[Cite as *Regular v. Paradise*, 2008-Ohio-7141.]

STATE OF OHIO, MAHONINGCOUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

NORMA REGULA, ET AL.,	)	
	)	
PLAINTIFFS-APPELLANTS,	)	
	)	
VS.	)	CASE NO. 07-MA-40
	)	
JOHN PARADISE, ET AL.,	)	OPINION
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. 05CV2446

JUDGMENT: Affirmed

APPEARANCES:

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: March 18, 2008

[Cite as *Regular v. Paradise*, 2008-Ohio-7141.]
DONOFRIO, J.

{¶1} Plaintiffs-appellants, Norma and Robert Regula, appeal from a Mahoning County Common Pleas Court decision granting summary judgment in favor of defendant-appellee, Grange Mutual Casualty Insurance Company.

{¶2} On July 16, 2003, Norma was driving in Campbell, Ohio when, according to her complaint, defendant John Paradise failed to yield and the car he was driving collided with Norma's vehicle causing injury to her and her vehicle. Appellants filed a lawsuit against Paradise on July 8, 2005, asserting claims for negligence and loss of consortium.

{¶3} At the time of the accident, appellants were covered by an uninsured/underinsured motorist (UM/UIM) policy with appellee with limits of $100,000 per person/$300,000 per accident. On September 18, 2006, appellants filed an amended complaint adding appellee as a defendant and asserting a UIM claim. In their motion for leave to file the amended complaint, appellants asserted they had just learned on August 31, 2006, that Paradise's insurance limits were only $15,000 per person/$30,000 per accident.

{¶4} Appellee filed a motion for summary judgment. It stated that appellants' policy expressly required that any UM/UIM claims had to be made within three years of the date of the accident and argued that appellants did not meet this deadline in filing their claim. The trial court agreed with appellee and entered summary judgment in its favor on January 5, 2007.

{¶5} Appellants then requested that the trial court file an amended judgment entry including the words "no just reason for delay" so that they could file an appeal even though their claims against Paradise were still pending. They stated that Paradise consented and agreed to this request. The trial court granted this request and entered another judgment entry granting summary judgment to appellee and this time finding that "there is no just cause for delay."[1]

{¶6} Appellants filed a timely notice of appeal on February 28, 2007.

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[1] Civ.R. 54(B) provides that "when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay."

{¶7} Appellants raise a single assignment of error, which states:

{¶8} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THAT ENFORCEMENT OF THE THREE YEAR FROM DATE OF ACCIDENT PROVISION BARS APPELLANT'S CLAIM FOR UM/UIM COVERAGE BEFORE IT ACCRUED."

{¶9} In reviewing an award of summary judgment, appellate courts must apply a de novo standard of review. *Cole v. American Indus. & Resources Corp.* (1998), 128 Ohio App.3d 546, 552, 715 N .E .2d 1179. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377. A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598, 603, 662 N.E.2d 1088, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202.

{¶10} Appellants break their assignment of error into two issues for review, the first of which asks:

{¶11} "When an insurance policy contains a provision requiring exhaustion of the tortfeasor's policy limits as a condition precedent to payment of a UM/UIM claim, can a contractual limitation period be enforced when such period expires before exhaustion of the tortfeasor's policy limits [?]"

{¶12} Appellants' policy contains a contractual statute of limitations, which provides:

{¶13} "So long as the **insured** has not prejudiced **our** right of subrogation, any suit against **us** will be barred unless commenced within 3 years (**THREE YEARS**) after that date of the accident causing the **bodily injury**, sickness, disease, or death, or within one year after the liability insurer for the owner or operator of the

motor vehicle liable to the **insured** has become the subject of insolvency proceedings in any state, whichever is later." (Policy, C-4) (Emphasis sic.).

{¶14} Appellants point to other provisions in the policy to support their argument that they were not required to file their claim against appellee until they became aware that Paradise was underinsured. They note that the policy provides that the insured must exhaust the tortfeasor's liability limits before appellee will pay UIM benefits. (Policy, C-1). Additionally, the policy provides that UIM coverage only applies if the liability "coverage available for bodily injury liability is less than the limit of liability for this coverage." (Policy, C-2).

{¶15} Appellants argue that their cause of action did not accrue against appellee until they became aware that Paradise was underinsured and they exhausted his policy limits. They argue that appellee's requirement that a suit must be commenced within three years after an accident is unreasonable because it is inconsistent with the policy language that requires exhaustion of the tortfeasor's policy limits, which in this case did not occur within three years of the accident.

{¶16} Appellants rely on *Bradford v. Allstate Ins. Co.*, 5th Dist. No. 04CA9, 2004-Ohio-5997, and *Phillips v. State Auto. Mut. Ins. Co.* (1998), 127 Ohio App.3d 175, 711 N.E.2d 1080.

{¶17} In *Bradford*, Augusta Eads was killed in an automobile accident. Her insurer paid the policy limits. Eads' grandson, Frederick Bradford, then filed a UIM claim with his insurer, Allstate, more than two years after the accident. Allstate refused to pay, citing a two-year contractual statute of limitations in the policy. Bradford filed a complaint for a declaration of coverage and the trial court granted him summary judgment. Allstate appealed, arguing that the trial court erred in failing to find that Bradford was required to bring his legal action within two years from the date of the accident.

{¶18} The Fifth District agreed with the trial court. It concluded that the provision requiring that Bradford bring the action within two years was in conflict with an "other insurance" provision making the Allstate coverage excess, and UM/UIM limits language requiring complete exhaustion "by payment of judgments or

settlements" of all limits of liability for all liability protection in effect and applicable at the time of the accident. Id. at ¶29. Therefore, the court concluded that the policy was ambiguous, which precluded enforcement of the two-year limitations period. Id. Accordingly, the court determined that Bradford's claim for UIM coverage against Allstate did not arise until the original settlement was reached, thus starting the running of the two-year limitations period. Id. at ¶31.

{¶19} In *Phillips*, 127 Ohio App.3d 175, Gloria Phillips was injured in an automobile accident. She sued the tortfeasor and settled with him for $5,000 less than his policy limits. One month after the settlement, and three years and six months after the accident, Phillips filed suit against her UIM insurer, State Automobile. Both parties moved for summary judgment. The trial court granted judgment in Phillips' favor finding that the two-year limitations period set forth in the State Automobile policy was ambiguous and, therefore, unenforceable. It read the policy's limitations period in concert with another policy provision providing: "[W]e will pay under this coverage only after the limits of liability under any applicable bodily injury, liability bonds or policies have been exhausted by payment of judgments or settlements." State Automobile appealed arguing that its contractual statute of limitations requiring the insured to bring her claim within two years of the accident was unambiguous and enforceable, which barred her claim as untimely.

{¶20} This court held that the exhaustion requirement was a precondition that activated UIM coverage. Id. at 179. We found that when construing the two provisions at issue against State Automobile and in favor of Phillips, the exhaustion clause made ambiguous an otherwise clear and unambiguous limitations clause. Id. at 180. We noted that Phillips timely sued the tortfeasor but was unable to conclude that suit and exhaust the tortfeasor's liability coverage through judgment or settlement within the two-year limitations period. Id. Therefore, we concluded that the reasonable interpretation of the policy language was that Phillips had two years from judgment or settlement to seek UIM coverage through her State Automobile policy. Id.

{¶21} In response, appellee argues that appellants' arguments are based on an outdated version of R.C. 3937.18 and outdated case law.

{¶22} R.C. 3937.18, which governs UM/UIM claims, was amended on October 31, 2001. R.C. 3937.18(H) now reads:

{¶23} "Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions requiring that, so long as the insured has not prejudiced the insurer's subrogation rights, each claim or suit for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages be made or brought *within three years after the date of the accident* causing the bodily injury, sickness, disease, or death, or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the insured has become the subject of insolvency proceedings in any state, whichever is later." (Emphasis added.)

{¶24} Prior to R.C. 3937.18's amendment in 2001, the statute was silent as to what limits insurers could place on the time to file a UM/UIM suit. Under the current statute, appellee argues, its three-year limitations period is expressly permitted.

{¶25} It is clear that the three-year limitations period in the policy is permitted under R.C. 3937.18(H). Prior to R.C. 3937.18's amendment, courts were faced with determining whether various one-year and two-year contractual limitations periods in insurance contracts were reasonable. See *Miller v. Progressive Cas. Ins. Co.* (1994), 69 Ohio St.3d 619, 635 N.E.2d 317; *Miller v. American Family Ins. Co.*, 6th Dist. No. OT-02-011, 2002-Ohio-7309. According to the uncodified law accompanying R.C. 3937.18, one of the purposes for amending the statute was to provide statutory authority for provisions limiting the time period within which an insured may make a claim for UM/UIM coverage to three years after the date of the accident causing the injury. Thus, the Legislature was trying to eliminate the uncertainty surrounding what limitations periods were reasonable in insurance policies.

{¶26} But that is not the key issue here. We must determine whether the three-year limitations period in this particular policy is ambiguous in light of the rest of the policy language.

{¶27} The Fifth District in *Bradford* and this court in *Phillips* did not conclude that the two-year limitations periods at issue were unreasonable. Instead, both courts determined that in light of other policy provisions providing that the insured must exhaust all other limits of liability insurance before the insurer would pay UM/UIM benefits, the policies were ambiguous as to when the insured must file suit against the insurer.

{¶28} But since the *Bradford* and *Phillips* decisions, the Ohio Supreme Court decided *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 835 N.E.2d 692, 2005-Ohio-5410, and this court subsequently decided *Whanger v. Grange Mut. Cas. Co.*, 7th Dist. No. 06-JE18, 2007-Ohio-3187.

{¶29} In *Sarmiento*, the plaintiffs were driving/riding in a pickup truck on November 5, 1998, in New Mexico when their vehicle was struck by another vehicle. The driver of the other vehicle was uninsured.

{¶30} At the time of the accident, Maria Sarmiento, the owner of the pickup truck was insured under a policy issued by Grange that included UM/UIM coverage. On November 5, 2001, the plaintiffs filed a complaint in Ohio, seeking UM coverage under the Grange policy. The trial court granted summary judgment in favor of Grange. It concluded that Grange was not obligated to provide UM coverage, because the plaintiffs had not filed suit within two years from the date of the accident as required by the policy.

{¶31} The plaintiffs appealed arguing that Grange's two-year limitation period was unreasonable and unenforceable because it was shorter than New Mexico's three-year statute of limitations for personal injuries, which applied to the underlying tort claim. The Eighth District Court of Appeals, applying Ohio law, determined that Grange's two-year limitation period was reasonable and enforceable and affirmed the trial court's judgment on that issue.

{¶32} The plaintiffs appealed to the Ohio Supreme Court, which framed the issue as: "[W]hether a two-year contractual limitation period for filing uninsured- and underinsured-motorist * * * claims is reasonable and enforceable when the underlying tort claim is governed by the laws of another state, whose statute of limitations for the claim is longer than two years." Id. at ¶1.

{¶33} The Court stated there was no dispute that the policy clearly and unambiguously limited to two years the time in which an insured could sue Grange for UM/UIM benefits. Id. at ¶ 12. However, it went on to address the plaintiffs' contention that the policy's two-year limitation should not bar their lawsuit for UM coverage that was filed within three years of the accident, because their claims against the tortfeasor were subject to a three-year statute of limitations under New Mexico law. The Court found that *Lane v. Grange Mut. Cos.* (1989), 45 Ohio St.3d 63, 543 N.E.2d 488, read in conjunction with *Miller*, 69 Ohio St.3d 619, was dispositive.

{¶34} In *Lane*, the Court construed language in a Grange policy that prohibited the filing of UM/UIM claims "'unless * * * commenced within the time period allowed by the applicable statute of limitations for bodily injury or death actions in the state where the accident occurred.'" *Sarmiento*, 106 Ohio St.3d at ¶15, citing Id. at 63. The Court concluded that the provision was unclear and ambiguous because it failed to tell policyholders the amount of time available for commencing an action and when the limitation period began to run. *Sarmiento*, 106 Ohio St.3d at ¶15, citing Id. at 64.

{¶35} In *Miller*, the Court held that a contractual one-year limitation period for filing UM/UIM claims, when Ohio's statute of limitations for bodily injury in R.C. 2305.10 was two years, was unreasonable and void as against the public policy behind former R.C. 3937.18. *Sarmiento*, 106 Ohio St.3d at ¶16, citing *Miller*, 69 Ohio St.3d at 623-24. But the Court noted that a two-year limitation period would be a reasonable and appropriate time period in which to require an insured to commence an action under the UM/UIM provisions of an insurance policy. *Sarmiento*, 106 Ohio St.3d at ¶16, citing *Miller*, 69 Ohio St.3d at 624-625.

{¶36} Based on these cases, the *Sarmiento* Court held:

{¶37} "Therefore, pursuant to *Miller v. Progressive*, the two-year limitation period in the Grange policy is reasonable and enforceable. A contractual limitation period of two years does not violate the underlying purpose of UM/UIM coverage, because the limitation period does not eliminate or reduce the UM/UIM coverage required by former R.C. 3937.18. * * * The insured is not foreclosed from commencing an action for UM/UIM coverage so long as the insured satisfies the policy's conditions precedent to coverage, including commencing an action against the insured [sic] within the contractual limitation period.

{¶38} "Despite the three-year statute of limitations for torts in New Mexico, nothing prevented the Sarmientos from commencing an action against Grange for UM benefits within the two-year contractual limitation period and then assigning their rights against the tortfeasor to Grange. Therefore, we hold that a two-year contractual limitation period for filing UM/UIM claims is reasonable and enforceable, regardless of whether the foreign state in which the accident occurred provides a longer statute of limitations for the underlying tort claim." Id. at ¶20-21. (Internal citation omitted.)

{¶39} In *Whanger*, 7th Dist. No. 06-JE18, the Whangers argued, in part, that language requiring them to file their action against Grange within one year of when they were aware, or should have been aware of their UIM claim, was ambiguous and did not advise them of how long they had to file a claim. We pointed out that:

{¶40} "The *Sarmiento* Court examined the identical contractual statute of limitations as the one at issue here. However, the issue in *Sarmiento* focused on the 'within two years of the accident' language, and not the 'within one year after you were aware or should have been aware' language. The Court quoted the entire statute of limitations clause. It then stated that there was no dispute that the policy clearly and unambiguously limited the time in which an insured may sue Grange for UM/UIM benefits to two years from the time the accident occurred. *Sarmiento*, 106 Ohio St.3d at ¶12. The Court did not separately comment on the 'within one year after you were aware or should have been aware' language." *Whanger*, at ¶45.

{¶41} We found the "within one year of when you knew or should have known" language to be unambiguous. We reasoned that to find otherwise would be at odds with *Sarmiento*, where the Court stated, "[d]espite the three-year statute of limitations for torts in New Mexico, nothing prevented the Sarmientos from commencing an action against Grange for UM benefits within the two-year contractual limitation period and then assigning their rights against the tortfeasor to Grange." *Whanger*, at ¶51, quoting *Sarmiento*, 106 Ohio St.3d at ¶ 21.

{¶42} In both *Sarmiento* and *Whanger*, the policy language stated that it would only pay UM/UIM coverage if:

{¶43} "1. The limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment, with our consent, of judgments or settlements; or

{¶44} "2. A tentative settlement has been made."

{¶45} The UIM clause at issue here is nearly identical to this provision.

{¶46} In *Sarmiento* and *Whanger*, the policies' contractual statute of limitations stated:

{¶47} "Any arbitration or suit against us will be barred unless commenced within **2 years (TWO YEARS)** from the date of the accident or **1 year (ONE YEAR)** after the date that you were aware, or should have been aware, of a claim for which coverage would apply whichever is later." (Emphasis sic.)

{¶48} In the case at bar however, the policy sets out a three-year statute of limitations, with no exceptions. It does not contain a provision allowing for the filing of a claim one year after the claimant knew or should have known of the claim as in *Sarmiento* and *Whanger*.

{¶49} Neither *Sarmiento* nor *Whanger* addressed the specific language at issue here. However, based on these two cases, we can conclude that the three-year statute of limitations at issue here is likewise unambiguous. As was the case in *Whanger* and *Sarmiento*, nothing prevented the Regulas from commencing an action against Grange for UIM benefits within the three-year contractual limitation period and then assigning their rights against the tortfeasor to Grange. The policy at issue

simply states that the insured must exhaust the tortfeasor's liability limits before appellee *will pay*. It does not state that the insured must exhaust the tortfeasor's limits before the insured can file a lawsuit. Furthermore, the policies in *Sarmiento* and *Whanger* both contained exhaustion provisions nearly identical to the one at issue here that appellants claim render the limitations clause ambiguous. And while neither the *Sarmiento* Court nor this court explicitly addressed whether the exhaustion provisions rendered the limitations provisions ambiguous, both found the limitations provisions unambiguous and enforceable.

{¶50} For these reasons, we must reach the same conclusion in this case and find that the limitations provision at issue is unambiguous and enforceable.

{¶51} Appellants' second issue for review asks:

{¶52} "Can a contractual limitation period be enforced when enforcement extinguishes the UM/UIM claim before the injured party is aware the UM/UIM claim exists?"

{¶53} Here appellants assert that they were initially advised that Paradise's liability policy limits were identical to their policy limits ($100,000/$300,000). If this had been true, they would not have had a UIM claim against appellee. They claim that they filed suit against appellee as soon as they learned that Paradise's policy limits were only $15,000/$30,000. Appellants argue that the limitations period did not begin to run until they learned of Paradise's lower policy limits.

{¶54} As stated above, the three-year limitations period is unambiguous and enforceable. And nothing precluded appellants from filing a claim against appellee within the allotted time period. Had they later learned that they would not need UIM benefits, they could have simply dismissed appellee from the lawsuit. Furthermore, as a matter of practice, appellants could have requested and examined a copy of Paradise's policy early on in discovery. Had they done so, they would have learned of Paradise's lower policy limits and realized they had a UIM claim against appellee. Appellants filed their suit against Paradise in July 2005. They had an entire year to conduct discovery and realize Paradise's policy limits before the contractual statute of limitations expired.

{¶55} Based on our analysis, appellants' sole assignment of error is without merit.

{¶56} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, J., concurs.

Waite, J., concurs.