGrath (McGrath), appeals an Order from the Lake County Court of Common Pleas which granted summary judgment in favor of the Appellee, Indiana Insurance Company (IIC).

{¶2} McGrath was involved in a motor vehicle accident on November 19, 1993. At that time, McGrath was an employee of Love Insurance Agency (LIA). LIA was insured by IIC pursuant to the terms of a commercial insurance policy. McGrath settled with the tortfeasor without the necessity for litigation.

{¶3} On April 28, 2003, McGrath filed a Complaint against IIC seeking a declaratory judgment that McGrath was entitled to recover uninsured/underinsured motorist benefits from IIC as a result of the 1993 accident and seeking money damages. IIC filed a motion for summary judgment on November 26, 2003.

{¶4} On December 6, 2004, the trial court granted the motion for summary judgment in favor of IIC.

{¶5} McGrath appeals from that grant of summary judgment and asserts the following assignments of error:

{¶6} “[1.] The trial court erred in granting summary judgment in favor of appellee when it ruled that appellants are, since they are no longer legally entitled to recover against the tort-feasor, no longer entitled to pursue a UM/UIM claim against appellee.

{¶7} [2.] The trial court erred in granting summary judgment in favor of appellee when it ruled that “the ten year period of delay occasioned here most likely constituted a breach of a ‘standard notice provision’ requiring an analysis of the resulting prejudice to [Indiana Insurance Company] [sic].”

{¶8} Summary judgment is to be reviewed pursuant to a de novo standard. See, *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523. In order to succeed on a motion for summary judgment, the moving party must show that there are no genuine issues of material fact. See, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. In addition, Civ.R. 56 requires that to be successful on a summary judgment motion, a moving party must also be entitled to judgment as a matter of law. See, *Bonacorsi v. Wheeling & Lake Erie Ry. Co.* (2002), 95 Ohio St. 3d 314, 320.

{¶9} The trial court determined that IIC was entitled to judgment as a matter of law in the instant action because it interpreted a compliance with the statute of limitations for torts as an intrinsic requirement to prevail on a UM/UIM claim. The trial court also referenced two genuine issues of material fact which may have precluded summary judgment had the SOL issue not been dispositive.

{¶10} McGrath asserts in his first assignment of error that the trial court erred in finding that the inability of McGrath to pursue the tortfeasor, after the expiration of the statute of limitations, corresponded with a prohibition on McGrath's ability to pursue IIC on a UM/UIM claim. McGrath's first assignment of error is well taken.

{¶11} The Ohio Supreme Court certified this very issue and rendered its decision days after the trial court granted the summary judgment motion in favor of IIC. *Ponser v. St. Paul Fire & Marine Ins. Co.*, 104 Ohio St.3d 621, 2004-Ohio-7105. In *Ponser*, the Court held that a failure to timely file suit against the tortfeasor within the statute of limitations is not a complete bar to a presentment of a UM/UIM claim. The Court advised that the contract language itself must control as to the prerequisites for presenting a UM/UIM claim in a timely fashion. "To determine whether an insured must file a wrongful-death action within the statute of limitations in order to meet the contract requirement of being legally entitled to recover, we need look only to the contracts." *Id.* at ¶48.

{¶12} In the instant case, the insurance policy produced as evidence is not legible. IIC would have this Court infer that we must find McGrath's claims barred in light of the unavailability of a clear and legible copy of the insurance policy taken in conjunction with the fact that the declaratory action was not filed within the statute of limitations for torts. However, the trial court itself recognized that "IIC has not shown

that the illegible parts of this policy cannot be recreated by examining standardized terms, clauses and/or endorsements from like policies retained by either IIC or LIA and used by IIC during the period in question....” The court went on to acknowledge, “the record is silent as to whether any form of enhancement technology could render legible the otherwise illegible parts of this policy.” We agree with the trial court on this issue. Whether the insurance policy can be enhanced or interpreted in some other manner remains to be seen and must be determined in compliance with *Ponser*.

{¶13} McGrath also alleged in his second assignment of error that the trial court erred by finding that the ten-year delay most likely resulted in prejudice to IIC. We are not convinced that the trial court actually ruled on this issue. The trial court stated “the court is unable to address at this time IIC’s claim that McGrath violated the timely notice provision of the policy....” Although the trial court then proceeded to analyze that issue, it is clear from the initial language that the court was not actually ruling on that issue. The language was merely advisory dicta. Therefore, as the trial court failed to rule on the issue regarding the notice provision, we are restrained from deciding the presence of error or lack of error. McGrath’s second assignment of error is not ripe for review.

{¶14} Likewise, IIC’s cross-assignments of error are not ripe for review. IIC asserted two cross-assignments of error. They first argued that the trial court erred in finding that coverage was not precluded solely on the basis of McGrath’s failure to point to a specific coverage clause in the illegible policy. A thorough reading of the trial court judgment entry reveals that the discussion surrounding the notice provision is merely a hypothetical analysis with no bearing on outcome since the court was already inclined to rule and in fact did rule that McGrath was barred from bringing his claim as a matter of law. There was no definitive ruling on the issue of the notice provision and even if one

interprets the trial court decision as rendering a tangible opinion on that issue, it became advisory upon the court's ruling that McGrath did not meet the standards to even assert the claim. IIC's first cross-assignment of error is not ripe for review.

{¶15} Likewise, IIC's second cross-assignment of error is not ripe for review as it is inconsistent with the trial court's decision. Although the trial court did find that whether McGrath was acting within the scope of his employment was an issue of material fact, that opinion did not form the basis for the decision rendered by the trial court nor does it support the ultimate outcome of the trial court. As such, this cross-assignment of error is not ripe for review.

{¶16} Therefore, it is the opinion of this Court that the judgment of the Lake County Court of Common Pleas must be reversed and remanded for further review for instructions consistent with this Court in light of *Ponser*.

COLLEEN M. O'TOOLE, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

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{¶17} I respectfully dissent.

{¶18} In its first cross assignment of error, Indiana Insurance Company argues that summary judgment is proper on the grounds that the McGraths failed to raise an issue regarding whether they are insureds under the policy and whether they are entitled to coverage.

{¶19} It is the established, black-letter law that the McGraths bore the burden of establishing that they are entitled to coverage under the Indiana policy. “In order to establish a sufficient claim for breach of an insurance contract, the plaintiff bears the burden of proof to demonstrate the existence of the policy of insurance and that the claimed loss was covered under the policy.” *Fischer v. United Servs Auto. Assn.*, 8th Dist. No. 83173, 2004-Ohio-1682, at ¶10, citing *Kleem v. Nationwide Ins. Co.* (Oct. 6, 1983), 8th Dist. No. 46027, 1983 Ohio App. LEXIS 12865, at *3-*4, citing *Inland Rivers Serv. Corp. v. Hartford Fire Ins. Co.* (1981), 66 Ohio St.2d 32, 34; accord *Piergallini v. Brister*, 7th Dist. No. 01 BA 15, 2002-Ohio-2996, at ¶21.

{¶20} It is equally well-established that the plaintiffs in the present case, the McGraths, have failed to do so. Therefore, Indiana Insurance is entitled to summary judgment.

{¶21} The majority reverses, however, on the grounds that enhancement technology might render legible the otherwise illegible parts of this policy. A plaintiff is entitled to establish the terms and conditions of an illegible insurance by policy by “other evidence.” See *Piergallini*, 2002-Ohio-2996, at ¶21 (citation omitted). The problem herein is that the McGraths have failed to do so. Upon Indiana Insurance’s moving for summary judgment, the McGraths bore the burden of proving, not that the policy could be reconstructed, but that they are entitled to coverage under the policy. If the McGraths required additional time to reconstruct the policy, Civ.R. 56(F) provided the appropriate remedy.

{¶22} The majority also errs by reversing on the narrow issue of whether the McGrath’s uninsured/underinsured motorist claim is timely under the terms of the

Indiana policy. Where the plaintiffs have failed to establish a prima facie case of entitlement to coverage, the question of whether the claim was timely is a non-issue.

{¶23} The majority declines to discuss the issue raised in Indiana Insurance's cross-assignment of error on the grounds that the trial court did not rule on this issue and, thus, the issue is "not ripe for review."

{¶24} Our review of an award of summary judgment is de novo. "[W]e review the judgment independently and without deference to the trial court's determination." *Wetmore v. Am. Guard Co.*, 11th Dist. No. 2002-L-058, 2003-Ohio-1589, at ¶11, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Moreover, the role of the appellate court is to review judgment of the court below, and affirm that judgment if there are grounds to support it. *State ex rel. Meyers v. Columbus* (1995), 71 Ohio St.3d 603, 605 ("a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof"); *State v. Eschenauer* (Nov. 10, 1988), 11th Dist. No. 12-237, 1988 Ohio App. LEXIS 4479, at *8 ("reviewing courts affirm and reverse judgments, not reasons") (citation omitted).

{¶25} Remanding a case so that evidence in the record can "be enhanced" or "interpreted in some other matter" is contrary to our system of appellate jurisprudence. There is hardly an appellate case that would not benefit from remand so that an appellant could enhance the evidence in the record. That is **not** how our appellate system works.

{¶26} In the absence of evidence that the McGraths' claimed loss is covered under the Indiana Insurance policy, the trial court's ruling should be affirmed.