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REPLY ARGUMENT

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 and Proposition of Law No. I:

No. 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*.

Proposition of Law No. II:

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*.

A. Ohio law did not permit the incorporation of S.B. 97 into an automobile insurance policy prior to expiration of a two-year guarantee period that commenced prior to the effective date of S.B. 97.

In 2000, this Court, in *Wolfe*, held:

1. Pursuant to R.C. 3937.31(A), every automobile liability insurance policy issued in this state must have, at a minimum, a guaranteed two-year policy period during which the policy cannot be altered except by agreement of the parties and in accordance with R.C. 3937.30 to 3937.39.
2. The guarantee period mandated by R.C. 3937.31(A) is not limited solely to the first two years following the initial institution of coverage.

Wolfe v. Wolfe, 88 Ohio St.3d 246, 2000-Ohio-322, paragraphs 1 and 2 of the syllabus.

Applying *Wolfe* to this case leads to a simple and easy result. Since the applicable two-year

guarantee period was March 12, 2001 to March 12, 2003, the S.B. 267 version of R.C. 3937.18 is the applicable version, meaning the S.B. 97 version has no application. Therefore, Appellant is entitled to UM/UIM coverage by operation of law in the amount of \$300,000 each person/\$500,000 each occurrence. It is that easy. On the authority of *Wolfe*, this Court must reverse the court of appeals and judgment must be entered in favor of Appellant.

This Court has recently made clear, *Wolfe* has not been overruled, is still good law and must be applied, even after the S.B. 267 amendments to R.C. 3937.31. This Court recently decided *Shay v. Shay*, 113 Ohio St.3d, 2007-Ohio-1384, in which it examined the viability of *Wolfe* in light of the S.B. 267 amendments of R.C. 3937.31. Specifically, this Court addressed whether *Wolfe* had been superseded by the amendments, as some members of this Court felt it had been. However, in *Shay*, this Court made it crystal clear *Wolfe* still applies even after S.B. 267 amendments to R.C. 3937.31.

{¶ 23} In *Wolfe*, we acknowledged the General Assembly's laudatory objectives in ensuring that all motorists maintain some form of liability coverage on their motor vehicles, and we held that "pursuant to R.C. 3937.31(A), every automobile liability insurance policy issued in this state must have, at a minimum, a guaranteed two-year policy period during which the policy cannot be altered except by agreement of the parties and in accordance with R.C. 3937.30 3937.39." 88 Ohio St.3d 246, 250, 725 N.E.2d 261. We further held that the commencement of each policy period brought a new contract of insurance into *177 existence, whether the policy was categorized as a new policy or a renewal of an existing policy. *Id.* In light of that construction of R.C. 3937.31(A), we held that enactments by the General Assembly that became effective after the commencement of a two-year policy period could not be incorporated into the insurance contract until after that two-year period had expired and a new one had begun. *Id.* at 250-251.

{¶ 24} *Wolfe* adhered to our prior holdings that the statutory law to be applied when interpreting a policy for motor-vehicle insurance is the statute in effect when the policy was issued. *Id.* at 250, 725 N.E.2d 261. We rejected the insurer's argument that our decision in *Benson v. Rosler* (1985), 19 Ohio St.3d 41, 44, 19 OBR 35, 482 N.E.2d 599, compelled a different result. *Wolfe*, 88 Ohio St.3d at 251. In *Benson*, we held that statutes pertaining to an insurance policy and its coverage that are enacted after the policy's issuance, are incorporated into a renewal of the policy if the renewal represents a new contract of insurance separate from the initial policy. Indeed, we stated expressly, "We now believe

that in *Benson* the majority misconstrued R.C. 3937.31(A)” and that the determination that the policies were to be considered new at each six-month renewal point was “confusing at best and flat-out wrong at its worst.” *Wolfe*, at 251.

{¶ 25} *Wolfe*, and the limitation it imposed on *Benson*, drew a strong dissenting opinion and a response from the legislature. Within six months of our decision, the General Assembly used S.B. 267 to amend R.C. 3937.31 by adding subsection E, which provides: “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.” S.B. No. 267, 148 Ohio Laws, Part V, 11385. In amending the statute, the General Assembly enunciated its purpose: “It is the intent of the General Assembly in amending section 3937.31 of the Revised Code make it clear that an insurer *may* modify the terms and conditions of any 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.” (Emphasis added.) *Id.* at 11386.

{¶26} In light of that legislative action, three members of this court, Justices Lundberg Stratton, O’Connor, and Lanzinger dissented from a decision to dismiss an appeal of *Young v. Cincinnati Ins. Co.*, 8th Dist. No. 82395, 2004-Ohio-54, as having been improvidently accepted. The dissenters opined that S.B. 267 superseded the interpretation of R.C. 3937.31 found in *Wolfe* and that, as a result of S.B. 267, a policy that is renewed every six months could be modified at the time of renewal rather than only at the beginning of a two-year guarantee period, as required by *Wolfe*. [Citations omitted.] The dissenters’ analysis did not prevail, however, and the dissent in *Young* remained just that, ‘a disagreement with a majority opinion,’ Black’s Law Dictionary (8th Ed.2004) 506, without force of law or precedential value.”

{¶27} Despite the dissent in *Young* questioning the viability of *Wolfe* in the wake of S.B. 267, there is no showing that the analysis set forth in *Wolfe* fails our tripartite test for overruling precedent. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph one of the syllabus. Thus, the dissent in *Young*, which is, essentially the appellee’s argument here – must cede to the precedent of *Wolfe*. That deference to an established majority opinion, despite a jurist’s disagreement with the opinion, is part of the court’s rich tradition of adherence to stare decisis. [Citations omitted.]

{¶ 28} As we stated in *Galatis*, whenever possible we must maintain and reconcile our prior decisions to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry. *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 43. That understanding is perhaps particularly true in cases driven by statutory interpretation and any legislative response to that interpretation. [Citations omitted.] (Brandeis, J., dissenting) (“As Justice Brandeis himself observed * * *

in commenting on the presumption of stability in statutory interpretation: ‘Stare decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. * * * This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation’ ”).

{¶ 29} Here, there is no showing that the legislative response to our decision in *Wolfe*, which is found in S.B. 267, required an insurer to incorporate its provisions *179 at the six-month renewal point. Given that S.B. 267 followed *Wolfe*, we presume that the General Assembly would have used language that mandated the incorporation of its terms into a policy at the six-month point of renewal rather than at the beginning of a new two-year guarantee period. The General Assembly did not do so. It simply stated that nothing in the law prohibited an insurer from doing so. **598 If it wishes to say more, it has that prerogative.

{¶ 30} Although we, like the appellate court, are aware of the intent of the statutes at issue here and the important public policies that underlie them, a court can not elevate its interpretation of those policies over the plain wording of the statute and established precedent.

“{¶31} We thus hold that absent an agreement between the insurer and the insured to amend the policy terms at the six-month renewal point, R.C. 3937.31(A) and our decision in *Wolfe v. Wolfe* (2000), 88 Ohio St.3d 246, 725 N.E.2d 261, prevent an insurance company from amending the terms of its policy to increase the amount of coverage it provides, at the six-month point of renewal. In light of this disposition of the first certified question, the second certified question is moot.

Shay, supra, ¶¶ 23 - 31. Applying *Wolfe* and *Shay* to the present case, the result is obvious and crystal clear - since there was there was no agreement between Appellant and Allstate to amend the policy terms at the six-month renewal point, the decision of the court of appeals must be reversed and judgment entered in favor of Appellant. *Shay* makes it clear that despite the inclusion of R.C. 3937.31(E) in S.B. 267, in this case, because *Wolfe* is still good law, S.B. 97 was not incorporated into Appellant’s policy until the expiration of the applicable two-year guarantee period.

Furthermore, an examination of the S.B. 267 amendments to R.C. 3937.31 reveals Allstate was not permitted to unilaterally incorporate S.B. 97 into Appellant’s policy at the six-month renewal point. First, while some courts have suggested that part of the legislative intent

of S.B. 267 was to overrule or supersede *Wolfe*, the legislature did not express any intent to do so. As this Court is well aware, the General Assembly, particularly in the automobile insurance arena, has never been shy about indicating its intent with respect to what court decisions it is trying to limit or supersede when amending statutes. The legislature specifically mentioned numerous Ohio Supreme Court cases in the uncodified law of both S.B. 267 and S.B. 97, yet it never mentioned *Wolfe*, which speaks volumes.

In addition, even after S.B. 267, the plain language of R.C. 3937.31(E) and the legislative intent make it clear that an insurer can only unilaterally incorporate statutory changes into a policy at a renewal within the two-year guarantee period if the statutory changes are either permitted or required by R.C. 3937.31 and the statutory section that is trying to be incorporated. So in this case, the question becomes whether R.C. 3937.31, as amended by S.B. 267, and R.C. 3937.18, as amended by S.B. 97, permits or requires that the S.B. 97 version of R.C. 3937.18 be incorporated at a six-month renewal within a two-year guarantee period?

R.C. 3937.31(E) is permissive in nature and R.C. 3937.18, as amended by S.B. 97 is totally silent as to incorporation into existing policies. Consequently, it is undisputed that the incorporation of the S.B. 97 version of R.C. 3937.18 at a six-month renewal, prior to the end of the two-year guarantee period is not “required.” So we are left with is it permitted?

In the case at bar, R.C. 3937.31 does not permit the incorporation of the S.B. 97 amendments to R.C. 3937.18. In fact, R.C. 3937.31(A) **specifically prohibits** the incorporation of S.B. 97 until the end of the two-year guarantee period. It provides:

“(A) Every automobile insurance policy shall be issued for a period of not less than two years or guaranteed renewable for successive policy periods totaling not less than two years. Where renewal is mandatory, “cancellation” as used in sections 3937.30 to 3937.39 of the Revised Code, includes refusal to renew a policy with at least the **coverages**, included insureds, **policy limits provided** at the end of the next preceding policy period. No insurer may cancel any such policy except pursuant to the terms of the policy, and in accordance with sections R.C. 3937.30 to 3937.39 of the Revised Code, and for one or more of the following reasons: ***”

(Emphasis added.) R.C. 3937.31(A) guarantees two years of coverage during which the insurer cannot unilaterally cancel the policy. Despite Allstate's argument to the contrary, its attempt to incorporate S.B. 97 into Appellant's policy at a six-month renewal period is nothing but an attempted cancellation of the policy, which is specifically prohibited by R.C. 3937.31. That is because "cancellation" includes the refusal of the insurer to renew the policy with "at least the coverages and policy limits provided at the end of the next preceding policy period" and since Allstate failed to comply with *Gyori, Linko* and their progeny, Appellant had UM/UIM coverage limits of \$300,000/\$500,000 at that beginning of the applicable two-year guarantee period.

Since application of S.B. 97 would reduce the policy limits to \$50,000 each person/\$100,000 each occurrence policy limits, S.B. 97 cannot be incorporated into the policy until it was automatically incorporated into the policy on March 12, 2003. As a result, because the incorporation of S.B. 97 into the policy is a "cancellation," of the policy, it is prohibited by R.C. 3937.31(A).

Amicus Curiae Ohio Association of Civil Trial Attorneys, on behalf of and in support of Appellee, cites five decisions, one each from the First (*St. Clair v. Allstate*), Second (*Arn v. McLean*), Third (*McDaniel v. Rollins*), Tenth (*Advent v. Allstate*) and Twelfth (*Westfield National v. Young*) Appellate Districts in support of Appellee's position [full case citations omitted]. However, all of these decisions were based in whole, or in large part, on the incorrect assumption and determination that R.C. 3937.31(E), as amended by S.B. 267, overruled and superseded *Wolfe*. But, as this Court made perfectly clear in *Shay*, *Wolfe* is still good law and is applicable even following the S.B. 267 amendments adding R.C. 3937.31(E). The appellant's argument in *Shay*, which is essentially Appellee's argument herein, was flatly rejected by this Court in *Shay*. Because the cases cited by *Amicus Curiae* on behalf of Appellee herein, rely on

the faulty premise that *Wolfe* was no longer good law after the passage of S.B. 267, said cases of no persuasive value in light of this Court's decision in *Shay*.

Moreover, it is extremely misleading for Appellee (or *Amicus Curiae*, on Appellee's behalf) to suggest all five of the aforementioned decisions (and Appellate Districts) have favored Appellee's position. In *Westfield v. Young*, the issue wasn't raised and wasn't the determining issue in the case. The court merely cited *Arn v. McLean* with approval in dicta. The same is true with *McDaniel v. Rollins*, where the court simply dropped a footnote, in dicta, indicating its erroneous belief that the S.B. 267 amendments to R.C. 3937.31 superseded *Wolfe*. However, the court in *McDaniel* was not even applying the S.B. 267 version of the statute.

Likewise, Appellee's and *Amicus Curiae* of behalf of Appellee's arguments urging this Court to return to *Benson* are untenable and must be flatly rejected in light of *Shay*.

For the foregoing reasons, pursuant to *Wolfe*, *Shay*, *Linko*, et al. and R.C. 3937.31, Appellant is entitled to UM/UIM coverage in the amount of \$300,000 each person/\$500,000 each occurrence and the court of appeals decision must be reversed and judgment entered for Appellant.

B. Assuming arguendo that Allstate was permitted to incorporate the S.B. 97 amendments to R.C. 3937.18 into Appellant's policy at a six-month renewal period before the collision, it did not do so.

If this Court somehow determines Allstate was permitted to incorporate the S.B. 97 amendments to R.C. 3937.18 into Appellant's policy at a six-month renewal period, it still must determine if Allstate did, in fact, effectively incorporate the amendments.

By the express statutory language of R.C. 3937.31(E), as well as the uncodified law, an insurer is not required to incorporate all statutory changes. Allstate merely has the option of incorporating statutory changes that are "permitted or required" - there is no "automatic" incorporation. If an insurer wants to incorporate statutory changes prior to the end of the two-

year period, it must take some affirmative action to do so – action that is consistent with the statutory scheme and the actual language of the applicable insurance policy itself.

The plain meaning R.C. 3937.31 makes it clear a change must be incorporated into the policy itself. Furthermore, the specific language of the Allstate policy makes it clear that any policy change that will reduce coverage or change policy limits must be done by endorsement. Since applying the S.B. 97 amendments to the policy would result in a reduction of UM/UIM coverage and policy limits, Appellant's Allstate policy requires that the change be done by endorsement. There is no dispute this wasn't done. Because Allstate did not comply with R.C. 3937.31 and its own policy language, S.B. 97 wasn't incorporated.

In addition, even if this Court is to consider the Allstate Form "XC15" notice, which is not an endorsement, the form itself gives no indication it is incorporating S.B. 97 or any other statutory changes into the policy. This notice makes no mention of any changes in the law. It doesn't mention that Allstate is incorporating changes in the law into the policy. It simply states Allstate has changed its own procedures for dealing with UM/UIM coverage. In fact, it misleads the insured by implying the changes were selected by Allstate.

Moreover, and most importantly, the notice makes no mention of what would happen to any UM/UIM coverage that an insured had by operation of law. Remember, at the beginning of the March 12, 2001 two-year guarantee period, there is no dispute that Appellant had UM/UIM policy limits of \$300,000 each person/\$500,000 each occurrence by operation of law. In fact, because Allstate had never had a valid offer and reduction of UM/UIM coverage, Appellant's policy had always had the higher policy limits, notwithstanding any indication to the contrary on the declarations pages. Had Allstate correctly listed Appellant's coverages and policy limits on the declarations pages, the March 12, 2001 renewal policy would have listed the actual UM/UIM policy limits of \$300,000/\$500,000, which could not be reduced by the S.B. 97 amendments until the beginning of the next two-year period on March 12, 2003. Certainly Appellee is not

arguing that if Appellant's declarations page at the beginning of applicable two-year period had listed UM/UIM coverage of \$300,000/\$500,000, it could have, nonetheless, reduced or canceled that UM/UIM coverage before the end of the two-year period following the passage of S.B. 97.

As previously stated, S.B. 97 represented a monumental shift in Ohio UM/UIM law. In addition, R.C. 3937.31(E) gives insurers the power to make unilateral changes to insurance policies within the two-year guarantee period as long as the changes are permitted or required by statute. Consequently, because the S.B. 97 changes are so drastic, it falls upon the courts to strictly uphold precedent, strictly interpret the statutory language of R.C. 3937.31 and hold insurance companies to the language they put in their policies; policies which are contracts of adhesion.

Because Allstate did not actually incorporate S.B. 97 into Appellant's policy by issuing an endorsement or otherwise changing the policy language to indicate the incorporation, S.B. 97 was not incorporated and, therefore, Appellant is entitled to UM/UIM coverage in the amount of \$300,000 each person, \$500,000 each occurrence.

Finally, it has been suggested that by ruling in Appellee's favor, this Court would simply be enforcing what the parties bargained for in the first place, since the declarations page indicated UM/UIM coverage limits of \$50,000/\$100,000. The Court should not be swayed by this argument. First and foremost, we have no idea what the parties originally contracted for in terms of UM/UIM limits. Neither Allstate nor Appellant's agent was ever able to produce the original application, or any signed UM/UIM reduction form. Furthermore, according to Appellant, his agent never told him what UM/UIM coverage was, quoted premiums, etc. The agent admitted it was extremely rare for a policy he sold to have UM/UIM limits that were less than the BI limits and he would not recommend to a customer to buy such a policy. Simply put,

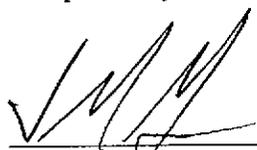
it is very much disputed that Appellant even contracted for UM/UIM coverage of \$50,000/\$100,000 in the first place.¹

And it is without dispute that Allstate never complied with *Gyori, Linko* and their progeny, meaning Appellant actually had UM/UIM coverage of \$300,000/\$500,000 since the policy's inception. Even when Appellant acknowledged he was "aware" his UM/UIM limits were \$50,000/\$100,000, it is misleading. He simply acknowledged he knew what the declarations page stated. In actuality, it was a misleading question by counsel for Allstate, because Appellant had \$300,000/\$500,000 in UM/UIM coverage, the declarations page notwithstanding, since Allstate never complied with *Gyori, Linko*, etc. in the first place.

CONCLUSION

For the foregoing reasons, the court of appeals decision below must be **REVERSED** and the cause should be **REMANDED** with instructions to enter judgment in favor of Appellant in the amount of \$200,000, the \$300,000 each person UIM limits minus the \$100,000 previously received from the tortfeasor, along with any appropriate pre-judgment and postjudgment interest pursuant to R.C. 1343.03, as determined by the trial court, plus costs.

Respectfully submitted,



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¹ See Appellant's Supplement, pp. 1 -7, "Affidavit of Jack R. Advent."

CERTIFICATE OF SERVICE

A copy of the "Reply Brief of Appellant Jack R. Advent, Exec." was sent by ordinary

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