[Cite as *Slone v. Allstate Ins. Co.*, 2004-Ohio-3990.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MELBA SUE SLONE

Plaintiff-Appellant

vs.

ALLSTATE INSURANCE COMPANY, et al.

Defendants-Appellees

JUDGES:
: Hon. Sheila G. Farmer, P.J.
: Hon. Julie A. Edwards, J.
: Hon. John F. Boggins, J.
:
:
: Case No. 2004CA0021
:
:
: OPINION

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2003CV0506D
JUDGMENT:	Reversed
DATE OF JUDGMENT ENTRY:	July 19, 2004

APPEARANCES:

For Plaintiff-Appellant

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For Allstate Insurance Company

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Edwards, J.

{¶1} Appellant Melba Sue Slone appeals from the February 3, 2004, Entry of the Richland County Court of Common Pleas granting summary judgment to appellee Allstate Insurance Company.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 27, 2001, Glenn Brady, a pedestrian, was struck by an automobile and killed.

{¶3} On May 23, 2003, appellant Melba Sue Slone, Mr. Brady's half-sister, filed a declaratory judgment action seeking uninsured/underinsured motorist benefits under her automobile policy issued by appellee Allstate Insurance Company.

{¶4} All parties filed motions for summary judgment. Pursuant to an Entry filed on February 3, 2004, the trial court granted appellee Allstate's motion, finding that the language under the policy precluded coverage to appellant.

{¶5} It is from the trial court's February 3, 2004, Entry that appellant now appeals, raising the following assignments of error:

I

{¶6} "THE TRIAL COURT ERRED IN FAILING TO FOLLOW THE WELL SETTLED LAW OF OHIO THAT THE STATUTORY LAW IN EFFECT AT THE TIME A POLICY ISSUES CONTROLS THE DETERMINATION OF COVERAGE."

II

{¶7} "IN DETERMINING WHETHER INSURANCE COVERAGE APPLIED TO PLAINTIFF-APPELLANT'S CLAIM, THE TRIAL COURT ERRED IN RETROACTIVELY APPLYING HB 267'S CHANGES TO ALTER THE INSURANCE POLICY ENTERED INTO SIX (6) MONTHS EARLIER."

III

{¶8} "THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF-APPELLANT'S CROSS MOTION FOR SUMMARY JUDGMENT."

{¶9} This case comes to us on the accelerated calender. App. R. 11.1, which governs accelerated calender cases, provides, in pertinent part: (E) Determination and judgment on appeal. The appeal will be determined as provided by App. R. 11. 1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form.

{¶10} This appeal shall be considered in accordance with the aforementioned rule.

I, II, III

{¶11} Appellant, in her three assignments of error, argues that the trial court erred in granting summary judgment to appellee Allstate Insurance. Specifically,

appellant claims that the trial court erred in retroactively applying H.B. No. 267 to the facts of this case. We agree.

{¶12} Appellant's insurance claim is based on the case of *Sexton v. State Farm Mutual Auto. Co.* (1982), 69 Ohio St.2d 431, 433 N.E.2d 555. In *Sexton*, the Supreme Court of Ohio decided that a wrongful death beneficiary could recover uninsured/underinsured motorist benefits under his or her own automobile policy for the death of a non-resident relative under then R.C. 3937.18.

{¶13} The policy at issue in this case became effective on February 5, 1998, and renewed for two year periods. Therefore, the new period commenced on February 5, 2000. On September 21, 2000, H.B. No. 267 took effect. Such bill amended R.C. 3937.18, permitting insurers to exclude *Sexton* type claims. The bill also amended R.C. 3937.31, adding subsection (E). Such section permits an insurer to incorporate into a policy "any changes that are permitted or required by this section or other sections of the Revised Code at the beginning of any policy period within the two-year period set forth in division (A) of this section." The accident occurred on May 27, 2001, after H.B. No. 267 took effect but prior to the end of the two year renewal period.

{¶14} Appellant argues that the law as it existed on February 5, 2000, which included *Sexton* type claims, should prevail. Appellant argues that the earliest H.B. No. 267 could have applied was February 5, 2002, the start of the next two year renewal period. In turn, appellee Allstate argues that, pursuant to R.C. 3937.31(E), it can incorporate changes that are permitted by R.C. 3937.18 at the beginning of any policy period within the two year period set forth in R.C. 3937.31(A) into its policy. Appellant specifically argues that because the policy was issued for six month periods within the

two year renewal period, H.B. No. 267 applied on February 5, 2001, the date of the six month issuance after H.B. 267 became effective on September 21, 2000.

{¶15} R.C. 3937.31(A) states, in part, that "Every automobile insurance policy shall be issued for a policy period of not less than two years or guaranteed renewal for successive policy periods totaling not less than two years…" In *Wolfe v. Wolfe*, 88 Ohio St.3d 246, 2000-Ohio-322, 725 N.E.2d 261, the Ohio Supreme Court held, in relevant part, as follows: "[P]ursuant to R.C. 3937.31(A), every automobile liability insurance policy issued in this state, must have, at a minimum, a guaranteed two-year policy period during which the policy cannot be altered except by agreement of the parties and in accordance with R.C. 3937.30 to 3937.39. We further hold that the commencement of each policy period mandated by R.C. 3937.31(A) brings into existence a new contract of automobile insurance, whether the policy is categorized as a new policy of insurance or a renewal of an existing policy. Pursuant to our decision in *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281, 695 N.E.2d 732, the statutory law in effect on the date of issue of each new policy is the law to be applied." Id. at 250. (Emphasis added).

{¶16} Applying *Wolfe*, the Third District Court of Appeals, in *Flowers v. Ohio Mut. Ins. Group*, Seneca App. No. 13-02-28, 2003-Ohio-441, held that, absent the parties' agreement, an automobile policy could not be altered for two years and that the uninsured motorist statute that was in effect when the parties entered into the policy applied, even though the policy itself was subject to renewal every six months.

{¶17} In *Flowers*, appellee Joshua Flowers was the named insured under an automobile policy. After his children were injured in an automobile accident on May 7, 2001, which was caused when their mother drove off the road and struck a tree,

appellee sought coverage under his automobile insurance policy. The liability portion of the policy excluded liability coverage for bodily injury or death to the named insured or a family member.

{¶18} The policy issued to appellee Joshua Flowers had an effective date of June 20, 2000, and was effective through December 20, 2000. The law in effect at the time the policy was entered into on June 20, 2000, was S.B. 57, effective November 2, 1999. The policy was later renewed with effective dates of December 20, 2000, to June 20, 2001. Approximately three months before the renewal, S.B. 267, which amended R.C. 3937.18 and 3937.31, became law on September 21, 2000.

{¶19} In *Flowers*, the insurance company argued that the automobile liability insurance policy was subject to the two year guarantee period set forth in R.C. 3937.31(A) and that the S.B. 57 version of R.C. 3937.18, which was in effect on June 20, 2000, when the policy was entered, permitted it to exclude family members. In turn, the appellee argued that the later amended version of R.C. 3937.31 effectively did away with the two year guarantee period and that the S. B. 267 version of R.C. 3937.18 deleted the family member exclusion.

{¶20} In concurring with the insurance company, the court, in *Flowers*, stated, in relevant part, as follows:

{¶21} "Despite the appellees' recommendation to the contrary, we find the S.B. 57 version of R.C. 3937.18, the revision in effect at the time the of the policy creation, is the law to be applied, not the later S.B. 267 version. As noted in *Wolfe*, R.C. 3937.31(A) guarantees a two-year period during which the OMI policy cannot be changed absent an agreement of the parties. This two-year period applies even though

the policy at bar is subject to renewals every six months. While the statute does not preclude an insured and the insurer from entering into a new contract of insurance within the two-year period, it has not been argued that the December 20, 2000, renewal constituted a new contract." Id. (Footnotes omitted). See also *Young v. Cincinnati Ins. Co.*, Cuyahoga App. No. 82395, 2004-Ohio-54. In *Young*, the Eighth District Court of Appeals held that R.C. 3937.31(A), stated no retroactive intent. The Court, in *Young*, further held that R.C. 3937.31(A), before its amendment by S.B. 267 effective September 21, 2000, guaranteed a two-year period of coverage and that retroactive application of the amended statute would be in violation of R.C. 1.58(A)(1) and (2) and would divest an insured of accrued rights by omitting the two-year guaranteed policy period.

{¶22} Based on the foregoing, we find that the version of R.C. 3937.18 in effect on February 5, 2000, the date the new two year period commenced, applied. Since such version permitted "*Sexton*" claims such as appellant's, the trial court erred in granting summary judgment to appellee and in retroactively applying the provisions of H.B. 267 to the case sub judice to deny coverage.

{¶23} Appellant's three assignments of error are, therefore, sustained.

{¶24} Accordingly, the judgment of the Richland County Court of Common Pleas is reversed.

By Edwards, J. and

Boggins, J. concur.

Farmer, P. J. dissents.

Farmer, P.J., *dissenting.*

{¶25} I respectfully dissent from the majority=s opinion that "the version of R.C. 3937.18 in effect on February 5, 2000, the date the new two year period commenced, applied."

{¶26} This case is not about controlling law, but contract interpretation. The policy as issued on February 5, 1998 included language excluding *Sexton* type claims. See, Part 3, Section 1, of Allstate Auto Insurance Policy, attached to May 23, 2003 Complaint as Exhibit 1. Based upon Ohio case law at the time, this language did not have any effect. However, the enactment of H.B. 267 permitted such language, giving the provision effect on September 21, 2000. Because the policy sub judice excluded *Sexton* type claims at its initial issuance, such claims were excluded under the policy as of September 21, 2000, eight months prior to the accident in question. As the trial court noted in its judgment entry of February 3, 2004, Allstate did not have to amend the policy to conform to H.B. 267 because the "policy always contained the limitation requiring the injured person to be an insured."

{¶27} I would deny the assignments of error and affirm the trial court's decision.

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JUDGE SHEILA G. FARMER

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

MELBA SUE SLONE	:	
Plaintiff-Appellant	:	
	:	JUDGMENT ENTRY
-vs-	:	
ALLSTATE INSURANCE COMPANY, et al.	:	
Defendants-Appellees	:	CASE NO. 2004CA0021

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Richland County, Ohio is reversed. Costs to appellee.

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JUDGES