

IN THE
SUPREME COURT OF OHIO

Laura Grace, et al,

Plaintiffs-Respondents,

vs.

*State Farm Mutual Automobile Insurance
Company, et al.,*

Defendants-Petitioners

CASE NO. 2009-0122

On Review of Certified Question from the
United States District Court, Northern
District of Ohio, Eastern Division

Angela Webb,

Plaintiff-Respondent,

vs.

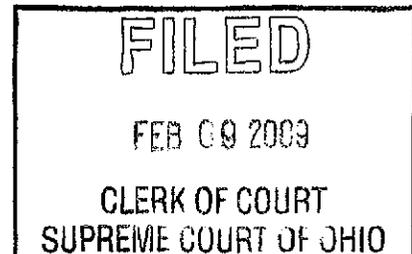
*State Farm Mutual Automobile Insurance
Company*

Patricia Schwab,

Plaintiff-Respondent,

vs.

*State Farm Mutual Automobile Insurance
Company*



**Preliminary Memorandum Addressing Certified Question of Law on behalf of
Plaintiffs-Respondents Grace, Garcia, Ruffin, Webb, and Schwab**

James A. DeRoche (0055613)
jderoche@garson.com
Garson & Associates, LPA
1600 Rockefeller Building
614 West Superior Avenue
Cleveland, OH 44113

Glenn D. Feagan (0041520)
gfeagan@feaganlaw.com
Law Offices of Glenn D. Feagan
8905 Lake Avenue, 4th Floor
Cleveland, OH 44113
*Counsel for Respondents Grace, Garcia,
Ruffin and Jones*

Alberto R. Nestico (0071676)
Nestico@KNRLegal.com
Gary W. Kisling (0003438)
Kisling@KNRLegal.com
Robert W. Redick (0070861)
Redick@KNRLegal.com
Thomas Vasvari (0046614)
Vasvari@KNRLegal.com
Kisling, Nestico & Redick, LLC
3200 W. Market Street, Suite 300
Akron, OH 44333
330-869-9007
330-869-9009 (facsimile)

Austin Tighe (*pro hac vice to be filed*)
Austin@feazell-tighe.com
Feazell & Tighe, LLP
6300 Bridgepoint Parkway
Bridgepoint 2, Suite 220
Austin, TX 78730
512-372-8100
512-372-8140 (facsimile)
Counsel for Respondent Angela Webb

(continued)

Mark A. Johnson (0030768)
mjohnson@bakerlaw.com
Rodger L. Eckelberry (0071207)
reckelberry@bakerlaw.com
Robert J. Tucker (0082205)
rtucker@bakerlaw.com
Baker & Hostetler, LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
614-228-1541
614-462-2616 (facsimile)

Michael K. Farrell (0040941)
mfarrell@bakerlaw.com
Baker & Hostetler, LLP
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114-3485
216-621-0200
216-696-0740 (facsimile)
*Counsel for Petitioners State Farm Mutual
Automobile Insurance Company and State
Farm Fire and Casualty Co.*

Patrick J. Perotti (0005481)
pperotti@dworkenlaw.com
Nicole T. Fiorelli (0079204)
nfiorelli@dworkenlaw.com
Dworken & Bernstein Co., LPA
60 South Park Place
Painesville, OH 44077
440-352-3391
440-352-3469 (facsimile)

Edwin E. Schottenstein (0016834)
schott100@sbcglobal.net
Schottenstein Law Offices
100 East Broad Street, Suite 1337
Columbus, OH 43215
614-452-2266
614-462-2406 (facsimile)
Counsel for Respondent Patricia Schwab

TABLE OF CONTENTS

| | |
|------------------------------|----|
| Introduction..... | 1 |
| Facts | 1 |
| Law and Argument | 2 |
| Conclusion | 8 |
| Certificate of Service | 10 |

PLAINTIFFS-RESPONDENTS' PRELIMINARY MEMORANDUM
ADDRESSING CERTIFIED QUESTION OF LAW

INTRODUCTION

On January 15, 2009 the Honorable Kathleen M. O'Malley, United States District Court Judge for the Northern District of Ohio, Eastern Division, issued a Memorandum and Order in Case Numbers 1:08-CV-2083 (*Schwab v. State Farm Insurance*); 1:08-CV-254 (*Grace v. State Farm Insurance*); and 5:08-CV-1917 (*Webb v. State Farm Insurance*) which certified a question to this Court. The question certified is:

Does Ohio Revised Code Section 3937.18, as amended in 2001 by S.B. 97 (effective October 31, 2001), permit insurers to include an express limitation of coverage in an automobile insurance policy that precludes payments made under Uninsured/Underinsured Motorist coverage for medical expenses that are paid or payable under the Medical Payments coverage purchased in the same policy?

Controlling precedent for all three of these cases is provided by this Court's decision in *Berrios v. State Farm Ins. Co.* (2002), 98 Ohio St.3d 109. Because this particular question is not one for which there is no controlling precedent in the decisions of this Court as required by S.Ct.Prac.R. XVIII(1), this Court should decline to answer the question. In addition, there are fact specific issues related to fraud which render this question inappropriate for this Court to answer.

FACTS

Each of the Plaintiffs-Respondents ("Plaintiffs") purchased auto insurance from State Farm. Their respective policies each included, among other coverages, Medical Payment Coverage (Med Pay) and Uninsured/Underinsured Motorist Coverage for Bodily Injury (UMBI). See Order Certifying Question of State Law at 2. Plaintiffs paid separate premiums for each coverage, and each coverage is governed by separate provisions and conditions within their policies. *Id.* Despite the fact that Plaintiffs paid separate premiums for each coverage, State

Farm included non-duplication clauses in the policies which limit State Farm's obligation to pay a claim under both coverages and prevent Plaintiffs from fully recovering on each policy for which they paid a premium. *Id.* at 2-3.

In addition to the denial of coverage under each policy, Plaintiffs have suffered a direct and concrete injury by having to pay two premiums for one coverage. As a result of State Farm's policy language, Plaintiffs have paid, and State Farm has collected, a premium for coverage that simply does not exist. State Farm fraudulently took premiums from Plaintiffs for both Med Pay and UMBI coverage, but State Farm never intended to pay claims for both coverages. State Farm denied Plaintiffs one of the coverages for which they paid.

This is not, as State Farm argues, merely a policy limitation issue. Coverage is not limited, it is rendered entirely worthless. This is nothing more or less than a bait and switch scheme. It is not permitted in Ohio.

This Court has held that "people who pay separate premiums for separate coverages should get what they pay for." *Berrios*, 98 Ohio St.3d at 112. That holding is clearly unaffected by S.B. 97 and represents the controlling precedent in this case.

LAW AND ARGUMENT

This Court may decline to answer questions certified by a federal court when there already is controlling precedent in the decisions of this Court. This Court may also decline to answer questions certified by a federal court when the certified questions of state law are factually specific in nature.

A federal court may certify a state law question to a state supreme court only if there is a state law procedure for such certification. 17A Wright, Miller & Cooper Fed. Prac. & Proc. 3d § 4248. Such certification may only be made, therefore, in accordance with the state procedure. This Court adopted such a certification procedure in 1988, S.Ct.Prac.R. XVI, and found it

constitutional in *Scott v. Bank One Trust Co., N.A.* (1991), 62 Ohio St.3d 39. The current version is found in S.Ct.Prac.R. XVIII.

The original version of the rule provided that “[t]he Supreme Court may, at its discretion, answer questions of law certified to it * * *,” and in Section 9 provided that this Court could “decline[] to answer any or all of the questions of law certified to it * * *.” The Sixth Circuit in *Diamond Club v. Insurance Co. of N. Am.* (6th Cir., 1993), 984 F.2d 746, 747 observed that “the Supreme Court is free, in the exercise of its discretion, to decline to answer any or all of the questions certified to it.” This Court did dismiss certification in *Fid. & Guar. Ins. Underwriters, Inc. v. Strayhorn Limousine Serv.* (1993), 66 Ohio St.3d 1493.

The current version of the rule still vests this Court with the discretion to answer the certified question (“[t]he Supreme Court may answer questions of law certified to it * * *”), and in Section 6 provides that this Court will “issue an entry identifying the question or questions it will answer and declining to answer the remaining question or questions.” This Court declined to answer the question certified in *Corwin v. Ford Motor Co.* (1994), 69 Ohio St.3d 1448 (“this court declines to answer the certified question pursuant to S.Ct.Prac.R. XVIII(6), and this cause is dismissed”).

Thus, under this Court’s certification procedure, not only must a federal court certify a question that may be determinative of the proceeding and for which no controlling precedent of this Court exists, but this Court must also agree to answer the question. *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St.3d 293, 294 (“the district court has certified to us, and we have agreed to answer, a specific question of state law * * *”).

To avoid the waste of judicial resources, S.Ct.Prac.R. XVIII(1) requires that the question of Ohio law be one “for which there is no controlling precedent in the decisions of this Supreme

Court.” Because this Court’s decisions in *Berrios v. State Farm Ins. Co.*, *supra*, and the cases upon which *Berrios* relied, *Grange Mut. Cas. Co. v. Lindsey* (1986), 22 Ohio St.3d 153 and *Shearer v. Motorists Mut. Ins. Co.*(1978), 53 Ohio St.2d 1, provide controlling precedent on this question, this Court should decline to answer the certified questions.

In addition, this Court has determined that it is not appropriate to answer certified questions of state law that are factually specific in nature. *Copper v. Buckeye Steel Castings* (1993), 67 Ohio St.3d 563. This case is not just about a policy limitation, as the certified question implies, it is about a fraudulent scheme to charge policy holders premiums to cover claims the insurer never intended to pay. Fraud is a factually driven cause of action. These factual issues take this case beyond the scope of the question posed and render the question inappropriate.

I. This Court’s decision in *Berrios v. State Farm Ins. Co.* (2002), 98 Ohio St.3d 109 provides controlling precedent for the certified question.

In *Berrios*, as in this case, the key factor was that the insurance company “treated UIM coverage separately from medical payments coverage by setting out separate conditions for payment under the contract and charging separate premiums.” *Berrios*, 98 Ohio St.3d at 113. This Court explained in *Berrios* at 98 Ohio St.3d 112 that “people who pay separate premiums for separate coverages should get what they pay for.” That is the rule of law in Ohio, and that is the controlling law in this case.

State Farm argued before Judge O’Malley that when the General Assembly amended R.C. 3937.18 in 2001 with S.B. 97, it abrogated *Berrios*. It did not.

To the extent the General Assembly intended to supersede or abrogate certain opinions of this Court, it expressly stated that intent in its statement of intent to S.B. 97:

Section 3. In enacting this act, it is the intent of the General Assembly to do all of the following:

* * *

(E) To supersede the holdings of the Ohio Supreme Court in (2000), 90 Ohio St. 3d 445, (1999), 85 Ohio St. 3d 660, (2000), 88 Ohio St. 3d 358, (1982), 69 Ohio St. 2d 431, (1996), 76 Ohio St. 3d 565, and their progeny.¹

Berrios was decided in 2002, after S.B. 97 was adopted, but it was based on two earlier cases: *Shearer v. Motorists Mut. Ins. Co.*, *supra* and *Grange Mut. Cas. Co. v. Lindsey*, *supra*. *Berrios* 98 Ohio St.3d at 111-112. Both of these cases considerably pre-date S.B. 97, yet neither is included in the lengthy list of cases which the General Assembly amended in R.C. 3937.18 to specifically supersede. In fact, none of the cases specifically listed in S.B. 97 dealt with the issue of charging premiums for coverage which the policy language then explicitly excluded.

What S.B. 97 did do was eliminate the requirement for the mandatory offer of uninsured and/or underinsured motorist coverage. The General Assembly also made this clear in its statement of intent to S.B. 97:

Section 3. 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:

(1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

* * *

What S.B. 97 did not do is permit insurance companies to charge two premiums for only one coverage.

¹ These cases are *Linko v. Indemnity Ins. Co. of N. America*, 90 Ohio St.3d 445 (2000); *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660 (1999); *Schumacher v. Kreiner*, 88 Ohio St.3d 358 (2000); *Sexton v. State Farm Mut. Auto. Ins. Co.*, 69 Ohio St.2d 431 (1982); and *Gyori v. Johnston Coca-Cola Bottling Group, Inc.*, 76 Ohio St.3d 565 (1996).

The elimination of the requirement for the mandatory offer of uninsured and/or underinsured motorist coverage is not the issue in this case. The “people who pay separate premiums for separate coverages should get what they pay for” principle announced in *Berrios* addressed the impropriety of requiring the payment of premiums for illusory coverage. That is not a mandatory offer of uninsured and/or underinsured motorist coverage issue, which might be affected by S.B. 97; it is an issue of fraud.

Thus, there is no basis upon which to conclude that the General Assembly abrogated this Court’s holding in *Berrios*, *Shearer*, or *Lindsey* on the issue of charging premiums for non-existent coverage when it eliminated the requirement for the mandatory offer of uninsured and/or underinsured motorist coverage. *Berrios* is still controlling on that issue.

State Farm also argued that the non-duplication provisions are merely policy limitations which are permitted by R.C. 3937.18. This is not a policy limitation or exclusion issue; it is an issue of fraud. In support of its argument State Farm cites *Snyder v. Am. Family Ins. Co.*, 114 Ohio St.3d 239 (2007), a case which has nothing to do with the issue before the federal court but that addressed the definition of an uninsured motorist and whether an immune tortfeasor was “uninsured” under the terms of the policy. This Court in *Snyder* at 114 Ohio St.3d 245 noted that the provisions in S.B. 97 “provide[] insurers considerable flexibility in devising specific restrictions on any offered uninsured—or underinsured-motorist coverage.” (Emphasis added.) But this “flexibility” is not a license to steal from the insured. *Snyder* is not relevant, let alone controlling.

Although *Snyder* did not address the question certified to this Court, *Berrios* did. *Snyder* did not overrule *Berrios*. To the contrary, *Snyder* at 114 Ohio St.3d 247 specifically reaffirmed

that a common-law prohibition, like that in *Berrios*, overrides the terms of the contract. *Berrios* thus provides controlling precedent, and this Court need not answer the certified question.

The mere fact that the federal court does not recognize that *Berrios* is controlling precedent does not obligate this Court to answer its certified question. As this Court noted in *Scott v. Bank One Trust Co., N.A.* (1991), 62 Ohio St.3d 39, 43 “[p]oints of state law that seem unclear to federal courts may be quite clear to ‘[i]nformed local courts.’” And informed local courts have not had a problem recognizing that S.B. 97 did not abrogate *Berrios*. In *Wayne Mut. Ins. Co. v. Bradley*, 5th Dist. No. 2005CA00200, 2006-Ohio-1517, the court refused to allow the insurance company to set off medical payments against the UM payments based on *Berrios*, *Shearer*, and *Lindsey*. This Court denied leave to appeal in *Wayne Mut. Ins. Co. v. Bradley* (2006), 110 Ohio St.3d 1442.

Because there is controlling precedent from this Court on the question certified to it, this Court should exercise its discretion and decline to answer the question.

II. Certified questions of state law that are factually specific in nature are inappropriate for this Court to answer.

This Court recognized, in *Copper v. Buckeye Steel Castings, supra* that “it is not appropriate for this court to answer certified questions of state law that are so factually specific in nature.”

Plaintiffs allege that State Farm represented that by paying two separate premiums, Plaintiffs would get two separate coverages. State Farm accepted the two premiums, but never intended to provide both coverages. That is fraud. The Ninth District Court of Appeals in *Baughman v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 22204, 2005-Ohio-6980, reversed a summary judgment in State Farm’s favor on active and constructive fraud claims in a similar

multiple premium case, as did the Second District Court of Appeals in *Cornett v. State Farm Mut. Ins. Co.*, 2d Dist. No. 19103, 2002-Ohio-3562.

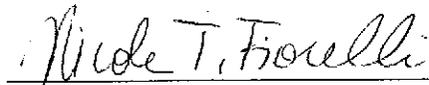
Fraud claims are fact specific, which is why Civ. R. 9(B) requires that “all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” The court in *F & J Roofing Co. v. McGinley & Sons, Inc.* (1987), 35 Ohio App. 3d 16, 17 explained that “‘the circumstances constituting fraud’ means the pleader must state the time, place and content of the false representation, the fact misrepresented, and what was obtained or given as a consequence of the fraud.” See also *Mohme v. Deaton*, 12th Dist. No. CA2005-12-133, 2006-Ohio-7042, ¶ 29 (“[w]hether fraud exists is generally a question of fact”); *Carpenter v. Scherer-Mountain Ins. Agency* (1999), 135 Ohio App. 3d 316, 328 (“[t]he existence of fraud is generally a question of fact”); *Whitmore v. Brittain*, (Mar. 18, 1976), 8th Dist. No. 34689 (“[i]t is well established that the existence of fraud is generally a question of fact”).

Accordingly, this case presents questions of state law that are so factually specific in nature as to render it inappropriate as a question for this Court to answer.

CONCLUSION

For the reasons set forth herein, this Court should exercise its discretion to decline to answer the question certified by the federal district court in *Schwab v. State Farm Insurance*, *Grace v. State Farm Insurance*, and *Webb v. State Farm Insurance*. There is controlling precedent in the decisions of this Court. These decisions include *Berrios v. State Farm Ins. Co.*, *Shearer v. Motorists Mut. Ins. Co.*, and *Grange Mut. Cas. Co. v. Lindsey*. In addition, because the claims in this action are based on fraud, the case presents factually specific issues which are not appropriate for this Court to answer.

Respectfully submitted,



Patrick J. Perotti, Esq.
Nicole T. Fiorelli, Esq.
Dworken & Bernstein Co., LPA

Edwin E. Schottenstein, Esq.
Schottenstein Law Offices
Counsel for Respondent Patricia Schwab

James A. DeRoche, Esq.
Garson & Associate Co., LPA

Glenn D. Feagan, Esq.
Law Offices of Glenn D. Feagan

*Counsel for Respondents Grace, Garcia,
Ruffin and Jones*

Alberto R. Nestico, Esq.
Gary W. Kisling, Esq.
Robert W. Redick, Esq.
Thomas Vasvari, Esq.
Kisling, Nestico & Redick, LLC

Austin Tighe, Esq.
Feazell & Tighe, LLP

Counsel for Respondent Angela Webb

CERTIFICATE OF SERVICE

This is to certify that a copy of Respondents' Memorandum Addressing Certified Question of Law was sent to the following by first class U.S. mail on February 6, 2009 addressed as follows:

James A. DeRoche, Esq.
Garson & Associate Co., LPA
1600 Rockefeller Building
614 West Superior Avenue
Cleveland, OH 44113

Glenn D. Feagon, Esq.
8905 Lake Avenue, 4th Floor
Cleveland, OH 44113
*Counsel for Respondents Grace, Garcia,
Ruffin and Jones*

Alberto R. Nestico, Esq.
Gary W. Kisling, Esq.
Robert W. Redick, Esq.
Thomas Vasvari, Esq.
Kisling, Nestico & Redick, LLC
3200 W. Market Street, Suite 300
Akron, OH 44333

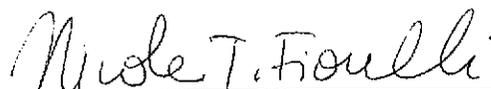
Austin Tighe, Esq.
Feazell & Tighe, LLP
6300 Bridgepoint Parkway
Bridgepoint 2, Suite 220
Austin, TX 78730
Counsel for Respondent Angela Webb

Edwin E. Schottenstein, Esq.
Schottenstein Law Offices
100 East Broad Street, Suite 1337
Columbus, OH 43215
Counsel for Respondent Patricia Schwab

Mark A. Johnson, Esq.
Rodger L. Eckelberry, Esq.
Robert J. Tucker, Esq.
Baker & Hostetler, LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4360

Michael K. Farrell, Esq.
Baker & Hostetler, LLP
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114-3485

*Counsel for Petitioners State Farm Mutual
Automobile Insurance Company and State
Farm Fire and Casualty Co.*



Nicole T. Fiorelli, Esq. (0079204)
Dworken & Bernstein co., LPA
*One of the Attorneys for Plaintiff-Respondent
Patricia Schwab*