

[Cite as *Russ v. Nationwide Mut. Ins. Co.*, 2004-Ohio-1616.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Kimberly Russ et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 03AP-783 (C.P.C. No. 01CVH-10-10793)
Nationwide Mutual Insurance Company,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

O P I N I O N

Rendered on March 30, 2004

George C. Rogers, for appellants.

Grey W. Jones Co., LLC, Grey W. Jones and Cheryl L. Ryan,
for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiffs-appellants, Kimberly Russ, personally (individually, "plaintiff"), and as parent and guardian of her two sons (collectively, "plaintiffs"), appeal from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of defendant-appellee, Nationwide Mutual Insurance Company ("Nationwide"), and overruling plaintiffs' summary judgment motion. Because plaintiffs have no right to recover under the policy, we affirm.

{¶2} During the early morning hours of October 27, 1995, Donald Williams, Jr. was riding his bicycle to a convenience store near 2262 East 55th Street in Cleveland, Ohio, when a speeding car, driven by Mary Pace, struck and killed him. At rates of speed more than 70 m.p.h., Pace lost control of her car, struck a utility pole, hit Williams, and then struck a second utility pole. Pace's car was split in half, and both Pace and Williams died at the scene. After the accident, no estate was opened for plaintiffs' decedent. Similarly, the record contains no evidence that an estate was opened for Pace, or that Pace had any property or assets; consequently, no tort lawsuits were filed against Pace's estate.

{¶3} On the date of the accident, plaintiff's mother, Helen Smith, temporarily was living with plaintiff, plaintiff's decedent, and their two children, Darius and Donny. During her residence at the Williams' home, Smith maintained an active Century II Automobile Insurance Policy (policy) with Nationwide that provided for uninsured motorists coverage. Recovery under the policy is limited to those damages the insured has a "legal right to recover * * * from the owner or driver of an **uninsured motor vehicle** * * *."

{¶4} On February 27, 2001, five years and four months after the accident, plaintiffs presented to Nationwide their uninsured motorist claims as Donald Williams, Jr.'s wrongful death beneficiaries; nothing in the record explains the lapse of time between the accident and the date of plaintiffs' claims. On October 2, 2001, Nationwide denied plaintiffs' claims, concluding its rights had been prejudiced from plaintiffs' "late report" of the claims. In response, plaintiffs filed a complaint on October 31, 2001, alleging Nationwide breached its contract in refusing uninsured benefits to plaintiffs.

{¶5} Nationwide filed a motion for summary judgment on August 6, 2002, contending no uninsured coverage was available to plaintiffs for several reasons. Initially, Nationwide asserted that even though plaintiffs claimed Pace was uninsured at the time of the accident, Nationwide's investigation failed to reveal whether plaintiffs' contention was accurate. Next, Nationwide contended plaintiffs' claims were barred not only by plaintiffs' failure to give Nationwide prompt notice of the accident, but by the resulting un rebutted presumption of prejudice. Finally, Nationwide contended its subrogation rights had been destroyed because plaintiffs failed to file a wrongful death suit against the tortfeasor within the two-year limitations period under R.C. 2125.02(D). Further asserting the two-year limitations period was not tolled for minors, Nationwide contended its subrogation rights on the claims of the decedent's children similarly were destroyed.

{¶6} Plaintiffs responded with a memorandum contra Nationwide's summary judgment motion and a cross-motion for summary judgment. Plaintiffs contended that even if their notice was untimely as Nationwide stated, Nationwide was not prejudiced because the tortfeasor had no assets and was not collectible. For the same reasons, plaintiffs asserted that any subrogation rights Nationwide may have had were worthless. In any event, plaintiffs contended Nationwide's subrogation rights had not been destroyed concerning the claims of the decedent's minor children, because the tolling statute, R.C. 2305.16, applies to minors' wrongful death claims under R.C. 2125.02. More importantly, however, plaintiffs asserted they, as wrongful death beneficiaries, were entitled to uninsured motorist coverage under the policy because the cause of action arose in contract, not tort, and thus was governed by the 15-year statute of limitations found in

R.C. 2305.06, not the two-year limitations period found in R.C. 2125.02. Finally, plaintiffs asserted Nationwide failed to act in good faith when it denied their claims.

{¶7} The trial court sustained Nationwide's summary judgment motion and overruled plaintiffs' cross-motion for summary judgment. Characterizing plaintiffs' cause of action as a "wrongful death claim," the trial court stated plaintiffs' suit was time-barred because it was not filed within two years of the decedent's death. The trial court further held that the minority of the decedent's children did not toll the statute of limitations for their wrongful death claims. As the trial court explained, "[t]he cause of action for wrongful death belongs to the personal representative of the estate, not to the beneficiaries, and R.C. 2125.02(A)(1) specifically brings any wrongful death claim that the decedent's children might have within its umbrella." (Decision, 3.) Lastly, the trial court did not apply the Supreme Court's decision in *Ferrando v. Auto-Owners Mut. Ins. Co.* (2002), 98 Ohio St.3d 186. Since the court determined plaintiffs' claims were barred as a matter of law, it concluded *Ferrando*, which set "forth the standard that a trial court is to apply when an insurer denies uninsured motorist coverage because the policy's notice and subrogation provisions have not been satisfied, is superfluous." (Decision, 5.)

{¶8} Plaintiffs appeal, and having withdrawn one of their original assignments of error, assign the following renumbered errors:

1. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN HOLDING THAT THE MERE PASSING OF THE UNDERLYING TORT ACTION FOR WRONGFUL DEATH DEPRIVED PLAINTIFFS OF THEIR CONTRACTUAL RIGHT TO UNINSURED MOTORISTS COVERAGE, AND IN FAILING TO FOLLOW HATCHER v. GRANGE MUT. CAS. CO. (DEC. 14, 1993), FRANKLIN APP. NO. 93 AP 882, AND

BUCKLEY v. WINTERING, FRANKLIN AP. NO. 02 AP-511, 2003-OHIO-824.

2. THE TRIAL COURT ERRED IN HOLDING THAT MINORS COULD BE DEPRIVED, DURING THEIR MINORITY, OF THEIR REMEDY FOR THE DAMAGES THEY SUFFERED A[S] WRONGFUL DEATH BENEFICIARIES WHEN FOR WHATEVER REASON NO ONE STEPPED FORWARD TO PRESENT THEIR ACTION ON THEIR BEHALF AS THEIR REPRESENTATIVE.

[3]. THE TRIAL COURT ERRED IN OVERRULING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

{¶9} Because plaintiffs' first and second assignments of error are interrelated, we address them jointly. Plaintiffs' first assignment of error asserts the trial court wrongly granted summary judgment to Nationwide because, even if the limitations period for filing a tort wrongful death action against the tortfeasor has expired, a 15-year statute of limitations governs their contractual right to recover uninsured motorist benefits under the policy. Plaintiffs' second assignment of error contends that the two-year statute of limitations period for wrongful death is tolled for minors, so that the wrongful death claims of the children of the decedent are preserved.

{¶10} An appellate court's review of summary judgment is conducted under a de novo standard. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41. Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C);

Davis v. Loopco Industries, Inc. (1993), 66 Ohio St.3d 64, 65-66; *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183.

{¶11} Even if an automobile accident or other tortuous activity be the precipitating factor in a cause of action, recovery under an uninsured motorist policy arises in contract, not in tort. *Motorists Mut. Ins. Co. v. Tomanski* (1971), 27 Ohio St.2d 222, 223 (concluding that "[t]he right to recover under an uninsured motorist insurance policy is on the contract, not in tort"); *Miller v. Progressive Cas. Ins. Co.* (1994), 69 Ohio St.3d 619, 624 (stating "that an action by an insured against an insurance carrier for payment of uninsured or underinsured motorist benefits is a cause of action sounding in contract"); *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 632 (acknowledging that the general limitation in R.C. 2305.06 applies to an insured's action against the insurer, in the absence of a valid contractual provision limiting the time for bringing such an action); *Hooker v. Nationwide Mut. Ins. Co.* (June 19, 1997), Cuyahoga App. No. 71472 (noting that "[e]ven though the 'triggering event' to a cause of action may be an automobile accident, when the cause of action is that of an insured against his own insurer, the matter sounds in contract, not in tort"). Thus, even though the limitation period for plaintiffs' wrongful death action is two years as set forth in R.C. 2125.02, plaintiffs' action on the policy is a contract action whose timeliness is dictated, in the absence of a valid contractual provision to the contrary, by the 15-year statute of limitations of R.C. 2305.06.

{¶12} Although R.C. 2305.06 applies to an insured's action against its insurer on a policy, a policy provision may validly limit the time for bringing an action on such contract to a shorter period than the general statute of limitations provides, as long as the shorter period is reasonable. *Kraly, supra*, quoting *United Commercial Travelers v. Wolfe* (1947),

331 U.S. 586, 608, 67 S.Ct. 1355; *Miller*, supra. However, "[t]o reduce the time for suit provided by the statute of limitations, an insurance policy must be written in terms that are clear and unambiguous to the policyholder." *Lane v. Grange Mut. Co.* (1989), 45 Ohio St.3d 63, 64; *Hatcher v. Grange Mut. Cas. Co.* (Dec. 14, 1993), Franklin App. No. 93AP-882.

{¶13} In *Miller*, the Ohio Supreme Court held that a provision attempting to limit to one year the time for making a claim for uninsured or underinsured motorist benefits was unreasonable, contrary to the purposes of R.C. 3937.18, and void as against public policy. Id. at 623-624. *Miller*, however, stated that a two-year time-limitation provision would be "reasonable and appropriate." Id. at 624; accord *McDonald v. State Farm Mut. Auto. Ins. Co.* (Aug. 10, 2000), Cuyahoga App. No. 76808. In *Lane*, supra, the Supreme Court ruled that a provision mandating the claim be brought "within the time period allowed by the applicable statute of limitations for bodily injury or death actions in the state where the accident occurred" was not clear and unambiguous because it "[did] not tell its policyholders the amount of time available for commencement of an action. One lacking knowledge of the Ohio Revised Code would not know that, generally, an action for bodily injury [or wrongful death] must be commenced within two years." Id. at 64.

{¶14} The time-limitation provision in the policy here stated that "[a]rbitration must be agreed upon, or the proper papers for any other legal action against us must be filed, within two years or the time limit allowed by law * * *. The laws of the state in which the accident occurred will determine these time limits." Different aspects of the provision at issue are similar to the clauses in *Miller* and *Lane*. Although the policy sets forth a plain two-year time limit, it also prescribes a time limit measured by the applicable statutes of

limitations. Because the clause "does not tell its policyholders the amount of time available for commencement of an action," it does not satisfy the "clear and unambiguous" test set forth in *Lane*. *Id.* at 64. As a result, the time-limitation provision in the parties' insurance contract does not reduce from 15 years to two years the period in which plaintiffs were required to bring their uninsured claim against Nationwide.

{¶15} Even though the explicit time limit provisions in the policy do not decrease to two years the time within which plaintiffs must bring an action for uninsured benefits under the contract, other language in the policy effectively does so by conditioning payment of benefits under the policy on plaintiffs' having a "legal right to recover" against the tortfeasor. While the policy declarations page and Nationwide's computer-generated notes differ slightly in setting forth the issuance date, both dates are subsequent to October 20, 1994, the date the S.B. No. 20 version of R.C. 3937.18 became effective. See *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281 (concluding that the statutory law in effect on the date each new policy is issued is the law to be applied). As a result, the S.B. No. 20 version of R.C. 3937.18 applies in defining "legally entitled to recover": "For purposes of division (A)(1) of this section, *a person is legally entitled to recover damages if he is able to prove the elements of his claim that are necessary to recover damages from the owner or operator of the uninsured motor vehicle.*" (Emphasis added.)

{¶16} R.C. 2125.02 requires that a valid claim for wrongful death "shall be commenced within two years after the decedent's death." R.C. 2125.02(D). The cause of action for wrongful death accrues on the date of the decedent's death. *Burris v. Romaker* (1991), 71 Ohio App.3d 772, 778, motion to certify overruled, 62 Ohio St.3d 1414

(refusing to adopt a discovery rule for wrongful death actions). While plaintiffs may contend to the contrary, courts have determined the time limitation stated in R.C. 2125.02(D) "expresses an integral element of the right of the action itself," not merely a defense to the claim. *Sabol v. Pekoc, Jr.* (1947), 148 Ohio St. 545, 552; *Brookbank v. Gray* (1996), 74 Ohio St.3d 279, 291; *Mitchell v. Schering Corp.* (Sept. 27, 2001), Cuyahoga App. No. 78031; *Fish v. Ohio Cas. Ins. Co.*, Stark App. No. 2003CA00030, 2003-Ohio-4380. As *Sabol* explains, "if an action is not brought within two years from the death of the decedent it must fail, not because a statute of limitations provides the time within which it must be brought[,] but because the time limit is of the very essence of the action. If this is so, the time limitation is not merely a matter of defense, which must be raised by demurrer or answer and which is waived if not so raised, but it is a condition precedent to bringing the action, and the question can be raised at any time during the progress of the action." *Id.* at 552. Cf. *Buckley v. Wintering*, Franklin App. No. 02AP-511, 2003-Ohio-824, judgment vacated, 101 Ohio St.3d 96, 2004-Ohio-199 (concluding the statute of limitations in a personal injury case was not a consideration in determining whether plaintiff was legally entitled to recover).

{¶17} The date of death for plaintiffs' decedent was October 27, 1995. Accordingly, to be entitled to recover against the tortfeasor, plaintiffs would have to file an action by October 27, 1997. They did not. Instead, plaintiffs filed a complaint against Nationwide on October 31, 2001, over six years after the accident. Because plaintiffs have not satisfied the time element of a wrongful death cause of action, they are not entitled to recover against the uninsured tortfeasor. Plaintiffs' first assignment of error is overruled.

{¶18} Plaintiffs' second assignment of error asserts that because Darius and Donny are minors, the limitations period for their wrongful death claim is tolled, thus preserving their "legal right to recover." Contrary to plaintiffs' contentions, the Ohio Supreme Court in *Brookbank* held that the two-year time limitation on bringing a wrongful death action imposed by R.C. 2125.02(D) "is not tolled by a beneficiar[y's] minority." *Id.* at 291. In support, the court cited *Taylor, Admx. v. Black & Decker Mfg. Co.* (1984), 21 Ohio App.3d 186, 189, which explains that the absence of tolling is "to prevent * * * an indefinite period of liability for a defendant * * * [as well as to provide] a restriction [qualifying] the right of action itself * * * not merely a time limitation upon the remedy." Accordingly, plaintiffs' second assignment of error is overruled.

{¶19} We recognize that the Ohio Supreme Court recently granted a discretionary appeal and certified a conflict from the Fifth District in *Ponser, Admr. v. St. Paul Fire & Marine Ins. Co.*, Licking App. No. 2002CA00072, 2003-Ohio-4377, conflict certified, 101 Ohio St.3d 214, 2004-Ohio-714. The question certified states: "If an insured does not file a wrongful death suit against the tortfeasor with[in] the two year statute of limitations set forth in R.C. [2125.02(D)], is he or she 'legally entitled to recover damages' against the tortfeasor under R.C. 3937.18 and, therefore, able to maintain an un[der]insured or uninsured motorists claim[?]" Because the case before us falls squarely within the question certified, we will certify this decision to the conflict at plaintiffs' request.

{¶20} For the foregoing reasons, we overrule plaintiffs' first and second assignments of error, rendering moot their third assignment of error and their motion, filed on February 2, 2004, objecting to an issue raised in oral argument. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BOWMAN and PETREE, JJ., concur.
