[Cite as *Freeland v. Liberty Mutual*, 2012-Ohio-3038.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, ohio

BETTY J. FREELAND, ADMINISTRATRIX OF THE ESTATE OF JOHN L. FREELAND, JR., DEC. AND OF THE ESTATE OF TINA M. FREELAND, DEC., et al.,	:	**O P I N I O N**
	:	**CASE NO. 2011-T-0105**
Plaintiffs-Appellants,	:	
- vs -	:	
LIBERTY MUTUAL FIRE INSURANCE CO.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 51.

Judgment: Affirmed.

Michael D. Rossi, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Plaintiffs-Appellants).

Amelia A. Bower, Plunkett & Cooney, P.C., 300 East Broad Street, Suite 590, Columbus, OH 43215, and *Jeffrey C. Gerish*, Plunkett & Cooney, 38505 Woodard Avenue, Southfield, MI 48304 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants appeal the judgment of the Trumbull County Court of Common Pleas granting summary judgment in favor of appellee, Liberty Mutual Fire Insurance Co. ("Liberty Mutual"). The trial court held the Uninsured/Underinsured motorist coverage ("UM/UIM coverage") available at the time of the March 7, 2007 car accident—which tragically killed John L. Freeland and his wife, Tina M. Freeland, and

seriously injured their three children—was $12,500 per person / $25,000 per accident as stated in the LibertyGuard Auto Policy issued by Liberty Mutual. For the following reasons, we affirm.

{¶2} The facts of this case are not in dispute. Appellants, John Freeland, Sr. and his wife, Betty J. Freeland ("the Freelands"), were issued an insurance policy in 1984. Under this policy, which was continually renewed and in effect at the time of the accident, Liberty Mutual provided the Freelands coverage for bodily injury up to a "single limit" of $100,000. The Freelands continually renewed the original policy through the policy period in effect at the time of the accident, i.e., November 2, 2006, to November 2, 2007.

{¶3} In 1999, the Freelands executed an Ohio Uninsured Motorists Bodily Injury Coverage selection/rejection form, whereby they selected UM/UIM coverage in the amount of $12,500 per person and $25,000 per accident.

{¶4} Liberty Mutual issued the Freelands an amended Declarations page for Vehicle 4, a Pontiac Trans Sport, with an effective date of February 3, 2007. The amended Declarations page also provided $100,000 in bodily injury ("BI") coverage and UM/UIM coverage in the amount of $12,500 per person and $25,000 per accident.

{¶5} On March 7, 2007, the Freelands loaned their Pontiac Trans Sport minivan to their son, John Freeland, who did not have car insurance of his own. While driving the minivan, John, along with his wife and three children, was involved in a tragic car accident when he ran a red light and struck a police cruiser in the middle of an intersection. Only the three children survived.

{¶6} The parties dispute whether the Freelands are entitled to recover only the UM/UIM limit of $25,000 or whether the defective initial offer of UM/UIM coverage entitled them to the policy's BI coverage of $100,000.

{¶7} The trial court granted Liberty Mutual's motion for summary judgment.

{¶8} The Freelands appealed and assign the following assignment of error:

{¶9} "The trial court erred in granting Defendant's summary judgment motion while denying that of the Plaintiffs."

{¶10} A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). An appellate court must independently review the record to determine if summary judgment was appropriate. Therefore, an appellate court affords no deference to the trial court's decision while making its own judgment. *Schwartz v. Bank One, Portsmouth, N.A.*, 84 Ohio App.3d 806, 809 (4th Dist.1992); *Morehead v. Conley*, 75 Ohio App.3d 409, 411-412 (4th Dist.1991).

{¶11} R.C. 3937.18, which governs UM/UIM coverage, has been amended several times by the Ohio legislature. Previous versions of R.C. 3937.18 required insurance carriers to initially offer the insured an amount of UM/UIM coverage equal to the amount of the policy's liability coverage. If the insurance carrier did not offer UM/UIM coverage in such an amount, an injured insured was given, by law, UM/UIM coverage in the full amount of the policy.

{¶12} The Ohio Supreme Court, in *Linko v. Indemity Ins. Co. of N. America*, 90 Ohio St.3d 445 (2000), set forth specific requirements for an insured to validly reject UM/UIM coverage or select coverage in an amount less than the policy liability limits. If

the insurance carrier failed to follow the specific requirements to set forth a valid offer, the insured, by operation of law, was to acquire UM/UIM coverage in an amount equal to the policy's liability limit. *Id.* The *Linko* Court stated that, "[t]o satisfy the offer requirement of R.C. 3937.18, the insurer must inform the insured of the availability of UM/UIM coverage, set forth the premium for UM/UIM coverage, include a brief description of the coverage, and expressly state the UM/UIM coverage limits in its offer." *Id.* at 447-448.

{¶13} In 1997, the Ohio legislature passed H.B. 261, which contained a special provision for renewal policies. Under this version of R.C. 3937.18, renewal policies did not have to offer UM/UIM coverage.

{¶14} In 2000, the General Assembly enacted S.B. 267, continuing the requirement that insurance carriers offer UM/UIM coverage and obtain written and signed selection/rejection from the insured. S.B. 267, however, did not require insurance carriers to obtain new UM/UIM rejection/selection forms at the beginning of each renewal period.

{¶15} Effective October 31, 2001, the General Assembly enacted S.B. 97, which made it optional for carriers to offer UM/UIM coverage. The renewal provision was deleted. In enacting the statute, the General Assembly stated that its intent, inter alia, was to "supersede the holdings of the Ohio Supreme Court in *Linko v. Indemnity Ins. Co. of N. America* (2000), 90 Ohio St. 3d 445, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St. 3d 660, *Schumacher v. Kreiner* (2000), 88 Ohio St. 3d 358, 2000-Ohio-344, *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St. 2d 431, *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St. 3d 565, and their progeny";

and "to eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy." *See* R.C.3937.18.

{¶16} In 2002, in *Kemper v. Michigan Millers Mut. Ins. Co.*, the Ohio Supreme Court held: (1) the requirements of *Linko* were relative to an offer of UM/UIM coverage, applicable to a policy of insurance written after the enactment of H.B. 261 in 1997, *but before* S.B. 97 in 2001; and (2) under H.B. 261, a signed rejection does not act as an effective declination of UM/UIM coverage, where there is no other evidence, oral or documentary, of an offer of coverage. 98 Ohio St.3d 162, 2002-Ohio-7101, ¶2-4.

{¶17} The Freelands argue the 1999 selection/rejection form of UM/UIM coverage did not comply with the *Linko* requirements, and thus, the Freelands' rejection of UM/UIM coverage was legally invalid. The Freelands claim that because the 1999 policy was invalid, the renewal policy also is invalid. Thus, the Freelands claim they are entitled to the BI limits of $100,000, rather than the UM/UIM limit of $25,000. The Freelands cite to the Sixth Circuit's opinion in *Roberts v. Universal Underwriters Ins. Co.* to support this argument. 334 F.3d 505, 506 (6th Cir.2003). A thorough reading of *Roberts*, however, reveals that it is inapposite to the facts of the instant case.

{¶18} In *Roberts*, the court found the insured was entitled to the policy's liability limits, as the insured's initial rejection of UM/UIM coverage was invalid under the carrier, Universal Underwriter Insurance Company's ("Universal"), original policy. The court examined a renewal policy effective November 1, 1998, through November 1, 1999; the insured obtained the first version of the policy from Universal in 1992. *Id.* at 507. The court stated the policy at issue—November 1, 1998, through November 1, 1999—was

"governed by the statute as it existed on November 1, 1998, which is after the enactment of H.B. 261 in 1997[.]" *Id.* at 508, fn. 2. The court first looked at the 1998 offer and acceptance to determine whether Universal satisfied the requirements to offer UM/UIM coverage under former R.C. 3937.18. *Id.* at 509. Relying on the holding in *Kemper*, *supra*, the court concluded the rejection/selection form offered by Universal was fatally defective as it did not satisfy the requirements outlined in *Linko*, *supra*. *Id.* at 510.

{¶19} The *Roberts* court then reasoned that if the policy were a valid renewal policy under former R.C. 3937.18(C), Universal could still be entitled to summary judgment, as renewal policies are exempted from having to offer UM/UIM coverage. *Id.* at 511. Former R.C. 3937.18(C) stated, in pertinent part, that UM/UIM offers "need not be provided in * * * a policy renewal or a new or replacement policy * * * where a named insured or applicant has rejected such coverages in connection with a policy previously issued." Examining former R.C. 3937.18(C), the court then determined that because Universal's 1992 offer was insufficient, the renewal provision of former R.C. 3937.18(C) was inapplicable. *Id.*

{¶20} The statutory law in effect at the time an insurance policy is issued or renewed defines the scope of underinsured motorist coverage in the policy. *Wolfe v. Wolfe*, 88 Ohio St.3d 246 (2000). In *Roberts*, the accident occurred on September 24, 1999; therefore, the court noted the relevant policy and concluded that it was "governed by the statute as it existed on November 1, 1998." *Roberts*, 334 F.3d 508, fn. 2. Therefore, the Ohio Supreme Court's holding in *Kemper* was applicable, as the policy

was written after 1997 and before 2001. Consequently, Universal's offer of UM/UIM coverage was defective.

{¶21} Notwithstanding Universal's defective offer of UM/UIM coverage, the court examined whether the policy was to be considered a valid renewal policy. As it existed in 1998, R.C. 3937.18(C) exempted renewal policies from offering UM/UIM coverage; however, the plain language of former R.C. 3937.18(C) exempts a renewal policy only if the insured has rejected coverages in a previously issued policy. As the previously issued policy in *Roberts* was defective, the renewal exception was inapplicable.

{¶22} The Freelands, however, fail to address the impact of the passage of S.B. 97, effective subsequent to the applicable policy period in *Roberts*. The question of whether S.B. 97 has superseded the impact of *Linko* and *Kemper*, et al., has been addressed by several other appellate districts. *See St. Clair v. Allstate*, 1st Dist. No. C-060028, 2006-Ohio-6159; *Arn v. McLean*, 159 Ohio App.3d 662, 2005-Ohio-654 (2d Dist.); *Fruit v. State Farm*, 8th Dist. No. 87294, 2006-Ohio-4121; and *Wilson v. AIG*, 12th Dist. No. CA2007-11-278, 2008-Ohio-5211. All have held that policies of insurance, renewed after the effective date of S.B. 97, are controlled by the provisions of that amendment. We agree.

{¶23} In this case, the accident occurred in March 2007. As a result, the relevant policy was from November 2, 2006, expiring November 2, 2007. *Kemper* is, therefore, inapplicable to this policy. Further, a review of the legislative history reveals that the renewal exception in R.C. 3937.18(C) was excised, effective October 31, 2001. The law in 2007 with respect to UM/UIM coverage, which is the current version of R.C. 3937.18, provides that any insurance policy that insures against loss "arising out of the

ownership, maintenance, or use of a motor vehicle, may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage," or both. *Arnerican v. United Services Auto. Assn.*, 3d Dist. No. 6-06-05, 2006-Ohio-3892, ¶13. "Accordingly, insurance companies that issue or renew policies after October of 2001 are no longer required to offer, and obtain a written rejection of, UM/UIM coverage." *Id.* It is of no significance whether Liberty Mutual's original offer of UM/UIM coverage was defective because the relevant policy was issued after the passage of S.B. 97 and Liberty Mutual was not required to include UM/UIM coverage.

{¶24} Because the Freelands have demonstrated that no genuine issue of material fact exists as to an essential element of their claim, Liberty Mutual is entitled to judgment as a matter of law. The trial court therefore did not err in entering summary judgment for Liberty Mutual.

{¶25} Accordingly, the judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.