

IN THE SUPREME COURT OF OHIO

CASE NO. 2007-0758

THERESA L. ANGEL, et al.,)	On Appeal from the Geauga County
)	Court of Appeals, Eleventh App. District
Plaintiffs-Appellees,)	
)	
v.)	
)	Court of Appeals Case No:
ERIC REED, et al.)	2005G2669
)	
Defendant-Appellants.)	

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF PLAINTIFFS-APPELLEES THERESA L. ANGEL, et al.**

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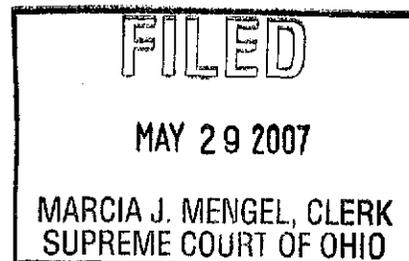


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APPELLEE'S STATEMENT IN OPPOSITION

TO DISCRETIONARY REVIEW

The case does not involve a matter of public or great general interest. The Appellant is seeking review of the Eleventh District's finding that the Plaintiff-Appellee's uninsured motorist claim did not accrue until she determined that the tortfeasor was without liability coverage. Reversing the trial court's grant of summary judgment, the Eleventh District relied upon the well-settled principles established by this Court in Kraly v. Vannewkirk (1994), 69 Ohio St.3d 627, syllabus, para 2., which held that "the 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."

In the case at bar, the Eleventh District found that the Plaintiff 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, but due to the tortfeasor's success in avoiding service, it was essentially impossible for the Plaintiff to discover his uninsured status within that two year period. These factual findings, which should not be disturbed, place this matter squarely within the purview of Kraly insofar as the Plaintiff's uninsured motorist claims against Allstate did not accrue until she discovered the tortfeasor's uninsured status.

Accordingly, the Eleventh District Court of Appeals' decision should remain undisturbed and this Court should not accept jurisdiction over this matter.

STATEMENT OF FACTS

On June 14, 2001, Plaintiff-Appellee Theresa 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."

Angel had uninsured/underinsured motorist insurance with Allstate. According to the terms of the Allstate policy, an "uninsured auto" included, "* * * 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."

STATEMENT OF THE CASE

On May 16, 2003 Angel filed suit against the tortfeasor, Reed. March 4, 2004, the suit was dismissed without prejudice pursuant to Civ.R. 41(A)(1)(a). On May 2, 2004, Plaintiff's counsel was informed by Nationwide that Reed's policy had been canceled approximately three months prior to the accident involving Angel. On July 30, 2004 Angel notified Allstate that she was making a claim for uninsured motorist benefits.

On February 17, 2005, Angel again filed suit against Reed, including Allstate as an

additional defendant. Allstate moved for summary judgment, which was granted by the trial court on August 26, 2005 on the grounds that Angel failed to bring the suit against Allstate within the contractual two-year limitations period following the accident. The court further found that there was no just reason for delay, and an appeal to the Eleventh District Court of Appeals timely followed.

On appeal, the Eleventh District held that Angel's UM claims did not accrue until Angel determined that the tortfeasor was without liability coverage, relying upon this Court's holding in Kraly v. Vannewkirk (1994), 69 Ohio St.3d 627, syllabus, para 2 as authority. Appellant Allstate now appeals that decision to this court.

ARGUMENTS SPECIFIC TO APPELLANT'S PROPOSITIONS OF LAW

All of the Appellant's propositions of law fail to identify issues of public or great general interest, rest on evidentiary materials that are not on the record, or have no application to this case.

Re: Appellant's First Proposition of Law:

I. 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.

Appellee Allstate is not entitled to enforce the "two years from the date of the accident" limitation within the UM contract because Supreme Court syllabus law requires that a UM contractual limitation period be marked only from the date of accrual. Kraly v. Vannewkirk (1994), 69 Ohio St. 3d 627, syllabus 2. No statutory or Supreme Court precedent subsequent to Kraly has altered the rule stated in the Kraly syllabus.

In this case, the tortfeasor, Eric Reed, apparently misinformed the police of his insurance status, and the Appellant had no way of knowing that Mr. Reed had no insurance until finally receiving written confirmation from Mr. Reed's purported carrier in May of 2004. So long as Mr. Reed had even the minimum limit of liability required by Ohio's financial responsibility laws, Ms. Angel could never have a claim under the plain terms of her policy. Further, the express terms of the Allstate policy make payment of UM benefits subject to the conditions precedent that all available liability coverages have already paid. In short, the Allstate policy requires action against Allstate within two years, but does not permit action against Allstate if the tortfeasor has any Ohio minimum limits insurance, and does not permit action against Allstate until the liability policy is exhausted. In a situation like the one at bar, where the Allstate policy holder cannot discover the tortfeasor's true insurance status until after two years have passed, the UM claim against Allstate does not accrue until such discovery, and the Allstate two year term may only be marked forward from that point.

It is not uncommon that a person injured in an auto accident would require more than two years following the accident to pursue a recovery against the tortfeasor. *See, e.g., Duriak v. Globe American Casualty Co.* (1986), 28 Ohio St. 3d 70, 74, J. Brown, dissenting, *quoting his Dissent in Colvin v. Globe American Cas. Co.* (1982), 69 Ohio St. 2d 293 ("This passage of time, from the date of the occurrence until the knowledge of absence of coverage, tends to erode, and provide less than the full period of, the limitation within which to bring an action under the policy. ...").

In Ohio, the limitations period for bringing an action for personal injury, as caused by an auto accident, is two years from the date of the accident. R.C. 2305.10. However, the statutory

limitations period for an action on a written contract, like a UM policy, is fifteen years. R.C. 2305.06. For this reason, the Supreme Court of Ohio has held that a two-year provision in a UM/UM contract must be marked from the date of accrual:

[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.** [Emphasis added.]

Kraly v. Vannewkirk (1994), 69 Ohio St. 3d 627, 635.

In this case, the Appellant had no way of knowing that she even had a UM claim against Defendant Allstate until receiving Nationwide's letter dated April 27, 2004. Case law is clear that no UM/UM claim accrued until that time. Kraly involved a similar situation in that the UM/UM claimants believed that their damages would be paid by a liability policy of insurance. Then the liability carrier went insolvent. The Supreme Court held that the claimants UM/UM claim did not accrue until the insolvency:

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.

Kraly at 635. There is no practical difference in this case. In Kraly, the claimants believed they would be compensated by a carrier who subsequently lost its ability to make good on the claim. In this case, the Appellant believed that the tortfeasor had adequate insurance to cover her claim, and promptly notified Allstate when it was learned that he did not. Whether the plaintiff later learns that the expected coverage does not exist because of the insurer, or because of the tortfeasor, the claim

accrues on the date of receiving notice that there is no liability coverage available.

Case law is in accord that generally, a UM/UIM claim does not accrue until the limits of the tortfeasor's insurance are exhausted. After quoting the syllabus of Kraly, the Tenth District Court of Appeals stated:

Under the policy provision, an insured's rights to payment by Erie for underinsured motorist coverage does not accrue until the tortfeasor's policy limits are exhausted. Under the rule of the second paragraph of the syllabus of Kraly, supra, the two-year limitation created by the policy cannot commence prior to that time. [Emphasis added.]

Kuhner v. Erie Ins. Co. (Franklin Ct. App., 1994), 98 Ohio App. 3d 692, 698.

The Fifth District has often repeated this excellent explanation:

"This is based upon the fact that underinsured coverage is only available when the damages suffered exceed those monies available under the tortfeasor's liability carrier." 1995 Ohio App. Lexis 5988 at 5. It is only then that a cause of action for underinsured motorist benefits accrues. [cite omitted.] **To require insureds to sue their underinsurance carriers before they know that they are in an underinsured situation, "taken to its logical conclusion ... would mean a party's right to file suit is entirely divorced from their right to recover."** Verhovec v. Motorist Ins. Cas. [Emphasis added.]

Haney v. Motorist Mut. Ins. Co. (Tuscarawas Ct. App., 2003), 2003 Ohio 3412, P41 (*reversed on other grounds*, In re Uninsured & Underinsured Motorist Coverage Cases (2003), 100 Ohio St. 3d 302); *see also* Kurtz v. Wayne Mut. Ins. Co. (Richland Ct. App., 1999), 1999 Ohio App. Lexis 5844; Fauskey v. Farmers Ins. of Columbus, Inc. (Cuyahoga Ct. App., 2000), 2000 Ohio App. Lexis 4881, 8-9.

In this case, the Plaintiff had no UM/UIM claim until May 3, 2004, with the receipt of

Nationwide's letter stating that its insured was not covered at all on the date of the accident.

Plaintiff re-filed this case on February 17, 2005, less than one year following the accrual of the claim. There is no question that the Plaintiff brought her UM action against Allstate within two years of its accrual.

Re: Appellant's Second Proposition of Law:

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.

First, there is no evidence anywhere on the record that the tortfeasor's uninsured status was "readily ascertainable." To the contrary, the Eleventh District Court of Appeals specifically found that "it was essentially impossible for the Plaintiff to discover his uninsured status within that two year period." Angel v. Reed (March 12, 2007) Case No. 2005-G-2669, para. 13.

Accordingly, Appellant's second proposition of law is inapposite to this case.

Regardless, there is no question that the rule of Kraly, syllabus 2, applies to UM claims. Further, there is no question that the Appellant's situation fits the definition of a UM claim under the Appellee's policy language. The only question is whether a UM claim does not accrue until it is known that the tortfeasor is uninsured.

The answer to this question is "yes," according to the this Court in Ross:

In Kraly, the court determined that the "insolvency [of the tortfeasor's liability insurance carrier] was the triggering event for uninsured motorist coverage." Id. at 634, 635 N.E.2d at 328. **The court analogized the situation in Kraly to those instances when a cause of action accrues upon the discovery of the alleged harm. n2**

n2 In Kraly, the court noted the similarities between contractual limitations periods and statutory limitations period. In doing so the court compared the factual similarities of Kraly and the case of Gaines v. Preterm-Cleveland, Inc. (1987), 33 Ohio St. 3d 54, 514 N.E.2d 709. Gaines concerned the constitutionality of former R.C. 2305.11(B), the four-year statute of repose for medical malpractice actions. The plaintiffs in Gaines discovered the event that gave rise to their injury "within the four-year statutory period but only six and one-half months before its expiration." Kraly, 69 Ohio St. 3d at 634, 635 N.E.2d at 328. In Gaines, the court determined that period to be unreasonably brief and allowed plaintiff's cause of action to accrue on the date that the malpractice was discovered. In Kraly, the court concluded that the Kralys should be afforded no less protection "against an equally onerous contractual provision." (Emphasis sic.) Id. **Thus, Kraly is akin to those causes of actions involving issues of accrual governed by the discovery rule.** [Emphasis added.]

Ross v. Farmers Ins. Group of Cos. (1998), 82 Ohio St. 3d 281, 286-287. The rule that a UM claim does not accrue until the tortfeasor is discovered to be uninsured has precisely the same origin and support as the rule that a UIM claim does not accrue until the policy holder settles with the tortfeasor.

Finally, the Appellant submits that the following explanation by Judge Grady of the Second District Court of Appeals is as thorough and eloquent a presentation of the Appellants' position as the Appellant could wish to make:

First, in this case the insured was not aware of the tortfeasor's uninsured status until more than two years had passed from the date of the accident. This fact operated to automatically exclude Marsh from the benefits of the uninsured motorist coverage that she had purchased by requiring her to claim it before she had notice of the fact that she was entitled to it. The only way to cure that problem, consistent with Miller, is to impose a due diligence

obligation on the insured to inquire about the tortfeasor's insurance status within the two year period after the accident. That is not an entirely satisfactory rule. Even when the inquiry is made, it may not be answered. **Then, the insured must file a lawsuit to protect his rights. Promoting litigation should not be endorsed as a method of obtaining the benefit of contract rights.**

These problems show why judicial approval of any specific period of time that applies uniformly in all cases is a snare and a delusion. The better approach is that taken in Kraly v. Vannewkirk (1994), 69 Ohio St. 3d 627, 635 N.E.2d 323, which, in effect, applies a discovery rule to determine when an uninsured motorist claim accrues. There, the Court held that because a policyholder cannot make an uninsured claim until he determines that the tortfeasor is uninsured, the policyholder's claim for uninsured motorist coverage does not accrue until he discovers the tortfeasor's uninsured status.***

Any limitation on coverage that a policy creates should be construed strictly against the insurer and liberally in favor of the insured, in order that the purpose of the insurance shall not be defeated. Kitt v. Home Indem.Co. (1950), 153 Ohio St. 505, 41 Ohio Op. 511; 92 N.E.2d 685. Engrafting a discovery rule onto the coverage limitation created by the two year claims period benefits the insured, who is burdened by engrafting a due-diligence requirement. **As between the two, a discovery rule is the better alternative because it preserves the uninsured motorist coverage that R.C. 3937.18 was enacted to create. Id.** [Emphasis added.]

Marsh v. State Auto. Mut. Ins. Co. (Montgomery Ct. App. 1997), 123 Ohio App. 3d 356, 363-364 (Judge Grady, dissenting).

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees oppose this Court's exercise of jurisdiction. The Court of Appeals' decision rests on correct application of controlling Ohio Supreme Court authority pertaining to the accrual of UM claims.

Respectfully submitted,



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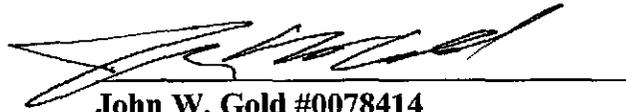
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Opposition of Jurisdiction of the Plaintiffs-Appellees was forwarded by Regular U.S. Mail, postage prepaid, on this 24th Day of May, 2007, to:

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