

IN THE SUPREME COURT OF OHIO

TERESA L. ANGEL

Plaintiff-Appellee,

vs

ERIC J. REED, et al.

Defendants/Appellants.

: ON APPEAL FROM THE
: GEAUGA COUNTY COURT OF APPEALS
: ELEVENTH APPELLATE DISTRICT

: Court of Appeals
: Case No. C.A. 2005-G-2669

07-0758

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT ALLSTATE INSURANCE COMPANY

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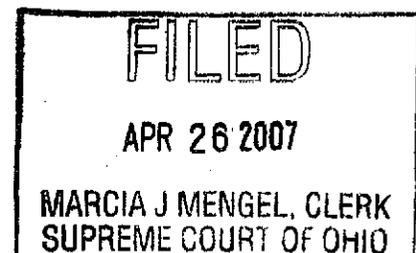


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST**

This case presents issues that are relevant to all automobile insurance policies containing uninsured motorists (UM) coverage written in the state of Ohio. The issues are (1) whether a cause of action for UM benefits accrues on the date of the accident when the tortfeasor has no insurance at the time and (2) whether a court is prohibited from applying a "discovery rule" to alter a valid contractual limitations period when the circumstances giving rise to the cause of action are readily ascertainable.

This case involves a common contractual limitations period for the filing of a claim for uninsured motorists benefits. The relevant language in Allstate Insurance Company's policy states: "Any legal action against Allstate must be brought within two years of the date of the accident." At the time Allstate wrote the subject policy, a two-year limitations period was reasonable and appropriate. The legislature subsequently amended the relevant statute, requiring a limitation period of at least three years for a policyholder to commence an action for uninsured motorists benefits.

The question of whether the cause of action for uninsured motorists benefits accrues on the date of the accident or some later date remains relevant, however, whether the limitations period is two years or three years. In fact, the question is relevant to virtually all automobile insurance policies that include UM coverage issued in Ohio because contractual limitations clauses for uninsured motorists claims are ubiquitous. Insurers must include a contractual limitations clause in their policies because even though a claim for UM benefits is essentially a claim for personal injury, the applicable statutory limitations period would be, if not for a limitations period, the 15-year period for contract claims rather than the 2-year period for bodily injury claims. Thus, in order to achieve a limitations period that is more in line with the bodily injury period, insurance carriers typically include a contractual limitations periods for UM claims in all their policies.

In the instant case, the Court of Appeals issued an opinion holding that, even when the tortfeasor has no insurance on the date of the accident, a cause of action for UM benefits does not accrue until the claimant discovers this lack of insurance. In doing so, the Court of Appeals applied a "discovery rule" that altered the express terms of the insurance contract. The Court of Appeals' decision was unprecedented in the body of law encompassing uninsured motorist coverage. In fact, all of the relevant case authority, including dicta from a prior decision issued by this Court, militated against the application of a "discovery rule" where the tortfeasor is uninsured at the time of the accident. As a result, this case presents this Court with the opportunity to settle a newly developed conflict in Ohio insurance law.

This case is one of public and great general interest because insurance carriers write countless automobile insurance policies every year for their customers in Ohio. The majority of those policies include UM coverage with a contractual limitations period for bringing a claim. Through this case, this Court will be able to establish a binding rule of law regarding when a claim for UM benefits accrues with respect to the contractual limitations period. Also, this Court can address whether it is generally improper for a court to alter the contractual limitations period by imposing a "discovery rule." Insurance providers could then do business in Ohio with the knowledge that the express terms provided in their insurance policies will be upheld by Ohio courts and given their proper contractual effect. Consumers would also know that the terms of their policy are accurately reflected in the policy language and will not be judicially modified. Thus, this Court should grant jurisdiction to hear this case and prevent the confusion and conflict that the instant Court of Appeals decision would create for all insurance providers and consumers in the state of Ohio.

STATEMENT OF THE CASE AND FACTS

This case arises from a motor vehicle accident and resultant lawsuit where a personal injury plaintiff filed an action for UM benefits more than one year and eight months after the expiration of the limitation period as stated in the relevant insurance policy. Appellee, Teresa L. Angel, was a passenger in a vehicle driven by Eric J. Reed, who is not a party to this appeal, on June 14, 2001. A motor vehicle accident occurred on June 14, 2001. Ms. Angel filed suit against Mr. Reed on May 16, 2003, alleging personal injury as a result of the negligence of Mr. Reed.

On the date of the subject accident, Mr. Reed had no liability insurance. He claimed, however, at the scene, that he did have liability insurance with Nationwide. This claim is reflected in the police report. Ms. Angel never contacted Nationwide to verify Mr. Reed's statement.

Ms. Angel was insured, at the time of the subject accident, by Allstate Insurance Company. Her policy, Allstate Automobile Insurance Policy Number 626654064, included a provision for uninsured motorists coverage. The policy defined an "Uninsured Auto" as "a motor vehicle which has no bodily injury liability bond or insurance policy in effect at the time of the accident." (Allstate policy at 14.) The policy also stated, "Any legal action against Allstate must be brought within two years of the date of the accident." (Allstate policy at 19.)

Ms. Angel did not bring a claim against Allstate in her original lawsuit, filed on May 16, 2003. On March 4, 2004, she voluntarily dismissed this original lawsuit without prejudice. She then re-filed her complaint, on February 17, 2005, this time including a claim against Allstate based upon UM coverage.

As Ms. Angel had waited more than three years and eight months to bring a claim against Allstate, Allstate moved for summary judgment. The trial court (Geauga County Common Pleas) granted Allstate summary judgment because Ms. Angel did not bring her suit within the

contractual two-year limitation period. Ms. Angel appealed. The Eleventh District Court of Appeals in a 2-1 decision, then reversed the summary judgment and, without citing any authority in support of this proposition, adopted a "discovery rule." The appellate court held that, even when the tortfeasor is uninsured at the time of the accident, "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." In doing so, the Eleventh District ignored prior decisions of other courts holding that a "discovery rule" is not appropriate in a situation where the facts giving rise to the cause of action are readily ascertainable. The Eleventh District also altered the express terms of an insurance policy with a standard limitations period that is similar to those included in many other policies written at the time of the accident and today.

This Court should grant jurisdiction to prevent the discord and legal instability the Eleventh District's decision threatens to create.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A cause of action for uninsured motorist benefits accrues on the date of the accident when the tortfeasor has no liability insurance on that date.

Prior to the Court of Appeals' decision in this case, the terms of coverage for a UM claim when the tortfeasor has no insurance at the time of the accident were clear. Under standard insurance policies containing UM coverage, such as the one issued by Allstate in the instant case, the insured has a claim for UM benefits on the date he is struck and allegedly injured by an uninsured motorist, i.e., the driver of an "uninsured auto." No determination, adjudication, or "discovery" of the tortfeasor's uninsured status is necessary. The simple question is, did the tortfeasor have insurance on the date of the accident? If not, a cause of action for UM benefits accrues on the date of the accident. The Court of Appeals decision has thrown this simple and orderly analysis into disarray.

The Allstate policy at issue in this case included language defining an “Uninsured Auto” as “a motor vehicle which has no bodily injury liability bond or insurance policy in effect at the time of the accident.” (Allstate policy at 14) (Emphasis added.) This definition is standard throughout the insurance industry, and it is consistent with the statutory definition set forth in R.C. §3937.18. (“an ‘uninsured motorist’ is the owner or operator of a motor vehicle if ... there exists no bodily injury liability bond or insurance policy covering the owner’s or operator’s liability to the insured.”) (Emphasis added.) There is no requirement in the Allstate policy or in the statutory definition that the claimant must know or must prove that tortfeasor is uninsured before he is considered an “uninsured motorist.” Again, the only relevant question is whether the tortfeasor actually had insurance on the date of the accident. The claimant’s knowledge of the tortfeasor’s status or any incorrect statements made by the tortfeasor are immaterial.

Similarly, there is no requirement in the policy that the claimant must learn that the tortfeasor is uninsured before the applicable limitations period begins to run. The specific policy language at issue states, “Any legal action against Allstate must be brought within two years of the date of the accident.” (Allstate policy at 19) (Emphasis added.) Again, Allstate’s policy language in this regard is consistent with that generally used in the insurance industry and as indicated by the current version of R.C. §3937.18(H), which specifically allows insurance carriers to include in their policies a limitations period of “three years after the date of the accident” to bring a UM claim.

The Court of Appeals below, however, re-wrote these express contractual provisions containing standard policy terms by holding that a cause of action for UM benefits did not “accrue” until the claimant becomes aware that the tortfeasor did not have any insurance at the time of the accident. In addition to being contrary to the terms of the Allstate policy, this holding was contrary to the decision of this Court in *Kraly v. Vannewkirk* (1994) 69 Ohio St.3d 627. In

Kraly, this Court considered a claim for UM coverage when the tortfeasor had a valid liability policy at the time of the accident, but the liability carrier subsequently became insolvent, rendering the coverage ineffective. This Court differentiated this situation, where UM coverage required a “triggering event” to become effective, from the standard UM situation involving a tortfeasor who simply has no insurance at the time of the accident. This Court stated:

In both *Colvin* [*v. Globe Am. Cas. Co.* (1980), 69 Ohio St.2d 293] and *Duriak* [*v. Globe Am. Cas. Co.* (1986), 28 Ohio St.3d 70], the tortfeasor was uninsured on the date that the injury was sustained by the injured insureds. Thus the cause of action for uninsured motorist coverage accrued on the same date that the injury occurred ... *Kraly* at 633.

When a tortfeasor is uninsured at the time of the accident, UM coverage is not in question. The matter is black and white. The tortfeasor either has insurance on the date of the accident, or he does not. All a claimant needs to do to “discover” whether he can make a valid UM claim is to ask the tortfeasor at the scene who his insurance carrier is, or look at the police report, and then follow up by calling the purported liability carrier if the tortfeasor claims to be insured.

The Court of Appeals attempted to justify its unprecedented holding by asserting that the Allstate policy imposed a “condition precedent” requiring a “determination” that the tortfeasor had no insurance coverage. The “condition” imposed by the Court of Appeals “must be fulfilled prior to the [UM] claim’s ripening.” As stated above, the language of the Allstate policy simply does not contain any such “condition.” In fact, the Court of Appeals did not quote any language or refer to any section of the applicable policy to support its conclusion. There is, however, an unusual and unexplained reference in the Eighth Appellate Court’s decision to the underinsured motorist (UIM) set-off provision in the Allstate policy. That provision states:

We are not obligated to make any payment for bodily injury under this coverage which arises out of the ownership, maintenance or use of an underinsured motor vehicle until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been fully and completely exhausted by payment of judgments or settlements. (Allstate policy at Page 16) (Emphasis added.)

This provision has no relevance to UM coverage. When UM coverage is involved, by definition, there is no applicable liability policy to exhaust. Even with respect to UIM coverage, the set-off provision does not create any sort of "condition precedent" that would prohibit a claimant from making a claim for UIM benefits. That set-off language only requires exhaustion of the tortfeasor's available liability coverage before Allstate is responsible for tendering payment of any amount due under its UIM coverage. This Court has explained that there is a distinction between the right to receive payment and the right to assert a claim based upon UIM coverage. *Ross v. Farmers Insurance Group of Companies* (1998), 82 Ohio St.3d 281, 287 (An automobile liability insurance policy will typically require exhaustion of the proceeds of a tortfeasor's policy before the right to payment of underinsured motorist benefits will occur. However, the date that exhaustion of the tortfeasor's liability limits occurs is not determinative of the applicable law to a claim for underinsured motorist coverage.") If this set-off language were a precondition to filing a claim, then a claimant would be required to sue the tortfeasor, obtain a judgment, obtain payment on that judgment, and then file a separate action to recover any remaining damages from the UIM carrier. The system does not work this way.

It is evident from the language of the applicable Allstate policy, as well as the many other similar policies written by other carriers and the language of the UM statute, that no "condition precedent" exists that requires a "determination" that the tortfeasor is uninsured to before a claim for UM benefits ripens. The UM claim is triggered on the date the claimant allegedly sustains bodily injury caused by a motorist who has no insurance. In this case, the claimant was unaware that she had a cause of action for UM benefits at the time of the accident because the tortfeasor claimed to be insured by Nationwide, however, the claimant never called Nationwide to verify this statement. It appears that the "condition precedent" rationale

was a pretext for the Court of Appeals to impose a “discovery rule” to extend the valid contractual limitations period. This Court should clarify that this type of judicial revision of contractual terms is improper.

Proposition of Law No. II: A court cannot apply a “discovery rule” to extend a valid contractual limitations period when the facts giving rise to a cause of action are readily ascertainable.

The policy considerations supporting the “discovery rule” in other contexts do not apply in a situation involving a UM claim based upon a tortfeasor’s lack of liability insurance at the time of an accident. Here the facts giving rise to the claim are not hidden and unforeseeable like they often are in a medical malpractice claim. A phone call or letter to the tortfeasor’s purported insurance carrier would provide the simple answer to the question of whether the tortfeasor has a liability insurance policy in effect and, consequently, whether the claimant has a uninsured motorist claim.

For this reason, courts that had addressed this issue prior to the Eleventh District’s decision had held that a “discovery rule” would be inappropriate with respect to a UM claim when the tortfeasor is uninsured at the time of the accident. For example, in *Miller v. Am. Family Ins. Co.*, the Sixth District Court of Appeals considered a similar situation to the instant case. 2002 Ohio 7309. The court examined the applicable case law and determined,

In light of these cases, it is clear that a two-year contractual limitations period that begins to run when a cause of action for uninsured motorist benefits accrues is reasonable. In the present case, the tortfeasor was uninsured on the date of the accident. Although the tortfeasor indicated to the trooper on the scene of the accident that he was insured, the validity of that insurance could have been readily determined. Accordingly, under the circumstances of this case, the day of the accident, June 22, 1999, is the day on which the contractual limitations period began to run. Appellants did not file their amended complaint adding CIC as a party defendant until June 25, 2001, and therefore did not timely assert their claim for uninsured motorist benefits. *Id* at ¶ 34. (Emphasis added).

In *Marsh v. State Automobile Ins. Co.* (1997), 123 Ohio App. 3d 356, 361, the Court of Appeals for the Second District distinguished situations such as medical or legal malpractice, in which

Ohio courts have applied a discovery rule, stating, "In the usual situation the insured has ample time to discover the insured status of the tortfeasor within the two-year contractual period. Indeed the insured will usually learn on the date of the accident or shortly thereafter whether the tortfeasor was insured under an automobile liability policy." *See also, Davis v. Allstate Insurance Co.* (Tenth App. Dist. 2003), 2003 Ohio App. LEXIS 3705.

In *Reeser v. City of Dayton* (2006), 167 Ohio App.3d 41, the Second Appellate District once again addressed the issues presented in the *Marsh* decision. In *Reeser*, the court found that:

"Although ascertaining the insurance status of the city may be more difficult than determining the insurance status of a tortfeasor who produces an insurance card at the scene, we nevertheless conclude, as we did in *Marsh*, that two years from the date of the accident was ample time for Reeser to investigate the issue and to file an uninsured motorist action against (the insurance company)." *Id.* at 44.

The unique circumstances presented in the *Kraly* case illustrate the type of unusual situation in which a "discovery rule" has been held appropriate with respect to a UM claim. 69 Ohio St.3d 627. As noted above, the tortfeasor in that case had insurance coverage on the date of the accident that was rendered ineffective by the subsequent insolvency of the insurance carrier. It was simply not reasonably foreseeable that this company would become insolvent, and it is something that could easily occur without the claimant being aware of it.¹ The liability carrier's insolvency in *Kraly* is similar to a surgical mishap, such as an instrument being left in a patient's body. The patient would have no way of knowing that the instrument was there until it causes some complication. The facts giving rise to the cause of action (i.e. the instrument being left in the body) are not foreseeable and could remain latent until the statute of limitations expires.

In contrast, getting into an accident with an uninsured tortfeasor is foreseeable. It is a fact that some people drive without insurance. That is the purpose of uninsured motorist coverage. It

¹ The situation involving the insolvency of the tortfeasor's liability carrier is so unique that the current version of R.C. 3937 provides for a special extension of the contractual limitations period in this specific scenario.

is also foreseeable that an uninsured tortfeasor would claim, at the scene of the accident, to have insurance when he actually does not because it is illegal to drive without insurance. The simple and reasonable solution is for the claimant to inquire with the tortfeasor's purported carrier to confirm the existence of coverage. If the carrier refuses to respond or provides false information, then there could be extenuating circumstances that could justify an extension of the limitations period or possibly a claim for coverage by estoppel. However, in the context of a standard UM claim, such as in the instant case, when the tortfeasor is uninsured at the time of the accident, the facts giving rise to the UM claim are readily ascertainable, regardless of any representations made by the tortfeasor at the scene. A simple phone call or letter to a tortfeasor's purported liability insurance carrier will result in confirmation or denial of the existence of liability coverage for that tortfeasor. Therefore, the "discovery rule" does not apply.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Allstate Insurance Company** was forwarded by regular U.S. mail, postage prepaid, on this 27th day of April, 2007, to:

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STATE OF OHIO
COUNTY OF GEAUGA

)
FILED
IN COURT OF APPEALS

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

MAR 12 2007

TERESA L. ANGEL,

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY
Plaintiff-Appellant

JUDGMENT ENTRY

- vs -

CASE NO. 2005-G-2669

ERIC J. REED, et al.,

Defendants,

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

For the reasons stated in the opinion of this court, the sole assignment of error is with merit. It is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Colleen Mary O'Toole

JUDGE COLLEEN MARY O'TOOLE

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.

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THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

FILED
IN COURT OF APPEALS

MAR 12 2007

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

TERESA L. ANGEL, : OPINION
Plaintiff-Appellant, :
- vs - : CASE NO. 2005-G-2669
ERIC J. REED, et al., :
Defendants, :
ALLSTATE INSURANCE COMPANY, :
Defendant-Appellee. :

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 05 P 000146.

Judgment: Reversed and remanded.

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COLLEEN MARY O'TOOLE, J.

{¶1} Teresa L. Angel appeals the judgment of the Geauga County Court of Common Pleas, granting summary judgment to Allstate Insurance Company. Angel is

seeking uninsured/underinsured motorist coverage under a policy issued to her by Allstate. We reverse and remand.

{¶2} June 14, 2001, Angel was injured when the vehicle in which she was a passenger struck another vehicle from behind in Cleveland, Ohio. The operator of the vehicle occupied by Angel was defendant, Eric Reed. Reed indicated on the police report of the accident that he had liability insurance with "Nationwide."

{¶3} Angel had uninsured/underinsured motorist insurance with Allstate. According to the terms of the Allstate policy, an "uninsured auto" includes, "**** a motor vehicle which has no bodily injury liability bond or insurance policy in effect at the time of the accident." The Allstate policy further provides that Allstate is not obligated to make any payments under the UM/UIM provisions of its policy, "**** until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been fully and completely exhausted by payment of judgments or settlements." Finally, it provides, "[a]ny legal action against Allstate must be brought within two years of the date of the accident. No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions." (Emphasis sic.)

{¶4} May 16, 2003, Angel filed suit against Reed. March 4, 2004, Angel dismissed the suit, without prejudice, pursuant to Civ.R. 41(A)(1)(a).

{¶5} May 2, 2004, counsel for Angel was informed by Nationwide that Reed's liability policy had been cancelled approximately three months prior to the accident involving Angel. July 30, 2004, Angel notified Allstate that she was making a claim for uninsured motorist benefits.

{¶6} February 17, 2005, Angel again filed suit against Reed, including Allstate as an additional defendant. Allstate moved for summary judgment. August 26, 2005, the trial court granted Allstate's motion on the grounds that Angel failed to bring suit against Allstate within the contractual two-year limitations period following the accident.¹ The court further found that there was no just reason for delay. Angel timely appealed, raising one assignment of error:

{¶7} "The trial court erred by granting summary judgment to Allstate because a valid two-year contractual limitation on filing suit for UM benefits can only be counted from the time the claim accrues."

{¶8} Angel raises a number of arguments under her assignment of error, but the axis upon which this case revolves is simply whether the two year limitation period for bringing a cause of action for uninsured motorist benefits under the subject Allstate policy is enforceable under the facts in this case. We hold that it is not.

{¶9} The legal basis for recovery of uninsured motorist benefits of an insurance policy is contract. *Motorists Mut. Ins. Co. v. Tomanski* (1971), 27 Ohio St.2d 222, 223. The limitations period for most written contracts, including insurance policies, is fifteen years. R.C. 2305.06. "**** [T]he parties to a contract may validly limit the time for bringing an action on a contract to a period that is shorter than the general statute of limitations for a written contract, as long as the shorter period is a reasonable one." *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 2005-Ohio-5410, at ¶11.

1. This court notes that Allstate has maintained this particular interpretation of its policy language throughout the state, and denied payment on first party UM/UIM claims as a consequence. Due to varying appellate decisions, some claims have, ultimately, been paid, others not.

Generally, a contractual two-year limitation period for filing UM/UIM claims is reasonable and enforceable. Cf. *Id.*, paragraph one of the syllabus.

{¶10} However, “[t]he validity of a contractual period of limitations governing a civil action brought pursuant to the contract is contingent upon the commencement of the limitations period on the date that the right of action arising from the contractual obligation accrues.” *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, paragraph two of the syllabus. For purposes of this case, therefore, the question presented is: “when did Angel’s cause of action for uninsured motorist benefits accrue?” To find the two year limitation period in the subject Allstate policy valid requires finding that the cause of action for uninsured motorist benefits accrued on the date of the accident. In *Kraly*, the Supreme Court stated, in dicta, that if a tortfeasor was uninsured on the date of the accident, then the cause of action for uninsured motorist benefits accrued on that date. *Id.* at 633. Accepting this view, the grant of summary judgment to Allstate herein was correct, since the tortfeasor, Reed, had been uninsured for some three months prior to the accident.

{¶11} *Kraly* is distinguishable on this point. The *Kraly* court was merely distinguishing its prior decisions in *Colvin v. Globe American Cas. Co.* (1982), 69 Ohio St.2d 293; and *Duriak v. Globe American Cas. Co.* (1986), 28 Ohio St.3d 70. *Kraly* at 633. Nothing in *Colvin* or *Duriak* indicates that the contractual issues we believe prevented accrual of the uninsured claim at the time of the accident in this case were fully presented or considered in those cases. Thus, in *Colvin*, it was clear that the uninsured status of the alleged tortfeasor was at issue well within the contractual limitation period. *Id.* at 296. In this case, it was not.

{¶12} Since an uninsured motorist claim arises in contract, courts must look to the provisions of the contract to determine when a cause of action accrues. The subject Allstate contract imposes various legitimate conditions precedent to an uninsured motorist claim, all of which must be fulfilled prior to the claim's ripening. In particular, it requires a determination that the claim arose from the use of a vehicle without insurance coverage. In this case, the tortfeasor, Reed, informed the police at the time of the accident that he was insured with Nationwide. The record indicates that Angel vigorously pursued her claim against Reed, but without success, seven attempts at service having failed by the time summary judgment was granted Allstate. It was only on May 2, 2004 – almost one year following the filing of the original action in this case and nearly three years following the accident – that Nationwide informed Angel's attorney that Reed was uninsured.

{¶13} In sum, Angel had every reason to believe the tortfeasor was insured, and made every reasonable effort to sue and serve him within the two year period required for personal injury claims – and the Allstate uninsured coverage. Due to Reed's success in avoiding service, it was essentially impossible for Angel to discover his uninsured status within that two year period. A contractual limitation period cannot be used to void a valid condition precedent to uninsured motorist coverage: a determination that the tortfeasor is uninsured. This is black letter contract law.

{¶14} Consequently, we hold 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.

{¶15} The sole assignment of error is with merit.

{¶16} For the foregoing reasons, the judgment of the Geauga County Court of Common Pleas is reversed, and this matter remanded for further proceedings consistent with this opinion.

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

{¶17} The facts of the present case are relatively simple.

{¶18} On June 14, 2001, Angel was injured while occupying a vehicle operated by Reed. At the time of the injury, Reed claimed to have liability insurance with Nationwide. In fact, Reed's policy with Nationwide was cancelled about three months prior to the accident.

{¶19} At the time of the injury, Angel had uninsured/underinsured motorist insurance with Allstate. According to the policy's terms, Angel had two years, from the date of accident, to bring legal action against Allstate.

{¶20} Angel did not bring suit against Allstate until February 17, 2005, well after the two-year period for initiating legal action.

{¶21} Accordingly, Angel's uninsured/underinsured motorist claim is time-barred. As the majority acknowledges, "a contractual two-year limitation period for filing UM/UIM claims is reasonable and enforceable." See *Sarmiento v. Grange Mut. Cas. Co.*, 106

Ohio St.3d 403, 2005-Ohio-5410, at paragraph one of the syllabus (“[a] two-year contractual limitation period for filing uninsured- and underinsured-motorist claims is reasonable and enforceable”); *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 624-625, 1994-Ohio-160 (“a two-year period *** would be a reasonable and appropriate period of time for an insured who has suffered bodily injuries to commence an action or proceeding for payment of benefits under the uninsured or underinsured motorist provisions of an insurance policy”) (emphasis sic).

{¶22} The majority, however, raises the issue “when did Ms. Angel’s cause of action for uninsured motorist benefits accrue?” The obvious answer to this question is that Angel’s cause of action accrued when she was injured by an uninsured motorist, i.e. June 14, 2001. As the Ohio Supreme Court has stated, in such cases “the cause of action for uninsured motorist coverage accrued **on the same date the injury occurred.**” *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 633 (emphasis added), discussing *Colvin v. Globe Am. Cas. Co.* (1982), 69 Ohio St.2d 293, and *Duriak v. Globe Am. Gas. Co.* (1986), 28 Ohio St.3d 70.

{¶23} The majority determines otherwise. The majority states that the Allstate insurance policy imposes, as a “condition precedent” to accrual, “a determination that the claim arose from the use of a vehicle without insurance coverage.” However, no such language exists in the Allstate policy. The unequivocal language of the policy states that “[a]ny legal action against **Allstate** must be brought within two years of the date of the accident,” not the date on which the tortfeasor is determined to be uninsured.

{¶24} Despite the lack of foundation in the language of the policy, Angel urges this court to adopt the “discovery rule” and hold that she had two years from the date she discovered Reed was uninsured to file suit against Allstate. This argument has been consistently rejected by Ohio’s courts.

{¶25} In *Marsh v. State Auto. Mut. Ins. Co.* (1997), 123 Ohio App.3d 356, as in this case, the plaintiff filed suit against her uninsured motorist carrier more than two years after the date of the accident and, thus, after the expiration of the limitations period for bringing suit contained in the insurance agreement. The plaintiff in *Marsh* argued that the two-year period only began to run after she learned the tortfeasor was uninsured. *Id.* at 359. The Second Appellate District rejected her argument, holding that two years from the date of the accident is a reasonable period of time for a policyholder to determine a tortfeasor’s insurance status. *Id.* at 361.

{¶26} “In the usual situation the insured has ample time to discover the insured status of the tortfeasor within the two year contractual period. Indeed the insured will usually learn on the date of the accident or shortly thereafter whether the tortfeasor was insured under an automobile liability policy. It is unlawful to operate a motor vehicle in this state unless proof of financial responsibility is maintained. See R.C. 4509.101. Proof of financial responsibility is ordinarily provided by use of financial responsibility identification cards which every insurer writing motor vehicle insurance in Ohio is required to provide to every policyholder. See, R.C. 4509.103. Discovering the insurance status of a tortfeasor is quite unlike discovering medical or legal malpractice. In the latter situation the Ohio Supreme Court has been willing to toll the short statute of

limitations period for bringing such actions while the malpractice remains undiscovered. *Fryssinger v. Leech* (1987), 32 Ohio St.3d 38, 512 N.E.2d 337.” *Id.* at 361.

{¶27} In the present case, the majority alleges that it was “virtually impossible for *** Angel to discover [Reed’s] uninsured status within that two year period.” On the contrary, 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 Reed was uninsured. See *Reeser v. Dayton*, 167 Ohio App.3d 41, 2006-Ohio-2333, at ¶13 (“Reeser certainly could have obtained the information about the City’s insurance status within two years of the accident”); *Davis v. Allstate Ins. Co.*, 10th Dist. No. 02AP-1322, 2003-Ohio-4186, at ¶18 (“Allstate’s failure to share with appellants any information it had regarding the insurance status of [the tortfeasor] does not negate the fact that appellants had a duty to determine this status for themselves”); *Miller v. Am. Family Ins. Co.*, 6th Dist. No. OT-02-011, 2002-Ohio-7309, at ¶34 (“[a]lthough the tortfeasor indicated to the trooper on the scene of the accident that he was insured, the validity of that insurance could have been readily determined”).²

{¶28} For the foregoing reasons, the decision of the court below should be affirmed.

2. In *Kraly*, the Ohio Supreme Court sanctioned the application of the discovery rule in the unique situation that the tortfeasor had valid liability insurance on the date of accident, but subsequently became uninsured when the liability insurer became insolvent. “Where the liability insurer of a tortfeasor has been declared insolvent, a right of action of an insured injured by the tortfeasor against his insurer under the uninsured motorist provision of his automobile insurance contract accrues on the date that the insured receives notice of the insolvency.” 69 Ohio St.3d 627, at paragraph three of the syllabus. As the Ohio Supreme Court later recognized, “*Kraly* unarguably involved a unique factual situation, and this court accordingly fashioned a remedy based upon concepts of fairness and public policy.” *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St.3d 281, 287, 1998-Ohio-381.