

IN THE SUPREME COURT OF OHIO  
CASE NO. 2007-0758

TERESA L. ANGEL	:	ON APPEAL FROM THE
	:	GEAUGA COUNTY COURT OF APPEALS
Plaintiff-Appellee,	:	ELEVENTH APPELLATE DISTRICT
	:	
vs	:	Court of Appeals
	:	Case No. C.A. 2005-G-2669
ERIC J. REED, et al.	:	
	:	
Defendants/Appellants.	:	

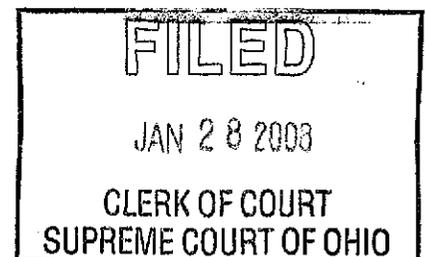
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REPLY BRIEF OF APPELLANT ALLSTATE INSURANCE COMPANY

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**I. REPLY TO APPELLEE'S STATEMENT OF FACTS**

In her Statement of Facts, Appellee sets forth in great detail the numerous efforts that she made to obtain service on tortfeasor Defendant Eric Reed, apparently implying that the delay she encountered in serving Mr. Reed somehow delayed her discovery of Reed's uninsured status. The connection, however, between Appellee's repeated failed attempts to serve Reed and her almost three-year delay in learning that Reed was uninsured is nowhere explained in Appellee's Merit Brief, nor is such a connection apparent – especially since the Crash Report identifies Reed's carrier as "Nationwide." Appellee thus erroneously implies that if she were able to obtain service on Reed earlier, she would have known that Nationwide was not his carrier, and that he was in fact not insured. But Appellee utterly fails to explain how obtaining service on Reed would have made her aware of Reed's uninsured status.

Likewise, Appellee relies on the assertion that before May 3, 2004, no one told her that Reed's policy had actually been cancelled before the accident.

Notably absent in Appellee's Statement of Facts is any attempt whatsoever in the **two-plus years** following the accident – whether by mail, email, telephone, or otherwise – to report Appellee's personal injury claim to Nationwide. Had she taken this simple and very routine step at any point in the days, weeks, months, or **two years** following the accident, she would have timely learned that Reed was uninsured. She would presumably, have then timely contacted her own carrier, Appellant Allstate Insurance Company, with an uninsured motorist claim. But Appellee failed to take this simple and routine step.

Next, Appellee sets forth various provisions of her Allstate policy to support the contention that “Appellee had no claim against Allstate at all until learning of the uninsured status of the tortfeasor.” (Appellee’s Merit Brief, p. 6). However, that contention is utterly false. Appellee unquestionably **had** an uninsured motorist claim against Allstate as of June 14, 2001, the date of the accident, because an uninsured motorist struck her vehicle on that day. Whether she **knew** that she had an uninsured motorist claim at that time does not change the fact that she **had** an uninsured motorist claim at that time. As previously stated in Appellant Allstate Insurance Company’s Merit Brief, the only relevant question is whether the tortfeasor actually had insurance on the date of the accident.

## II. REPLY TO APPELLEE’S ARGUMENT

In paragraph one of Appellee’s “Argument” section, Appellee argues that Allstate’s limitations provision requiring that “any legal action against Allstate must be brought within two years of the date of the accident” is not enforceable because syllabus 2 of *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627 “requires that a UM contractual limitation provision period be marked only from the date of accrual.” (Appellee’s Merit Brief, p. 4). It is not clear what Appellee means by stating that the contractual limitation provision must be “marked” from the date of accrual. Syllabus 2 of *Kraly* reads as follows:

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 other words, a contractual limitation provision is valid only if it starts to run when the claim accrues. If this is what Appellee means by stating that the contractual limitation

provision must be “marked” from the date of accrual in order to be enforceable, then Appellant Allstate agrees with Appellee’s statement as a correct reading of *Kraly* and the two year contractual limitation began to run on the date of the accident.

Next, in paragraph two, Appellee maintains that she “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.” Further down in paragraph two she also states that this was a “situation ... where the Allstate policy holder cannot discover the tortfeasor’s true insurance status until after two years have passed.” The error in these statements goes to the very heart of what is wrong with Appellee’s position and the Appellate Court’s erroneous ruling below; namely, she did have a very simple and easy way of finding out that Reed had no insurance. In fact, she had many simple and easy ways of finding this out. She could have called Nationwide. She could have sent Nationwide a letter. She could have sent an email to Nationwide. She could, and should have done all of the normal, routine things that an injured party typically does in contacting the responsible party’s insurance carrier. At no time in any of these proceedings has Appellee demonstrated, nor even argued these things. In short, she did none of these things, and that is why she did not know of Reed’s uninsured status until almost three years had expired.

**A. REPLY TO § I. OF APPELLEE’S ARGUMENT**

Appellee next focuses a great deal of attention on *Sarmiento v. Grange Mut. Cas. Co.* (2005), 106 Ohio St.3d 403 a case which Allstate cites for the limited proposition that “a two-year contractual limitation period for filing uninsured- and underinsured-motorist

claims is reasonable and enforceable.” Allstate does not cite *Sarmiento* in support of any proposition of law other than “two years is reasonable.” There can be no dispute that Appellant Allstate’s policy of insurance contained a valid two year suit provision:

**Legal Actions**

Any legal action against Allstate must be brought within two years from 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.

The policy language clearly and unambiguously states that a lawsuit against Allstate for uninsured motorists coverage **must be brought within two years from the date of the accident.**

The interpretation of a contract is a matter of law for the court. *See, Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241. “Furthermore, where the terms in an existing contract are clear and unambiguous, this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.” *Id. at 246*, citing Paragraph one of the syllabus in *Blosser v. Enderlin* (1925), 113 Ohio St. 121. Therefore, by the express terms of the policy there can be no question that Appellee’s claim against Allstate for uninsured motorists coverage must have been brought by the two year anniversary of the accident. To hold otherwise would call into question the effectiveness of contract language that is clear and unambiguous.

Appellee’s attempt to incorrectly portray Allstate’s position as being dependent on *Sarmiento* is nothing more than a straw-man argument. In the process of attempting to distinguish *Sarmiento* from this case, Appellee states that “she did not receive confirmation that Nationwide had no policy in effect until after more than two years had passed following the accident.” (Appellee’s Merit Brief, p. 6).

But as is explained above, Appellee fails to state that she made any attempt whatsoever, in the **two-plus years** following the accident, to report her claim to Nationwide. The reason why no one ever told her Reed was uninsured, was because she never asked. Appellee's repeated lament that "no one told her" begs the question: Who exactly was supposed to inform Appellee that Reed was uninsured if she never contacted Nationwide? Until Appellee asked Nationwide about it, no one had any reason to give her any information about it. Nationwide, no doubt, did not even know that the accident had occurred until Appellee's counsel contacted them about it almost three years after the fact.

Appellee also points out that the tortfeasor Reed "eluded nine different attempts at service." (Appellee's Merit Brief, p. 6). What relevance this has to the question of whether the two-year contractual limitations period is enforceable is far from apparent. Serving a defendant with a complaint does not inform the plaintiff whether that defendant is insured. Appellee does not explain how service on Reed would have provided her with this information.

Appellee next states that "Nationwide is not a proper party to any action until a judgment is first obtained against the tortfeasor." Again, it is not even clear what this statement refers to, as Nationwide would not be a proper party in any event, since Reed was not a Nationwide insured. Perhaps Appellee intends to argue that Reed's uninsured status could not have been determined until judgment was rendered against Reed. But this, too, does not make sense, because one of the first steps in any personal injury lawsuit is to contact the liability carrier to put them on notice of a claim and to engage in

settlement negotiations. Once contacted, there is little question that Nationwide would have informed Appellee that Reed is not an insured.

Appellee subsequently argues that she “had no claim against Allstate at all until learning of the uninsured status of the tortfeasor.” (Appellee’s Merit Brief, p. 6). But Appellee unmistakably had an uninsured motorist claim on June 14, 2001, the date of the accident, because an uninsured motorist struck her on that day. She thereafter lost that claim when she failed to file suit within two years of the accident, per the contractual limitations provision.

Finally, at the bottom of page 8 of her Merit Brief, Appellee begins to address when Appellee’s uninsured motorist claim accrued. If it accrued on the date of the accident, as Appellant Allstate urges, then the policy’s two-year limitations provision is valid and enforceable under *Kraly*. Appellee, on the other hand, contends that the claim accrued almost three years after the accident, in May of 2004, when she received notice that the tortfeasor did not have any liability insurance. (Appellee’s Merit Brief, p. 8).

Curiously, in support of this position, Appellee cites the *dissenting* opinions in *Colvin v. Globe Am. Cas. Co.* (1980), 69 Ohio St.2d 293 and *Duriak v. Globe Am. Cas. Co.* (1986), 28 Ohio St.3d 70, two cases which stand for the proposition that “the cause of action for uninsured motorist coverage accrued on the same date that the injury occurred...” *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627.

Appellee then argues that the insolvent-carrier-discovery rule announced in *Kraly*, which expressly limits its application to those exceedingly rare cases in which the liability

carrier becomes insolvent, also applies to cases such as this where the plaintiff erroneously believes that the tortfeasor is insured. (Appellee's Merit Brief, p. 9).

But Appellee's reliance on the *Kraly* insolvent-carrier-discovery rule is misplaced, as *Kraly* itself again cites *Colvin* and *Duriak* for the proposition that "the cause of action for uninsured motorist coverage accrued on the same date that the injury occurred ..." *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627. *Kraly* is distinguished on the basis that the plaintiff therein could not have possibly known that the tortfeasor lacked liability coverage until the liability insurer declared that it was insolvent. In this case, on the other hand, Appellee could have easily found out that the tortfeasor Reed was uninsured, by way of a simple phone call, letter, or email to Nationwide.

Appellee next relies on a number of cases holding that *underinsured* motorist claims do not accrue until the tortfeasor's policy limits are exhausted. In attempting to extend this holding to *uninsured* motorist cases, Appellee once again confuses the issues. Clearly, in an *underinsured* motorist case, a claim does not accrue until the underlying limits are exhausted.

But *uninsured* cases do not rely on a determination of whether any underlying limits are exhausted, and therefore the claim accrues when the accident occurs. Where *underinsured* cases require that the parties wait to see if the tortfeasor's limits will be sufficient to pay the claim, uninsured motorist cases involve no such delay. On the date of the accident, the tortfeasor either *is* insured, or he *is not*. There is no waiting to see if underlying limits are exhausted, because in an *uninsured* motorist case, there are no underlying limits.

Accordingly, Appellee essentially compares apples to oranges when she cites case law holding that underinsured motorist claims do not accrue until the tortfeasor's underlying limits are exhausted. These cases simply do not apply to the uninsured motorist claim at issue here.

**B. REPLY TO § II. OF APPELLEE'S ARGUMENT**

Appellee then further confuses the issues by arguing with the trial court's statement that "The tortfeasor [in *Kraly*] was insured at the time of the accident. In this case, Reed was not." (Appellee's Merit Brief, p. 11). A straightforward reading of *Kraly* reveals that the tortfeasor was indeed insured at the time of the accident. He later became uninsured by way of his liability carrier's insolvency.

Appellee then insists that a "subsequent Supreme Court discussion of *Kraly* makes it clear that *Kraly* was an *Uninsured* Motorist case." (Appellee's Merit Brief, p. 11). Again, Appellee muddles the issues. No one – not the trial court, not Appellant – disputes that *Kraly* was an "uninsured motorist case." The tortfeasor in that case was insured when the accident occurred, and became uninsured when his insurance carrier became insolvent. But the fact that *Kraly* is an "uninsured motorist case" does not mean that its insolvent-carrier-discovery rule, which applies only in those exceedingly rare cases of insurance companies becoming insolvent, applies to this garden-variety uninsured motorist case, where the tortfeasor indisputably was not insured on the date of the accident.

Appellee subsequently cites *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281 for the proposition that an uninsured motorist claim does not accrue until the plaintiff knows that the tortfeasor is uninsured. (Appellee's Merit Brief, p. 12). However,

this holding is nowhere to be found in *Ross*. Certainly, the portion of *Ross* that Appellee quotes in support discusses the rationale for the insolvent-carrier-discovery rule announced in *Kraly*. But as is explained above, that rationale, which applies only to those rare circumstances when the tortfeasor's carrier becomes insolvent, does not apply in cases such as this, where the tortfeasor's uninsured status due to prior cancellation of his policy is readily verifiable on the date of the accident. A discovery rule is not appropriate when a simple phone call to an insurance company – the sort of call that a typical personal injury claimant would normally make to report a claim – would reveal that the tortfeasor was uninsured. Further, the discovery rule finds even less support when a claimant is given two years from the date of the accident to make such a routine inquiry, and yet fails to do so.

Finally, on page 13 of her Merit Brief, Appellee cites to a case that is exactly on-point with the facts of the subject matter. *Marsh v. State Auto Mut. Ins. Co.* (1997), 123 Ohio App.3d 356. The only problem is, Appellee quotes the dissenting opinion. Under facts that are similar in all relevant aspects to those presented here, *Marsh* held in favor of the insurer, and barred plaintiff's uninsured motorist claim because it was filed more than two years after the accident. *Marsh* explains that the discovery rule is inappropriate, because "in the usual situation the insured has ample time to discover the insured status of the tortfeasor within the two year contractual period." *Marsh*, 123 Ohio App.3d 356, 361.

The Court in *Marsh* further explained that:

Indeed the insured will usually learn on the date of the accident or shortly thereafter whether the tortfeasor was insured under an automobile liability policy. It is unlawful to operate a motor vehicle in this state unless proof of financial responsibility is maintained. See R.C. 4509.101. Proof of financial

responsibility is ordinarily provided by use of financial responsibility identification cards which every insurer writing motor vehicle insurance in Ohio is required to provide to every policyholder. See, R.C. 4509.103. Discovering the insurance status of a tortfeasor is quite unlike discovering medical or legal malpractice. In the latter situation the Ohio Supreme Court has been willing to toll the short statute of limitations period for bringing such actions while the malpractice remains undiscovered. *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 512 N.E.2d 337. *Marsh*, 123 Ohio App.3d 356, 361.

### III. CONCLUSION

For all of the foregoing reasons, and for those set forth in Appellant Allstate Insurance Company's Merit Brief, the Court of Appeals' decision must be reversed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A true copy of the foregoing **Reply Brief of Appellant Allstate Insurance Company** was forwarded by regular U.S. mail, postage prepaid, on this 25<sup>th</sup> day of January 2008,

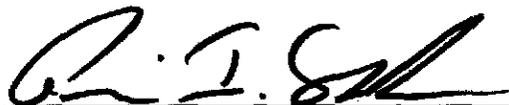
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