

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 Appellate
Plaintiffs-Appellees,)	District
)	
v.)	
)	Court of Appeals Case No:
ERIC REED, et al.)	2005G2669
)	
Defendant-Appellants.)	

MERIT BRIEF OF THE APPELLEE

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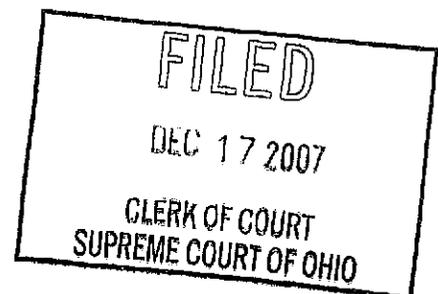


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STATEMENT OF FACTS

It is undisputed that the Appellee's claims arise out of a motor vehicle accident that occurred on June 14, 2001. Appellee Teresa Angel was a front seat passenger in the vehicle then driven by Defendant Eric Reed. Mr. Reed struck another vehicle from behind, causing Ms. Angel's injuries. Mr. Reed apparently denied fault to the police at the scene. (Supp. at 54.) Mr. Reed's liability carrier is listed on the Crash Report as "Nationwide." (*Id.* at 52.)

Initially it appeared that the Appellee would be fully compensated for her injuries by payment from the tortfeasor's liability policy. For that reason, initially brought suit only against Mr. Reed. In that first case, No. 03P000471, the Appellee made three separate attempts at service against Mr. Reed. (*See* Appellant's Appx. 1-2, Docket sheet, at 5/21/03, 7/22/03, and 10/16/03.) At no time did the Appellee obtain information throughout the prosecution of Case No. 03P000471 that Mr. Reed's policy with Nationwide had actually been cancelled prior to the accident. The Appellee eventually dismissed that action voluntarily as allowed by Ohio Civ. R. 41(A)(1)(a).

The case at bar was filed on February 17, 2005, naming both Mr. Reed and the Appellee's personal uninsured/underinsured motorist ("UM/UIM") carrier, Appellant Allstate Insurance Company. The Appellees's efforts to obtain service on Mr. Reed in this case were again diligent, but frustrated. (Appx. 4-6, at 3/2/05, 4/7/05, 5/11/05, 8/11/05, 8/19/05, all providing notice of failure of attempts at service; 9/7/05, attempting service by ordinary mail; 9/20/05, allowing the Appellee to obtain service by publication.) Thus service on Mr. Reed was attempted three times during the first action, and seven additional times during this case. Appellee eventually obtained service and a default judgment against Mr. Reed. (*Id.* at 6, 5/18/06.)

On May 3, 2004, the Appellee learned for the first time that Mr. Reed's policy was cancelled just three months prior to the accident. (See Supp., p. 51 letter from Stephanie Nicholson at Nationwide Mutual Ins. Co.) To that point, it was believed that a full and final settlement could be reached and payable by the tortfeasor's liability policy, and that the Appellees' UM/UIM coverage would not be necessary. It was at that time, for the first time, that the Appellee learned that she had a UM claim against her own insurer, Appellant Allstate. For that reason, the Appellee's UM claim did not accrue until May of 2003.

The Angels' UM/UIM limit coverage limit was \$12,500.00, which matches Ohio's minimum financial responsibility limits. (Supp. at 13.) The Appellee made a claim for UM benefits under her Allstate policy on July 30, 2004. (*Id.* at 56.) The Appellee did not file suit against Allstate until the Appellant denied Ms. Angel's claim for UM benefits.

Appellant Allstate invoked the following provision, limiting the amount of time to bring suit or arbitration against Allstate:

Legal Actions

Any 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 added.]

(Supp. at 33, page 19 of the policy.) Thus, "full compliance" with all policy terms and conditions is an express prerequisite to filing suit against Allstate. This admonition *immediately* follows the "two year" limitation period at issue in this case. Because of the language chosen by Allstate, it is necessary to examine what these terms and conditions are.

To begin, under a section headed, "Limits of Liability," the Allstate policy states:

Any amount payable to or for an insured person * under this coverage will be reduced by all amounts paid by the owner or operator of the underinsured auto or anyone else legally responsible. This includes all sums paid under the bodily injury liability coverage of this or any other auto policy.**

We are not obligated to make any payment for bodily injury under this coverage which arises out of the *** 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. [Emphasis added.]

(Supp. at 30, policy at 16.) Again, the Appellees' policy was a **minimum-limits** UM policy. Because of the set-off language emphasized above, if the tortfeasor would have had *any* applicable liability coverage, the policy makes it clear that there would be no UM/UIM claim at all.

An "Uninsured" vehicle is defined to include vehicles with no liability policy in effect (Supp. at 28, policy p. 14, Defn. 1), and vehicles "for which the insurer ... denies coverage or becomes insolvent." (Id. at Defn. 3.) There are no separate terms for Underinsured Motorist coverage, except a definition stating that an Underinsured vehicle is one with at least a minimum limits Ohio policy, but less than the limits of liability in the Appellee's policy. (Id. at Defn. 5.) However, because the Angels' policy is also a minimum limits (i.e., \$12,500) policy, it is impossible for Definition 5 ever to be met. However, Definition no. 5 makes one thing clear: in the Allstate policy at issue, "underinsured" auto is defined only as a subset of "uninsured" autos. Thus, the coverage terms for "underinsured" vehicles are not differentiated from those for "uninsured" vehicles.

ARGUMENT

Appellant Allstate is not entitled to enforce the “two years from the date of the accident” limitation within the UM contract because this Court’s 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.

I. **Re: First Proposition of Law: THIS COURT HAS ALREADY DECIDED THAT A TWO-YEAR CONTRACTUAL LIMITATION PERIOD IS ONLY MARKED FROM THE DATE OF ACCRUAL.**

Appellee acknowledges the necessity of discussing the Supreme Court's recent pronouncement concerning the validity of a two year contractual limitation period for bringing a UM suit. Appellant suggests the proposition that Sarmiento stands as a categorical endorsement of the validity of a two-year limitation. However, a close examination reveals that Sarmiento concerned a different issue, one that had nothing to do with a dispute about the accrual of the UM/UIM claim in that case:

1. A two-year contractual limitation period for filing uninsured- and underinsured-motorist claims is reasonable and enforceable, **regardless of whether the foreign state in which the accident occurred provides a longer statute of limitations for the underlying tort claim.** [Emphasis added.]

Sarmiento v. Grange Mut. Cas. Co. (10/26/05), 106 Ohio St.3d 403, syllabus 1. Thus the issue in Sarmiento was whether a UM/UIM policy's two limitation is enforceable when the limitation period for the underlying tort is longer. *Id.* at ¶ 1.

The court reviewed prior case law about the two year issue, most notably discussing Lane v. Grange Mut. Cos. (1989), 45 Ohio St.3d 63. In Lane, the court held that a contractual limitation period that tied the time to bring suit to the statutory limit for the underlying claim was ambiguous, and therefore unenforceable. The Sarmiento court found that the rule advanced by the appellant was essentially the same as the rule earlier rejected in Lane, and therefore held that the limitations period in a UM contract is not, as a matter of law, tied to the statutory limitations period governing the policy holder's personal injury action against the tortfeasor. Drawing on the court's earlier dicta in

Miller v. Progressive Cas. Ins. Co. (1994), 69 Ohio St.3d 619, the court reasoned:

A contractual limitation period of two years does not violate the underlying purpose of UM/UIM coverage, **because the limitation period does not eliminate or reduce the UM/UIM coverage required by former R.C. 3937.18.** [Cite omitted.] The insured is not foreclosed from commencing an action for UM/UIM coverage so long as the insured satisfies the policy's conditions precedent to coverage, including commencing an action against the insured within the contractual limitations period. [Emphasis added.]

Sarmiento, supra, at ¶ 20. The Sarmiento court did not facts under which the UM insured *was* foreclosed from commencing an action, or from fulfilling conditions precedent.

This case presents issues not before this Supreme Court in Sarmiento. First, the only information available to the Appellee herein was the notation on the police report that "Nationwide" was the tortfeasor's liability carrier. The Appellee did not receive confirmation that Nationwide had no policy in effect until after more than two years had passed following the accident. The tortfeasor, after informing the police that "Nationwide" insured him, has eluded nine different attempts at service. Of course, Nationwide itself is not a proper party to any action until a judgment is first obtained against the tortfeasor. R.C. 3929.06(B); Chitlik v. Allstate Ins. Co. (Cuyahoga Ct. App. 1973), 34 Ohio App. 2d 193, 197-198.

Moreover, the terms of the Appellee's own policy make it clear that so long as the tortfeasor should have even minimum limits, Appellee would have no claim against Allstate. In addition, the Allstate policy states that Allstate would pay nothing until all liability monies are paid. In short, the Appellee had no claim against Allstate at all until learning of the uninsured status of the tortfeasor. The Allstate policy clearly includes coverage when the tortfeasor is uninsured, but it requires any and all available liability sums to be paid first. Allstate cannot now claim that its two year term ran when

the policy itself requires the policy holder to do exactly what she had been doing: pursue recovery from the tortfeasor.

In its reply brief in the trial court, the Appellant cited and attached the recent Sixth District case, Terry v. Wright (Ottawa Ct. App. 2005), 2005 Ohio 2942. Both Sarmiento and Terry are inapposite to this case for the same reason: neither one considered any issue of when the UM/UIM claim accrued. The rule regarding the accrual of UM claims remains as stated previously by the Supreme Court:

2. 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.

4. A provision in a contract of insurance which purports to extinguish a claim for uninsured motorist coverage by establishing a limitations period which expires before or shortly after the accrual of a right of action for such coverage is per se unreasonable and violative of the public policy of the state of Ohio as embodied in R.C. 3937.18. [citations omitted.]

Kraly v. Vannewkirk (1994), 69 Ohio St. 3d 627, syllabus. Appellees concede that following Sarmiento, there is little doubt that a two-year limitation period is not per se unenforceable as being inconsistent with the Ohio UM/UIM statute, R.C. 3937.18. (*Cf.* R.C. 3937.18(H)[eff. 10/31/01], now forbidding any contractual limitation shorter than three years.) But the fact remains that nothing in Sarmiento supercedes the Kraly rule that the contractual period can only be marked forward from the date of accrual.

A pronouncement of the Supreme Court is not superceded or overruled unless a subsequent case addresses the same issue:

This court is bound to follow and apply the precedents of the Supreme Court of Ohio. However, not everything stated in opinions of the Ohio Supreme Court are controlling precedents. **Only determinations necessary to the decision form the *ratio decidendi*, the rule of law, on which a case is decided.** Black's Law Dictionary (6th ed. 1990), 1262; *see, also, Marsh v. State Auto Mut. Ins. Co.* (1997), 123 Ohio App.3d 356, 362, 704 N.E.2d 280, (Grady, J., dissenting). [Emphasis added.]

Columbia Gas of Ohio v. Crestline Paving & Excavating Co. (Lucas Ct. App. 2003), 2003 Ohio 793, P18; *see also* Black's Law Dictionary (7th ed. 1999), at 1269, defining *ratio decidendi*. Nowhere does the word "accrue" appear in Sarmiento. In fact, the Sarmiento court considered a very different set of facts than at issue herein, and stated "nothing prevented the Sarmientos from commencing an action against Grange for UM benefits within the two-year limitation period and then assigning their rights against the tortfeasor to Grange." Sarmiento at ¶ 21. In this case, the Appellees could only work with the tortfeasor's statement that his carrier was "Nationwide." Further, the Allstate policy's terms prevented the Angels from filing suit against Allstate because the policy makes it clear that the UM coverage does not apply if the tortfeasor has any insurance, and does not pay in any event until after the liability coverage(s) pay.

Therefore it is settled law that a contractual limitation period for filing a UM claim may only be marked forward from the date that the UM claim accrues. Kraly, at syllabus 2.

The Appellees' UM claim did not accrue until receipt of notice that the tortfeasor did not have any liability insurance. 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/UIM 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 Appellee 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/UIM claim accrued until that time. Kraly involved a similar situation in that the UM/UIM 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/UIM 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 essential 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.

Justice Lundberg-Stratton, who authored the Sarmiento opinion, has stated clearly that no UM/UIM claim exists on the date of the accident:

It is illogical to award interest beginning on the date of the accident when no UIM claim then existed.

*** (There can be no money owed on the date of the accident until it is known that the tortfeasor's policy is exhausted.)

Miller v. Gunckle (2002), 96 Ohio St. 3d 359, 368 (holding that an arbitration panel could award pre-judgment interest on a UM/UIM claim), J. Lundberg-Stratton, dissenting.

Re: Second Proposition of Law: A UM CONTRACT CANNOT REQUIRE THE INVOLVEMENT OF A STRANGER TO THE CONTRACT WHO MAY OR MAY NOT TIMELY VERIFY THE INSURANCE STATUS OF THE TORTFEASOR.

First it must be noted that the trial court's single sentence that ostensibly distinguished Kraly is mistaken. The trial Court stated, "The tort feisor [in Kraly] was insured at the time of the accident. In this case, Defendant Reed was not." (T.d. 8/26/05, Judgment Entry, Exhibit A.) However, a subsequent Supreme Court discussion of Kraly makes it clear that Kraly was an *Uninsured* Motorist case:

First, Kraly involved a claim for uninsured motorist coverage, while

the present cause of action concerns claims for underinsured motorist benefits.

Ross v. Farmers Ins. Group of Cos. (1998), 82 Ohio St. 3d 281, 286. 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 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

Appellant Teresa Angel's UM claim in this case is not barred by the two year contractual limitation period because the syllabus law of the Ohio Supreme Court requires that a UM contractual time limit be marked only from the date the claim accrues. Ms. Angel's claim did not accrue until she learned that the tortfeasor was uninsured. For the foregoing reasons, the Appellees asks this Court to Affirm the Decision of the Eleventh District Court of Appeals.

Respectfully submitted,



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