

ORIGINAL

IN THE SUPREME COURT OF OHIO

DENNIS J. DOMINISH, : **10-1431**
Plaintiff-Appellee, : **On Appeal from the Lake**
 : **County Court of Appeals**
vs. : **Eleventh Appellate District**
NATIONWIDE INSURANCE COMPANY, : **Court of Appeals**
 : **Case No. 2009-L-116**
Defendant-Appellant. :
 :
 :

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT NATIONWIDE INSURANCE COMPANY**

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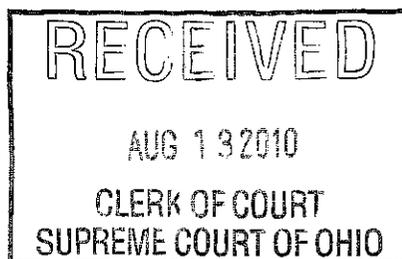
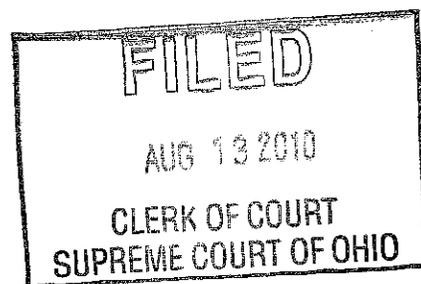


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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND/OR
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents two very critical and distinct issues involving the citizens of the State of Ohio, the insurance industry, contractual rights, and whether certain actions can be deemed to constitute a waiver of contractual rights. The first issue is whether the following language contained in the Nationwide insurance policy issued to the plaintiff-appellee is clear and unambiguous on its face. That provision provides as follows:

Suit Against Us. No action can be brought against us unless there has been full compliance with the policy provisions. Any action must be started within one year after the date of loss or damage.

Despite the clear language set forth above, and despite the fact that the plaintiff-appellant in the lower court did not even raise the issue on appeal, a majority of the court of appeals decided *sua sponte* that the above policy provision was ambiguous, stating that “a policyholder could interpret it to mean that the initial claim must be presented within one year, thus “starting” the adverse action against Nationwide”. In a strong dissent, Judge Grendell wrote that “No reasonable interpretation of this provision would lead anyone to conclude that the word ‘action’ entails the filing of an insurance claim.” Further, in the dissenting opinion it was stated that “The majority’s construal of ‘action’ as possibly meaning the filing of an insurance claim is forced and unnatural.” This decision is also contrary to numerous other courts which have held that the same or similar language was not ambiguous, but instead was clear and unambiguous.

The second issue involves the issue of waiver or estoppel. Specifically, the court of appeals held that by continuing to communicate with the insured after the one-year limitation period had expired, Nationwide waived the one-year provision in the policy. The court of appeals so held, despite the fact that the Nationwide claim representative had specifically sent the plaintiff written

correspondence stating that Nationwide was issuing a “partial denial of claim,” and further pointing out to the insured that there was a one-year limitation in the policy to bring suit. Further, Nationwide had advised the plaintiff insured that by continuing to investigate the claim it was not waiving the provisions of the policy. Despite the above, a majority of the court of appeals concluded as follows:

- (1) “By sending the letter after the expiration of the limitation of action provision and indicating in that letter that it would further consider the merits of Dominish’s claim, Nationwide waived the limitation of action provision.”
- (2) Since these (nonwaiver) “agreements” were not ratified (signed) by Dominish, they are of no legal effect.

This Court has not had occasion to consider the issue of whether an insurance company waives a limitation of action provision in its policy by continuing to investigate the claim or communicate with the insured beyond the applicable limitation period since the cases of Hounshell v. American States Ins. Co. (1981), 67 Ohio St.2d 427, and Broadview Savings & Loan Co. v. Buckeye Union Ins. Co. (1982), 70 Ohio St.2d 47. Most, if not all, of the insurance policies issued in the state of Ohio have limitation of action provisions limiting the amount of time within which suit can be filed against the insurance carrier. It is important, and of public and great general interest, that the citizens of Ohio and the insurance industry know whether provisions such as those contained in the Nationwide policy at issue are clear and unambiguous. Likewise, it is extremely important that the citizens of the state of Ohio and the insurance industry know whether and under what circumstances conduct beyond the limitation period may constitute a waiver or estoppel.

The lower court decision holding that the Nationwide policy language was ambiguous and further holding that Nationwide waived its right to rely upon said provision was decided by a 2-1 majority, with a strong dissenting opinion. It is respectfully submitted that this decision was contrary

to the decisions rendered in Hounshell, *supra*, and Broadview Savings & Loan Co., *supra*, and further was contrary to the Eleventh District Court of Appeals opinion in Vogias v. Ohio Farmers Ins. Co., 177 Ohio App.3d 391, 2008-Ohio-3605. In that case, the same court of appeals held that “by investigating her claim, Ohio Farmers’ action can in no way be constructed as waiving the time limitation for a legal action”. In the case at bar, the same court of appeals held exactly the opposite in holding that the subsequent investigation by Nationwide constituted a waiver of the time limitation. Further, in Vogias the language in the Ohio Farmers policy was absolutely identical to the language contained in the Nationwide policy. Despite the fact that both policies contained identical language, the court of appeals in Vogias did not find the language to be ambiguous, but in the case at bar the court of appeals *sua sponte* decided that the same language was ambiguous.

This case presents issues of public and great general interest and further involves the substantial constitutional right of parties to freely enter into contracts. As stated in the case of Westfield Ins. Co. v. Galatis, 2003-Ohio-5849, 100 Ohio St.3d 216:

An insurance policy is a contract. The freedom to contract and the attendant benefits and responsibilities of the parties to a contract are integral to the liberty of the citizenry, so much so that the United States Constitution specifically protects against state encroachment upon contracts. Clause 1, Section 10, Article I, United States Constitution. In order to protect the integrity of contracts, the United States Constitution gives the United States Supreme Court the authority to overrule a state supreme court’s interpretation of a state statute that infringes upon the right to contract. (Citations omitted).

The Ohio Constitution also protects the freedom of contract. “The General Assembly shall have no power to pass . . . laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intentions of parties . . . by curing omissions, defects, and errors in instruments . . . arising out of their want of conformity with the laws of this state. Section 28, Article II, Ohio Constitution.

When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. Hamilton Ins. Serv. Inc. v. Nationwide Ins. Cos. (1999), 86 Ohio St.3d 270, 273, citing Employers Liability Assurance Corp. v. Roehm (1919), 99 Ohio St. 343; syllabus. We examine the

insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. Kelly v. Med Life Ins. Co. (1987), 31 Ohio St.3d 130, ¶1 of the syllabus. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. Alexander v. Buckeye Pipeline Co. (1978), 53 Ohio St.2d 241, ¶2 of the syllabus. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. Id. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. Gulf Ins. Co. v. Burns Motors, Inc. (Texas 2000), 22 S.W.3d 417, 423.

On the other hand, where a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent. Shifrin v. Forest City Enterprises, Inc. (1992), 64 Ohio St.3d 635. A court, however, is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties. Id.; Blosser v. Enderlin (1925), 113 Ohio St. 121, ¶1 of the syllabus.

The court of appeals in this case took the clear and unambiguous language of the policy and created an ambiguity where none existed. As was stated in the dissenting opinion, the majority's finding of an ambiguity "is forced and unnatural".

With respect to the issue of waiver, it is important that insurers and insureds be given clear guidance as to under what circumstances conduct by an insurance company may constitute waiver of the limitation of action provision. Under the holding in the court of appeals below, an insurance company would be discouraged from communicating with its insured after the limitation of action period had expired for fear that any conduct or contact would constitute a waiver. In fact, in the majority opinion it is stated that "if Nationwide did not intend to waive the limitation of action provision, it could have merely denied the claim, closed its case and not anticipated further action." The majority in the court of appeals below seems to suggest that it would be better practice for an insurance company to simply deny a claim and close its case as soon as the limitation period expires, as opposed to attempting to communicate with and possibly work with its insured in attempting to resolve the claim. This cannot be prudent public policy in the state of Ohio, and this Court should take the opportunity to clearly delineate under what circumstances waiver and estoppel apply.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellant Dennis J. Dominish made a claim under his homeowner's insurance policy issued by defendant-appellee Nationwide Insurance Company, claiming that on July 28, 2006, he sustained loss and/or damages caused by a violent rain storm. Nationwide had issued a homeowner's insurance policy to the plaintiff, which was effective from July 7, 2006, through July 7, 2007. A copy of the entire Nationwide policy is part of the record. Michael Rahe, the Nationwide claims representative, investigated the claim. On September 6, 2006, Nationwide, through Mr. Rahe, sent the plaintiff a letter and enclosed an estimate in the amount of \$6,741.96 for the alleged damages to the house. Also, Nationwide sent a check in that same amount to the plaintiff under separate cover. On September 6, 2006, plaintiff was also sent a "PARTIAL DENIAL OF COVERAGE" letter, indicating "There is no coverage available for your roof or any damage to contents of your home or any resultant mold formed as a result of your loss. There is coverage available for the resultant interior damage to your home." Further, in this same letter of September 6, 2006, Mr. Rahe of Nationwide also advised the plaintiff that "any suit you wish to file against Nationwide as a result of this claim must be done so within one year."

The plaintiff refused Nationwide's settlement offer and returned the check to Nationwide. On April 5, 2007, Nationwide sent another letter to the plaintiff with a "non-waiver agreement" indicating that Nationwide was not waiving any rights under the policy while it continued to investigate the loss. On June 6, 2007, Nationwide again sent another check in the amount of \$6,741.96, together with a copy of the original estimate, to the plaintiff. Again, the plaintiff rejected this settlement amount and returned the check along with the letter to Nationwide with a handwritten note and the voided check. On August 16, 2007, Mr. Rahe sent a non-waiver form requesting that it be signed and returned by the plaintiff. However, Nationwide did indicate its willingness to consider whatever other information the plaintiff wished to present in support of the claim.

Having failed to reach any agreement with Nationwide, the plaintiff then filed a complaint in the Lake County Common Pleas Court on July 25, 2008, which was nearly two years after the alleged date of loss. In his complaint, the plaintiff claimed that Nationwide breached the contract of insurance by failing to pay the claim, and the plaintiff further alleged negligence, breach of fiduciary duty and bad faith. Nationwide filed an answer, denying the allegations of the complaint and further raising the affirmative defense that the suit was time barred under the terms of the policy. See ¶¶ 33 and 34 of the answer. Also, defendant Nationwide raised the same issue in its counterclaim for declaratory judgment. See ¶¶ 26 and 34 of the counterclaim for declaratory judgment filed by Nationwide.

Subsequently, on March 9, 2009, Nationwide filed a motion for summary judgment claiming that the plaintiff's suit was barred by the one-year limitation of action provision in the policy. A certified copy of the Nationwide policy was attached to the motion for summary judgment. In response, the plaintiff argued that the policy provision was ambiguous and, in addition, the plaintiff argued that Nationwide had waived the one-year limitation by continuing to investigate the claim. Defendant submitted a reply brief in support of the motion for summary judgment, together with an affidavit and copies of the various correspondence from Nationwide to the plaintiff. On August 24, 2009, the trial court issued an order granting the motion for summary judgment, holding as follows:

1. “. . . reasonable minds must find that the policy language regarding the one-year limitation-on-action clause in Nationwide's policy is clear and unambiguous and that the plaintiff was or should have been fully aware of its restrictions.”
2. “. . . the record shows that the plaintiff had no reasonable basis to hope for an adjustment from Nationwide, and cannot argue that he relied on such an expectation to delay filing suit. Therefore, reasonable minds must find that Nationwide did not waive the limitation-of-action provision in Dominish's policy.

3. “In cases such as the one at bar regarding property damage claims under homeowner insurance policies, courts have generally found that one-year limitation provisions are reasonable and enforceable. Therefore, reasonable minds must find that a one-year limitation-of-action provision in a homeowner insurance policy is lawful.

On September 22, 2009, plaintiff filed a notice of appeal with the Eleventh District Court of Appeals, Lake County, Ohio. It is important to note that the only assignment of error set forth by the plaintiff-appellant concerned the waiver issue. Plaintiff-appellant did not appeal the decisions of the trial court to the effect that the policy provision was clear and unambiguous and/or that the policy provision was reasonable and enforceable. After the parties fully briefed the issue of waiver, the court of appeals, in a 2-1 decision, reversed the trial court, holding that the policy provision was ambiguous; and that Nationwide waived the one-year policy provision “by sending the letter after the expiration of the limitation of action provision and indicating in that letter that it would further consider the merits of Dominish’s claim.” (Court of Appeals opinion, p. 10). In the dissenting opinion, Judge Grendell disagreed, stating that the plaintiff-appellant had not raised the issue of ambiguity as an assignment of error; that the issue was neither briefed nor argued; and that the policy provision was not ambiguous. Further, Judge Grendell was of the opinion that Nationwide did not waive the policy provision based upon the facts and circumstances of the case.

Defendant Nationwide now appeals to the Ohio Supreme Court on the grounds that the court of appeals decision was incorrect as a matter of law, and that this appeal presents issues of public and great general interest and involves a substantial constitutional question.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1

A PROVISION IN A HOMEOWNER’S INSURANCE POLICY TITLED
“SUIT AGAINST US. NO ACTION CAN BE BROUGHT AGAINST US UNLESS
THERE HAS BEEN FULL COMPLIANCE WITH THE POLICY PROVISIONS.
ANY ACTION MUST BE STARTED WITHIN ONE YEAR AFTER THE DATE

OF LOSS OR DAMAGE" IS UNAMBIGUOUS AND IN A SUIT ON THE POLICY COMMENCED MORE THAN ONE YEAR AFTER THE DATE OF LOSS SUCH PROVISION WILL BE ENFORCED IN ACCORDANCE WITH THE PLAIN MEANING OF ITS TERMS. APPEL V. COOPER INS. CO. (1907), 76 Ohio St. 52, APPROVED AND FOLLOWED.

Despite this issue not having been raised on appeal, and despite the fact that this issue was neither briefed nor argued, the majority of the court of appeals held that the language contained in the Nationwide policy providing that "any action must be started within one year after the date of loss or damage" was ambiguous. The court of appeals suggested that the word "action" did not necessarily mean a lawsuit and the term "starting" did not necessarily mean the filing of a legal action. However, as correctly stated in the dissenting opinion, the provision, read in its entirety, entitled "Suit Against Us", the "usual and ordinary" meaning of the word action is a legal proceeding and "no reasonable interpretation of this provision would lead anyone to conclude that the word 'action' entails the filing of an insurance claim."

Similar if not identical provisions have been repeatedly held by various courts to be clear and unambiguous. For instance, in the case of Appel v. Cooper Ins. Co., *supra*, in syllabus 2, this Court held that a similar provision in a fire insurance policy providing that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within six months next after the fire" was unambiguous. Further, in the case of Giles v. Nationwide Mut. Ins. Co., 199 Ga.App. 483, 405 S.E.2d 112 (Ga. App. 1991), the court of appeals in Georgia held that the exact policy provision which is in the policy at issue was not ambiguous. In that case, the appellants argued that the clause was ambiguous because the term "action" could be interpreted to mean any action taken by the insured, as opposed to the initiation of a lawsuit. The Georgia court of appeals disagreed, holding that the word "action" must be read together with the clause heading, "Suit against us". The court went on to state that "when these terms are given their ordinary

meaning and viewed from the perspective of a lay person, the clear and unambiguous meaning of the clause is that lawsuits brought against appellee must be filed within one year of the date of loss or damage.

In the case of Jares v. Jefferson Ins. Co. of New York, Case No. 48926, 1985 Ohio App. LEXIS 7493 (Cuyahoga Cty. Ct. App.), the Eighth District Court of Appeals held that the word “action” as used in an insurance policy “refers to a proceeding in a court of law, particularly when the word ‘action’ appears under the heading “suit against us”.

This Court has repeatedly held that an insurance policy is a contract and that the relationship and rights of the insurer and insured are contractual in nature. Sarmiento v. Grange Mut. Cas. Co., 106 Ohio St.3d 403, 2005-Ohio-5410. In interpreting a policy provision, words used in the contract must be given their plain and ordinary meaning. Gomolka v. State Auto Mut. Ins. Co. (1982), 70 Ohio St.2d 166. The role of a court is to give effect to the intent of the parties to the agreement. Hamilton Ins. Services, Inc. v. Nationwide Ins. Co. (1999), 86 Ohio St.3d 270. The insurance contract must be examined as a whole and it must be presumed that the intent of the parties is reflected in the language used in the policy. Kelly v. Med Life Ins. Co. (1987), 31 Ohio St.3d 130. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. Gulf Ins. Co. v. Burns Motors, Inc. (Tex. 2000), 22 S.W.3d 417. See also Westfield Ins. Co. v. Galatis, 2003-Ohio-5849, 100 Ohio St.3d 216.

In the case at bar, the provision in question is clearly titled “Suit Against Us”. If there were any ambiguity in the word “action”, which defendant-appellant disputes, when reading the provision in its entirety it is clear and unambiguous that a lawsuit must be filed within one year of the date of loss. In addition, Nationwide sent a letter to the plaintiff-appellee on September 6, 2006, in which it was clearly pointed out to the insured by the Nationwide claims representative “that the policy

states on page E2 that any suit you wish to file against Nationwide as a result of this claim must be done so within one year, per the following condition:”. The entire policy provision was then set forth in the letter. This letter was titled “PARTIAL DENIAL OF COVERAGE”. See Exhibit A-2 attached to the brief of defendant-appellee in the court of appeals.

Finally, in the case of Vogias v. Ohio Farmers Ins. Co., 177 Ohio App.3d 391, 2008-Ohio-605 (Ohio App. 11th Dist. 2008), the same court of appeals, including the two judges who wrote the majority opinion in the case at bar, considered language which was identical to the language found in the Nationwide policy. In that case, the same court of appeals affirmed the granting of a summary judgment in favor of the defendant insurance company. The primary issue in that case was whether the insurance company had waived the one-year provision, but, significantly, the court of appeals in Vogias did not determine the same language to be ambiguous.

For all of the foregoing reasons, it is respectfully submitted that this Court should accept jurisdiction in this case in order to clarify whether such language as used in respective insurance policies should be enforced according to the clear and unambiguous language of the policy.

PROPOSITION OF LAW NO. 2

AN INSURANCE COMPANY MAY NOT BE HELD TO HAVE WAIVED A LIMITATION OF ACTION CLAUSE IN A FIRE INSURANCE POLICY WHERE THE INSURANCE COMPANY CLEARLY ISSUES A “PARTIAL DENIAL OF COVERAGE”, TENDERS A CHECK FOR THE AMOUNT OF THE COVERED LOSS AND WHICH CHECK IS REFUSED AND RETURNED BY THE INSURED, AND WHERE THE INSURANCE COMPANY MERELY INDICATES A “WILLINGNESS TO INVESTIGATE THE CLAIM FURTHER” AFTER THE ONE-YEAR LIMITATION PERIOD HAS EXPIRED.

The record below reflects the following undisputed and salient facts with regard to the claim of the plaintiff-appellee that Nationwide waived the one-year limitation of action provision in its policy:

1. The alleged loss occurred on July 28, 2006.

2. After investigation, Nationwide sent plaintiff a letter dated September 6, 2006, enclosing an estimate in the amount of \$6,741.96 for the alleged covered damages to plaintiff's home. On the same date, Nationwide sent the plaintiff a check in the amount of \$6,741.96 together with a second letter titled "PARTIAL DENIAL OF COVERAGE". The letter from Nationwide went on to state that "There is no coverage available for your roof or any damage to contents of your home or any resultant mold formed as a result of your loss. There is coverage available for the resultant interior damage to your home." That same letter advised the plaintiff that "any suit you wish to file against Nationwide as a result of this claim must be done so within one year, per the following condition". The "Suit Against Us" provision of the policy was then set forth verbatim.

3. On April 5, 2007, Nationwide sent another letter to the plaintiff enclosing a reservation of rights and non-waiver agreement, indicating that by continuing to investigate the claim Nationwide was not waiving or invalidating any of the terms or conditions of the policy.

4. On June 6, 2007, a copy of the original estimate as well as a reissued check in the amount of \$6,741.96 were again forwarded to the plaintiff. This letter was again sent back to Nationwide, with a handwritten note from the plaintiff along with a voided check.

5. The one-year limitation period expired on or about July 28, 2007.

6. On August 16, 2007, Nationwide sent a final letter to the plaintiff acknowledging that the plaintiff had returned the previously sent check and also acknowledging receipt of a report from an engineer hired by the plaintiff. In this letter, the Nationwide representative once again enclosed a non-waiver form purporting to acknowledge and preserve the plaintiff's rights under the policy as well as Nationwide's rights, and further indicating that Nationwide was willing to "investigate the claim further, in an effort to handle to a proper conclusion".

7. Plaintiff filed suit on July 25, 2008, nearly two years after the date of loss.

The court of appeals, in its majority opinion, held that the letter of August 16, 2007, acted as a waiver of the one-year policy provision. In the dissenting opinion, Judge Grendell pointed out that under the case of Hounshell v. American States Ins. Co. *supra*, that “where there is a specific denial of liability upon the policy, either totally or in part, there would generally be no waiver occasioned by an offer of settlement” (emphasis added). Further, in her dissent Judge Grendell cited to this Court’s opinion in Broadview Savings & Loan Co. v. Buckeye Union Ins. Co., *supra*, where this Court stated that “the process of investigation in determining liability by an insurer does not constitute a waiver by that insurer”. Finally, the dissent cited to the language in Hounshell, *supra*, where this Court stated that there must be “resulting reliance by the insured” in order for there to have been a waiver of the policy provision.

In the case of Hounshell v. American States Ins. Co., *supra*, this Court held in its syllabus as follows:

An insurance company may be held to have waived a limitation of action clause in a fire insurance policy by acts or declarations which evidence a recognition of liability, or acts or declarations which hold out a reasonable hope of adjustment and which acts or declarations occasion the delay by the insured in filing an action on the insurance contract until after the period of limitation has expired.

Subsequently, in the case of Broadview Savings & Loan Co. v. Buckeye Union Ins. Co., *supra*, this Court held that “no settlement offers and actions by or on behalf of the insurance company here could have reasonably led the mortgagee Broadview to believe that the matter was being settled, and that it would be relieved of its contractual responsibility to bring legal action within the period set forth in the policy”. *Id.* at p. 51.

In both Hounshell, *supra*, and Broadview Savings & Loan, *supra*, this Court emphasized that in order for there to be a waiver of the one-year policy provision there must be two requirements. First, the insurance company must recognize or admit liability under the policy; and secondly, the insured must have reasonably relied on the acts or declarations of the company to delay in bringing

an action on the insurance contract. Neither of these requirements is present in the case at bar. First, Nationwide clearly issued a “PARTIAL DENIAL OF COVERAGE” in a lengthy letter dated September 6, 2006, a little over one month after the alleged loss. Nationwide tendered a check for what it believed to be the amount owed, which check was rejected and never cashed by the plaintiff. Nationwide again tendered the check in June of 2007, over a month before the limitation period expired, and once again the plaintiff rejected the check and returned it to Nationwide. At that point, it was clear that there was a partial denial of liability, and further, there was nothing done by Nationwide to suggest that the insured could delay bringing an action on the policy. There was absolutely no reliance on the part of the insured plaintiff at that point that would have justified his failure to file within the one year period.

The majority of the court of appeals below held that the letter of August 16, 2007, whereby the Nationwide representative indicated a “willingness to investigate the claim further”, constituted a waiver. However, this letter did not meet either of the above requirements. Specifically, the letter did not indicate that Nationwide was accepting or recognizing liability beyond that which it had previously recognized in September of 2007. Further, this letter, which was written after the one-year limitation period had already expired, could not have caused the plaintiff insured to delay filing the action within one year.

In Broadview Savings & Loan, *supra*, this Court concluded that where the adjuster was “attempting to gather information for consideration of the claim, and where no settlement offers were made or any assurances made with respect to the likelihood of future settlement offers, there is no basis for an estoppel of the insurance company’s right to enforce the suit limitation provision”. That is precisely the situation which is presented to the Court in this case. In fact, Nationwide was arguably showing good faith in stating to the insured that it would keep an open mind and consider any additional information which the insured might wish to present in support of the claim, even

though the one-year limitation of action period had expired. Showing a willingness to consider additional information without committing to liability under the policy and without leading the insured to believe that additional money would be forthcoming on the claim cannot be deemed to have constituted a waiver of the policy provision mandating that suit against the company be brought within one year. Arguably, had the insured presented additional information that established the validity of his claim over and above what Nationwide had already determined, the parties may have reached an agreement for some additional compensation. However, based on the policy language, the insured would simply not be able to file a lawsuit at that point in time.

In determining whether Nationwide waived the policy provision, the Court must necessarily look only at the actions of the company and the actions of the insured that took place prior to the one-year limitation period expiring. It is only in looking at the actions of the parties before the one-year period expired that it can be determined whether there had been an admission of liability and/or detrimental reliance on the part of the insured, as was held in both Hounshell, *supra*, and Broadview Savings & Loan, *supra*. See also, Thomas v. Allstate Ins Co., 974 F.2d 706 (6th Cir. 1992), where the Sixth Circuit Court of Appeals held that “the process of investigation in determining liability by an insurer does not constitute a waiver by that insurer.” In Thomas, *supra*, the defendant sent a notice of denial and at no time thereafter did the defendant company indicate any contrary intention. The Sixth Circuit held that there was no waiver under such circumstances.

Finally, in Vogias v. Ohio Farmers Ins. Co., *supra*, this same court of appeals held that the delay in making the claim by the plaintiff and filing the lawsuit was due to “her own inaction”.

In Vogias, the Eleventh District Court of Appeals further stated as follows:

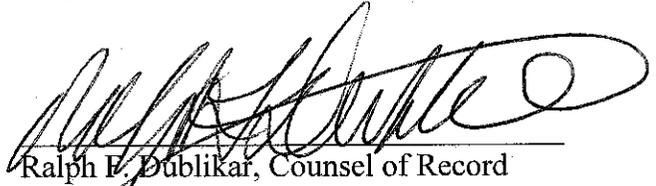
There is no time limitation in the homeowner’s policy for an investigation and payment of a claim, but there is an express clause limiting a time within which suit can be brought. By investigating her claim, Ohio Farmers’ action can in no way be construed as waiving the time limitation for a legal action.”

Although the court of appeals in the case at bar attempted to distinguish Vogias on its facts, there is no rational basis for holding that Nationwide in any way waived its limitation of action provision in the policy.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Honorable Court should accept jurisdiction in this case, recognizing that this case presents issues which are of public and great general interest, and also that this case involves substantial constitutional questions regarding the rights of parties to enter into valid contracts.

Respectfully submitted,

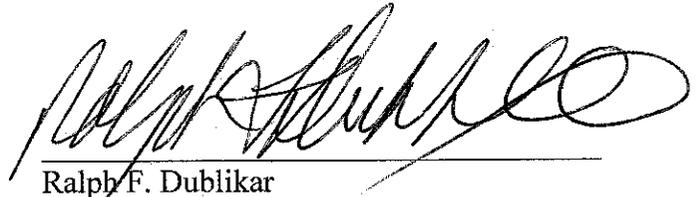


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NATIONWIDE INSURANCE COMPANY

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, David A. McGee, Svete & McGee Co., LPA, 100 Parker Court, Chardon, Ohio 44024, on August 12, 2010.



Ralph F. Dublikar

COUNSEL FOR APPELLANT
NATIONWIDE INSURANCE COMPANY

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

DENNIS J. DOMINISH, : OPINION
Plaintiff-Appellant, :
- vs - : CASE NO. 2009-L-116
NATIONWIDE INSURANCE COMPANY, :
Defendant-Appellee. :

**FILED
COURT OF APPEALS
JUN 30 2010
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO**

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 002372.

Judgment: Reversed and remanded.

David A. McGee, Svete, McGee & Carrabine Co., L.P.A., 100 Parker Court, Chardon, OH 44024 (For Plaintiff-Appellant).

Ralph F. Dublikar and Andrea K. Ziarko, Baker, Dublikar, Beck, Wiley & Mathews, 400 South Main Street, North Canton, OH 44720 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Dennis J. Dominish, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court granted a motion for summary judgment filed by appellee, Nationwide Insurance Company ("Nationwide").

{¶2} On July 27, 2006, a thunderstorm moved through Lake County, causing a tree to fall onto Dominish's home in Perry, Ohio. According to Dominish, the tree caused damage to the roof, attic, and interior of the residence.

{¶3} At the time of the storm damage, Dominish carried a policy of homeowner's insurance through Nationwide. Among other items, the policy contained a one-year limitation of action provision, which provided that "any action" against Nationwide needed to be "started" within one year of the date of the loss.

{¶4} Dominish contacted Nationwide and reported the incident by filing a claim for property damage. Michael Rahe of Nationwide was assigned to handle Dominish's claim. On September 6, 2006, Rahe sent Dominish a letter, which stated (1) Nationwide was not covering the roof damage, damage to personal property, or resultant mold damage; (2) Nationwide would cover the interior damage in the amount of \$6,741.96; and (3) Dominish may be entitled to \$2,201.82 for depreciation if he completes certain interior work and permits Nationwide to conduct another inspection within 180 days. Nationwide sent Dominish a check for \$6,741.96; however, Dominish did not cash this check.

{¶5} Also on September 6, 2006, Rahe sent Dominish a "partial denial of coverage" letter. This letter reiterated that certain damages to Dominish's home were not covered by his homeowner's policy. The letter stated that Nationwide sent a roofing contractor to Dominish's home to inspect the roof and the inspector concluded that the damage to the roof was caused by deterioration, not storm-related damage. In addition, this letter stated that if Dominish wished to file a lawsuit as a result of the claim, it must be filed within one year and quoted the one-year limitation of action provision from the insurance contract.

{¶6} On April 5, 2007, Rahe sent Dominish another letter. This letter indicated that Nationwide had been unable to schedule an inspection of the property by an

engineer due to Dominish's failure to accommodate the offered dates. It asked Dominish to provide acceptable dates to accomplish the inspection. In addition, the letter stated that a nonwaiver agreement was enclosed and asked Dominish to sign the nonwaiver agreement and return it to Nationwide. Also, the letter indicated a reservation of rights letter was included.

{¶7} The nonwaiver agreement provided that any action Nationwide took in investigation of the claim would not waive any rights Nationwide had under the policy. Dominish never signed this document.

{¶8} On June 6, 2007, Rahe sent Dominish another letter. This letter referenced Dominish's failure to sign the nonwaiver agreement and his failure to accommodate Nationwide by offering potential dates for the inspection by Nationwide's engineer. The letter stated a check was enclosed for the originally-determined covered damage. The letter stated that Nationwide concluded its handling of the claim; however, it instructed Dominish to contact Nationwide if he wished to pursue the claim further.

{¶9} Dominish wrote on the June 6, 2007 letter and returned it to Rahe. Dominish stated:

{¶10} "I have two times previously sent you contractors[] true repair costs which you have not responded too (enclosed again within) also enclosed is the inspection of an engineer, structural; showing the double rafter roof showing that the problem was not ongoing but was done by the fallen tree. Please find the completely unrealistic check voided back to you."

{¶11} On August 16, 2007, Rahe sent another letter to Dominish. In this letter, Rahe acknowledged receiving the report from Dominish's engineer, Eric Satler. Also, Rahe asked Dominish to contact him to set up another inspection in which Satler, another engineering firm, and Nationwide representatives would attend, as well as any other individuals that Dominish requested on his behalf. In addition, the letter provided:

{¶12} "The cause of loss needs to be better defined, as do the damages caused by the covered cause of loss. Another estimate applying the proper unit cost to the covered damages, may then need to be written.

{¶13} "The enclosed Non-Waiver form should be read, signed, dated and returned to me via the enclosed envelope. *This form acknowledges and preserves your rights under the homeowner's policy, as well as the rights of Nationwide, and indicate[s] Nationwide's wish and willingness to investigate the claim further, in an effort to handle to a proper conclusion.*" (Emphasis added.)

{¶14} On July 25, 2008, Dominish filed a complaint, commencing the instant action against Nationwide. In his complaint, Dominish advanced claims for breach of contract, negligence, breach of fiduciary duty, and bad faith. In addition, he sought declaratory judgment that the policy covered his losses.

{¶15} Nationwide filed an answer to Dominish's complaint. In that same pleading, Nationwide also advanced a counterclaim for declaratory judgment. Dominish filed an answer to Nationwide's counterclaim.

{¶16} Nationwide filed a motion to bifurcate the claims for bad faith, negligence, and breach of fiduciary duty from the claims for breach of contract and declaratory

judgment. Dominish filed a brief in opposition to Nationwide's motion to bifurcate. Upon consideration, the trial court granted Nationwide's motion to bifurcate.

{¶17} Nationwide filed a motion for summary judgment and attached a copy of the homeowner's policy that was issued to Dominish to its motion. Dominish filed a brief in opposition to Nationwide's motion for summary judgment and attached his affidavit and a copy of the August 16, 2007 letter from Rahe. Nationwide filed a reply brief in support of its motion for summary judgment and attached an affidavit from Jennifer Short, a Special Claims Representative at Nationwide. In addition, there are several documents attached to Short's affidavit, including: a copy of the September 6, 2006 letter from Nationwide to Dominish; a copy of a portion of the September 6, 2006 "denial of benefits" letter; a copy of the April 5, 2007 letter from Nationwide to Dominish; a copy of the "nonwaiver agreement"; a copy of the June 6, 2007 letter from Nationwide to Dominish; a copy of Dominish's handwritten response to the June 6, 2007 letter; and a copy of the August 16, 2007 letter from Nationwide to Dominish.

{¶18} The trial court granted Nationwide's motion for summary judgment. The trial court found the one-year limitation of action provision in the policy was not ambiguous, was enforceable, and was not waived by Nationwide.

{¶19} Dominish raises the following assignment of error:

{¶20} "The trial court erred in holding that Mr. Dominish failed to demonstrate a genuine issue of material fact which established Nationwide's waiver of their one (1) year contractual limitation of action against Nationwide and, thus, erred in granting Nationwide's motion for summary judgment."

{¶21} In order for a motion for summary judgment to be granted, the moving party must demonstrate:

{¶22} "(1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶23} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶24} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E) provides:

{¶25} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶26} Summary judgment is appropriate pursuant to Civ.R. 56(E) if the nonmoving party does not meet this burden.

{¶27} Appellate courts review a trial court's entry of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. "De novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

{¶28} Generally, a cause of action for breach of a written contract must be brought within 15 years. R.C. 2305.06. However, the parties to a contract may limit the time in which a lawsuit must be filed, provided the limitation is "reasonable." *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 2005-Ohio-5410, at ¶11. (Citations omitted.)

{¶29} In this matter, the policy language in question provides:

{¶30} "Suit against us. No action can be brought against us unless there has been full compliance with the policy provisions. Any action must be started within one year after the date of loss or damage."

{¶31} To be enforceable, the limitation of action provision in the contract must be "clear and unambiguous to the policy holder." *Sarmiento v. Grange Mut. Cas. Co.*, at ¶11, citing *Colvin v. Globe Am. Cas. Ins. Co.* (1982), 69 Ohio St.2d 293, 296. At the trial court level, Dominish argued the limitation of action provision in the instant contract is ambiguous. On appeal, Dominish does not raise this argument. However, under our de novo standard of review, we briefly address this issue.

{¶32} In *Thomas v. Allstate Ins. Co.*, the Sixth Circuit concluded that a limitation of action provision was not ambiguous. *Thomas v. Allstate Ins. Co.* (C.A.6, 1992), 974 F.2d 706, 710. In that case, the limitation of action provision provided, in part: “[a]ny suit or action must be brought within one year after the date of loss.” In this matter, the last sentence of the provision provides “[a]ny *action* must be *started* within one year after the date of loss or damage.” (Emphasis added.) This language is ambiguous, in that a policy holder could interpret it to mean that the initial claim must be presented within one year, thus “starting” the adverse action against Nationwide. A policy holder may likely believe he or she is “starting” a claim when it is submitted to the insurance company. It appears Nationwide may have intended this language to preclude the filing of lawsuits after one year. However, Nationwide, as the drafter of the policy, could have clearly stated that any *lawsuit* must be *filed* within one year if this is, in fact, what it intended. It could also have defined “action” to include lawsuit, but “action” is undefined in the policy.

{¶33} In its analysis of this issue, the trial court concluded that Nationwide specifically informed Dominish that a lawsuit needed to be filed within one year. There is a copy of a letter in the record, which purports to inform Dominish that any suit needs to be filed within one year. The language of this letter is, “[f]inally, I wish to point out that the policy states on page E2 that any suit you wish to file against Nationwide as a result of this claim must be done so within one year of the date of loss or damage.” This language is merely Rahe’s interpretation of the policy language. “An insurance policy is a contract.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶9.

Accordingly, the actual language of the policy controls, regardless of any interpretation by a Nationwide claims representative made after the contract was executed.

{¶34} Further, in his affidavit, Dominish states that Nationwide never informed him that he only had one year to file a lawsuit. This matter is at the summary judgment level and there is a factual dispute on this issue, which must be resolved in favor of Dominish as the nonmoving party. Thus, Nationwide's assertion that it informed Dominish of the one-year requirement in the September 2006 letter is not determinative of this issue.

{¶35} We conclude that the policy language in question is ambiguous. In addition, even if the language was unambiguous, for the following reasons, we conclude that Nationwide waived the limitation of action clause.

{¶36} The Supreme Court of Ohio has held:

{¶37} "An insurance company may be held to have waived a limitation of action clause in a fire insurance policy by acts or declarations which evidence a recognition of liability, or acts or declarations which hold out a reasonable hope of adjustment and which acts or declarations occasion the delay by the insured in filing an action on the insurance contract until after the period of limitation has expired." *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St.2d 427, syllabus.

{¶38} In this matter, Nationwide initially admitted partial liability by sending Dominish a check for \$6,741.96. In addition, Nationwide initially denied the claim, in part, concluding that the damage to the roof was not caused by the tree. However, after Dominish submitted a report from an engineer, Nationwide sent Dominish a letter indicating that it wanted to perform another inspection of the house by an engineer.

This letter indicated that the cause of loss would be further investigated, that damages would be reviewed, and that “another estimate *** may then need to be written.” The fact that Nationwide sought another inspection by an engineer reveals that it intended to investigate the structural components of the house. This, together with the remaining language of the letter, suggests that Nationwide was willing to reconsider its initial determination that the roof damage was not covered under the policy.

{¶39} Accordingly, at this point, Nationwide was engaged in active negotiations with Dominish regarding the settlement of his claim. Nationwide sent Dominish a check, which Dominish did not accept and indicated was “unreasonable.” Thereafter, Nationwide agreed to reconsider its settlement offer by agreeing to conduct another inspection with engineers and other parties in light of the submission of the expert report from Dominish’s hired engineer.

{¶40} Moreover, it is important to note that this letter was sent to Dominish *after* the expiration of the limitation of action provision. If Nationwide did not intend to waive the limitation of action provision, it could have merely denied the claim, closed its case, and not anticipated further action.

{¶41} By sending the letter after the expiration of the limitation of action provision and indicating in that letter that it would further consider the merits of Dominish’s claim, Nationwide waived the limitation of action provision.

{¶42} In *Vogias v. Farmers Ins. Co.*, this court concluded that a nonwaiver agreement between the insured and an insurance company precludes a waiver claim regarding a limitation of action provision. *Vogias v. Farmers Ins. Co.*, 177 Ohio App.3d 391, 2008-Ohio-3605, at ¶33. Nationwide argues that there were two nonwaiver

agreements sent to Dominish. However, the undisputed evidence in the record indicates that neither of these "agreements" was signed by Dominish. Thus, since these "agreements" were not ratified by Dominish, they are of no legal effect.

{¶43} Nationwide claims the mere fact that it continued to investigate the claim does not mean it waived the limitation of action provision. The Sixth Circuit has held that "[t]he process of investigation in determination of liability by an insurer does not constitute a waiver by that insurer." *Thomas v. Allstate Ins. Co.*, 974 F.2d at 710, citing *Broadview Savings & Loan Co. v. Buckeye Union Ins. Co.* (1982), 70 Ohio St.2d 47, 51.

{¶44} In the case sub judice, Nationwide was not merely investigating the claim. It had made a settlement offer to Dominish by tendering two checks to him. When Dominish indicated that the settlement offers were too low, Nationwide agreed to reinvestigate the damage to Dominish's home for the purpose of determining if he was entitled to a higher settlement offer. Nationwide had already determined that it was partially liable for the damage to Dominish's home. In August 2007, the inquiry shifted to the extent of Nationwide's liability.

{¶45} In *Vogias v. Farmers Ins. Co.*, the insurance company investigated the claim after the one-year limitation of action provision expired. *Vogias v. Farmers Ins. Co.*, 2008-Ohio-3605, at ¶31. However, it is important to note in that case that the claim itself was presented after the expiration of the one-year limitation of action period. *Id.* at ¶30.

{¶46} Nationwide argues that it did not waive the limitation of action provision because it specifically denied coverage in the September 2006 letter. However, subsequent to that letter, Nationwide took action, in the form of the August 2007 letter,

which could only be construed as a willingness to reconsider its previous denial of coverage.

{¶47} Nationwide contends that Dominish caused some of the delay in this matter by failing to accommodate Nationwide's inspections. While some of the letters suggest that Dominish was not cooperating with Nationwide for the purpose of setting up a home inspection, Dominish stated in his affidavit that he "repeatedly offered Nationwide free and continuing access to the home for any inspection they wanted."

{¶48} Through its actions, Nationwide waived the requirement that a lawsuit be filed within one year as its actions permitted Dominish to hold out a reasonable hope that Nationwide would ultimately settle the claim.

{¶49} Due to our conclusion that Nationwide waived the requirement that a lawsuit be filed within one year, we do not address whether the limitation of action provision is reasonable.

{¶50} In this matter, the policy language containing the limitation of action provision is ambiguous. The ambiguity must be construed in favor of Dominish. Further, Nationwide waived the requirement that a lawsuit be filed within one year by the actions it took in this matter. Accordingly, Nationwide is not entitled to judgment as a matter of law, and the trial court erred in granting its motion for summary judgment.

{¶51} Dominish's assignment of error has merit.

{¶52} The judgment of the Lake County Court of Common Pleas is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶53} The majority holds that the one-year limitation-of-action provision in defendant-appellee, Nationwide Insurance Company's, insurance policy is ambiguous or, in the alternative, that Nationwide has waived enforcement of the limitation. The majority's decision is contrary to both logic and precedent. Accordingly, I respectfully dissent.

{¶54} As an initial matter, plaintiff-appellant, Dennis J. Dominish, did not raise the issue of the provision's ambiguity as an assignment of error and, therefore, the issue was neither briefed nor argued before this court.

{¶55} At issue is the following provision:

{¶56} 7. **Suit Against Us.** No action can be brought against us unless there has been full compliance with the policy provisions. Any action must be started within one year after the date of loss or damage. [Emphasis sic.]

{¶57} The majority finds this language ambiguous, "in that a policy holder could interpret it to mean that the initial claim must be presented within one year." I disagree. No reasonable interpretation of this provision would lead anyone to conclude that the word "action" entails the filing of an insurance claim. The basic meaning of the word "action" broadly refers to any process of acting or doing. Construed in isolation, the word may signify such diverse meanings as a legal proceeding, a military engagement, or human endeavor. When construing the language used in a policy, however, words

are not to be construed in isolation but in context and with regard for the intent of the parties.

{¶58} "In interpreting a provision in a written contract, the words used should be read in context and given their usual and ordinary meaning." *Carroll Weir Funeral Home v. Miller* (1965), 2 Ohio St.2d 189, 192, citing *Morgan v. Boyer* (1883), 39 Ohio St. 324, at paragraph three of the syllabus. In the context of a limitation-of-action provision prefaced by the caption **Suit Against Us**, the "usual and ordinary" meaning of the word action is a legal proceeding. *Giles v Nationwide Mut. Fire Ins. Co.* (Ga.App.1999), 405 S.E.2d 112, 114.¹ The majority's construal of "action" as possibly meaning the filing of an insurance claim is forced and unnatural. Not only is such a construction contrary to the caption of the provision, it is also contrary to the parties' intent as evidenced by other provisions of the policy requiring the insured to provide "immediate notice" in case of loss.

{¶59} The majority argues, in the alternative, that Nationwide has waived the enforcement of the limitation-of-action clause by indicating a "willing[ness] to reconsider its initial determination that the roof damage was not covered under the policy."

{¶60} "An insurance company may be held to have waived a limitation of action clause in a fire insurance policy by acts or declarations which evidence a recognition of liability, or acts or declarations which hold out a reasonable hope of adjustment and

1. "Applying the rule that '[a]n insurance policy, like any other contract, must be interpreted according to its plain language and express terms [cit.], *** we find that in the clause at issue the word 'action' must be read together with the clause heading, '[s]uit against us.' The Random House Dictionary of the English Language (unabr. 2d ed.) defines 'suit' as, inter alia, 'the act, the process, or an instance of suing in a court of law; legal prosecution; lawsuit.' Id. at 1902. 'Action' is defined in part as 'Law[;] a proceeding instituted by one party against another[;] the right of bringing it.' Id. at 20. Thus, when these terms are given their ordinary meaning and viewed from the perspective of a lay person, *** the clear and unambiguous meaning of the clause is that lawsuits brought against appellee must be filed within one year of the date of loss or damage." *Giles*, 405 S.E.2d at 114 (citations omitted).

which acts or declarations occasion the delay by the insured in filing an action on the insurance contract until after the period of limitation has expired." *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St.2d 427, at syllabus.

{¶61} The Ohio Supreme Court explained that "not *** all offers of settlement made by insurance companies to the insured are to be construed as waivers of the time limitation." *Id.* at 432-433. In particular, "[w]here there is a specific denial of liability upon the policy, either totally or in part, there would generally be no waiver occasioned by an offer of settlement." *Id.* at 433; *Thomas v. Allstate Ins. Co.* (C.A.6 1992), 974, F.2d 706, 710, citing *Broadview S. & L. Co. v. Buckeye Union Ins. Co.* (1982), 70 Ohio St.2d 47, 51 ("[t]he process of investigation in determining liability by an insurer does not constitute a waiver by that insurer").

{¶62} In the present case, Nationwide specifically denied liability in part in its letter of September 6, 2006, which is captioned PARTIAL DENIAL OF COVERAGE. This letter states that "there is no coverage for certain aspects of your storm related claim under the Nationwide Homeowner policy," in particular, "there is no coverage available for your roof or any damage to contents of your home *** as a result of your loss." This letter further advised Dominish that "any suit you wish to file against Nationwide as a result of this claim must be done so within one year."

{¶63} In subsequent correspondence, Nationwide indicated its willing to re-inspect the claimed loss. However, it also indicated that "any action taken by the insurance company *** in investigating the cause of loss, or investigating and ascertaining the amount of loss and damage which occurred on 07-28-2006, shall not

waive or invalidate any of the terms or conditions of any policy ***, and shall not waive or invalidate any rights whatever of the parties to this agreement.”

{¶64} The majority determines the language of Nationwide’s non-waiver agreements to be “of no legal effect” because Dominish did not sign them. The legal effect of the agreements does not depend on Dominish’s signature or acquiescence. The legal effect of these documents is to put Dominish on notice that, although Nationwide was willing to conduct further investigation into his claim, it was not waiving any of its rights under the policy, including the limitation-of-action provision. Waiver of a contract term is essentially a form of estoppel which requires detrimental reliance on behalf of the party asserting the waiver. *Id.* at 432 (“where there has been activity by the insurance company which evidences an admission of liability upon the policy, and **resulting reliance by the insured** thereon and failure to file within the time limitation of the contract, the company is deemed to have waived the limitation”) (emphasis added). In light of Nationwide’s unambiguous intent to preserve its rights under the policy, Dominish cannot claim to have relied on the purported waiver of those rights.

{¶65} Finally, on June 6, 2007, Nationwide sent Dominish a letter, advising him that it was “at this time closing the claim” and tendering payment for a second time. Dominish responded by disputing the extent of Nationwide’s liability under the policy, claiming that damage to the “double rafter roof *** was not ongoing but was done by the fallen tree.” Even at this point, it was over a year before Dominish filed suit against Nationwide, and almost two years from the date of loss.

{¶66} Construing this evidence in Dominish’s favor, there is no genuine issue of material fact as to whether Nationwide intended to waive its limitation-of-action provision

or whether Dominish reasonably relied on Nationwide's willingness to further consider his claim to his detriment.

{¶67} For the foregoing reasons, I respectfully dissent.

STATE OF OHIO
COUNTY OF LAKE

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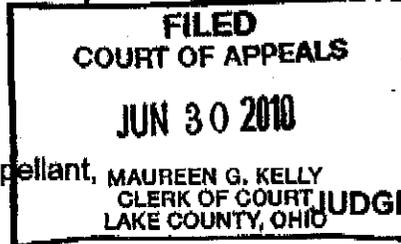
IN THE COURT OF APPEALS
ELEVENTH DISTRICT

DENNIS J. DOMINISH,

Plaintiff-Appellant,

- vs -

NATIONWIDE INSURANCE COMPANY,
Defendant-Appellee.



JUDGMENT ENTRY

CASE NO. 2009-L-116

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings consistent with the opinion. Costs to be taxed against appellee.


JUDGE TIMOTHY P. CANNON

MARY JANE TRAPP, P.J., concurs.

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.