[Cite as *Rhoades v. State Farm Fire & Cas. Co.*, 2010-Ohio-4629.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GARY RHOADES

Plaintiff-Appellant

-vs-

STATE FARM FIRE AND CASUALTY CO., et al.

Defendants-Appellees

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2009 CA 00105

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 03168

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 27, 2010

APPEARANCES:

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Wise, J.

{¶1} Plaintiff-Appellant Gary Rhoades appeals the March 31, 2009, decision of the Stark County Court of Common Pleas granting summary judgment in favor of Defendants-Appellees State Farm Fire and Casualty Company and Mark Hufstetler.

STATEMENT OF THE CASE AND FACTS

{¶2} Gary and Shelley Rhoades married on June 28, 1997. On March 19, 2005, Mrs. Rhoades was killed in a traffic accident caused by an underinsured motorist.

{¶3} At the time of the accident, Appellant was insured under two policies issued by State Farm-affiliated companies: (1) a primary policy which expressly provided UM/UIM coverage with limits of $250,000.00 per person/$500,000.00 per accident, and (2) a State Farm Personal Umbrella Policy.

{¶4} Appellant settled his claims with the underinsured tortfeasor and his own primary underinsured motorist insurer for a total of $250,000.00. ($100,000 from the tortfeasor and $150,000.00 from the underlying UM/UIM coverage).

{¶5} Appellant then made a claim for additional UM/UIM coverage under his Personal Umbrella Liability Policy issued by Appellee State Farm.

{¶6} The State Farm Umbrella Policy at issue in this matter was first issued on August 8, 1996, at which time Appellant and his former girlfriend, Jodie Leyda, both signed a rejection of UM/UIM coverage. On July 1, 1997, Appellant requested that Ms. Leyda be removed from the umbrella policy and Shelley Rhoades be added as a named insured. This policy was thereafter renewed on an annual basis.

{¶7} On February 10, 2006, Appellant Gary Rhoades, individually and as the Administrator of the Estate of Shelley Rhoades, filed an action against State Farm Fire

and Casualty Co. and Mark Hufstetler. (See *Rhoades, etc. v. State Farm Fire and Cas. Co., et al.*, Case No. 2006CV00593). In his Complaint, Appellant asserted claims against Appellees for declaratory judgment, negligence, bad faith, and punitive damages, stemming from Appellees' actions related to Appellant's insurance coverage and claims both before and after Shelley Rhoades was killed.

{¶8} On November 17, 2006, Appellant voluntarily dismissed this Complaint.

{¶9} On August 3, 2007, Appellant re-filed his lawsuit against Appellees State Farm and Hufstetler claiming, inter alia, that UM/UIM coverage arose under the personal liability policy by operation of law.

{¶10} On August 30, 2007, Appellant filed a motion for partial summary judgment on the coverage issue, arguing that the trial court should judicially impose UM/UIM coverage by operation of law.

{¶11} On September 6, 2007, Appellees filed their Answer.

{¶12} On October 17, 2007, the case was stayed to await the decision of the Ohio Supreme Court in *Advent v. Allstate Insurance Co.* (2008), 118 Ohio St.3d 248, which was issued on May 20, 2008.

{¶13} On February 3, 2009, Appellees filed a Motion to Lift Stay, Renewed Motion to enter Summary Judgment and Brief in Opposition to Plaintiff's Motion for Summary Judgment. [1]

{¶14} The trial court re-activated this case on February 4, 2009, and set a briefing schedule on the parties' motions for summary judgment.

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[1] Appellees' Motion for Summary Judgment was originally filed on October 27, 2006, under the prior Case No. 2006 CV 00593.

{¶15} On February 19, 2009, Appellant filed a Memorandum Contra to Appellee's motion for summary judgment and also filed a Renewed Motion for Summary Judgment.

{¶16} By Judgment Entry filed March 31, 2009, the trial court granted summary judgment in favor of State Farm finding that Appellant had "specifically rejected UM/UIM coverage" under the State Farm Umbrella Policy and that *Advent* precludes the imposition of UM/UIM coverage by operation of law under the State Farm Umbrella Policy .

{¶17} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶18} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT TO DEFENDANT-APPELLEE BEFORE ALLOWING PLAINTIFF-APPELLANT TO CONDUCT ADEQUATE DISCOVERY.

{¶19} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT ON PLAINTIFF-APPELLANTS NEGLIGENCE, BAD FAITH, AND PUNITIVE DAMAGES CLAIMS.

{¶20} "III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED SUMMARY JUDGMENT ON THE ISSUE OF PLAINTIFF'S UM/UIM COVERAGE."

I.

{¶21} In his first assignment of error, Appellant asserts that it was error for the trial court to grant summary judgment without allowing adequate time for discovery. We disagree.

{¶22} More specifically, Appellant argues that Appellees' motion for summary judgment should have been denied as he had not had an opportunity to discover "claims file materials." (Appellant's brief at 11).

{¶23} Civ.R. 56(F) provides

{¶24} **"(F) When affidavits unavailable**

{¶25} **"**Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

{¶26} At the outset, we note "[t]he provisions of Civ.R. 56(F) are all discretionary. They are not mandatory." *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 648, citing *Ramsey v. Edgepark, Inc.* (1990), 66 Ohio App.3d 99, 106, Thus, trial courts possess broad discretion when regulating the discovery process, and a trial court's decision will not be reversed absent an abuse of discretion. *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 57; *Stegawski v. Cleveland Anesthesia Group, Inc.* (1987), 37 Ohio App.3d 78, 86-87.

{¶27} The standard of review is abuse of discretion. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. We must look at the totality of the circumstances in the case sub judice and determine whether the trial court acted unreasonably, arbitrarily or unconscionably.

{¶28} In this case, Appellant did not file a Civ.R. 56(F) motion for an extension of time to respond to Appellees' motion for summary judgment. Additionally, Appellant himself filed his own motion for partial summary judgment on the issue of coverage.

{¶29} We therefore do not find under the facts and circumstances of this case, that the trial court abused its discretion in not allowing additional discovery prior to the granting of summary judgment.

{¶30} Appellant's first assignment of error is overruled.

II., III.

{¶31} "Summary Judgment Standard"

{¶32} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

{¶33} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶34} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶35} It is based upon this standard that we review Appellant's second and third assignments of error.

III.

{¶36} For ease of review, we shall address Appellant's assignments of error out of order.

{¶37} In his third assignment of error, Appellant asserts that the trial court erred in granting summary judgment on the issue of UM/UIM coverage. We disagree.

{¶38} Appellant sought declaratory judgment that he was entitled to UM/UIM coverage under the personal umbrella policy by operation of law. Appellant argues that such coverage should be imposed because the decedent, Shelly Rhoades, never personally rejected such coverage when she was added to the policy as a named insured on July 1, 1997.

{¶39} Upon review, we find that when the State Farm Umbrella Policy was first issued on August 8, 1996, Mr. Rhoades and his prior girlfriend, Jodie Leyda, both signed and rejected UM/UIM coverage.

{¶40} After Ms. Leyda was removed and Mrs. Rhoades was added on July 1, 1997, no other substantive changes were made to the State Farm Umbrella Policy. Eight renewals occurred prior to Mrs. Rhoades' death. At no time during those eight renewals did Appellant ever request to add UM/UIM coverage to the State Farm Umbrella Policy.

{¶41} Appellant argues that because UM/UIM coverage was never offered to and/or rejected by Mrs. Rhoades, such coverage rose by operation of law.

{¶42} Again, when State Farm initially issued the personal umbrella policy herein to Appellant Gary Rhoades and his girlfriend, Jodi Leyda, on August 8, 1996, the original policy included a written rejection of UM/UIM coverage signed by both Rhoades and Leyda. Then on July 1, 1997, Appellant requested that Ms. Leyda be removed from the policy and his wife Shelly Rhoades be added as a named insured. The policy was renewed every year; with the last renewal before this collision being August 8, 2004.

{¶43} Appellant argues that under the law in effect at that time, UM/UIM coverage arose by operation of law because Mrs. Rhoades never expressly rejected such coverage. Assuming for purposes of argument that such coverage did arise by operation of law at that time, such coverage could not be terminated during the two-year guaranteed policy period under the version of R.C. §3937.31(A) in effect at that time. *Wolfe v. Wolfe,* 88 Ohio St.3d 246, 2000-Ohio-322. Thus, UIM coverage by operation of law would therefore have been guaranteed through August 8, 1998.

{¶44} Effective September 21, 2000, the Ohio legislature enacted S.B. 267. S.B. 267 amended R.C. §3937.31 by adding the following subsection (E):

{¶45} "(E) Nothing in this section prohibits an insurer from incorporating 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."

{¶46} Then, effective October 31, 2001, in S.B. 97, the Ohio legislature amended R.C. §3937.18 to make the provision of uninsured motorists coverage permissive rather than mandatory, and eliminated the possibility of such coverage being implied by operation of law.

{¶47} In *Advent v. Allstate Ins. Co.,* the Ohio Supreme Court recently addressed a conflict among the courts of appeals as to whether an insurer could incorporate the S.B. 97 amendments into a policy during a guarantee period which began after the effective date of S.B. 267 but before S.B. 97. The Court found S.B. 267 allowed but did not require insurers to incorporate changes permitted or required by statute during a policy renewal period within a two-year guarantee period. The policy at issue in that case was renewed every six months during the two-year guarantee period; the provisions of S.B. 97 were incorporated into the policy during one of those renewal periods before the accident, through an "Important Notice" accompanying the renewal policy declarations. This notice stated that "the coverage limits you have chosen for Uninsured Motorists Insurance for Bodily Injury are less than your limits for Bodily Injury under Automobile Liability Insurance," and advised the insured to contact their agent if

they wished to increase their limits. Thus, the Court found, the (lower) stated limits for UIM coverage applied at the time of the accident.

{¶48} Appellant further claims that he believed he was paying a premium for and receiving UM/UIM coverage under the umbrella policy. However, on the three renewals immediately prior to Mrs. Rhoades' death, State Farm included a written notice with the renewal which expressly advised the Rhoades that the State Farm Umbrella Policy did not include UM/UIM coverage. The notice provided, in pertinent part:

{¶49} "You have been provided the opportunity to purchase Uninsured Motor Vehicle Coverage, including underinsured motor vehicle protection, in an amount equal to the limits for bodily injury liability coverage. A named insured or an applicant [Mr. Rhoades] has declined to purchase Uninsured Motor Vehicle Coverage (including underinsured motor vehicle protection). If you want to purchase Uninsured Motor Vehicle Coverage or have questions, please contact your agent [Hufstetler]."

{¶50} We find that this notice contained sufficient information to put the insured on notice that their policy did not include UM/UIM coverage and that they should contact their insurer if they wanted to purchase such coverage. By failing to take any action, they consented to this change. *Advent,* at ¶ 18.

{¶51} In summary, we find that the original policy in this case did not include UM/UIM coverage due to a written rejection of such coverage at the outset. However, if we were to find that no valid rejection existed as to Mrs. Rhoades, such coverage would have arisen by operation of law under the version of R.C. §3937.18 in existence prior to S.B. 97. The policy renewals which occurred in 2002, 2003 and 2004 were issued under the S.B. 97 version of 3937.18 which no longer required an offer of UM/UIM coverage

and further did away with the imposition of such coverage by operation of law. Additionally, the insurer included a notice with the last three renewals which advised the insured that he/she had chosen not to purchase uninsured motorists insurance, but could do so if the insured wished. This notice made clear to the insured that he or she did not have UIM coverage, effectively incorporating the provisions of S.B. 97 making the offer of UIM coverage permissive rather than mandatory. Therefore, we hold that S.B. 267 allowed State Farm to amend its policy to incorporate statutory changes and to incorporate S.B. 97 by making clear that the insured did not have UIM coverage. Consequently, the trial court correctly concluded that State Farm was entitled to judgment as a matter of law.

{¶52} Appellant's third assignment of error is overruled.

II.

{¶53} In his second assignment of error, Appellant argues that the trial court erred in granting summary judgment on his claims of negligence, bad faith and punitive damages. We disagree.

{¶54} Based on our finding of a lack of imposition of coverage as set forth in AOE III, we find that the trial court did not err in granting summary judgment on Appellant's claims of negligence and bad faith. Appellant has failed to present any evidence in support of its negligence, breach of duty and bad faith claims.

{¶55} Appellant in this case has not argued that he requested UM/UIM coverage and his agent negligently failed to procure such coverage but rather that UM/UIM coverage should have been imposed by operation of law through failure to obtain an

express rejection from Shelly Rhoades. No statutory duty to offer or provide UM/UIM coverage exists.

{¶56} Appellant's second assignment of error is overruled.

{¶57} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

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JUDGES

JWW/d 0913

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GARY RHOADES	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
STATE FARM FIRE AND CASUALTY CO., et al.	:	
	:	
Defendants-Appellees	:	Case No. 2009 CA 00105

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES