

[Cite as *Cowburn v. Am. States Ins. Co.*, 2003-Ohio-4212.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

RONALD COWBURN :

Plaintiff-Appellant : C.A. CASE NO. 19817

vs. : T.C. CASE NO. 01CV4292

AMERICAN STATES INSURANCE CO. : (Civil Appeal from
Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 8TH day of August, 2003.

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GRADY, J.

{¶1} Plaintiff, Ronald W. Cowburn, appeals from a summary judgment for Defendant, American States Insurance Company ("American States"), on Cowburn's claim asking the trial court to declare that he is entitled to uninsured/underinsured motorists (UM/UIM) coverage under a policy of liability insurance that American States issued to Cowburn's employer, Orbit Sheet Metal Company.

{¶2} Cowburn's claim against American States is predicated on the rule of *Scott-Ponzer v. Liberty Mut. Fire Ins. Co.* (1999),

85 Ohio St.3d 660. The trial court, applying the rule this court announced in several cases, granted summary judgment for American States on its motion because Cowburn, when he settled with the tortfeasor, failed to comply with consent to settle requirements which American States' policy imposes as a condition of coverage.

{¶3} On appeal, Cowburn argues that the trial court erred when it granted summary judgment on those grounds because, per *Ferrando v. Auto-Owners Mutual Insurance Company*, 98 Ohio St.3d 186, 2002-Ohio-7217, his failure to give notice creates only a presumption of prejudice, one which he is entitled to rebut before the UM/UIM coverage he seeks is denied on that account. *Ferrando* was decided subsequent to the summary judgment the trial court granted on American State's motion.

{¶4} American States urges us to follow the rule of *Bogan v. Progressive Ins. Co.* (1988), 36 Ohio St.3d 22, which made compliance with notice of settlement provisions an absolute requirement of coverage. A reading of *Ferrando* reveals that it overruled *Bogan*, in part, to hold that the resulting prejudice to the insurer is only presumed, and that a claimant is entitled to rebut the presumption.

{¶5} Summary judgment may be granted only if no genuine issue of material fact remains for determination and the movant is entitled to judgment as a matter of law. Civ.R. 56(C). We review appeals from summary judgments de novo on the issues of law involved. *Navilar v. Osborn* (1998), 127 Ohio App.3d 1.

{¶6} We find that, on this record, and per *Ferrando*, a genuine issue of material fact remains for determination: whether

Cowburn's failure to provide notice of settlement so prejudiced American States that it is entitled to judgment on Cowburn's claim for relief. Therefore, Cowburn's assignment of error is sustained, and the case will be remanded to the trial court for further proceedings in the action.

WOLFF, J. and YOUNG, J., concur.

Copies mailed to:

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Hon. John W. Kessler