

IN THE SUPREME COURT OF OHIO

JACK R. ADVENT, Exec.,

Appellant,

v.

ALLSTATE INSURANCE COMPANY, et  
al.,

Appellees.

)  
) On Appeal from the Franklin County  
) Court of Appeals, Tenth Appellate  
) District

) Supreme Court Case Nos. 06-2271  
) 06-2393

) Court of Appeals Case No. 06AP-103  
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MERIT BRIEF OF APPELLEE ALLSTATE INSURANCE COMPANY

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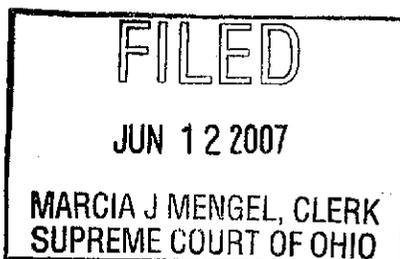
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## STATEMENT OF FACTS AND THE CASE

This action arises out of an automobile accident that occurred on September 28, 2002. Decedent Vali Jean D. Advent was driving a 1995 Honda Odyssey westbound on I-75 in Danville Township, Illinois, and was involved in an automobile accident with Scott D. Rude. Vali Jean Advent died as a result of the injuries she sustained in that accident. (See, Appellee's Supp. at p. 3, ¶¶7, 8 and 12.) At the time of the accident, Scott Rude was insured by State Farm Mutual Automobile Insurance Company. Appellant settled all claims with State Farm Mutual Automobile Insurance Company and Scott Rude for \$100,000. (See, Appellee's Supp. at p. 5, ¶24.)

At the time of the accident, decedent Vali Jean Advent was a named insured on Policy No. 0 92 005461 issued by Allstate Insurance Company. (See, Appellee's Supp. at p. 4, ¶18; see also, Appellant's Supp. at p. 15.) The policy provided liability coverage up to \$300,000 per person and \$500,000 per occurrence. (See, Appellant's Supp. at p. 16-19.) The policy provided uninsured motorist insurance for bodily injury up to \$50,000 per person or \$100,000 per accident. (See, Appellant's Supp. at p. 20.)

Mr. and Mrs. Advent first purchased automobile insurance coverage from Allstate on March 12, 1989. (See, Appellee's Supp. at p. 10.) The policy was renewed every six months thereafter, up to and including the policy period beginning September 12, 2002 to March 12, 2003. (See, Appellant's Supp. at p. 15.) On October 1, 2001, S.B. 97 became effective, eliminating the requirement of a written offer and rejection or reduction of UM/UIM coverage. See, R.C. §3937.18 as amended by S.B. 97. At each renewal date after the law changed, Appellant's policy included a notice to insureds that the written requests for a change in the amount of UM/UIM coverage were no longer

necessary and asking insureds to review their coverage to verify that it was correct. (See, Appellant's Supp. at 55.) Mr. Advent does not dispute that he received these notices and admits that, at all times before the accident, he was aware that his UM/UIM coverage limits were lower than his liability coverage limits. (See, Appellee's Supp. at 11-16.)

Despite this knowledge, Appellant filed suit in the Franklin County Court of Common Pleas claiming he was entitled to UM/UIM coverage equal to his liability coverage by operation of law. Appellee Allstate filed a motion for summary judgment that was granted by the Trial Court. Mr. Advent appealed and the Tenth District Court of Appeals affirmed the Trial Court's decision. We are now before this Court on Mr. Advent's appeal of the Court of Appeals decision.

## ARGUMENT

### I. CERTIFIED QUESTION

**Certified Conflict Question:** Can the S.B. No. 97 amendments to R.C. 3937.18 be incorporated into an insurance policy during a two-year guarantee period that commenced subsequent to the S.B. No. 267 amendments to R.C. 3937.18 and R.C. 3937.31, but prior to the S.B. No. 97 amendments?

**Answer:** Yes. The Court must answer this question in the affirmative to effect the intent of the legislature. The rules of statutory construction and the express statements of the legislature support the conclusion that the legislature intended to allow insurers to incorporate the S.B. 97 changes in the law into existing policies.

In determining the legislative intent of a statute, the Court may not delete words or insert words, but must give effect to the words used. See, *State ex rel. Sears, Roebuck & Co. v. Industrial Com. of Ohio* (1990), 52 Ohio St. 3d 144, 148, 556 N.E.2d 467; citing, *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St. 2d 24, 28, 263 N.E.2d 249. If the legislative intent is clearly expressed in the statute, "the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged." See, *Weaver v. Edwin Shaw Hosp.* (2004), 104 Ohio St. 3d 390, 393, 2004-Ohio-6549, 819 N.E.2d 1079. The Court may not "modify an unambiguous statute under the guise of judicial interpretation." See, *id.*; citing, *Crowl v. DeLuca* (1972), 29 Ohio St.2d 53, 278 N.E.2d 352. Sections of the Ohio Revised Code are also to be read *in pari materia*. That is, statutes on the same subject should be read together to ascertain and effectuate the legislative intent. See, *State ex rel. City of Westlake v. Corrigan* (2007), 112 Ohio St.3d 463, 466, 2007-Ohio-375, 860 N.E.2d 1017.

To answer the certified question, the Court must determine the legislature's intent in enacting both S.B. 267 and S.B. 97. Applying these rules of statutory construction and reviewing the express statements of the legislature regarding its intent, it becomes

apparent that the legislature intended to allow insurers to incorporate the S.B. 97 changes into existing policies. A brief legislative history illustrates the point. On June 21, 2000, S.B. 267 was enacted. Among the amendments in S.B. 267 was a change to R.C. §3937.31. The General Assembly added R.C. §3937.31(E) which states that:

Nothing in this section prohibits an insurer from incorporating into a policy any changes that are permitted or required by this section or other sections of the Revised Code at the beginning of any policy period within a two year period set forth in Division A of this section.

See, R.C. §3937.31(E), amended by S.B. 267. The notes that accompanied R.C. §3937.31 set forth the intent of the General Assembly as follows:

It is the intent of the General Assembly in amending R.C. §3937.31 to make it clear that an insurer may modify the terms and conditions of an automobile insurance policy to incorporate changes that are permitted or required by that section and other sections of the Revised Code at the beginning of any policy period within the two year period set forth in Division A of that section.

See, R.C. §3937.31, at notes. S.B. 267 became effective on September 21, 2000.

Less than a year later, on May 1, 2001, S.B. 97 was introduced before the next General Assembly. S.B. 97 was the first amendment to R.C. §3937.18 after the General Assembly established that an insurer could incorporate changes in the law into existing policies. Through S.B. 97, the General Assembly eliminated the requirement that an insurer make an offer of UM/UIM coverage equal to the insured's liability coverage limits and prove the rejection of such coverage in writing. The General Assembly changed R.C. §3937.18 to explicitly indicate that an insurer "may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages." See, R.C. §3937.18 as

amended by S.B. 97. The General Assembly also issued an explicit statement of its intent to:

- (B) Express the public policy of the state to:
  - (1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;
  - (2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;

\* \* \*

- (4) Eliminate any requirement of a written offer, selection, or rejection form for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages from any transaction for an insurance policy;
- (5) Ensure that a mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages not be construed to be required by the provisions of section 3937.181 of the Revised code as amended by this act, that make uninsured motorist property damage coverage available under limited conditions;

\* \* \*

- (D) To supersede the holdings of the Ohio Supreme Court in those cases previously superseded by ... Sub. S.B. 267 of the 123<sup>rd</sup> General Assembly.
- (E) To supersede the holdings of the Ohio Supreme Court in *Linko v. Indemnity Ins. Co. of N. America* (2000), 90 Ohio St.3d 445, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, *Schumacher v. Kreiner* (2000), 88 Ohio St.3d 358, *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St.2d 431, *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St.3d 565, and their progeny.

See, R.C. §3937.18, at notes.

The legislature's express objective in passing S.B. 97 was to eliminate UM/UIM coverage "from being implied as a matter of law" and to "eliminate any requirement of a written offer." See, *id.* Had the legislature intended to exclude this change in the law of S.B. 97 from those changes that an insurer is permitted to incorporate into existing policies, it could have further amended R.C. §3937.18 or §3937.31 to do so. The legislature chose not to create that exception. Therefore, this Court is obliged to conclude that the legislature did not intend there to be such an exception.

This interpretation of the changes in the law created by S.B. 97 and S.B. 267 is even more compelling when considering the time frame in which the changes occurred. As discussed above, S.B. 97 was introduced less than a year after S.B. 267. It was also the first amendment to R.C. §3937.18 after S.B. 267 was enacted. It would be contrary to reason to conclude that, although the legislature had just granted insurers the ability to incorporate changes in the law into existing policies, it did not intend for insurers to incorporate changes in the law made less than a year later.

Appellant argues that the General Assembly did not intend to allow the changes in S.B. 97 to be incorporated into existing policies because it did not explicitly include language stating that the S.B. 97 changes in the law may or must be incorporated. Appellant suggests that the General Assembly could have codified the following language: "pursuant to R.C. §3937.31(E), an insurer may (or must) incorporate the changes to R.C. §3937.18 into an existing policy at the point of a policy renewal, even if that renewal is within the two-year guarantee period set forth in R.C. §3937.31(A)."

However, Appellant's suggestion would render the S.B. 267 amendments to R.C. §3973.31(E) meaningless. As amended by S.B. 267, R.C. §3937.31(E) reads as follow:

Nothing in this section prohibits an insurer from incorporating into a policy **any changes** that are permitted or required by this section or other sections of the Revised Code at the beginning of any policy period within the two-year period set forth in division (A) of this section.

See, R.C. §3937.31(E) as amended by S.B. 267. The word "any" does not mean only those changes that the General Assembly explicitly states may or must be incorporated. The General Assembly used the word "any" and this Court must presume that the General Assembly meant "any" changes. To require the General Assembly to explicitly point to those changes in the law it meant to include in this section would be to render the word "any" meaningless.

The only way that the Court can give effect to the intent of the legislature is to answer the certified question in the affirmative. The S.B. No. 97 amendments to R.C. §3937.18 can be incorporated into an insurance policy during a two-year guarantee period that commenced subsequent to the S.B. No. 267 amendments to R.C. §3937.18 and R.C. §3937.31, but prior to the S.B. No. 97 amendments.

## **II. PROPOSITIONS OF LAW NOS. 1 AND 2**

**Appellant's Proposition of Law No. 1:** R.C. §3937.31(E), added by S.B. 267, does not permit an automobile insurer to unilaterally incorporate the S.B. No. 97 version of R.C. §3937.18 into an insurance policy during a two-year guarantee period mandated by R.C. §3937.31(A) because to do so would be an impermissible "cancellation" of the policy because the S.B. 97 version reduces the "coverages" and "policy limits" of the policy during the two-year guarantee period, which is expressly prohibited by R.C. §3937.31(A) and contrary to *Wolfe*.

**Appellant's Proposition of Law No. 2:** R.C. §3937.31(E), which provides automobile insurers may incorporate changes into a policy during the two-year guarantee period that are "permitted or required" by the Revised Code does not allow the incorporation of any statutory language that would effect a "cancellation" of the policy as defined in R.C. §3937.31(A), including the incorporation of statutory language that would reduce

“coverages, included insureds, and policy limits provided at the end of the next preceding policy period,” which is expressly prohibited by R.C. §3937.31(A) and contrary to *Wolfe*.

**Appellee’s Response:** Incorporating S.B. 97 into existing policies does not reduce coverages or policy limits. Therefore, it does not violate R.C. §3937.31(A) or *Wolfe*.

**A. Both R.C. §3937.31(A) and *Wolfe* Allow for the Incorporation of S.B. 97 into Existing Insurance Policies.**

Pursuant to R.C. §3937.31(A), every automobile insurance policy is guaranteed renewable for not less than two years. An insurer may not cancel any policy within that two-year guarantee period. Cancellation includes refusal to renew a policy with at least the coverage and policy limits provided at the end of the next preceding policy period. See, R.C. §3937.31(A). As this Court recognized in *Wolfe*:

One of the purposes behind R.C. §3937.31 is to ensure that consumers of automobile liability insurance are able to **maintain the level of coverage and policy limits that they had originally contracted for.**

See, *Wolfe v. Wolfe* (2000), 88 Ohio St.3d 246, 265, 2000-Ohio-322, 725 N.E.2d 261, *emphasis added*. The Court noted that R.C. §3937.31(A) attempts to ameliorate the threat posed by uninsured motorists by mandating that insureds receive notice of any planned cancellation in time for them to secure new coverage. See, *id.* at 256.

Both parties agree that the coverage that Plaintiff contracted for was liability coverage with limits of \$300,000 per person and \$500,000 per occurrence and uninsured/underinsured motorist coverage with limits of \$50,000 per person and \$100,000 per occurrence. Appellant testified at his deposition that he knew that his uninsured motorist coverage limits were lower than his liability insurance limits before the accident. (See, Appellee’s Supp. at p. 11-16.) By incorporating the changes of S.B. 97 into Appellant’s existing policy, Allstate did nothing to change that coverage.

Appellant maintained the coverage he contracted for. Therefore, the incorporation of these changes was not a cancellation of the policy as defined in R.C. §3937.31(A) and it does not violate the spirit of *Wolfe*.

Appellant devotes a great deal of his brief to the proposition that *Wolfe* is still good law. Appellee agrees. However, a careful reading of *Wolfe* reveals that the decision does not support Appellant's position. In deciding *Wolfe*, this Court took great pains to divine the intent of the General Assembly behind R.C. §3937.31(A). The Court recognized that it was the intent of the General Assembly to protect consumers from losing coverage that the consumer contracted for without adequate advanced warning. See, *Wolfe*, supra at 265. Nothing in *Wolfe* stands for the proposition that an insurer should be bound to offer coverage with greater limits than the coverage the consumer purchased.

Appellant also argues that the Court's recent decision in *Shay v. Shay* (2007), 113 Ohio St.3d 172, 2007-Ohio-1384, 863 N.E.2d 591 supports his position. However, there are several facts that distinguish *Shay* from the facts of this case. First, *Shay* involved a guarantee period that began before the effective date of S.B. 267. The relevant guarantee period ran from July 6, 2000 to July 6, 2002. See, *id.* at 173. Therefore, the issue in *Shay* was whether S.B. 267 would be applied retroactively. In this case, there is no dispute that S.B. 267 applies.

Second, the change in the law that the insured sought to apply in *Shay* involved a clear change in the language of the policy itself. In *Shay*, the insured argued that the insurer should be prohibited from enforcing exclusions in the policy because the law no longer allowed those exclusions after S.B. 267. This Court held that the parties could

amend policy terms such as these by agreement at the six-month renewal point. See, *id.* at 179. The Court's rationale made sense because the change in the law would have changed both parties' understanding of what they had bargained for.

In this case, we are not dealing with a change in the policy language. We are dealing with a change in the procedure in offering or reducing UM/UIM limits. The coverage that may have been implied as a matter of law before the passage of S.B. 97 was not the result of any bargain between insurer and insured. Therefore, the same analysis cannot apply. There would be no reason for the parties to reach an agreement on the change in procedure because it does nothing to change the coverage that the parties bargained for. The facts in *Shay* simply differ in too many respects for that decision to dictate the outcome of this case. In this case, the Court should come to the conclusion that the law allowed the incorporation of the changes in S.B. 97 into Appellee's existing policy.

**B. Allstate Properly Incorporated the Changes in S.B. 97 into Appellant's Existing Policy.**

After the effective date of S.B. 97, Allstate provided notice to Appellant of its intent to incorporate these changes in the law into the new policies that began on March 12, 2002 and September 12, 2002. When the policies were sent to Appellant, they included an important Notice which stated as follows:

We would like to let you know that we have changed the process for selecting and making changes to uninsured motorist insurance for bodily injury and uninsured motorist insurance—property damage.

Effective immediately, you can add or remove uninsured motorist insurance for bodily injury and uninsured motorist insurance—property damage and increase or decrease your limits under uninsured motorist insurance for

bodily injury by simply calling your Allstate representative. There will be no forms to sign.

Please refer to the enclosed Policy Declarations to determine if your policy currently has uninsured motorist insurance for bodily injury and uninsured motorist insurance-property damage.

If uninsured motorist insurance for bodily injury or uninsured motorist insurance-property damage is not included in your policy and you would like to purchase it, or if you would like to increase or decrease the uninsured motorist insurance for bodily injury limits shown on the Policy Declarations, please feel free to contact your agent or the Allstate Customer Information Center at 1-800-ALLSTATE (1-800-255-7828).

(See, Appellant's Supp. at p. 55.) Through this language, Allstate Insurance Company explicitly adopted the changes in the law of S.B. 97 and provided notice to Plaintiff to consider the uninsured motorist coverage limits of his policy and let Allstate know if he wanted to change them. Plaintiff has no reason to doubt that he received the notice and admits that he knew his uninsured/underinsured motorist coverage limits were less than his liability limits at the time of the accident. (See, Appellee's Supp. at p. 11-16.)

This Court should impose no greater duty on an insurer to incorporate the changes of S.B. 97 into existing policies. Appellant argues that Allstate should have been required to change the policy itself by endorsement. However, as discussed above, the argument is contrary to reason. The purpose of an endorsement is to change the language of the policy. The language of the policy never provided for UM/UIM coverage that may arise by operation of law, as the phrase "by operation of law" suggests. Therefore, there was no policy language to be changed. The procedure for adding or removing UM/UIM coverage was not written into the policy. The procedure was dictated by *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St.3d

565, 1996-Ohio-358, 669 N.E.2d 824 and *Linko v. Indemnity Ins. Co. of North America* (2000), 90 Ohio St.3d 445, 2000-Ohio-92, 739 N.E.2d 338. Since the procedures dictated by those decisions were not written into the policies, there would be no policy language to change when those decisions were superseded by the General Assembly. Therefore, the types of changes made by S.B. 97 were not changes that could be achieved through a written endorsement.

Appellant also argues that the notice incorporating S.B. 97 should have provided greater explanation of the change in the law. Specifically, Appellant argues that the notice did not validly incorporate S.B. 97 because it did not explain what would happen to UM/UIM coverage that the insured had by operation of law. However, Appellant's argument assumes that the insured was aware that coverage would arise by operation of law. In his deposition, Appellant testified that he knew he had UM/UIM coverage limits that were lower than his liability limits. (See, Appellee's Supp. at p. 11-16.) He had no expectation of coverage that would arise by operation of law. Therefore, there would be no need for Allstate to inform him that a change in the law meant that such coverage would no longer arise by operation of law.

This Court should conclude that the notice provided by Allstate effectively incorporates the S.B. 97 changes in the law because it is consistent with the R.C. §3937.31(E) and does not undermine the purposes of R.C. §3937.31(A). The unambiguous language of R.C. §3937.31(E) allows an insurer to incorporate any changes permitted or required by the Ohio Revised Code. The General Assembly did not dictate the manner in which such changes were to be incorporated, but left that decision to the insurers. The manner in which Allstate incorporated the S.B. 97

changes does not undermine the goals of R.C. §3937.31(A) because it does not remove any coverage that the insured contracted for.

### **CONCLUSION**

For the foregoing reasons, Appellee Allstate Insurance Company asks that this Court answer the certified question in the affirmative and affirm the decision of the Tenth District Court of Appeals. The Court must conclude that S.B. 97 changes in the law can be incorporated into existing insurance policies within the two-year guarantee period to give effect to the intent of the legislature. Pursuant to R.C. §3937.31(E) as amended by S.B. 267, an insurer may incorporate **any** changes in the law within the two-year guarantee period. Since the legislature passed S.B. 97 as the very next change in the law without making an exception under R.C. §3937.31(E), this Court must conclude that the legislature intended S.B. 97 to be among those changes in the law that an insurer may incorporate.

This incorporation of S.B. 97 is also permitted under Ohio law because it does not violate R.C. §3937.31(A) or *Wolfe v. Wolfe*. The S.B. 97 changes in R.C. §3937.18 did not eliminate coverage, but eliminated the possibility that coverage would be implied by operation of law. Therefore the incorporation of S.B. 97 was not a "cancellation" of coverage.

Finally, Allstate properly incorporated the S.B. 97 changes because the notice issued to its insureds complied with R.C. §3937.31(E). The General Assembly did not dictate the manner in which insurers were to incorporate changes in the law. However, the notice issued by Allstate does not undermine the goals of R.C. §3937.31(A)

because it does not cancel any coverage purchased by the insured. The decision of the Tenth District Court of Appeals should be affirmed.

Respectfully submitted,

**LANE, ALTON & HORST, LLC**



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Appellee Allstate Insurance Company was sent via ordinary U.S. mail to the following this the 12<sup>th</sup> day of June 2007:

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