

ORIGINAL

IN THE SUPREME COURT OF OHIO

DENNIS J. DOMINISH, : Case No. 2010-1431  
Plaintiff-Appellee, : On Appeal from the Lake  
vs. : County Court of Appeals  
 : Eleventh Appellate District  
NATIONWIDE INSURANCE COMPANY, : Court of Appeals  
Defendant-Appellant. : Case No. 2009-L-116  
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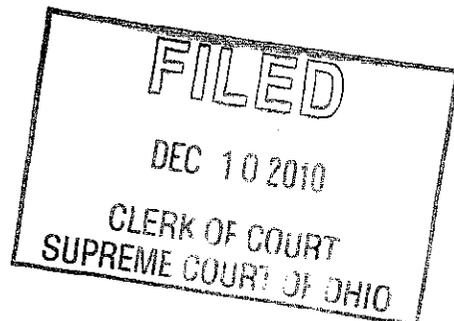
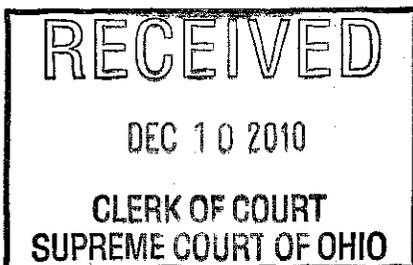
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MOTION FOR RECONSIDERATION  
OF APPELLANT NATIONWIDE INSURANCE COMPANY

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## **MOTION FOR RECONSIDERATION**

Pursuant to Supreme Court Rule XI, Section 2(B)(1), Appellant, Nationwide Insurance Company, by and through its counsel, hereby moves the Court for an order reconsidering its decision to not accept jurisdiction as to Proposition of Law No. 2.

In the instant case, this Court accepted jurisdiction with respect to Proposition of Law No. 1, but did not accept jurisdiction as to Proposition of Law No. 2. It is respectfully submitted that this Court should reconsider its prior decision and accept jurisdiction as to Proposition of Law No. 2 since these two issues are inextricably intertwined, and a proper resolution of this case necessarily depends upon this Court accepting jurisdiction and addressing both Propositions of Law Nos. 1 and 2. Further grounds for said motion for reconsideration are set forth below.

### **LAW AND ARGUMENT**

#### **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 court of appeals, in a 2-1 decision, reversed the trial court's granting of a motion for summary judgment in favor of Nationwide. The majority of the court of appeals issued two separate and distinct holdings in reaching its decision, as follows:

1. The court of appeals held that the provision in the Nationwide policy providing that suit be brought within one year after the date of loss was ambiguous and unenforceable.

2. The court of appeals also held that irrespective of whether the policy provision was or was not ambiguous, Nationwide waived the policy provision by showing a willingness to investigate the claim further after the one-year period had elapsed.

As stated above, this Court has accepted jurisdiction with respect to the first issue, Proposition of Law No. 1, regarding the enforceability of the one-year policy provision. However, this Court declined to accept jurisdiction as to the second issue, that of “waiver”.

As the case now stands, no matter how this Court rules on Proposition of Law No. 1, this case would be destined to be remanded to the trial court since the court of appeals held that Nationwide waived the one-year provision. In other words, even if this Court reverses the court of appeals and holds that the one-year policy provision is unambiguous, valid and enforceable, that would not resolve the case and this Court’s decision on the one-year policy provision would essentially be moot. The only way that this case can be resolved in total, and for this Court’s decision as to Proposition of Law No. 1 to have meaning, is for this Court to accept jurisdiction and review both of the issues which were determined by the court of appeals, namely the enforceability of the one-year provision and also the issue of waiver.

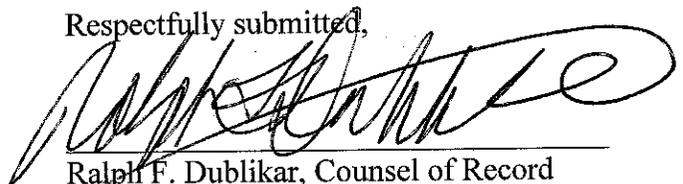
This Court has not addressed the issue of waiver since its decisions in the cases of *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, and *Broadview Savings & Loan Co. v. Buckeye Union Ins. Co.* (1982), 70 Ohio St.2d 47. It is extremely important, and of public and great general interest, that the citizens of Ohio as well as the insurance industry know whether and under what circumstances conduct in evaluating and attempting to resolve a claim may constitute waiver or estoppel. Under the holding in the court of appeals below, an insurance company would be discouraged from even communicating with its insured after the limitations of

action period had expired for fear that any conduct or contact would constitute a waiver of certain policy provisions. In fact, the court of appeals went so far as to even suggest that the better practice would have been to merely deny the claim, close its case and not anticipate further action. This cannot be consistent with public policy in Ohio, and it would seem that public policy should encourage insureds and insurers to attempt to resolve claims and disputes if possible without fear of a court holding that such conduct would constitute a waiver of policy provisions. In fact, in this case Nationwide, on more than one occasion, sent letters to the insured indicating that further investigation would not constitute a waiver of the policy provisions.

### CONCLUSION

Under the facts and circumstances of this case, it is extremely important that this Court accept jurisdiction with respect to Proposition of Law No. 2 also. Given the decision of the court of appeals below, even if this Court were to reverse as to Proposition of Law No. 1, that would have no effect upon the holding of the court of appeals that Nationwide waived the policy provision even if valid and enforceable. Therefore, the efficient administration of justice requires that this Court should accept jurisdiction as to Proposition of Law No. 2 as well as Proposition of Law No. 1 so as to give guidance to the citizens of the State of Ohio, the insurance industry, the Bench and Bar, as to under what circumstances an insurance policy provision is deemed to have been waived.

Respectfully submitted,



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COUNSEL FOR APPELLANT  
NATIONWIDE INSURANCE COMPANY

**CERTIFICATE OF SERVICE**

I certify that a copy of this Motion for Reconsideration was sent by ordinary U.S. mail this 9th day of December, 2010, to David A. McGee, Counsel for Appellee, Svete & McGee Co., LPA, 100 Parker Court, Chardon, Ohio 44024.



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