

IN THE SUPREME COURT OF OHIO

NORMA REGULA, et al.)	SUPREME COURT CASE NO. 2008-0856
)	
Plaintiffs-Appellants)	On Appeal from Mahoning County Court of Appeals, Seventh Appellate District
)	
vs.)	
)	Court of Appeals Case No.: 2007 MA 40
JOHN PARADISE, et al.)	
)	
Defendants-Appellees)	
)	

**APPELLEE GRANGE MUTUAL CASUALTY COMPANY'S MEMORANDUM
IN RESPONSE TO APPELLANT'S MEMORANDUM
IN SUPPORT OF JURISDICTION**

LYNN MARO #0052146
1032 Boardman-Canfield Road
Boardman, Ohio 44512
Telephone: 330/629-9030
Facsimile: 330/629-9036
Attorney for Appellant

JOHN A. AMS #0074644
Pfau, Pfau & Marando
P. O. Box 9070
Youngstown, Ohio 44513
Telephone: 330/702-9700
Facsimile: 330/702-9704
email: ppm@ppmlegal.com
Attorney for Appellee
Grange Mutual Casualty Co.

CONSTANT A. PRASSINOS #0016510
Creekside Professional Centre, Bldg. B
6715 Tippecanoe Road
Canfield, Ohio 44406
Telephone: 330/533-0916
Facsimile: 330/533/1043
Attorney for Appellee,
John Paradise

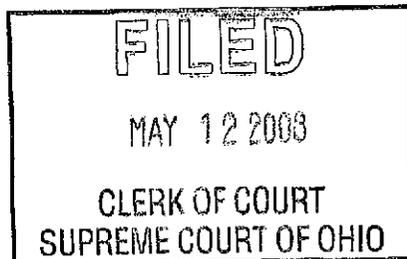


TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC AND GREAT GENERAL INTEREST	3
STATEMENT OF THE CASE AND FACTS	6
ARGUMENT IN OPPOSITION TO APPELLANT’S PROPOSITIONS OF LAW	9
<u>Proposition of Law No. I:</u>	9
<u>Proposition of Law No. II:</u>	14
CONCLUSION	14
PROOF OF SERVICE	15

EXPLANATION WHY THIS IS NOT A CASE OF
PUBLIC OR GREAT GENERAL INTEREST

This case involves a unique set of facts and presents no novel issue of law for this Court to decide. Appellant contends that this case is about whether a contractual limitation period can extinguish a UIM claim before it accrues. Appellant also believes that where exhaustion of the tortfeasor's policy limits occurs after the expiration of the contractual limitation to file suit, the claim for UIM coverage may not be barred.

However, this case is not about either issue.

This case is about a claimant's failure to conduct routine due diligence to discover the tortfeasor's policy limits. This is not a case of public or great general interest. This is one claimant's mistake and her desperate attempt to correct it.

The Court of Appeals' decision does not in any way attempt to amend, alter or change law that has already been firmly established by this Court.

Appellants' first issue addresses whether a contractual limitation period can extinguish a UIM claim before it accrues. The problem in the instant case is that Appellants' UIM claim had accrued, but the Appellants failed to discover this when they should have. Appellant Norma Regula states in her affidavit, "The only reason I did not file a UM/UIM claim against Grange before the three (3) year deadline was because I was told [by her attorney] the policy limits for Paradise [the tortfeasor] were the same as my UM/UIM limits." In other words, Appellants already knew the full extent of their damages. They knew a UIM claim would be necessary if the tortfeasor's policy limits were not high enough. Most importantly, Appellants knew all of this before the three year contractual limitation expired. The only thing Appellants lacked was accurate actual knowledge of

the tortfeasor's policy limits. To obtain this information, Appellants relied on an informal verbal discussion between Appellants' counsel and the tortfeasor's attorney. Never did Appellants attempt to get written confirmation of the policy limits through formal discovery or otherwise. This is despite having three years after the accident to determine this very important fact.

Appellants cry that their claim was extinguished before it accrued, but the facts show that they were already fully aware of the potential for a UIM claim and would have made one but for a misstatement by the tortfeasor's attorney as to the policy limits. Appellants argue that their claim could not accrue until they had accurate actual knowledge. No Ohio court has held this, especially after the amendment of R.C. 3937.18 in 2001. In fact, one of the cases upon which Appellants rely, *Angel v. Reed* (Mar. 9, 2007), 11th App. No. 2005-G-2669, unreported, 2007-Ohio-1069, 2007 WL 726893 held at ¶14 that "a cause of action for uninsured motorist benefits accrues when the injured party knows, **or has reason to know, with the exercise of due diligence**, that the tortfeasor was uninsured." (Emphasis added). Here, the Appellants, had they exercised due diligence by seeking written confirmation or even formal discovery of the tortfeasor's policy limits, had reason to know that the tortfeasor was underinsured. Appellants' cause of action had indeed accrued.

Thus, Appellants' first issue is not even consistent with the facts of this case and certainly not one of public or great general interest.

Furthermore, this Court has already determined in *Sarmiento v. Grange Mut. Cas. Co.* (2005), 106 Ohio St.3d 403 that 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. (The limitation at issue in the instant case is even longer: three years.) Thus, this Court has already considered this issue.

This case is also not of public or great general interest because the state legislature has already expressed a public policy of permitting a three year limitation by amending R.C. 3837.18. R.C. §3937.18, Uncodified Law (“...it is the intent of the General Assembly to ... Express the public policy of the state to: ... Provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages”). The public and general interest has already been addressed and determined by the legislature, so there is no need for this Court to review the instant case.

Appellants’ second issue argues that where exhaustion of the tortfeasor’s policy limits occurs after the expiration of the contractual limitation to file suit, the claim for UIM coverage may not be barred. The thrust of this argument is that the limitations provision and the exhaustion provision read together create an ambiguity. The Seventh District Court of Appeals found no ambiguity. Instead, it found that the exhaustion provision was a condition precedent to *payment*, not to filing suit. *Regula v. Paradise* (Mar. 18, 2008), 7th App. No. 07-MA-40 at ¶49. The Court of Appeals further noted that in this Supreme Court’s decision in *Sarmiento*, the policy contained an exhaustion provision, but this Court still found the limitations provision to be unambiguous and enforceable. *Id.* Once again, this Court has already decided a case with similar, if not exactly the same, issues and there is no need to revisit them.

The Court of Appeals’ decision does not present an issue of public or great general interest. Therefore, jurisdiction should be denied.

STATEMENT OF THE CASE AND FACTS

Appellants filed an amended complaint for personal injury and underinsured motorists benefits against John Paradise and Grange Mutual Casualty Company, respectively, on September 18, 2006. Grange filed a motion for summary judgment, which was granted by the trial court on January 5, 2007. An amended judgment entry was filed on February 20, 2007, adding language that there was no just reason for delay. Appellants then filed their appeal to the Seventh District Court of Appeals, which affirmed the trial court's decision. Appellants then filed a notice of appeal to this Court.

This matter arises from an automobile accident occurring on July 16, 2003. On that date, a vehicle operated by John Paradise ran a red light while traveling southbound on 12th Street in Campbell, Ohio. The Paradise vehicle entered the intersection with Tenney Avenue and struck the rear passenger side of a vehicle operated by Appellant, Mary Regula. Regula had been traveling westbound on Tenney and had almost cleared the intersection with 12th Street when the collision occurred.

At the time of the accident, the Appellants were insured by Appellee, Grange Mutual Casualty Company ("Grange"). The uninsured/underinsured motorists coverage section of the policy states as follows:

So long as the insured has not prejudiced our right of subrogation, any suit against us will be barred unless commenced within 3 years (**THREE YEARS**) after the date of the accident causing the **bodily injury** or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the **insured** has become the subject of insolvency proceedings in any state, whichever is later.

Grange's Motion for Summary Judgment, Exhibit A (Emphasis supplied in the original). The Grange policy contains UM/UIM limits of \$100,000 per person and \$300,000 per accident. *Id.*

On June 4, 2004, Appellee Grange, through its medical claims representative, Donna Berenics, sent a letter to Appellants' counsel which acknowledged representation and advised as follows:

So long as the insured has not prejudiced our right of subrogation, any suit against us will be barred unless commenced within 3 years (**THREE YEARS**) after the date of the accident causing the **bodily injury** or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the **insured** has become the subject of insolvency proceedings in any state, whichever is later.
FAILURE TO PROCEED AS OUTLINED IN THIS PARAGRAPH WITHIN THREE YEARS OF THE ACCIDENT WILL RESULT IN THE FORFEITURE OF YOUR CLIENT'S (UNINSURED/UNDERINSURED) MOTORIST COVERAGE.

Grange's Motion for Summary Judgment, Exhibit B (Emphasis supplied in the original).

The three years came and went without the Appellant making any claim for UM/UIM benefits from Grange. On August 17, 2006, Grange Senior Claims Representative Tammy Lyons sent a letter to Appellants' counsel indicating that the three year limitations period had expired a month prior and reiterated the relevant policy language. Grange's Motion for Summary Judgment, Exhibit C. Lyons indicated that no UM/UIM claim could be made and that she was closing her file.
Id.

On September 18, 2006, two months after the limitations period expired, Appellants filed an amended complaint naming Grange as a defendant for a claim of uninsured/underinsured motorist benefits. Aware of their failure to file within the limitations period, Appellants allege that they only learned of Paradise's liability policy limits on August 31, 2006. Specifically, Appellants claim that in April 2006, Paradise's policy limits were represented during an informal conversation with Paradise's counsel (not Grange) to be \$100,000 per person and \$300,000 per accident, but Appellants later learned on August 31, 2006 that the limits were actually \$15,000 per person and

\$30,000 per accident. Appellants' Amended Complaint, ¶¶18-19. Basically, Appellants claim that this mistaken representation of the policy limits by Paradise's counsel somehow waives or extends the limitations period for the Grange policy. In other words, Appellants argue that the informal verbal representation by Paradise prevented their claim from accruing.

Appellants failed to conduct any formal discovery to determine the true policy limits for Paradise prior to the expiration of the three-year limitations period, instead relying on the verbal representations of a third-party not controlled by Grange.

Appellants' claim accrued prior to the expiration of the three year limitations period. Appellant Norma Regula testified in an affidavit: "If I would have known John Paradise's policy limits were less than my UM/UIM limits, I would have filed suit against Grange before the three (3) year deadline." Plaintiffs' Response to Grange's Motion for Summary Judgment, Exhibit A at ¶11. Ms. Regula continues, "The only reason I did not file a UM/UIM claim against Grange before the three (3) year deadline was because I was told the policy limits for Paradise were the same as my UM/UIM limits." *Id.* at ¶12. The person who told this information to Ms. Regula was her own attorney. *Id.* at ¶7. Ms. Regula's testimony demonstrates a clear awareness that a UIM claim existed and was contemplated before the three years expired. She would have timely filed the lawsuit for such a claim had she simply exercised due diligence by conducting formal discovery and obtaining written confirmation of Paradise's policy limits.

ARGUMENTS IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

Appellant's Proposition of Law No. I: Appellant argues that a contractual limitation cannot be employed to extinguish a claim before it accrues.

A. Appellants' cause of action accrued before the contractual limitations period expired.

This issue is not even properly before this Court because the claim **did** accrue. Appellants contend that the claim did not accrue within the contractual limitations period because they lacked actual and accurate notice of the tortfeasor's liability policy limits. However, the standard is not what the Appellants actually knew, but what they knew *or had reason to know with the exercise of due diligence*. *Angel, supra* at ¶14. In order to determine whether Appellants had a viable underinsured motorists claim, they had to first determine that their injuries were caused by a motorist who was underinsured. *Id.* at ¶12.

It is undisputed that the tortfeasor in the instant case had, at the time of the auto accident, liability limits of \$15,000 per person and \$30,000 per accident. It is also undisputed that Appellants had a policy providing UM/UIM coverage limits of \$100,000 per person and \$300,000 per accident. Finally, it is undisputed that Appellant Norma Regula knew the extent of her damages and would have made her claim for UIM benefits prior to the expiration of the three-year contractual limitations period had she exercised due diligence and obtained accurate confirmation of the tortfeasor's policy limits.

The Court of Appeals commented on Appellants' lack of due diligence as follows:

Furthermore, as a matter of practice, appellants could have requested and examined a copy of Paradise's policy early on in discovery. Had they done so, they would have learned of Paradise's lower policy limits and realized they had a UIM claim

against appellee. Appellants filed their suit against Paradise in July 2005. They had an entire year to conduct discovery and realize Paradise's policy limits before the contractual statute of limitations expired.

Regula at ¶54.

With these undisputed facts, there can be no question that Appellants' case accrued well before the contractual limitation period expired. Thus, the contractual limitation is valid and enforceable because it did not extinguish Appellants' claim before or shortly after the cause of action accrued.

B. Appellants rely on outdated authority and the public policy of the prior (and inapplicable) version of R.C. 3937.18.

Appellants cite several cases in support of their position, but fail to cite any case that addresses the 2001 amendment to R.C. 3937.18, which significantly altered the statute and permitted the contractual limitation found in the Grange policy at issue in this case. None of Appellants' arguments are valid under the current and applicable version of R.C. 3937.18, which specifically states as follows:

(H) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions requiring that, so long as the insured has not prejudiced the insurer's subrogation rights, each claim or suit for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages be made or brought within three years after the date of the accident causing the bodily injury, sickness, disease, or death, or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the insured has become the subject of insolvency proceedings in any state, whichever is later.

The statute, which went into effect on October 31, 2001, also states in the section of Uncodified Law:

In enacting this act, it is the intent of the General Assembly to do all of the following:

(B) Express the public policy of the state to:

(3) Provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(C) Provide statutory authority for provisions limiting the time period within which an insured may make a claim under uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages to three years after the date of the accident causing the injury;

(Emphasis added).

It is noteworthy that Appellants avoided even addressing this uncodified law in their brief.

The language of the Grange policy issued to the Appellants mirrors the current and applicable statutory language:

So long as the insured has not prejudiced our right of subrogation, any suit against us will be barred unless commenced within 3 years (**THREE YEARS**) after the date of the accident causing the **bodily injury** or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the **insured** has become the subject of insolvency proceedings in any state, whichever is later.

Grange's Motion for Summary Judgment, Exhibit A (Emphasis supplied in the original).

Essentially, Appellants argue that the three year limitation violates the public policy of Ohio law. Appellants cite Ohio court opinions where two-year limitations periods (not three-year periods) were deemed unreasonable and against the public policy of R.C. 3937.18. However every single case cited by the Appellants is distinguishable because each case is based upon the prior version of R.C. 3937.18. The statutory provision cited above (which authorizes the three-year period) did not exist prior to 2001. Appellants' inapplicable legal authority interprets insurance

contracts under the old version of the statute, with accidents and/or policy periods that occurred prior to October 31, 2001.

Furthermore, a similar amount of Ohio case law establishes that even prior to October 31, 2001, a two-year limitations period was considered lawful and enforceable. See *Marsh v. State Automobile Mut. Ins. Co.* (1997), 123 Ohio App.3d 356; *Miller v. Progressive Cas. Ins. Co.* (1994), 69 Ohio St.3d 619, 624-625. The Grange policy in the instant case contains a *three* year contractual limitations period.

Appellants' reliance on *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627 is misplaced. *Kraly* involved an insured who filed a UIM claim after learning the tortfeasor's insurer had become insolvent. The tortfeasor had valid insurance at the time of the accident, so there was no reason to pursue a UM claim. The insurer became insolvent while the case was pending, creating a need for UM benefits. This Court fashioned a discovery rule unique to the facts of that case. *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281, 287. In the instant case, the UIM claim did not suddenly spring into being because of insolvency. Appellants would have made the claim in a timely manner had they obtained accurate knowledge of the tortfeasor's policy limits.

As stated above, Appellants' citation to *Angel, supra*, actually bolsters Appellee's argument because it holds that the claim accrues when the insured knew or had reason to know through the exercise of due diligence that the tortfeasor was uninsured. *Angel* at ¶14.

Mowery v. Welsh (March 31, 2006), 9th App. No. 22849, unreported, 2006-Ohio-1552, 2006 WL 826293 involved an insured who continued to incur medical expenses and damages after the contractual limitation expired and before it was known that the damages would exceed the

tortfeasor's policy limits. Such is not the case here, where Appellants already knew the extent of their damages. The *Mowery* court even limited its ruling to the "facts presented herein." *Id.* at ¶25.

The cases cited by Appellants do not support their argument. Furthermore, the public policy considerations raised by Appellants are based upon the former R.C. 3937.18 and fail to address the express legislative intent of the statute's 2001 amendment.

C. This Supreme Court has already upheld nearly identical provisions as those contained in the Grange policy.

In *Sarmiento v. Grange Mut. Cas. Co.* (2005), 106 Ohio St.3d 403 this Court examined a two-year contractual limitation and found it "did 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." *Sarmiento* at ¶20. This Court added, "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 [sic] within the contractual limitations period." *Id.*

In the instant case, the Seventh District Court of Appeals found that the UIM clause (requiring exhaustion of the tortfeasor's policy limits) in the Grange policy was "nearly identical" to the provision in *Sarmiento*. *Regula* at ¶45. In addition, although the contractual limitation provision in the Grange policy was not identical to the provision in the *Sarmiento* policy, the Court of Appeals found the Grange contractual limitation provision unambiguous and the UIM exhaustion clause did not impact that determination. *Id.* at ¶¶46-49. Instead, the Court of Appeals tracked this Court's reasoning in *Sarmiento*: "As was the case in *Whanger* and *Sarmiento*, nothing prevented the *Regulas* from commencing an action against Grange for UIM benefits within the three-year

contractual limitation period and then assigning their rights against the tortfeasor to Grange.” *Id.* at ¶49. The Court of Appeals continued as follows:

The policy at issue simply states that the insured must exhaust the tortfeasor’s liability limits before appellee *will pay*. It does not state that the insured must exhaust the tortfeasor’s limits before the insured can file a lawsuit. Furthermore, the policies in *Sarmiento* and *Whanger* both contained exhaustion provisions nearly identical to the one at issue here that appellants claim render the limitations clause ambiguous. And while neither the *Sarmiento* Court nor this court explicitly addressed whether the exhaustion provisions rendered the limitations provisions ambiguous, both found the limitations provisions unambiguous and enforceable.

Id. (emphasis in original).

Thus, the Court of Appeals decision is a natural and consistent interpretation of this Court’s opinion in *Sarmiento*.

Appellant’s Proposition of Law No. II: This issue is a more fact-intensive version of the first proposition of law, but the arguments and analysis are the same and are incorporated herein. This Court has already found a provision like the one at issue here to be unambiguous and enforceable. *Sarmiento, supra*.

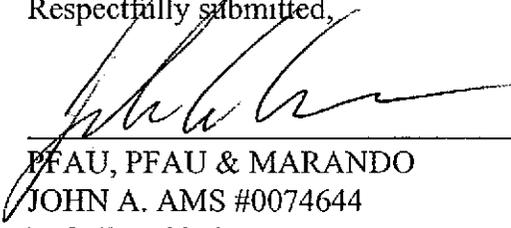
The Seventh District Court of Appeals has already distinguished and explained the inapplicability of its own opinion in *Phillips v. State Auto Mut. Ins. Co.* (1998), 127 Ohio App.3d 175 and *Bradford v. Allstate*, 5th App. No. 04CA9, 2004-Ohio-5997, and such reasoning need not be restated here. Appellants’ remaining authority was decided under the former R.C. 3937.18 and prior to *Sarmiento*.

CONCLUSION

There are no unique issues of law for this Court to decide and this is not a case of public and great general interest. This is a case about an insured who failed to utilize discovery procedures in

the Civil Rules to accurately determine the tortfeasor's policy limits. This Court has already found language such as that in the Grange policy to be unambiguous and enforceable. The legislature has amended R.C. 3937.18 to specifically permit such language and expressed the legislative intent to that effect. There is no new issue to resolve. The law is firm and clear. Therefore, the Supreme Court should decline jurisdiction of this case.

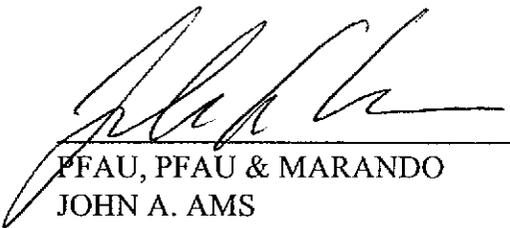
Respectfully submitted,



PFAU, PFAU & MARANDO
JOHN A. AMS #0074644
P. O. Box 9070
Youngstown, OH 44513
Telephone: 330/702-9700
Fax: 330/702-9704
E-mail: jaa@ppmlegal.com
ATTORNEYS FOR APPELLEE
GRANGE MUTUAL CASUALTY CO.

CERTIFICATE OF SERVICE

A copy of the foregoing Brief has been forwarded by regular mail this 8th day of May, 2008, to: Lynn Maro, attorney for Plaintiffs, 1032 Boardman-Canfield Road, Youngstown, Ohio 44512; and Constant A. Prassinis, attorney for Defendant John Paradise, Creekside Professional Centre, Building B, 6715 Tippecanoe Road, Canfield, Ohio 44406.



PFAU, PFAU & MARANDO
JOHN A. AMS