**[Cite as *Chalker v. Steiner*, 2009-Ohio-6533.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

| | | |
|---|---|---|
| RONNIE CHALKER | ) | CASE NO. 08 MA 137 |
| | ) | |
| PLAINTIFF-APPELLANT | ) | |
| | ) | |
| VS. | ) | OPINION |
| | ) | |
| DARLENE STEINER, et al. | ) | |
| | ) | |
| DEFENDANTS-APPELLEES | ) | |

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 05 CV 1668

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

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For Defendants-Appellees:

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JUDGES:

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

Dated: December 8, 2009

**[Cite as *Chalker v. Steiner*, 2009-Ohio-6533.]**
WAITE, J.

**{¶1}** Appellant, Ronnie Chalker, appeals the entry of summary judgment against him and in favor of Appellee, Grange Mutual Casualty Insurance Company. In this breach of contract action, Appellant seeks underinsured motorist ("UIM") benefits under an automobile insurance policy issued by Appellee. According to the judgment entry, the trial court entered summary judgment in favor of Appellee because Appellant failed to file an action for his UIM benefits within the three-year limitations period set forth in the policy. For the following reasons, the judgment of the trial court is affirmed.

## Facts

**{¶2}** On May 23, 2003, Appellant was injured in a motor vehicle collision caused solely by the negligence of Darlene Steiner. Appellant was operating a motor vehicle owned by his employer and was acting within the scope of his employment when he was injured. The vehicle was insured through an automobile policy issued by Appellee, bearing limits of $100,000.00/$300,000.00 of UIM coverage.

**{¶3}** Appellant filed a lawsuit alleging negligence against Steiner on May 9, 2005, and the Bureau of Workers Compensation ("BWC") was joined as a party to reflect its subrogated interest. Although Steiner initially denied liability for the motor vehicle accident, a settlement offer of Steiner's policy limit of $25,000.00 was received by Appellant on October 4, 2006. The settlement offer was tendered approximately four and a half months after the three-year limitations period in the insurance policy had expired.

**{¶4}** On or about October 9, 2006, Appellant forwarded the settlement offer to Appellee and requested permission to settle the claim against Steiner or, in the alternative, for advancement of the funds. In a letter dated October 25, 2006, Appellee refused to authorize the settlement or to advance the settlement funds. Instead, Appellee requested additional documentation regarding the settlement offer as well as evidence that Appellant had filed an action for UIM benefits within the limitations period specified in the insurance contract.

**{¶5}** Appellant amended his complaint on December 29, 2006 to include a subrogation claim for Appellee and a claim against Appellee for UIM benefits. On February 12, 2007, Appellee informed Appellant's counsel that no UIM coverage would be provided due to Appellant's failure to file an action within the limitations period set forth in the insurance policy. As a consequence, Appellee stated through a representative that it was not in a position to grant or deny permission to settle the action against Steiner, but that it would not use the settlement with Steiner as a defense in the pending action.

**{¶6}** On February 20, 2007, Appellee filed its motion for summary judgment premised on Appellant's breach of the limitations clause. On July 11, 2007, Appellant filed his brief in opposition. Appellee filed a reply brief on June 28, 2007. Appellant filed a response to the reply brief on June 28, 2007.

**{¶7}** After the issues and intervening caselaw had been fully briefed, the magistrate issued his decision to grant summary judgment in favor of Appellee in this case on April 4, 2007. Appellant filed his objections to the magistrate's decision on

April 18, 2008. The trial court entered summary judgment in favor of Appellee on May 14, 2008. This timely appeal followed.

**{¶8}** Some of the additional briefing in this matter was undoubtedly due to recent decisions in this district. On June 21, 2007, we issued our decision in *Whanger v. Grange Mutual Casualty Company*, 7th Dist. No. 06-JE-18, 2007-Ohio-3187. Appellee filed a brief with supplemental authority on August 20, 2007. Then, on March 18, 2008, we issued our decision in *Regula v. Paradise*, 7th Dist. No. 07-MA-40, 2008-Ohio-7141. Appellant filed a second brief with supplemental authority on April 1, 2008.

**{¶9}** *Whanger* and *Regula* constitute a shift of view as to the enforceability of limitations provisions for uninsured/underinsured motorist ("UM/UIM") coverage in insurance contracts in this district. These decisions were not, however, unforeseeable. They were based on changes in Ohio Supreme Court cases and on caselaw from other districts seeking to follow Supreme Court mandates. A review of the caselaw on this issue is instructive.

**{¶10}** In 1998, we excused an insured's failure to file an action for UIM benefits within the stated policy limitations period in *Phillips v. State Auto. Mut. Ins. Co.* (1998), 127 Ohio App.3d 175, 711 N.E.2d 1080. This Court held that an otherwise unambiguous limitations provision in an insurance policy is ambiguous and unenforceable when read in conjunction with an exhaustion provision that authorizes an insurer to withhold payment of UIM benefits until the insured exhausts by payment of judgments or settlement of any claim against the tortfeasor. Id. at 180.

**{¶11}** In *Phillips*, the insured timely sued the tortfeasor but was unable to conclude the suit and exhaust the tortfeasor's liability coverage through judgment or settlement within the two-year limitations period found in the insurance contract. We held that, "[t]he reasonable interpretation of the policy language is that [the insured] has two years from judgment or settlement to seek underinsured motorist coverage through [her insurer's] policy." Id.

**{¶12}** *Phillips* was decided following a series of cases in Ohio that sought to determine a reasonable time limitation to place on actions for UM/UIM coverage. See e.g., *Lane v. Grange Mut. Cos.* (1989), 45 Ohio St.3d 63, 543 N.E.2d 488; *Miller v. Progressive Cas. Ins. Co.* (1994), 69 Ohio St.3d 619, 624, 635 N.E.2d 317. Then, in 2001, the General Assembly amended the UM/UIM statute in an effort to resolve the uncertainty surrounding the amount of time that constitutes a reasonable period in which to file a claim for UM/UIM benefits.

**{¶13}** R.C. 3937.18(H) reads, in its entirety:

**{¶14}** "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."

**{¶15}** In 2005, the Ohio Supreme Court decided a pre-amendment case, *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 2005-Ohio-5410, 835 N.E.2d 692. In that case, Ohio plaintiffs, who were involved in a car accident in New Mexico and failed to satisfy a two-year limitations period in an insurance policy, argued that the limitations period was unreasonable and unenforceable because it was shorter than New Mexico's three-year statute of limitations for personal injuries.

**{¶16}** The *Sarmiento* Court held that the limitations provision did 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" and, "[t]he 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." Id. at ¶20. The Court reasoned that "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." Id. at ¶21.

**{¶17}** We first interpreted the Ohio Supreme Court's decision in *Sarmiento* in *Whanger*, supra. In apparent reliance on our decision in *Phillips*, supra, the Whangers argued that, despite the fact that they did not file an action for UIM benefits within the limitations period prescribed by their insurance policy, they did file

the action within one year of having exhausted the limits of the tortfeasor. *Whanger* at ¶12. They further argued that the facts in *Sarmiento*, which was decided during the pendency of their case, were distinguishable from their own facts, because they were seeking UIM benefits whereas the Sarmientos filed an action for UM benefits.

**{¶18}** At the outset, we rejected the alleged distinction between UM and UIM coverage because the *Sarmiento* syllabus specifically refers to both types of coverage. Id. at ¶41. Next, we concluded that the limitations provision in the insurance contract was not ambiguous because such an interpretation, "would be at odds with part of the Ohio Supreme Court's decision in *Sarmiento*," that is, that nothing prevented the *Whanger* plaintiffs from filing an action within two years of the accident. Id. at ¶51.

**{¶19}** In *Regula*, the plaintiffs alleged that the limitations period for the UM/UIM coverage in their insurance policy expired before they learned the policy limits of the tortfeasor's insurance coverage. Thus, they argued that their action against their insurance company did not accrue until they became aware that the tortfeasor was underinsured. They claimed that the limitations provision was ambiguous when read in concert with the exhaustion provision. We note that the limitations provision and the exhaustion provision addressed in *Regula* are identical to the provisions in the above-captioned case.

**{¶20}** Based on *Sarmiento* and its progeny, we held that while the exhaustion requirement was a condition precedent to payment of benefits by the insurance company, it was not a condition precedent to filing an action against the insurance

company. *Regula* at ¶49. With respect to the claim that the insureds had initially been mislead into believing that the tortfeasor had sufficient coverage, we encouraged a preemptive action for UM/UIM benefits, which could be dismissed in the event that the torfeasor's policy limits were identical to the UM/UIM policy limits. Id. at ¶54. We also admonished the Regulas for failing to determine the tortfeasor's policy limits through the discovery process within the time allowed by the limitations provision.

**{¶21}** In *Regula*, this Court acknowledged that while neither *Sarmiento* nor *Whanger* addressed the exact claim that the limitations clause read in conjunction with the exhaustion clause created ambiguity in the insurance contract (the issue addressed in *Phillips*) we concluded that first as in those cases, "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." Id. at ¶49.

**{¶22}** Turning to the matter before us, several provisions of the insurance policy are at issue in this case. The limitations provision reads, in its entirety:

**{¶23}** "So long as the i**nsured** has not prejudiced **our** right of subrogation, any suit against **us** will be barred unless commenced within 3 years **(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." (Policy, p. C-4(OH).)

**{¶24}** Appellant contends that the limitations provision is ambiguous and unenforceable when read in conjunction with two other contract provisions. The "Insuring Agreement" provision reads, in pertinent part:

**{¶25}** "The owner's or operator's liability for these damages must arise out of the ownership, maintenance, or use of the **uninsured motor vehicle**. **We** will pay under this coverage only if 1. or 2. below applies:

**{¶26}** "1. The limits of liability under any **bodily injury** liability bonds or policies applicable to the underinsured motor vehicle have been exhausted by payment, with **our** consent, of judgments or settlements; or

**{¶27}** "2. A tentative settlement has been made between an **insured** and the insurer, or the insured operator of a vehicle described in Paragraph C. of the definition of **uninsured motor vehicle** and **we:**

**{¶28}** "a. Have been given prompt written notice of such settlement; and

**{¶29}** "b. Advanced payment to the **insured** in an amount equal to the tentative settlement within 90 days after receipt of notification." ["the exhaustion provision"]. (Policy, p. C-1(OH).)

**{¶30}** The "Legal Action Against Us" provision reads, in pertinent part, "[n]o legal action may be brought against **us** until there has been full compliance with all the terms of this policy." ["legal action provision"]. (Policy, p. F-2(OH).)

**{¶31}** In his first assignment of error, Appellant argues that the doctrine of substantial performance, as it was applied in *Ferrando v. Auto Owners Mut. Ins. Co*., 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, governs this case. In other

words, Appellant claims that his failure to satisfy the limitations provision does not constitute a material breach of the contract, and that Appellee suffered no prejudice as a result of the non-material breach.

**{¶32}** In his second and third assignments of error, Appellant argues that the limitations provision is ambiguous when read in conjunction with the exhaustion provision and the legal action provision, and that it is technically impossible to comply with all three of the provisions.

**{¶33}** Because the limitations provision in this case is unambiguous and enforceable, and the exhaustion provision is a condition precedent to payment rather than the right to file an action for UM/UIM benefits, Appellant's assignments of error are overruled, and the entry of summary judgment in favor of Appellee is affirmed.

Standard of Review

**{¶34}** An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court pursuant to Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 364 N.E.2d 267. When a court

considers a motion for summary judgment the facts must be taken in the light most favorable to the non-moving party. Id.

**{¶35}** "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim*." (Emphasis in original.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264. If the moving party carries its burden, the nonmoving party has the reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. Id. at 293, 662 N.E.2d 264. In other words, in the face of a properly supported motion for summary judgment, the nonmoving party must produce some evidence that suggests that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 386, 701 N.E.2d 1023.

FIRST ASSIGNMENT OF ERROR

**{¶36}** "Summary Judgment was improper because under general principles of contract law, the substantial performance of a party is sufficient to entitle it to recover under a contract, and a non-material breach which causes no damage or prejudice does not preclude such recovery."

**{¶37}** Relying on the rule of law announced in *Ferrando,* supra, Appellant contends that his failure to satisfy the limitations provision in the insurance policy did not constitute a material breach and Appellee suffered no prejudice. Therefore, Appellant claims, summary judgment was inappropriate. In *Ferrando*, the Ohio

Supreme Court held that violations of notice or subrogation clauses do not preclude recovery as a matter of law, but, instead, present a question of fact regarding whether the insureds acted reasonably and whether the insurance company was actually prejudiced. Appellant argues that the same standard should apply to violations of the limitations provision of an insurance contract.

**{¶38}** Appellee counters that Appellant waived this argument on appeal because he failed to raise it in his objections to the magistrate's decision. In the alternative, Appellant argues that the rule of law announced in *Ferrando* should not be applied to violations of limitations provisions.

**{¶39}** Civ.R. 53(D)(3)(b)(ii) reads, in pertinent part, "[a]n objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." The rule further states that a party is barred from raising any error on appeal, other than plain error, pertaining to a trial court's adoption of any finding of fact or conclusion of law by a magistrate unless that party timely objected to that finding or conclusion as required under the rule. Civ.R. 53(D)(3)(b)(iv).

**{¶40}** Appellant did not raise this substantial performance argument in his opposition to the motion for summary judgment, nor did he advance the argument in his objections to the magistrate's decision. In fact, he raises the substantial performance argument for the first time on appeal. Therefore, pursuant to Civ.R. 53, Appellant has waived all but plain error of his substantial performance argument by failing to raise it in his objections to the magistrate's decision.

**{¶41}** Plain error is recognized in a civil case only in an, "extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, ¶43, quoting *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 679 N.E. 2d 1099, syllabus.

**{¶42}** That said, we note that the Fifth District Court of Appeals declined to apply the *Ferrando* rule to UM/UIM limitations provisions in *Shirley v. Republic-Franklin Insurance Co*., 5th Dist. No. 2006-Ohio-1848. In that case, the Shirleys argued that their failure to satisfy various notice and limitations provisions of an insurance policy did not bar their UM/UIM claim based upon the holding in *Ferrando*.

**{¶43}** The Fifth District concluded that, although the Ohio Supreme Court has held that violations of notice and subrogation clauses do not preclude recovery as a matter of law, the same rule cannot be applied to limitations provisions. The *Shirley* Court reasoned that, "[i]n *Sarmiento,* the Supreme Court found that a two-year limitation is per se reasonable and enforceable, without any equitable test or interpretation. This holding removes it from *Ferrando*." Id. at ¶17.

**{¶44}** We agree with our sister district. In fashioning the rule of law announced in *Sarmiento*, as well as in applying it in a subsequent case, the Ohio Supreme Court neither invoked nor even considered the application of the actual prejudice test announced in *Ferrando*. See *Angel v. Reed*, 119 Ohio St.3d 73, 2008-

Ohio-3193, 891 N.E.2d 1179. In both cases, the Court enforced the limitations provision without any demonstration of prejudice.

**{¶45}** Accordingly, Appellant's first assignment of error is overruled. Because Appellant's second and third assignments of error both advocate the reversal of our decision in *Regula*, supra, they shall be treated together for the purpose of judicial economy.

SECOND ASSIGNMENT OF ERROR

**{¶46}** "Summary Judgment was improper because the Grange contract of insurance contained conditions precedent which contractually prohibited its insured from filing suit against it until all policy conditions were met."

THIRD ASSIGNMENT OF ERROR

**{¶47}** "Summary Judgment was improper because the GRANGE policy contained provisions which were impossible of performance, contradictory and ambiguous, and R.C. 3937.18(H) did nothing to eliminate such impossibility, ambiguity or conflict."

**{¶48}** "[A] claim for UM/UIM coverage sounds in contract, not in tort." *Sarmiento* at ¶8. For the purpose of determining the scope of coverage of an underinsured motorist claim, the statutory law in effect at the time of entering into a contract for automobile liability insurance controls the rights and duties of the contracting parties. *Ross v. Farmers Ins. Group of Companies* (1998), 82 Ohio St.3d 281, 695 N.E.2d 732, syllabus.

**{¶49}** The exact issue presented by this case was addressed in *Regula*, that is, whether the identical three-year limitations provision of Appellee's automobile policy is enforceable when the clause is read in conjunction with other provisions of the policy. Like the Regulas, Appellant contends that certain conditions precedent are created by the contract, which essentially prevent an insured, or at least this insured, from filing a lawsuit for UIM benefits within the contractual limitations period. Because Appellant did not receive authorization from Appellee to accept Steiner's settlement offer until February 12, 2007, three years and seven and a half months after the accident, Appellant contends that the limitations provision should not be enforceable.

**{¶50}** However, in *Regula*, we held that the requirements listed in the exhaustion provision were conditions precedent to Appellee's duty to pay UIM benefits, not to Appellant's right to file a lawsuit. *Regula* at ¶49. Appellee concedes that the time for filing a lawsuit is not affected by the exhaustion requirement, which is a condition precedent only to the payment of benefits. (Appellee's Brf., p. 12.)

**{¶51}** Admittedly, we did not directly address the effect of the "Legal Action Against Us" provision in *Regula.* As stated earlier, that provision does not authorize legal action against Appellee, "until there has been full compliance with all the terms of [the] policy." (Policy, p. F-2(OH).) Appellant contends that, "no language or term in the GRANGE policy reconciled the three year limitation period (running from the date of accident) with the General Provisions term prohibiting action against the insurer until there was full compliance with all of the terms of the policy, including

exhaustion." (Appellant's Brf., p. 20.) However, as we concluded in *Regula* that exhaustion is a condition precedent to payment by the insurer rather than a condition precedent to legal action by the insured, it is clear that the legal action provision does not render the limitations provision unenforceable.

**{¶52}** Next, Appellant argues that the rule announced in *Sarmiento* should not be applied to UIM claims. However, as we stated in *Regula*, in *Sarmiento* the Ohio Supreme Court clearly and specifically referred to both UM and UIM claims in the syllabus.

**{¶53}** Appellant does not cite any change in the law that warrants a reversal of our decision in *Regula*. As a matter of fact, Ohio appellate courts examining the enforceability of UM/UIM limitations provisions post-*Sarmiento* have engaged in the same fact based test that we employed in *Regula* to determine whether the insured knew or should have known that the tortfeasor's liability limits would be insufficient prior to the expiration of the limitations period.

**{¶54}** In *Mowery v. Welsh*, 9th Dist. No. 22849, 2006-Ohio-1552, the insured learned that she required elbow surgery after the limitations period in her insurance policy expired. The *Mowery* Court relied on the Ohio Supreme Court's decision in *Kraly v. State Farm Mut. Auto. Ins. Co.* (1994), 69 Ohio St.3d 627, 635 N.E.2d 323 for the rule of law that a provision in an insurance agreement that attempts to extinguish a UM claim by creating a time limitation that terminates either before or shortly after a right of action arises is per se unreasonable and violates public policy. *Mowery* at ¶16, citing *Kraly* at 635.

**{¶55}** Although the Ninth District acknowledged that the Ohio Supreme Court limited *Kraly* to its factual situation, the Court concluded that the same public policy considerations compelled its decision in *Mowery*: only where the insured, despite due diligence, could not have known that the tortfeasor's liability limits would be insufficient before the expiration of the limitations period is the limitation invalid. Id. at ¶19.

**{¶56}** In *Lynch v. Hawkins*, 6th Dist. No. H-07-026, 2008-Ohio-1300, the Sixth District adopted the same approach to determine whether to enforce a limitations provision for UIM coverage. In that case, the Sixth District was confronted with the exact same policy language that is presented in this case, including the "Legal Action Against Us" provision. Although the insured claimed that the policy language was ambiguous, the Court focused instead on the enactment of R.C. 3937.18(H), which authorized three year limitations provisions for UM/UIM coverage.

**{¶57}** The *Lynch* Court acknowledged that the General Assembly, in enacting R.C. 3937.18(H), knew that UIM provisions routinely required exhaustion of the tortfeasor's liability limits. The Court then concluded that the case presented no, "unique facts or circumstances that make application of the limitations period, commencing on the date of the accident, rather than on the date of exhaustion of liability coverages, unreasonable under the particular circumstances of this case." Id. at ¶58.

**{¶58}** Approximately one week after we released *Regula v. Paradise*, the Supreme Court of Ohio issued *Angel v. Reed*, 119 Ohio St.3d 73, 2008-Ohio-3193,

891 N.E.2d 1179. Angel was injured in a motor vehicle accident in June of 2001 that was caused by the negligence of Reed. Angel was a passenger in Reed's vehicle. Reed indicated in the accident report that he had liability insurance with Nationwide. In fact, Reed's Nationwide policy had lapsed three months before the accident.

**{¶59}** In May 2004, Angel learned that Reed was uninsured, and, in June of 2004, she notified her insurance company, Allstate, that she was making a claim for uninsured motorist benefits. Angel argued that the two-year limitations period in the policy did not begin to run until her claim for uninsured motorist coverage accrued in May, 2004, when she learned that Reed did not have a valid insurance policy with Nationwide.

**{¶60}** Angel filed an action against Allstate, but the trial court entered summary judgment in favor of the insurance company based upon the limitations provision in the policy. In a 2-1 decision, the Eleventh District Court of Appeals reversed the decision of the trial court. *Angel v. Reed,* 11th Dist. No. 2005-G-2669, 2007-Ohio-1069. The majority reasoned that Reed had avoided service several times, making it "essentially impossible" for Angel to discover Reed's uninsured status within the two year limitations period. Id., ¶13. The majority ultimately concluded that, "a cause of action for uninsured motorist benefits accrues when the injured party knows, or has reason to know, with the exercise of due diligence, that the tortfeasor was uninsured." Id., ¶14.

**{¶61}** The Ohio Supreme Court, quoting the dissent from the Eleventh District decision, wrote that, "all that was necessary to determine Reed's insurance status

was to contact Nationwide. There is no reason why it should have taken Angel three years to realize that Reed was uninsured." Id., ¶17. As a consequence, the Supreme Court reinstated summary judgment in favor of Allstate.

**{¶62}** While Appellant would undoubtedly argue that the holding in *Angel* should be limited to UM coverage, two Ohio appellate courts have extended the holding in *Angel* to underinsured motorist cases. In *Griesmer v. Allstate Ins. Co.*, 8th Dist. No. 91194, 2009-Ohio-725, the insureds argued that they did not have standing to make their underinsured motorist claim until after the court proceedings resulted in a settlement with the tortfeasor. Id., ¶24. The Eighth District cited *Angel* for the proposition that the Griesmers discovered that the tortfeasor had only $25,000 in coverage from which to pay six claimants within the two year limitations period provided by the policy, and that the unambiguous language of the provision was enforceable.

**{¶63}** In *Pottorf v. Sell*, 3d Dist. No. 17-08-30, 2009-Ohio-2819, the insureds argued that the three year limitations provision in the policy was tolled because they did not know the amount of the tortfeasor's policy limits until a court-ordered mediation was conducted approximately three years after the accident. The Third District rejected the insureds' argument, holding instead that the mechanisms in the discovery portions of the civil rules could have been utilized to determine the limits of Sell's liability coverage. Id., ¶15.

**{¶64}** Recent Ohio appellate courts, as well as the Supreme Court of Ohio, have consistently enforced limitations provisions for UM/UIM coverage where the

insured knew or could have known that the tortfeasor's liability limits were insufficient prior to the expiration of the limitations period. Therefore, our decision in *Regula* is not inconsistent with the current state of the law in Ohio and, in fact, accurately reflects the determinations of the Ohio Supreme Court and our sister districts. Accordingly, Appellant's second and third assignments of error are overruled and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.