

ORIGINAL

IN THE SUPREME COURT OF OHIO  
CASE NO. 2010-1091

MATTHEW BARBEE, et al.,	)	ON APPEAL FROM THE LORAIN
	)	COUNTY COURT OF APPEALS
Appellees,	)	NINTH APPELLATE DISTRICT
	)	
-vs.-	)	Court of Appeals
	)	Case No. 09CA009594/09CA009596
ALLSTATE INS. COMPANY, et al.,	)	
	)	
Appellants.	)	

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MERIT BRIEF OF  
APPELLANT ALLSTATE INSURANCE COMPANY

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## STATEMENT OF FACTS

This appeal arises out of a motor vehicle that occurred on October 12, 2002. Appellees, Edward Barbee, Darlene Barbee, Thomas Barbee, Margaret Barbee, Mathew Barbee, and Harvey Barbee alleged injuries as a result of the accident. On January 18, 2007, almost 4 years and 3 months after the accident, the Barbees filed suit against Appellant Allstate Insurance Company in Lorain County Common Pleas Court seeking underinsured motorist (hereinafter "UIM") coverage benefits pursuant to two Allstate policies. The policies both stated, "Any legal action against Allstate must be brought within three years of the date of the accident." The Barbees also filed suit against Appellant Nationwide Insurance Company seeking UIM benefits at the same time.

The accident occurred in Madison, Wisconsin. See Stipulations filed in trial court on February 6, 2009, at Supp. At p.1, para. 1. The Barbees were riding in two separate vehicles. Edward Barbee operated one, and Mathew Barbee operated the other. Supp. at p. 1-2, para. 2, 4. The other Barbees were passengers in the vehicles. The two potential tortfeasors were Vaughn Larson, an employee of the United States of America, and Danielle Skatrud. Supp. at p. 3, para. 9.

### **A. INSURANCE POLICIES AND LIMITATIONS PERIOD**

At the time of the accident, Edward, Darlene, Mathew, and Harvey Barbee were covered under two Allstate insurance policies issued to Gladys Barbee and Mathew Barbee (policy #092358136, Supp. at p.42, was attached to "Defendants Motion for Summary Judgment," filed in the trial court on 11/29/2007, (MSJ) as "Exhibit A") and Harvey and Jane Barbee (policy #092222355, Supp. at p. 80, attached to MSJ as

"Exhibit B.") The two policies provided the above named Appellees with UIM coverage and medical payments coverage. Edward, Margaret, Thomas, and Darlene Barbee also had UIM and medical payments coverage through Nationwide. Following the accident, the Barbees submitted for and received payments from Allstate and Nationwide pursuant to medical payments coverage. Supp. at p. 2, para. 6. Within one year from the date of the accident, the Barbees' counsel notified Allstate and Nationwide of "potential" UIM claims. Supp. at p. 2, para. 7.

The material terms of both Allstate policies are the same. See MSJ Exhibits A and B at Supp. 42-118 ("Allstate policies.") They both contain a three year limitations period for all legal actions against Allstate. The policies state:

### **Legal Actions**

Any legal action against **Allstate** must be brought within three years of the date of the accident. No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions.

Allstate policies at Policy Endorsement p. 8; Supp. at p. 78, 117. (underline added.)

The Allstate policies also include the following general statement of uninsured motorists coverage and definition of an "underinsured motorist"<sup>1</sup>:

### **Section 1 – Uninsured Motorists Insurance for Bodily Injury**

#### **General Statement of Coverage**

If a premium is shown on the Policy Declarations for Uninsured Motorists Insurance, we will pay those damages which an insured person or an additional insured person:

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<sup>1</sup>The policy defines the term "uninsured motorist" to include an "underinsured motorist" as defined in the policy.

1. is legally entitled to recover from the owner of operator of an uninsured auto, ...

because of bodily injury sustained by an insured person or an additional insured person.

The bodily injury must be caused by accident and arise out of the ownership, maintenance, or use of an uninsured auto. ...

An Uninsured Auto is:

\* \* \*

5. an underinsured motor vehicle which has liability protection in effect and applicable at the time of the accident in an amount equal to or greater than the amounts specified for bodily injury liability by the financial responsibility laws of Ohio, but less than the limits of liability for Uninsured Motorists Insurance shown on the Policy Declarations.

Allstate policies at Policy Endorsement p.1, 2; Supp. at p. 71-72, 110-111. (underline added.)

#### **B. PRIOR LITIGATION**

The first litigation arising out of the subject accident was a subrogation suit filed by Nationwide in the United States District Court for the Western District of Wisconsin on September 30, 2004. Supp. at p. 2-3, para. 8, 9. That case was styled, ***Nationwide Mutual Fire Co. v. United States of America***, Case No. 04C0729S (hereinafter, the "Nationwide case"). ***Id.*** The Barbees filed suit against the United States of America and the estate of Danielle Skatrud on April 22, 2005, in the same court. ***Id.*** That case was styled, ***Edward Barbee v. United States of America***, Case No. 05-CB-0249F. ***Id.*** The Barbees then amended their complaint on September 9, 2005, to add Allstate and Nationwide as defendants because of the medical payments coverage they had

previously provided to the Barbees, as required by Wisconsin law. Supp. at p. 3, para. 10. The Amended Complaint did not assert any claim for UIM coverage.

Faith C. Donley was another person involved in the subject accident who made an injury claim. Supp. at p. 3, para. 13. She filed her own suit in the Western District of Wisconsin. *Id.* It was consolidated with the *Nationwide* case. *Id.*

On October 12, 2004, two years after the accident, Faith Donley brought a separate suit against Allstate, asserting a UIM claim, in the Lorain County Common Pleas Court (Case No. 04CV139887.) Supp. at p. 3, para. 14. That suit was stayed pending the resolution of Donley's claim against the United States of America and the estate of Danielle Skatrud in the Wisconsin action. *Id.*

### C. LIABILITY DETERMINATION

The Nationwide case proceeded to a bench trial on the issue of negligence. On June 7, 2005, the Honorable John C. Shabaz assigned 30% liability to the United States of America and its employee, Vaughn Larson, and 70% liability to the estate of Danielle Skatrud. Supp. at p.4, para. 16, 17. The Barbee case then proceeded to trial, on the issue of damages only, the parties having stipulated that the percentages of fault established in the Nationwide trial would control. Supp. at p. 4, para. 18. On December 7, 2005, Appellees obtained damage awards in the Barbee case. The damages are listed in the Stipulations at paragraph 19, and those figures are not in dispute. The individual Appellees obtained payment from the United States of America for 30% of the total damage awards, and they each received a pro rata share of the insurance coverage available to Danielle Skatrud's estate. Supp. at p. 5, para. 20. The

parties to this action stipulated to the unpaid amount of each Appellee's judgment, which are the subject of the UIM claim. Supp. at p. 5, para. 21.

**D. THE BARBEES' UIM CLAIMS**

On January 18, 2007, approximately 4 years and 3 months after the accident, the Barbees filed suit against Allstate, in Lorain County Common Pleas Court, for UIM benefits based upon injuries claimed as a result of the accident. Supp. at p. 6, para. 23. They also filed suit against Nationwide, and the two cases were consolidated. Allstate settled Donley's, previously stayed suit for UIM benefits, on November 14, 2007. Supp. at p. 6, para. 24. That settlement was possible because, unlike the Barbees, Donley had filed her action against Allstate within the contractual three year limitations period.

As the Barbees failed to bring their action against Allstate within three years of the accident, as required by the policy, Allstate asserted a defense based upon the expiration of the contractual limitations period. By the time the Barbees filed their suit in Lorain County, they had already litigated the underlying negligence claims against the tortfeasors, Vaughn R. Larson and his employer, the United States of America, and the estate of Danielle Skatrud, in federal court in Wisconsin.<sup>2</sup> Therefore, negligence and the amount of damages had already been determined.

Nationwide asserted a similar limitations period defense in the Lorain County action. The parties agreed to extensive fact stipulations, leaving only the issues of

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<sup>2</sup>Appellants also brought a claim against Allstate based upon Allstate's right of subrogation for payments made pursuant to medical payments coverage in the Wisconsin action.

whether the Barbees' claims against Allstate and Nationwide were barred by the contractual limitations periods and whether *res judicata* barred Appellees' claims against Allstate for the trial court to decide. The Barbees, Allstate, and Nationwide filed motions for summary judgment. The trial court denied Allstate and Nationwide's motions and granted Appellees' motion, finding that, although it was not stated anywhere in the policies, Appellees' UIM claims did not "accrue" until June 7, 2005, at the earliest. Trial Court decision at p.2. The Ninth Appellate District then affirmed the trial court's decision.

## LAW AND ARGUMENT

I. **A contractual limitations period in an insurance policy that unambiguously requires the insured to bring a claim for underinsured motorist coverage benefits within three years of the date of the accident is valid and enforceable.**

The Allstate policy at issue in this case plainly and unambiguously requires, “Any legal action against Allstate must be brought within three years of the date of the accident.” Supp. at p. 78, 117 (Emphasis added.) This contractual limitations period of three years from the date of the accident is specifically authorized by O.R.C. 3937.18. It is also consistent with this court’s precedent.

The parties to a contract may validly limit the time for bringing an action on the contract to a reasonable period shorter than the general statute of limitations for a written contract, which is 15 years. *Miller v. Progressive Cas. Ins. Co.* (1994), 69 Ohio St. 3d 619, 624. A claim for uninsured motorist coverage benefits (including an underinsured motorist claim) is a cause of action sounding in contract, rather than tort. *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627. If the words of the contract provision that reduces the time provided in the statute of limitations are clear and unambiguous, then a two-year limitation period for filing UM/UIM claims is reasonable and enforceable. *Sarmiento v. Grange Mut. Cas. Co.* (2005), 106 Ohio St. 3d 403, 407 (case dealt with the previously acceptable two-year period before RC 3937.18(H) changed the period to three years.)

The current version of the UM/UIM statute, R.C. 3937.18, effective October 31, 2001, specifically permits insurers to limit the time available for filing suit for uninsured

motorist coverage or underinsured motorist coverage benefits to three years from the date of the accident. The statute states:

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 ...

R.C. 3937.18 (H) (Emphasis added.)

The Court of Appeals for the Sixth Appellate District recently considered R.C. 3937.18(H) when it upheld a three-year limitations period for a UIM claim in ***Lynch v. Hawkins*** (2008), 175 Ohio App. 3d 695. Just like in this case, the plaintiffs in ***Lynch*** argued that the contractual limitations period was ambiguous because it conflicted with an exhaustion clause and a "full compliance" requirement in the relevant insurance policy. 175 Ohio App. 3d at 700. In rejecting this argument, the court noted that R.C. 3937.18(H) "specifically authorizes a three year contractual limitations period in UM and UIM insurance policies commencing on the date of the accident unless underinsured status is predicated on the insolvency of the liability insurer." ***Lynch*** at 703. The court further noted, "In enacting R.C. 3937.18(H), the General Assembly clearly knew that UIM insurance policy provisions routinely require exhaustion of the underinsured motorist's liability insurance coverage." ***Lynch*** at 704. The court agreed that, despite the exhaustion clause, there was no reason why the plaintiff could not have filed suit against the UIM carrier before the expiration of the three year limitations period. ***Id.***

This Court recently confirmed that, based upon substantially identical policy language, the limitations period in an Allstate policy was enforceable, and the period began to run on the date of the accident, as stated in the policy. *Angel v. Reed* (2008), 119 Ohio St. 3d 73, 75. In *Angel*, the plaintiff sought to bring a UM claim against Allstate after the contractual limitations period had expired. That policy language stated, “any legal action against Allstate must be brought within two years of the date of the accident.” *Id.* at 73. Angel felt that the limitations period should not begin to run until her UM claim “accrued.” *Id.* She argued that her claim did not “accrue” until she learned that the tortfeasor was uninsured. *Id.* This Court found that the express terms of the Allstate policy stated that an “uninsured auto” is one that has no insurance policy in effect at the time of the accident, and any claim against Allstate must be brought within two years of the date of the accident. *Id.* at 75. Therefore, this Court rejected Angel's proposed “discovery rule” and upheld the express language of the policy, which stated that Angel had two years to file her suit against Allstate. *Id.*

Here, the Allstate policy language is almost identical to the *Angel* language, except it is a three-year period. Just as clearly as in *Angel*, the express terms of the policy state that the period begins to run on the date of the accident. Although *Angel* involved a UM claim, rather than a UIM claim, that distinction is immaterial. The Allstate policies state that an “underinsured motorist” is a person with liability coverage in effect at the time of the accident with lower limits than the Allstate UM limit. Allstate

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<sup>3</sup> The policy in *Angel* also contained an “exhaustion clause” and “full compliance” requirement that are identical to the ones in the Allstate policies in the instant case. 119 Ohio St. 3d at 73.

policies at Policy Endorsement p.1, 2, quoted at p.7, *supra*. This definition is substantially similar to the definition of an “uninsured auto” noted in **Angel** (i.e., one with no liability coverage in effect at the time of the accident.) The key is that it is readily determinable at the time of the accident whether a tortfeasor meets the definition of an “uninsured” or an “underinsured” motorist. In this case, the Barbees were apparently aware within one year of the accident that Skatrud was underinsured because they notified Allstate and Nationwide of “potential” UIM claims. Supp. at p. 2, para. 7. Despite that knowledge, they failed to actually bring those claims within the three-year limitations period.

The Ninth District below attempted to distinguish **Angel** from the instant case, stating, “Because there were multiple tortfeasors, one of whom had unlimited liability coverage, the Barbees could not know that they had a claim under their policies until the federal court determined liability.” This statement by the Ninth District is simply incorrect. The Barbees might not have known whether they would need to pursue their UIM claim prior to the liability determination. However, they could have known that they had a UIM claim. Whether there are multiple alleged tortfeasors or only one alleged tortfeasor, it is readily ascertainable for the plaintiff whether any alleged tortfeasor has liability limits in effect at the time of the accident that are lower than the plaintiff’s UM limits. Therefore, it is readily ascertainable whether a UIM claim exists. There is no requirement in the policy that there must be a judicial determination that the alleged tortfeasor is at fault before the plaintiff can make a UIM claim.

The Barbees alleged that they sustained injuries as a result of the negligence of Vaughn Larson and/or Danielle Skatrud. Whether either one of those alleged tortfeasors had liability coverage in effect at the time of the accident with limits lower than the Barbees' UM limits, was readily ascertainable by contacting the relevant insurance carriers. Therefore, the Barbees could have determined, at any time after the accident, that they had a UIM claim against Skatrud. In fact, they notified both Allstate and Nationwide of "potential" UIM claims within one year of the accident. The trial court could have ultimately concluded that Skatrud was not negligent and that Larson was 100% at fault. In that situation, the Barbees would not have been able to collect anything on their UIM claim. However, that situation is no different than an ordinary uninsured motorist situation. Unless liability is stipulated, it is always possible that the jury could find that the alleged tortfeasor is not liable. If the alleged tortfeasor is uninsured and the plaintiff brought a UM claim, then the plaintiff would not be able to collect anything if the jury determines the alleged tortfeasor is not at fault. Yet, there is nothing preventing the plaintiff from bringing the UM claim based on the allegations of negligence against the tortfeasor, in the hope that the jury will find in the plaintiff's favor. In the instant case, there was nothing preventing the Barbees from bringing their UIM claims within the contractual three-year from date of accident limitations period.

Allstate's policy language setting forth the three-year limitations period could not be any clearer. The policies state, "Any legal action against Allstate must be brought within three years of the date of the accident." Allstate policies at Policy Endorsement p. 8; Supp. at p. 78, 117. (Emphasis added.) The contractual limitations period starts to

run on the day of the accident, pursuant to the plain language of the insurance contract.

**II. An “exhaustion clause” in an automobile insurance policy, requiring exhaustion of all applicable liability coverage before the insurer is obligated to make a payment pursuant to UIM coverage, does not preclude the insured from filing suit based upon UIM coverage prior to the exhaustion of the underlying liability coverage.**

There is no question that, based upon the plain language of the contractual limitations period clause in the Allstate policy, the Barbee Appellees’ claims for UIM coverage are barred because they did not bring this action against Allstate within three years of the date of the accident. The trial court and the Ninth District Court of Appeals sought to avoid this result by opining that the “exhaustion clause” in the Allstate policy prevented the Barbees from filing suit for UIM benefits prior to the payment of the tortfeasor’s liability limits. The Ninth District then concluded that there is a conflict between their interpretation of the “exhaustion clause” and the language of the limitation period. Based upon this alleged conflict, the lower court read ambiguity into the contractual limitations period to avoid the result that would have been created by enforcing the three years from date of accident limitation.

The fundamental flaw in the lower courts’ reasoning is that the “exhaustion clause” does not require exhaustion of the underlying limits prior to filing suit for UIM benefits. The lower courts’ interpretation of the “exhaustion clause” is contrary to the plain language of the policy, contrary to the weight of authority on the issue, and contrary to logic and the reality of litigation.

## A. Policy language

The Allstate policies state:

We are not obligated to make any payment for bodily injury under this coverage which arises out of the ownership, maintenance or use of an underinsured motor vehicle until after the limits of liability of all liability protection in effect and applicable at the time of the accident have been fully and completely exhausted by payment of judgments or settlements.

Allstate policies at Policy Endorsement p. 4; Supp. at p. 74, 113. (Emphasis added.)

The most critical rule of construction of written contracts, including insurance policies, is that a court may not rewrite the contract when the terms of the policy are clear and unambiguous. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665. A court must give undefined terms in an insurance contract their plain and ordinary meaning. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108.

The Ohio Supreme Court has consistently upheld the primacy of the express language of an insurance policy in defining the terms of the agreement. The Court has stated:

An insurance policy is a contract whose interpretation is a matter of law. In *Westfield Ins. Co. v. Galatis*, we stated, "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. 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. 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. 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."

*Cincinnati Ins. Co. v. CPS Holdings, Inc.* (2007), 115 Ohio St. 3d 306, 307-308 (internal citations omitted.)

The trial and appellate courts below read into the Allstate “exhaustion clause” a requirement that the tortfeasor’s liability limits be exhausted prior to filing suit for UIM benefits. However, the policy simply does not say so. The policies’ plain language states that Allstate is not obligated to make any payment until the tortfeasor’s limits are paid. It does not in any way purport to prevent the insured from filing suit. The lower courts created out of whole cloth the requirement of exhaustion as a precondition to filing suit. In doing so, the lower courts violated the cardinal rule of contract interpretation; i.e., the plain language of the written instrument controls. See *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St. 3d 216, 219 (“A court ... is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties.”)

#### **B. Case law**

This Court has recognized that there is a clear distinction between the existence of a cause of action, i.e. a right to file suit, and an obligation on the part of the defendant to make payment on the claim. In *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St. 3d 281, 287, Farmers argued that the statutory law in effect at the time of payment of the underlying liability limits controlled the case because the insureds’ rights to UIM benefits did not accrue until the underlying limits were exhausted. Farmers claimed that an insured’s right to underinsured motorist benefits accrues when certain contractual preconditions to such coverage are met, and the contractual preconditions of the appellants’ automobile insurance policies required appellants to exhaust all applicable liability coverage before appellants could access

their underinsured motorist coverage. Thus, Farmers contended that appellants' claims for underinsured motorist coverage did not accrue until they had settled with the tortfeasor, thereby exhausting the tortfeasor's available liability coverage. This Court disagreed, stating:

*Kraly [v. Vannewkirk* (1994), 69 Ohio St. 3d 627] should not be read to stand for the proposition that claimants' rights to underinsured motorist coverage are contingent upon satisfaction of contractual preconditions to such coverage. An automobile liability insurance policy will typically require exhaustion of the proceeds of a tortfeasor's policy before the right to payment of underinsured motorist benefits will occur. However, the date that exhaustion of the tortfeasor's liability limits occurs is not determinative of the applicable law to a claim for underinsured motorist coverage.

*Ross* at 287.

*Ross* did not deal specifically with the issue of the contractual limitations period. However, this Court clearly rejected, in *Ross*, the idea that a claim for UIM benefits does not "accrue" until the tortfeasor's limits are exhausted. This Court recognized, in *Ross*, that the exhaustion requirement is a precondition to payment of UIM benefits, and not a precondition to the right to UIM coverage or the right to file a claim or lawsuit on the basis of UIM coverage.

Several appellate courts in Ohio that have considered this issue are at odds with the Ninth District's decision in this case. These courts have found that "exhaustion" language substantially identical to the language in the Allstate policies is a precondition to payment of benefits, not to filing a lawsuit. Most recently, the Court of Appeals for the Tenth Appellate District considered the issue in *D'Ambrosia v. Hensinger*, 2010 Ohio 1767. The relevant "exhaustion language" stated, "When the accident involves underinsured motor vehicles, we will not pay until all other forms of insurance ... have

been exhausted by payment of their limits.” *D’Ambrosia* at P7. The court found that there was nothing preventing the insured from filing suit for UIM benefits within the contractual limitations period of two years, even though the tortfeasor’s liability limits had not yet been exhausted. *D’Ambrosia* at P16. In doing so, the court cited the Seventh District’s decision in *Chalker v. Steiner*, 2009 Ohio 6533. In *Chalker*, the court noted “the exhaustion requirement [is] a condition precedent to payment of benefits by the insurance company, it [is] not a condition precedent to filing an action against the insurance company.” 2009 Ohio 6533, at P20 (emphasis added).

*Chalker* was consistent with the Seventh District’s prior holding in *Regula v. Paradise*, 2008 Ohio 7141, P49 (“nothing prevented the Regulas from commencing an action against Grange for UIM benefits within the three-year contractual limitation period ... 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 liability limits before the insured can file a lawsuit.”) Also, the Eighth Appellate District, in *Griesmer v. Allstate Ins. Co.*, 2009 Ohio 725, P24-P31, rejected the argument that the insureds did not have “standing” to make a claim “until after the court proceedings resulted in settlement with the tortfeasor.” The court found that the case involved a standard underinsured motorist claim, and the contractual two-year from date of accident limitations period was enforceable, barring the insureds’ belated action.

The only appellate court that has expressed a current opinion similar to the Ninth District’s regarding the “exhaustion clause” is the Fifth District in *Bradford v.*

*Allstate Ins. Co.*, 2004 Ohio 5997. In *Bradford*, Allstate's UIM coverage was excess to State Farm's UIM coverage. The court held that the claim against Allstate for excess UIM coverage did not arise until the settlement with State Farm occurred. To the extent that this case stands for the idea that an "exhaustion clause" similar to the one in the Allstate policies in this case prevents suit prior to the exhaustion of underlying liability limits, Allstate asserts the *Bradford* court is incorrect. *Bradford* was also decided prior to this Court's decision in *Sarmiento, supra*, in which this Court held a two-year contractual limitations period for UM/UIM claims to be reasonable and enforceable.

The primary authority on which the Ninth District appeared to rely in its decision below was a statement in dicta from the case, *Bogan v. Progressive Casualty Ins. Co.* (1988), 36 Ohio St. 3d 22. The dicta states, "First, the exhaustion requirement functions as a precondition to application of the underinsured motorist coverage. Progressive is not obligated and the claim is not matured under Progressive's policy until the exhaustion requirement is satisfied." *Bogan* at 27. The issue this Court addressed in the relevant section of the *Bogan* was whether a commitment from the tortfeasor's insurer to pay an amount in settlement with the injured party retaining the right to proceed against UIM carrier for only those amounts in excess of the tortfeasor's policy limits was sufficient to satisfy the exhaustion clause. *Bogan* at 27-28 and at Syllabus at 2. This Court did not address, in *Bogan*, the issue of whether an "exhaustion clause" bars an insured from filing suit for UIM coverage benefits prior to exhaustion the underlying limits. Therefore, the statement the Ninth District relied upon is mere dicta. It also does not speak to the issue presented in the instant case. To

the extent it indicates that exhaustion of the tortfeasor's limits is a precondition to UIM coverage, the **Bogan** language in question is also inconsistent with this Court's more recent statement in **Ross, supra**. **Bogan** is also distinguishable from the instant case because **Bogan** did not involve any issue regarding the contractual limitations period, and it was decided prior to the enactment of the current version of R.C. 3937.18(H) in October of 2001. Therefore, Allstate asserts the **Bogan** should not be read to indicate that the "exhaustion clause" in the relevant Allstate policies prevented the Barbees from filing suit for UIM benefits prior to exhaustion of the tortfeasor's limits.

### **C. Logic and reality of litigation**

The idea that a person or entity can be sued on the basis of alleged liability before that person has any obligation to pay money to the plaintiff is not novel. Rather, it is the standard model for litigation. If person A alleges that person B was negligent and caused him an injury, person A has every right to file a lawsuit against person B based upon those allegations, but person B has no legal obligation to pay person A money until there is a judgment against him.

The same logical procedure occurs in the context of a UIM claim. The plaintiff files a claim against the tortfeasor and the UIM carrier based upon an alleged injury with alleged liability on the part of the tortfeasor that exceeds the tortfeasor's liability limits. Although they have been sued, neither the tortfeasor, nor the UIM carrier, has any obligation to pay until they either contractually agree to it by way of settlement, or until there is a verdict and judgment in favor of the plaintiff. The "exhaustion clause" merely protects the UIM carrier from having to pay any money until the value of the

injury is determined, either by way of settlement or verdict, to exceed the tortfeasor's liability limits.

This Court noted, in *Bogan*, that exhaustion clauses seem to have been created in response to the possible implication of former R.C. 3937.18(A)(2), which mandated underinsured motorist coverage in an amount equal to the policy's liability coverage "less those amounts actually recovered under all applicable insurance policies." *Bogan* at 27. The implication was that the insured could potentially voluntarily decide not to pursue the tortfeasor, or to accept a settlement for a small amount from the tortfeasor, and then pursue his own insurer, based upon UIM coverage, for the remainder of the claim. The effect of the exhaustion clause was to protect insurers from providing coverage for amounts which the injured party could have received from the tortfeasor's insurer but for his voluntary decision to accept a lesser amount in settlement. *Id.*

Accepting the Ninth District's interpretation of the "exhaustion clause" would create an unwieldy situation for litigation of UIM claims, potentially requiring the issues of liability and damages to be litigated twice, including two trials, for every UIM claim. It would require a UIM claimant, when the tortfeasor is not willing to tender policy limits to settle, to file suit against the tortfeasor, proceed all the way to trial, obtain an "excess" verdict, and then file a second lawsuit against the UIM carrier. The UIM carrier would likely then be entitled to re-litigate the injury claim, including a possible second trial on liability and damages, since the carrier was not a party to the first case and had no opportunity to defend the claim in the first trial.

Not only would such an interpretation of the exhaustion clause be inefficient and against the interests of judicial economy, it is not consistent with reality. As a practical matter, there simply is no such "exhaustion" requirement as evidenced by the fact that claimants commonly file suit against the tortfeasor and the UIM carrier at the same time. In fact, Faith Donley filed a timely UIM claim against Allstate arising out of the same accident. Supp. at p. 3, para. 13. She did not unnecessarily wait until the Wisconsin litigation concluded. She had a UIM claim at the time of the accident. One of the tortfeasors was an underinsured motorist pursuant to the terms of the Allstate policy because her liability limits were lower than Donley's UM limit. She filed her lawsuit for UIM coverage within the three year limitations period. Therefore, her claim was not time barred, and her UIM claim was recognized and resolved by Allstate.

**III. An "exhaustion clause" in an automobile insurance policy, requiring exhaustion of all applicable liability coverage before the insurer is obligated to make a payment pursuant to UIM coverage, does not render ambiguous an otherwise enforceable limitations period of three years from the date of the accident for claims for UIM benefits.**

The Allstate policy plainly states that any action against Allstate must be brought within three years of the date of the accident. The Allstate "exhaustion clause" does not prevent the insured from filing suit at any time within those three years. Therefore, Allstate asserts there is no conflict between the limitations period provision and the exhaustion clause, or the clause requiring full compliance with all the policy's terms. Allstate asserts the limitations period is unambiguous and enforceable.

When the language of an insurance policy is clear, a court may look no further than the writing itself to find the intent of the parties. *Cincinnati Ins. Co.*, *supra*, at 307-

308. Although ambiguity in an insurance contract is construed against the insurer and in favor of the insured, this rule may not be applied so as to provide an unreasonable interpretation of the words in the policy. *Id.* A court may not read ambiguity into the contract to avoid what it feels to be a harsh result. *State of Ohio v. Porterfield* (2005), 106 Ohio St. 3d 5, 7. This Court has stated:

When confronted with allegations of ambiguity, a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning. *Westfield Ins. Co. v. Galatis*. Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling. *Id.*

In the instant case, there is only one definitive meaning apparent from the language of the limitations clause. That meaning is that any legal action against Allstate for UIM benefits must be brought within three years of the date of the accident. Likewise, there is only one definitive meaning apparent from the language of the exhaustion clause. That meaning is that the tortfeasor's liability limits must be exhausted before Allstate is required to make any payment pursuant to UIM coverage. To say that the exhaustion clause requires, or even that it may require the exhaustion of the tortfeasor's limits prior to filing suit based upon UIM coverage, is to add words that do not appear in the contract language to alter the contract's meaning. For a court to do so is to read ambiguity into the contract, where none exists, to avoid what the court determines to be a harsh result. This action by a court is not permitted under the law. See, e.g., *State of Ohio v. Porterfield*, *supra*; *Motorists Mutual Ins. Co. v. Tomanski* (1971), 27 Ohio St. 2d 222, 226 ("This court has refused to change the meaning of language contained in an insurance contract when that wording is directly applicable

to the facts under consideration, and will not read into a contract meaning which was not placed there by an act of the parties.”)

The Sixth Appellate District (*Lynch, supra*), Tenth Appellate District (*D'Ambrosia, supra*), and Seventh Appellate District (*Chalker, supra*), have all considered and rejected the argument that a contractual limitations period conflicts with an “exhaustion clause” and a “full compliance” requirement and have upheld contractual limitations periods beginning on the date of the accident in UIM cases. Without specifically addressing this “ambiguity” argument, the Eighth Appellate District (*Griesmer, supra*) and the Third Appellate District (*Pottorf v. Sell*, 2009 Ohio 2819, P12-P15), have also upheld contractual limitations periods beginning on the date of the accident in UIM cases, based upon this Court’s decision in *Angel*.

The three-year from date of accident limitations period and the exhaustion clause in the Allstate policies are unambiguous. There is no conflict between them because the plain language of the exhaustion clause does not bar the insured from filing suit prior to exhaustion. Like the majority of lower appellate courts that have considered the issue, this Court should hold that the plain language of the Allstate policies unambiguously requires that any suit based UM or UIM coverage be brought within three years of the date of the accident.

**IV. The “exhaustion clause” in an automobile insurance policy does not prevent the insured from filing suit for UIM coverage and therefore, *res judicata* bars the insured from raising a claim for UIM coverage in a subsequent action arising from the same transaction or occurrence as one previously litigated.**

The Court of Appeals, below, posited that “the Barbees did not have a claim for underinsurance coverage until all other liability insurance was exhausted and that that did not occur until the federal district court entered its December 7, 2005, judgment.” At para. 36. For the reasons stated above, Allstate asserts the Ninth District’s position is incorrect and inconsistent with the plain language of the policies. Allstate asserts nothing prevented the Barbees from raising a UIM claim in the action in Wisconsin. Therefore, *res judicata* bars the Barbees from bringing a UIM claim in a subsequent action based upon the same motor vehicle accident and injuries.

The Barbees filed the lawsuit, *Barbee v. United States of America*, in federal court in Wisconsin, against the tortfeasors, United States of America and Danielle Skatrud, seeking damages for personal injuries sustained as a result of the motor vehicle accident on October 12, 2002. Supp. at p. 2-3, para. 8, 9. The Barbees amended their Complaint on September 9, 2005, to add Allstate and Nationwide as defendants as a result of medical payments coverage they had provided to the Barbees. Supp. at p. 3, para. 10. It is undisputed that the Barbees did not bring a claim based upon UIM coverage at this time.

*Res judicata* bars litigants from bringing a subsequent action based upon claims that could have been brought in a prior one. *Grava v. Parkman Township* (1995), 73 Ohio St. 3d 379, 382 (“a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence

that was the subject matter of the previous action.”) In this manner, “the doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.” *Id.* A “transaction” is defined as a “common nucleus of operative facts.” *Id.* “That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims.” *Id.*

In the instant case, the Barbees filed the lawsuit, *Barbee v. United States of America*, based upon the injuries they claimed arose from the motor vehicle accident on October 12, 2002. The Barbees named Allstate and Nationwide as parties to the case. The Barbees’ UIM claims arise out of the same injuries claimed in the Wisconsin case. The Barbees failed to raise their UIM claims in the Wisconsin case. The case proceeded to trial, and a final judgment was rendered on the merits of the case. The Barbees could and should have brought their UIM claims in conjunction with the Wisconsin litigation. Allstate asserts that, pursuant to *res judicata*, their failure to do so bars them from bringing those claims in a subsequent lawsuit.

### CONCLUSION

Pursuant to settled rules of contract interpretation, the plain language of a written contract, such as an insurance policy, controls. The Allstate policies at issue plainly state that any action against Allstate must be brought within three years of the date of the accident. This limitations period is specifically authorized by statute in the context of both UM and UIM claims. This Court’s prior decisions have held such limitations provisions to be valid and enforceable. The exhaustion clause in the Allstate policy

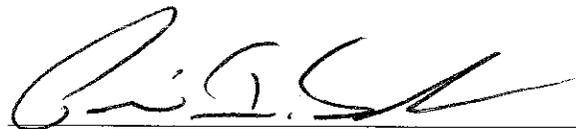
plainly states that exhaustion of the tortfeasor's liability limits is a precondition only to payment of benefits pursuant to UIM coverage. Nowhere do the policies state that exhaustion is a precondition to filing suit based upon UIM coverage. To find such a precondition to filing suit in the Allstate policy would require inserting words into the policy that are not present. It would also create the absurd and unwieldy situation where plaintiffs seeking UIM benefits would need to litigate their injury claims twice, once against the tortfeasor and again against the UIM carrier. Fortunately, a plain reading of the policy language does not lead to this result.

Nothing prevented the Barbees from filing suit for UIM coverage prior to the expiration of the three year limitations period clearly stated in the policy. Therefore, this Court should reverse the decision of the Ninth District Court of Appeals, below, and order that judgment be rendered in favor of Allstate.

Respectfully submitted,

WILLIAMS, MOLITERNO & SCULLY CO., L.P.A.

By:



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**CERTIFICATE OF SERVICE**

A copy of the foregoing **Merit Brief of Appellant Allstate Insurance Company** was forwarded by regular U.S. mail, on this 3<sup>rd</sup> day of January, 2011, to:

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WILLIAMS, MOLITERNO & SCULLY CO., L.P.A.

By:



---

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Office of  
**Ron Nabakowski**  
Lorain County Clerk of Courts of Common Pleas



Lorain County Justice Center, 225 Court St., 1st Floor P.O. Box 749, Elyria, OH 44036-0749

Public Docket Information

**MATHEW BARBEE VS ALLSTATE INSURANCE CO**

Case Number: 07CV149278

Case Details

Type Of Action: Other Civil-CV  
Judge: Miraldi, Judge James  
Filed On: 1/18/2007

000001

## Parties

Name	Birth Date	Party	Address	Attorney(s)
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620 LEADER BUILDING  
526 SUPERIOR AVENUE  
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## Filter Docket

- Show All  
 FILING  
 (JLM)  
 MOTION  
 ANSWER  
 FEES  
 Journal Entry  
 NOTICE  
 TAXED-BILL  
 SENT/DISBURSED  
 APPEAL

Date	Type	Description
01/18/2007	N/A	Deposit Payment: \$111.00, by: HENRY CHAMBERLAIN
01/18/2007	FILING	COMPLAINT W/JURY DEMAND FILED.
02/03/2007	N/A	SUMMONS W/COPY OF COMPLAINT SENT CERTIFIED MAIL TO 'ALLSTATE INSURANCE COMPANY', Article Number:71603901984979042241
02/16/2007	FILING	SIGNED RECEIPT FOR CERTIFIED MAIL RETURNED AND FILED. 71603901984979042241 ALLSTATE INS. CO. (NO DATE)
03/22/2007	(JLM)	DO HEREBY STIPULATE THAT DEFENDANT,ALLSTATE INSURANCE COMPANY,HAS THIRTY(30)DAYS UNTIL APRIL 15,2007,TO MOVE OR PLEAD. (SEE JOURNAL)
04/13/2007	MOTION	MOTION TO CONSOLIDATE WITH CASE NO. 04CV139887 FILED.
04/16/2007	ANSWER	ANSWER WITH REQUEST FOR DEMAND FOR JUDGMENT AND NOTICE OF SERVICE OF INTERROGATORIES FILED. (Jury demand endorsed hereon)
04/17/2007	N/A	Pursuant to Loc. R. 7, Defendant Allstate Insurance Co.(s) motion to consolidate is subject to the approval of Judge Betleski in Case No. 04CV139887, as Judge Betleski has the case with the lowest case number.
04/19/2007	N/A	Cost Bill Entry
04/20/2007	N/A	The above captioned case has been scheduled for TELEPHONE STATUS CONFERENCE with the Honorable Judge James L. Miraldi, on July 3, 2007 at 11:30AM. The counsel for Plaintiff(s) is responsible for initiating the conference call between the parties and then contacting the Court Staff Attorney Linda Butler at (440) 328-2393. If the line is busy, please call (440) 328-2390
07/03/2007	N/A	STATUS CONFERENCE HAD. ALL NON-EXPERT DISCOVERY SHALL BE COMPLETED ON OR BEFORE OCTOBER 26, 2007. CASE IS SET FOR TELEPHONE STATUS CONFERENCE ON NOVEMBER 1, 2007 AT 1:30P.M. PARTIES SHALL BE PREPARED TO DISCUSS ISSUES OF STATUTE OF LIMITATIONS AND PRIOR APPORTIONMENT OF FAULT BY FEDERAL COURT.

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07/06/2007 N/A	Cost Bill Entry Status Conference had. Defendant shall file a motion for summary judgment by December 3, 2007. Plaintiffs' response shall be filed by January 3, 2008. Court to rule thereafter. Status conference had.
11/01/2007 N/A	Case is set for a telephone status conference on January 22, 2008 at 1:00P.M. PLAINTIFF SHALL INITIATE TELEPHONE CONFERENCE TO (440) 328-2393 OR ALTERNATIVE NUMBER (440) 328-2390.
11/06/2007 FEES	FEES ADDED:
11/29/2007 MOTION	DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED.
11/29/2007 MOTION	DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED.
12/26/2007 N/A	PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED.  STATUS CONFERENCE HAD. CASE IS SET FOR TELEPHONE STATUS CONFERENCE ON MARCH 7, 2008 AT 2:30P.M. PLAINTIFF SHALL INITIATE TELEPHONE CONFERENCE TO (440) 328-2393 OR ALTERNATIVE NUMBER (440) 328-2390. THIS COURT FINDS THAT PURSUANT TO CIV.R. 56, (1)THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT TO BE LITIGATED; (2)THAT DEFENDANT, THE MOVING PARTY, IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW; AND (3) THAT IT APPEARS FROM THE EVIDENCE THAT REASONABLE MINDS CAN COME TO MORE THAN ONE CONCLUSION VIEWING THE EVIDENCE IN FAVOR OF PLAINTIFF. THEREFORE, DEFENDANT ALLSTATE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT IS DENIED.
01/22/2008 N/A	
01/25/2008 FEES	FEES ADDED:  STATUS CONFERENCE HAD. PARTIES HAVE ADVISED THE COURT THAT THEY WILL BE FILING A JOINT MOTION TO CONSOLIDATE WITH CASE NO. 07CV148277. CASE IS SET FOR PRETRIAL ON MAY 9, 2008 AT 9:30A.M. PARTIES AND/OR PERSONS WITH AUTHORITY TO SETTLE SHALL BE PRESENT. PARTIES OR COUNSEL WHO FAIL TO APPEAR MAY BE SUBJECT TO SANCTIONS ACCORDING TO LOCAL RULES.
03/14/2008 N/A	
03/18/2008 FEES	FEES ADDED:
03/24/2008 N/A	The motion to consolidate is granted. Case No. 07CV149277 on the docket of Judge Betleski is hereby consolidated with and shall go forward as Case No. 07CV149278 on the docket of Judge Miraldi. All future filings shall be under Case No 07CV149278.
03/24/2008 FEES	FEES ADDED:
04/15/2008 MOTION	DEFENDANT NATIONWIDE MUTUAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT FILED.
04/28/2008 N/A	PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED.  Defendant Nationwide Insurance Company has filed a motion for summary judgment which raises the same issues contained in the motion for summary judgment which was previously filed by Defendant Allstate Insurance Company. This Court denied Allstate's motion for summary judgment on January 22, 2008. Defendant Nationwide Insurance Company's motion for summary judgment is also denied.
05/05/2008 N/A	
05/06/2008 FEES	FEES ADDED:  CASE CALLED FOR PRETRIAL. CASE IS SET FOR TELEPHONE STATUS CONFERENCE ON JULY 15, 2008 AT 11:00A.M. PLAINTIFF SHALL INITIATE TELEPHONE CONFERENCE TO ALL OTHER COUNSEL AND THEN TO THE COURT AT (440) 328-2393 OR ALTERNATIVE NUMBER (440) 328-2390. THE TELEPHONE CONFERENCE MAY BE CONTINUED IF THE SUPREME COURT OF OHIO HAS NOT REACHED A DECISION IN THE CASE OF ANGEL V. REED.
05/09/2008 Journal Entry	
05/12/2008 N/A	Cost Bill Entry  STATUS CONFERENCE HAD. CASE IS SET FOR A

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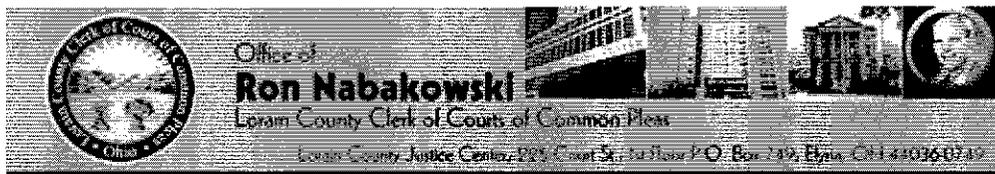
07/21/2008 N/A	SETTLEMENT CONFERENCE ON OCTOBER 28, 2008 AT 1:30P.M. PARTIES AND/OR PERSONS WITH AUTHORITY TO SETTLE SHALL BE PRESENT. PARTIES OR COUNSEL WHO FAIL TO APPEAR MAY BE SUBJECT TO SANCTIONS ACCORDING TO LOCAL RULES. DEFENDANTS ARE GRANTED UNTIL AUGUST 29, 2008 TO FILE SUPPLEMENTAL BRIEFS. PLAINTIFF IS GRANTED UNTIL SEPTEMBER 26, 2008 TO RESPOND. COURT TO RULE THEREAFTER.
07/22/2008 FEES	FEES ADDED:
08/19/2008 N/A	DEFENDANT ALLSTATE INSURANCE COMPANY'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FILED.
08/29/2008 N/A	DEFENDANT NATIONWIDE MUTUAL INSURANCE COMPANY'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FILED.
09/25/2008 N/A	PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT, ALLSTATE INSURANCE COMPANY AND DEFENDANT, NATIONWIDE MUTUAL INSURANCE COMPANY'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT FILED.
10/07/2008 (JLM)	DEFENDANT NATIONWIDE INSURANCE AND DEFENDANT ALLSTATE INSURANCE'S MOTIONS FOR SUMMARY JUDGMENT ARE STILL DENIED.CASE REMAINS SET FOR SETTLEMENT CONFERENCE ON OCT 28,2008 AT 1:30PM.(SEE JOURNAL)
10/28/2008 N/A	SETTLEMENT CONFERENCE HAD. COUNSEL SHALL PREPARE AND FILE STIPULATIONS BY NOVEMBER 11, 2008. PLAINTIFFS ARE GRANTED LEAVE TO FILE A MOTION FOR SUMMARY JUDGMENT THEREAFTER. RESPONSE BRIEFS SHALL BE FILED WITHIN 7 DAYS AFTER THE FILING OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT. COURT TO RULE THEREAFTER.
10/29/2008 FEES	FEES ADDED:
01/09/2009 N/A	No stipulations have been filed as previously ordered. Case is set for pretrial on January 21, 2009 at 9:00a.m.
01/13/2009 FEES	FEES ADDED:
01/21/2009 N/A	Pretrial is continued to February 2, 2009 at 9:00a.m. The pretrial shall be cancelled if stipulations are provided to the Court by February 2, 2009.
01/23/2009 FEES	FEES ADDED:
01/30/2009 N/A	Upon the request of the parties, the pretrial set for February 2, 2009 is rescheduled to February 4, 2009 at 1:30p.m.
02/04/2009 N/A	Plaintiffs shall file their motion for summary judgment by February 18, 2009. Defendants' response shall be filed by March 6, 2009. Plaintiff's reply shall be filed by March 16, 2009. Court to rule thereafter.
02/05/2009 FEES	FEES ADDED:
02/06/2009 N/A	STIPULATIONS FILED BY PARTIES.
02/18/2009 N/A	PLT'S MOTION FOR SUMMARY JUDGMENT FILED
03/06/2009 N/A	Defendants are granted until March 13, 2009 to respond to Plaintiffs' motion for summary judgment. Plaintiffs' reply shall be filed by March 23, 2009. Court to rule thereafter.
03/06/2009 MOTION	DEFENDANTS' JOINT MOTION FOR EXTENSINO OF TIME TO RESPOND TO PLAITNIFFS' MOTION FOR SUMMARY JUDGMENT FILED.
03/10/2009 FEES	FEES ADDED:
03/10/2009 N/A	ALLSTATE'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDMGENT FILED.
03/13/2009 MOTION	DEFENDANT NATIONWIDE MUTUAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED.

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03/25/2009 N/A	PLAINTIFF'S MOTION TO STRIKE.
03/30/2009 N/A	DEFENDANT NATIONWIDE MUTUAL INSURANCE COMPANY'S RESPONSE TO PLAINTIFFS' MOTION TO STRIKE.
05/05/2009 (JLM)	PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. CASE CLOSED. COSTS TO DEFENDANTS. SEE JOURNAL.
05/07/2009 NOTICE	CIVIL RULE 58 (B) NOTICE MAILED.
05/07/2009 FEES	FEES ADDED:
05/07/2009 N/A	Cost Bill Entry
05/21/2009 TAXED-BILL SENT/DISBURSED	CASE TAXED AND DISBURSED
05/21/2009 TAXED-BILL SENT/DISBURSED	CASE TAXED & BILL SENT TO: atty. james e. burns - allstate insurance.
05/21/2009 TAXED-BILL SENT/DISBURSED	CASE TAXED & BILL SENT TO: atty. peter d. janos - nationwide insurance.
05/21/2009 N/A	Cost Bill Entry
05/21/2009 N/A	Cost Bill Entry
06/02/2009 APPEAL	NOTICE OF APPEAL TO THE COURT OF APPEALS FILED. (09CA009594)
06/03/2009 APPEAL	NOTICE OF APPEAL TO THE COURT OF APPEALS FILED. (09CA009596)
06/29/2009 N/A	Cost Bill Entry
06/29/2009 N/A	Receipt #: 09-0022013 Processed.
07/15/2009 N/A	NOTICE OF FINAL APPEALABLE ORDER FILED BY PLAINTIFF.
05/10/2010 N/A	DECISION AND JOURNAL ENTRY: JUDGMENT AFFIRMED. SEE JOURNAL (09CA009594) (09CA009596).
05/10/2010 FEES	FEES ADDED:

Print Docket      Close

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Public Docket Information

**MATTHEW BARBEE ET AL VS ALLSTATE INSURANCE**

Case Number: 09CA009594

Case Details

Type Of Action: Court Of Appeals  
Judge: Appeals, Court of  
Filed On: 6/2/2009

000007

## Parties

Name	Birth Date	Party	Address	Attorney(s)
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BARBEE, HARVEY	N/A	P		CHAMBERLAIN, HENRY W CHAMBERLAIN LAW FIRM CO., L.P.A. 620 LEADER BUILDING 526 SUPERIOR AVENUE Cleveland, OHIO 44114
BARBEE, DARLENE	N/A	P		CHAMBERLAIN, HENRY W CHAMBERLAIN LAW FIRM CO., L.P.A. 620 LEADER BUILDING 526 SUPERIOR AVENUE Cleveland, OHIO 44114
BARBEE, EDWARD	N/A	P		CHAMBERLAIN, HENRY W CHAMBERLAIN LAW FIRM CO., L.P.A. 620 LEADER BUILDING 526 SUPERIOR AVENUE Cleveland, OHIO 44114
BARBEE, THOMAS	N/A	P		CHAMBERLAIN, HENRY W CHAMBERLAIN LAW FIRM CO., L.P.A. 620 LEADER BUILDING 526 SUPERIOR AVENUE Cleveland, OHIO 44114
BARBEE, MARGARET	N/A	P		CHAMBERLAIN, HENRY W CHAMBERLAIN LAW FIRM CO., L.P.A. 620 LEADER BUILDING 526 SUPERIOR AVENUE Cleveland, OHIO 44114
ALLSTATE INSURANCE COMPANY	N/A	D		SAH, PERRIN I WILLIAMS SENNETT & SCULLY CO, LPA 2241 PINNACLE PARKWAY

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TWINSBURG, OHIO  
44087

NATIONWIDE  
MUTUAL INS. CO.

N/A D

JANOS, PETER D  
LAW OFFICE  
323 LAKESIDE AVE, W.,  
#410  
CLEVELAND, OHIO  
44113

KIMBLER, JOYCE V  
50 SOUTH MAIN  
STREET  
SUITE 502  
AKRON, OHIO 44308

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Date	Type	Description
06/02/2009	N/A	Filing fee of \$125.00, paid by: ALLSTATE INSURANCE COMPANY
06/02/2009	APPEAL	NOTICE OF APPEAL FILED. (07CV149278)
06/02/2009	DOCKET	DOCKETING STATEMENT FILED.
06/02/2009	FEES	FEES ON DEPOSIT
06/04/2009	NOTICE	COPY OF NOTICE OF APPEAL AND DOCKETING STATEMENT SENT BY ORDINARY MAIL TO ATTORNEY FOR APPELLEES.
06/23/2009	Journal Entry	(MAGISTRATE'S ORDER) BECAUSE THE ABOVE APPEALS ARISE OUT OF THE SAME TRIAL COURT ENTRY, THEY ARE HEREBY CONSOLIDATED FOR PURPOSE OF FILING THE RECORD AND BRIEFS AND FOR PRESENTING ORAL ARGUMENTS. FOR PURPOSES OF THIS APPEAL, ALLSTATE INSURANCE COMPANY IS DESIGNATED AS THE APPELLANT/CROSS-APPELLEE AND NATIONWIDE MUTUAL INSURANCE CO. IS DESIGNATED AS THE APPELEE/CROSS APPELLANT. MATTHEW BARBEE, HARVEY BARBEE, EDWARD BARBEE, THOMAS BARBEE, DARLENE BARBEE, AND MARGARET BARBEE ARE DESIGNATED AS THE APPELLEES. SEE JOURNAL.
06/23/2009	MISC	A COPY OF THE JOURNAL ENTRY/MAGISTRATE'S ORDER WAS MAILED TO PARTIES/COUNSEL OF RECORD.
06/24/2009	TRANSMISSION	TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES TOGETHER WITH ALL ORIGINAL PAPERS RECEIVED AND FILED FROM

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06/24/2009 NOTICE	COMMON PLEAS CASES, 07CV149277 AND 07CV149278. NOTIFICATION SENT TO ATTORNEYS OF THE FILING OF THE RECORD.
07/08/2009 N/A	MOTION FOR EXTENSION OF TIME TO FILE BRIEF OF APPELLANT/CROSS-APPELLEE ALLSTATE INSURANCE CO. (COPY FAXED TO AKRON)
07/14/2009 N/A	BRIEF OF APPELLANT, NATIONWIDE MUTUAL INSURANCE COMPANY.
07/15/2009 N/A	APPELLANT NATIONWIDE MUTUAL INSURANCE COMPANY'S RESPONSE TO MAGISTRATE'S ORDER/REQUEST.
07/20/2009 N/A	APPELLANT/CROSS-APPELLEE, ALLSTATE INSURANCE COMPANY'S JURISDICTIONAL RESPONSE.
07/20/2009 Journal Entry	APPELLANT'S MOTION FOR AN EXTENSION OF TIME TO FILE AN APPELLATE BRIEF IS GRANTED UNTIL AUGUST 3, 2009.
07/20/2009 MISC	A COPY OF THE JOURNAL ENTRY/MAGISTRATE'S ORDER WAS MAILED TO PARTIES/COUNSEL OF RECORD.
07/29/2009 MOTION	MOTION FOR EXTENSION OF TIME TO FILE RESPONSE BRIEF FILED BY APPELLEES VIA FACSIMILE. COPY FAXED TO AKRON.
07/30/2009 N/A	Cost Bill Entry for copies to send Motion for Extension of Time to File Response Brief to Akron.
08/03/2009 N/A	APPELLANT/CROSS-APPELLEE ALLSTATE INSURANCE COMPANY'S BRIEF AND ASSIGNMENTS OF ERROR.  (MAGISTRATE'S ORDER) NATIONWIDE'S JULY 14, 2009, BRIEF IS PREMATURE AND IS HEREBY STRICKEN. NATIONWIDE IS DIRECTED TO COMPLY WITH THE BRIEFING SCHEDULE ISSUED ON JUNE 23, 2009 AND IS DIRECTED TO REFER TO ITSELF UNDER THE DESIGNATION PROVIDED IN THAT ORDER. IN ADDITION, APPELLEES, MATTHEW BARBEE ET AL MOTION FOR AN EXTENSION OF TIME TO FILE THEIR BRIEFS IS GRANTED. APPELLEES' ANSWER BRIEF(S) WILL NOW BE DUE TWENTY DAYS AFTER NATIONWIDE FILES ITS CROSS-APPELLANT'S ASSIGNMENTS OF ERROR BRIEF. DUE TO THE EXTENSION OF TIME GRANTED TO APPELLEE'S, ALLSTATE'S AND NATIONWIDE'S REPLY BRIEFS WILL NOW BE DUE TEN DAYS AFTER ALL APPELLEE AND CROSS-APPELLEE ANSWER BRIEFS HAVE BEEN FILED. SEE JOURNAL.
08/12/2009 Journal Entry	
08/12/2009 MISC	A COPY OF THE JOURNAL ENTRY/MAGISTRATE'S ORDER WAS MAILED TO PARTIES/COUNSEL OF RECORD.
08/24/2009 N/A	BRIEF OF APPELLEE/CROSS-APPELLANT, NATIONWIDE MUTUAL INSURANCE COMPANY.
08/28/2009 N/A	MOTION TO CHANGE DESIGNATION FILED APPELLEE/CROSS-APPELLANT.
09/11/2009 N/A	APPELLEES RESPONSE BRIEF TO APPELLANTS ASSIGNMENTS OF ERROR AND MOTION TO STRIKE.
09/24/2009 N/A	APPELLEE/CROSS-APPELLANT, NATIONWIDE MUTUAL INSURANCE COMPANY, REPLY BRIEF AND RESPONSE TO APPELLEES' MOTION TO STRIKE.
09/24/2009 N/A	APPELLANT/CROSS-APPELLEE ALLSTATE INSURANCE COMPANY'S REPLY BRIEF.
10/20/2009 Journal Entry	(MAGISTRATE'S ORDER) NATIONWIDE MUTUAL INSURANCE COMPANY HAS MOVED THIS COURT TO CHANGE ITS DESIGNATION. THE MOTION IS GRANTED. NATIONWIDE'S DESIGNATION WILL BE CROSS APPELLANT. SEE JOURNAL.
10/20/2009 MISC	A COPY OF THE JOURNAL ENTRY/MAGISTRATE'S ORDER WAS MAILED TO PARTIES/COUNSEL OF RECORD.
12/11/2009 Journal Entry	(MAGISTRATE'S ORDER) NOTICE OF ORAL ARGUMENT SCHEDULED FOR TUESDAY, JANUARY 19, 2010 AT 11:30 A.M. ROOM 608 OF THE LORAIN COUNTY JUSTICE CENTER , 225 COURT ST., ELYRIA, OH.
12/14/2009 MISC	A COPY OF THE JOURNAL ENTRY/MAGISTRATE'S ORDER WAS MAILED TO PARTIES/COUNSEL OF RECORD.

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12/22/2009 N/A	APPELLANT ALLSTATE INSURANCE COMPANY'S MOTION FOR CONTINUANCE OF ORAL ARGUMENT.
01/05/2010 N/A	ENTIRE CASE SENT TO AKRON (1/6/2010)
01/07/2010 N/A	NOTICE OF ORAL ARGUMENT SCHEDULED FOR TUESDAY, FEBRUARY 16, 2010 AT 12:00 P.M. IN ROOM 608, LORAIN COUNTY JUSTICE CENTER, 225 COURT ST., ELYRIA, OH.
01/07/2010 MISC	A COPY OF THE JOURNAL ENTRY/MAGISTRATE'S ORDER WAS MAILED TO PARTIES/COUNSEL OF RECORD.
04/26/2010 N/A	APPELLEE'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY INSTANTER.
05/05/2010 N/A	APPELLANT/CROSS-APPELLEE ALLSTATE INSURANCE COMPANY'S RESPONSE IN OPPOSITION TO APPELLEE'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY INSTANTER.
05/10/2010 AFFIRM	DECISION AND JOURNAL ENTRY. JUDGMENT AFFIRMED. COSTS TAXED TO APPELLANT/CROSS-APPELLEE. SEE JOURNAL.
05/11/2010 NOTICE	APPELLANT RULE 30 NOTICE MAILED TO PARTIES/COUNSEL OF RECORD.
05/20/2010 N/A	NOTICE OF SUBSTITUTION OF COUNSEL FILED BY JOYCE V. KIMBLER, ATTORNEY FOR APPELLEE/CROSS-APPELLANT.
05/20/2010 N/A	APPELLEE/CROSS-APPELLANT, NATIONWIDE MUTUAL INSURANCE COMPANY'S MOTION TO CERTIFY CONFLICT.
05/28/2010 N/A	PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO MOTION TO CERTIFY CONFLICT.
06/28/2010 Journal Entry	APPELLEE, NATIONWIDE INSURANCE COMPANY HAS MOVED THIS COURT TO CERTIFY A CONFLICT BETWEEN ITS JUDGMENT IN THIS CASE AND THE JUDGMENT OF THE TENTH DISTRICT COURT OF APPEALS IN D'AMBROSIO V. HENSINGER, 10TH DIST. NO. 09AP-496, 2010 OHIO 1767. THE MOTION IS GRANTED BECAUSE THE TWO CASES CONFLICT ON THE SAME QUESTION OF LAW. SEE JOURNAL.
06/28/2010 MISC	A COPY OF THE JOURNAL ENTRY/MAGISTRATE'S ORDER WAS MAILED TO PARTIES/COUNSEL OF RECORD.
07/02/2010 S/C APPEAL	(SUPREME COURT CASE NO. 10-1091) NOTICE OF APPEAL BY NATIONWIDE MUTUAL INS. CO. TO THE SUPREME COURT OF OHIO FILED FROM COURT OF APPEALS CASE NOS. 09CA009594 AND 09CA009596 RECEIVED FROM OHIO SUP. CT. AND FILED.
08/02/2010 N/A	APPELLANT, NATIONWIDE MUTUAL INSURANCE COMPANY'S NOTICE OF CERTIFIED CONFLICT. (S/C 10-1314)
10/01/2010 Journal Entry	PURSUANT TO RULE 5.3 AND 5.6 OF THE RULES OF PRACTICE OF THE SUPREME COURT OF OHIO, YOU ARE HEREBY ORDERED TO PREPARE AND FORWARD TO THE CLERK'S OFFICE THE RECORD IN THE ABOVE CAPTIONED CASE. (S/C 2010-1091) (EB)
10/01/2010 Journal Entry	UPON CONSIDERATION OF THE JURISDICTIONAL MEMORANDA FILED IN THE CASE, THE COURT ACCEPTS THE APPEAL. THE CLERK SHALL ISSUE AN ORDER FOR THE TRANSMITTAL OF THE RECORD FROM THE COURT OF APPEALS FOR LORAIN COUNTY, AND THE PARTIES SHALL BRIEF THIS CASE IN ACCORDANCE WITH THE RULES OF PRACTICE OF THE SUPREME COURT OF OHIO. (S/C 2010-1091)
10/19/2010 N/A	COMPLETE FILE SENT CERTIFIED MAIL (7009 22250 0003 9788 4990) TO THE OHIO SUPREME COURT OF OHIO.

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**ORIGINAL**

IN THE SUPREME COURT OF OHIO

THOMAS BARBEE, ET AL.

Appellees

vs.

ALLSTATE INSURANCE COMPANY,  
ET AL.

Appellants

Case No.

**10-1091**

On Appeal from the Lorain  
County Court of Appeals  
Ninth Appellate District

Court of Appeals  
Case Nos. 09CA009594  
09CA009596

**RECEIVED**  
JUN 23 2010  
CLERK OF COURT  
SUPREME COURT OF OHIO

**NOTICE OF APPEAL OF APPELLANT,  
NATIONWIDE MUTUAL INSURANCE COMPANY**

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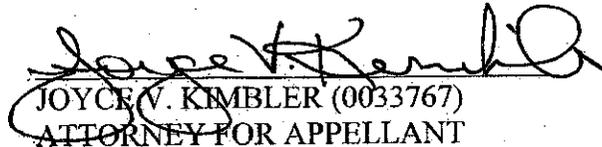
**FILED**  
JUN 23 2010  
CLERK OF COURT  
SUPREME COURT OF OHIO

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Appellant, Nationwide Mutual Insurance Company, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lorain County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case Nos. 09 CA 009594 and 09 CA 009596 on May 10, 2010.

This case is one of public or great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via regular U.S. Mail, postage pre-paid, upon the following this 22<sup>nd</sup> day of June, 2010:

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Darlene Barbee, Harvey Barbee  
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Company

  
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ATTORNEY FOR APPELLANT,  
NATIONWIDE MUTUAL  
INSURANCE COMPANY

[Cite as *Barbee v. Allstate Ins. Co.*, 2010-Ohio-2016.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF LORAIN        )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

MATTHEW BARBEE

Appellee

v.

ALLSTATE INSURANCE COMPANY

Appellant

C. A. Nos.     09CA009594  
                  09CA009596

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.     07CV149278

DECISION AND JOURNAL ENTRY

Dated: May 10, 2010

---

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Two cars collided on a Wisconsin highway in October 2002. As a result of the collision, one of those cars traveled across the median and collided with two other cars in which members of the Barbee family were riding. Because one of the drivers involved in the first collision was employed by the United States military, the Barbees sued him and the driver of the other car involved in the original collision in federal court. In June 2005, the judge in that case determined that the military employee was 30 percent at fault for the Barbees' injuries and that the other driver was 70 percent at fault. Because the Barbees had insurance policies with Allstate Insurance Company and Nationwide Mutual Fire Insurance Company with underinsurance coverage that was greater than the non-military driver's liability coverage, they brought this action against Allstate and Nationwide in January 2007, seeking a declaration that they can recover under those policies. Allstate and Nationwide moved for summary judgment,

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arguing that the Barbees' claims were barred under the policies' three-year contractual limitations period and by the doctrine of res judicata. The trial court denied their motions and granted summary judgment to the Barbees. This Court affirms because the ambiguous language of the insurance policies must be construed in a light most favorable to the Barbees, and the Barbees could not have made their claims for underinsurance benefits in the federal case.

#### FACTS

{¶2} On October 12, 2002, Edward Barbee, Darlene Barbee, Thomas Barbee, Margaret Barbee, Matthew Barbee, and Harvey Barbee were travelling in two cars on a highway near Madison, Wisconsin, when a car came across the median and collided with them. The reason the car came across the median was because of a collision between it and another car. One of the cars involved in the first collision was being driven by an employee of the United States military.

{¶3} At the time of the collisions, Edward, Darlene, Thomas, and Margaret Barbee were riding in a Honda Accord that was insured by Nationwide with underinsurance limits of \$300,000 per person, \$300,000 per occurrence. Matthew and Harvey Barbee were riding in a Buick LeSabre that was insured by Allstate with underinsurance limits of \$100,000 per person, \$300,000 per occurrence.

{¶4} The Barbees sued the drivers of the two cars involved in the first collision in the United States District Court for the Western District of Wisconsin. They joined Allstate and Nationwide because those companies had paid them for medical expenses and had a subrogated right to repayment. In June 2005, the judge in that case determined that the United States was 30 percent liable for the Barbees' injuries and the other driver was 70 percent liable. In December 2005, the court entered judgment awarding damages to the Barbees. The United States paid its

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pro rata share of the damages, and the other driver's \$75,000 in liability coverage was split among all the injured parties.

{¶5} While the federal case was pending, the Barbees' lawyer informed Allstate and Nationwide that, if the district court found that the United States was not liable, the Barbees would have an underinsured motorist claim against them because the remaining liability coverage would be inadequate. In January 2007, the Barbees separately sued Allstate and Nationwide in Lorain County Common Pleas Court, seeking a declaration that they could recover on the underinsurance coverage. The cases were consolidated by the trial court.

{¶6} Allstate and Nationwide moved for summary judgment, arguing that the Barbees' claims were time-barred because they were not brought within three years of the incident. They also argued that the Barbees' claims were barred by the doctrine of res judicata because they could have been brought as part of the federal case. The Barbees opposed the motions, arguing that enforcement of the limitations period would violate public policy. They argued that, under the insurance policies, they did not have an underinsurance claim until the liability coverage of the drivers who caused the collisions was exhausted. Because that coverage was not exhausted until the district court entered its judgment in December 2005, the Barbees argued that it was impossible for them to have sued Allstate and Nationwide within three years of the date of the collisions or as part of the federal case. They noted that they filed their claims within two years of discovering that they were entitled to underinsurance benefits.

{¶7} The trial court denied Allstate's and Nationwide's motions. It noted that, if the United States had been found 51 percent or more liable in the federal case, then, under Wisconsin law, the Barbees would have been able to enforce the entire judgment against it, eliminating their need for underinsurance benefits. See Wis. Stat. § 895.045(1) (2001). It,

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therefore, determined that the Barbees' underinsurance claims did not accrue until the federal court determined liability in June 2005. It noted that the Barbees brought their actions against Allstate and Nationwide within three years of that date.

{¶8} The trial court also determined that the underinsurance policies were ambiguous. It noted that one of the conditions for payment of underinsurance benefits was exhaustion of all other liability insurance. The policies also provided that no suit could be brought against Allstate or Nationwide until there had been full compliance with all of the terms and conditions of the policies. It concluded that it would be unfair to enforce a limitations period against policyholders who did not know whether they had an underinsurance claim until all other insurance had been exhausted. It resolved the ambiguity in the policies in favor of the Barbees and concluded that their claims were not time-barred. It also concluded that, because the Barbees did not know they had an underinsurance claim against Allstate and Nationwide until liability was decided in the federal case, they were not able to bring a claim for underinsurance benefits in that case. Accordingly, their claims were not barred by the doctrine of res judicata. The court later granted summary judgment to the Barbees. Allstate and Nationwide have appealed, assigning two errors.

#### LIMITATIONS PERIOD

{¶9} Allstate and Nationwide's first assignment of error is that the trial court incorrectly denied their motions for summary judgment. They have argued that the court should have enforced the insurance policies' three-year contractual limitations period. In reviewing a ruling on motions for summary judgment, this Court applies the same standard the trial court is required to apply in the first instance: whether there are any genuine issues of material fact and

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whether the moving parties are entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶10} Although the Barbees' claims are for underinsurance, that coverage is included within the "Uninsured Motorist" sections of the Allstate and Nationwide policies. "[T]he legal basis for recovery under the uninsured motorist coverage of an insurance policy is contract and not tort." *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193, at ¶10 (quoting *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, 632 (1994)). The Ohio Supreme Court has recognized that, "[i]n Ohio, the statutory limitation period for a written contract is 15 years. . . . However, the parties to a contract may validly limit the time for bringing an action on a contract to a period that is shorter than the general statute of limitations for a written contract, as long as the shorter period is a reasonable one. A contract provision that reduces the time provided in the statute of limitations must be in words that are clear and unambiguous to the policyholder." *Id.* at ¶11 (quoting *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St. 3d 403, 2005-Ohio-5410, at ¶11).

{¶11} Allstate and Nationwide have argued that the policies unambiguously provide that the Barbees had three years to sue them after the collision. Allstate's policy provides that "[a]ny legal action against Allstate must be brought within three years of the date of the accident. No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions." Nationwide's policy provides that "[n]o lawsuit may be filed against us . . . until the said person has fully complied with all the terms and conditions of this policy . . . . Subject to the preceding . . . , under the Uninsured Motorists coverage of this policy, any lawsuit must be filed against us: a) within three (3) years from the date of the accident . . . ."

{¶12} The Barbees have argued that the trial court correctly concluded that the policies are ambiguous. They have noted that one of the "terms" of both policies is that the insurer has

no obligation to pay until all other liability insurance is exhausted. Allstate's policy provides that "[w]e are not obligated to make any payment for bodily injury under this coverage . . . until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been fully and completely exhausted . . . ." Nationwide's policy provides that "[n]o payment will be made until the limits of all other liability insurance and bonds that apply have been exhausted by payments." The Barbees have argued that the "full compliance" language in the lawsuit provision of the policies has been drafted as broadly as possible and creates the impression "that exhaustion must occur for full compliance, which in turn must occur to file suit." They have argued that the ambiguity regarding whether exhaustion is a pre-condition to their right to sue should be construed in their favor.

{¶13} In *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627 (1994), the Kralys were involved in an automobile collision caused by Collin Vannewkirk. They sued him for their injuries. At the time the case began, Mr. Vannewkirk had liability insurance, but his insurance company became insolvent while the Kralys' case was pending. After learning of the insolvency, the Kralys sought to recover from State Farm under their uninsured motorist coverage. State Farm denied coverage because the Kralys did not sue it within two years of the collision, as required by the policy.

{¶14} The Ohio Supreme Court noted that "the present case involves a limitations period which commences before the contractual obligation of [State Farm] to provide uninsured motorist coverage arises." *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, 633 (1994). It noted that, under the terms of the policy, the Kralys had "no right of action against [State Farm] . . . until all the terms of [the] policy have been met." *Id.* "Obviously encompassed within this language are the events that are a condition precedent to coverage." *Id.* It noted that one of the "condition[s]

precedent to uninsured motorist coverage of the [Kralys] is a determination that, for the reasons identified in the policy, the tortfeasor is uninsured. One such circumstance is the insolvency of the insurer of the tortfeasor. This insolvency was therefore the triggering event for uninsured motorist coverage. Without such an event, uninsured motorist coverage would not be operative.” *Id.* at 633-34. It concluded that the two year limitations clause was not enforceable, noting that, “[i]nasmuch as this court has rejected legislative attempts to foreclose a right of action before it accrues on the basis of Section 16, Article I of the Ohio Constitution, we are required to be equally resolute with respect to contractual provisions which presume to extinguish the rights of insureds before they arise and, as a result, violate the public policy of this state.” *Id.* at 634. It held that “[t]he validity of a contractual period of limitations governing a civil action brought pursuant to the contract is contingent upon the commencement of the limitations period on the date that the right of action arising from the contractual obligation accrues.” *Id.* at paragraph two of the syllabus. It also held that “[a] provision in a contract of insurance which purports to extinguish a claim for uninsured motorist coverage by establishing a limitations period which expires before or shortly after the accrual of a right of action for such coverage is *per se* unreasonable and violative of the public policy of the state of Ohio . . . .” *Id.* at paragraph four of the syllabus.

{¶15} *Kuhner v. Erie Ins. Co.*, 98 Ohio App. 3d 692 (1994), involved a similar issue. The Kuhnners were injured in an automobile collision in 1987. Mrs. Kuhner’s condition deteriorated over the next few years and the cost of her treatment eventually exceeded the tortfeasor’s liability coverage. Erie Insurance denied coverage under the Kuhnners’ underinsured motorist coverage because the policy required that any legal action against Erie begin within two years of the collision.

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{¶16} The Tenth District concluded that the policy was ambiguous. *Kuhner v. Erie Ins. Co.*, 98 Ohio App. 3d 692, 695-96 (1994). It noted that there was a “clear inconsistency” between the policy’s limitations clause and its exhaustion clause. *Id.* at 696. The exhaustion clause provided that, “[if] the accident involves underinsured motor vehicles, we will not pay until all other forms of insurance applicable at the time of the accident have been exhausted by payment of their limits.” *Id.* It noted that it was unlikely that the limits of all other insurance policies would be exhausted within two years of the collision. *Id.* at 698. The court also noted the holdings from *Kraly*. It concluded that, because the Kuhners’ right to payment for underinsured motorist coverage did not accrue under the policy until the tortfeasor’s policy limits were exhausted, “[u]nder the rule of the second paragraph of the syllabus of *Kraly*, . . . the two-year limitation created by the policy cannot commence prior to that time. Accordingly, that limitation period cannot preclude the instant action, which was commenced within two years of the exhaustion of the other policies.” *Id.*

{¶17} The terms of the Allstate and Nationwide policies at issue in this case are similar to the policy at issue in *Kuhner*. One of the conditions precedent for payment for underinsurance is exhaustion of all other liability coverage. It is not disputed that the liability insurance of the drivers who caused the collisions with the Barbees was not exhausted until December 2005.

{¶18} As this Court has previously noted in this opinion, underinsured motorist coverage is governed by contract law. *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193, at ¶10. “Generally, a breach of contract action is pleaded by stating (1) the terms of the contract, (2) the performance by the plaintiff of his obligations, (3) the breach by the defendant, (4) damages, and (5) consideration.” *American Sales Inc. v. Boffo*, 71 Ohio App. 3d 168, 175 (1991). To succeed on their claims, the Barbees had to prove that they performed their

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contractual obligations and that Allstate and Nationwide failed to fulfill their obligations without legal excuse. *Laurent v. Flood Data Serv. Inc.*, 146 Ohio App. 3d 392, 398 (2001).

{¶19} The Ohio Supreme Court has explained that, if an automobile insurance policy contains an exhaustion clause, “the exhaustion requirement functions as a precondition to application of the underinsured motorist coverage. [The insurer] is not obligated and the claim is not matured . . . until the exhaustion requirement is satisfied.” *Bogan v. Progressive Cas. Ins. Co.*, 36 Ohio St. 3d 22, 27 (1988), overruled on other grounds by *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St. 3d 186, 2002-Ohio-7217. The Barbees, therefore, did not have a right to coverage or a mature claim against Allstate and Nationwide until the liability insurance of the two drivers in the initial collision was exhausted.

{¶20} The liability insurance of the drivers involved in the first collision was exhausted in December 2005. Exhaustion was the triggering event that gave the Barbees a right to underinsurance benefits. See *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, 633-34 (1994). The Allstate and Nationwide insurance policies, however, purported to only give the Barbees until October 2005 to sue them. In such circumstances, in which there is a conflict between a policy’s exhaustion clause and limitations clause, there is an ambiguity in the contract. *Bradford v. Allstate Ins. Co.*, 5th Dist. No. 04CA9, 2004-Ohio-5997, at ¶29 (concluding that there was an ambiguity in underinsured motorist policy because there was a conflict between contract provisions requiring an action to be brought within two years, an “other insurance” provision making the Allstate coverage excess, and language requiring complete exhaustion of all limits of liability protection in effect at the time of the collision). Ambiguities in insurance contracts must be construed strictly against the insurer and liberally in favor of the insured. *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, syllabus (1988). The trial court, therefore, correctly determined

that the policies should be construed in the Barbees' favor and that the limitations periods did not begin to run at the time of the collision. *Bradford*, 2004-Ohio-5997, at ¶29; see also *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, paragraph four of the syllabus (holding that policy provision that purports to extinguish a claim for uninsured motorist coverage by establishing a limitations period that expires before the accrual of a right to such coverage is “*per se* unreasonable.”).

{¶21} Allstate and Nationwide have argued that the limitations provisions are enforceable under *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193. In *Angel*, Teresa Angel was injured in a June 2001 motor vehicle collision caused by the negligence of Eric Reed. Mr. Reed indicated on a police report that he had liability insurance, but, actually, his policy had been cancelled. Ms. Angel did not discover that the policy had been cancelled until May 2004 and did not sue her insurer, Allstate, until 2005. Allstate argued that her claim was barred by her policy's two-year contractual limitations period.

{¶22} The Ohio Supreme Court first examined whether the two year limitations period was reasonable. It concluded it was under *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St. 3d 619, 624 (1994). *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193, at ¶12-13. It next examined when the two years began to run. Allstate argued that it ran from the date of the collision, while Ms. Angel argued that it ran from the date she discovered that Mr. Reed was uninsured. The Supreme Court concluded that the express language of the contract controlled. *Id.* at ¶15. It rejected Ms. Angel's argument that she could not have discovered that Mr. Reed was uninsured earlier, noting that all that she would have had to do was contact his insurer. *Id.* at ¶17. It distinguished *Kraly* as presenting unique facts. *Id.* at ¶19 (“Unlike *Kraly*, this case presents a standard uninsured-motorist claim in which the tortfeasor was uninsured at the time of

the accident. No subsequent event rendered Reed uninsured; he already was uninsured.”). It, therefore, concluded that Ms. Angel’s claim was untimely. *Id.*

{¶23} Like the Allstate policy in this case, the insurance policy at issue in *Angel* contained language that “[n]o one may sue us . . . unless there is full compliance with all the policy terms and conditions.” *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193, at ¶3. *Angel* is distinguishable, however, for two reasons. First, the Ohio Supreme Court did not analyze whether the “full compliance” provision or an exhaustion requirement created an ambiguity in the policy. Second, unlike in that uninsured motorist case, in this case the Barbees could not have determined that they had an underinsurance claim simply by contacting the tortfeasors’ insurers. Because there were multiple tortfeasors, one of whom had unlimited liability coverage, the Barbees could not know that they had a claim under their policies until the federal court determined liability. Accordingly, the facts of this case are closer to *Kraly* than *Angel*.

{¶24} Allstate and Nationwide have next argued that this case is similar to *Griesmer v. Allstate Ins. Co.*, 8th Dist. No. 91194, 2009-Ohio-725. In that case, the Griesmers were injured in a motor vehicle collision. After they settled with the tortfeasor, they sought benefits under the underinsured motorist coverage that they had with Allstate. Allstate denied coverage because the Griesmers had not sued them within two years, as required by their policy. The trial court granted summary judgment to Allstate. On appeal, the Griesmers argued that they did not have standing to make a claim against Allstate until they settled with the tortfeasor. *Id.* at ¶24. The Eighth District determined that the case presented a standard underinsured motorist claim like the claim in *Angel*. *Id.* at ¶30. It noted that *Angel* had determined that a two-year limitations period was reasonable. *Id.* It also noted that the Griesmers had learned that the tortfeasor had

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only \$25,000 in liability coverage during the two years following the collision. *Id.* It, therefore, enforced the contractual limitations period. *Id.* at ¶43.

{¶25} Although the Eighth District correctly analyzed whether the two-year limitations period was reasonable, it did not examine whether the contract contained a full compliance or exhaustion clause that made the policy ambiguous. That case also involved only one tortfeasor, whose liability insurance was limited.

{¶26} Allstate and Nationwide have next argued that this case is similar to *Pottorf v. Sell*, 3d Dist. No. 17-08-30, 2009-Ohio-2819. In 2005, Mrs. Pottorf was injured in a motor vehicle collision. In 2007, she sued the tortfeasor, and, in 2008, more than three years after the collision, she joined Nationwide, her underinsured motorist carrier. Her policy provided that any lawsuits against Nationwide had to be filed within three years of the date of the collision. The Third District concluded that, under *Angel* and *Miller* and Section 3927.18(H) of the Ohio Revised Code, the three-year limitations period was reasonable. *Id.* at ¶12. Citing *Angel*, it rejected the Pottorfs' argument that they did not know the limits of the tortfeasors' liability coverage until June 2008, noting that all they had to do was contact his insurer. *Id.* at ¶14-15. As in *Angel* and *Griesmer*, however, the Third District did not consider whether the policy had a "full compliance" or exhaustion provision that created an ambiguity in the contract.

{¶27} Allstate and Nationwide have next argued that the limitations provisions are enforceable under *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St. 3d 403, 2005-Ohio-5410. In *Sarmiento*, the Ohio Supreme Court considered whether a two-year contractual limitations period for filing uninsured- or underinsured-motorist claims was reasonable and enforceable when the underlying tort claim was governed by the laws of another state. *Id.* at ¶1. The Sarmientos were injured in a motor vehicle collision in New Mexico. New Mexico had a three-year statute of

limitations for personal injury claims. When the Sarmientos sued Grange three years after the date of the collision seeking to recover under their uninsured/underinsured motorist coverage, Grange sought to enforce the policy's two-year contractual limitations provision. The Ohio Supreme Court determined that, under *Miller*, the two-year period was reasonable and enforceable. *Id.* at ¶20. It noted that “[an] insured is not foreclosed from commencing an action for [uninsured or underinsured] coverage so long as the insured satisfies the policy’s conditions precedent to coverage, including commencing an action against the [insurer] within the contractual limitation period.” *Id.* at ¶20. It also noted that “nothing prevented the Sarmientos from commencing an action against [their insurer] for [uninsured motorist] benefits within the two-year contractual limitation period and then assigning their rights against the tortfeasor to [their insurer].” *Id.* at ¶21.

{¶28} In *Sarmiento*, the Ohio Supreme Court recognized that insurance contracts contain conditions that must be satisfied before the insurer is required to provide coverage. It is not mentioned in the Supreme Court’s opinion or the decision appealed from whether the insurance policy at issue in that case contained an exhaustion provision similar to the ones in this case. Even if it contained a similar provision, it was not analyzed.

{¶29} Allstate and Nationwide have next argued that Section 3937.18(H) specifically allows insurance contracts to limit the time to bring claims for underinsurance to three years. Under Section 3937.18(H), “[a]ny policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both . . . may include terms and conditions requiring that . . . each claim or suit . . . be made or brought within 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.” This Court agrees that, under Section 3937.18(H), a three-year contractual limitations period is reasonable. Section 3937.18(H), however, does not cure the ambiguity in the Allstate and Nationwide policies.

{¶30} Allstate and Nationwide have further argued that their obligation to pay under the policies and the Barbees’ accrual of a cause of action are separate and distinct concepts. They have noted that, in *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St. 3d 281 (1998), the Ohio Supreme Court wrote that “[a]n automobile liability policy will typically require exhaustion of the proceeds of a tortfeasor’s policy before the right to payment of the underinsured motorist benefits will occur. However, the date that exhaustion of the tortfeasor’s liability limits occurs is not determinative of the applicable law to a claim for underinsured motorist coverage.” *Id.* at 287. This Court agrees that an insurer’s obligation to pay on a contract and an insured’s right to sue for breach of that contract are separate concepts. They are related, however, in that the Barbees have no right to sue Allstate and Nationwide until those companies have failed to perform their obligations under the insurance contract, and that Allstate and Nationwide have no obligations under the contract until all other liability insurance has been exhausted. *Ross*, is distinguishable because the question in that case was “[w]hen does a cause of action for underinsured motorist coverage accrue so as to determine the law applicable to such a claim?” *Id.* at 284. The Supreme Court did not consider in that case whether a limitations provision is enforceable if the time for filing a lawsuit would expire before the insured is able to satisfy the conditions for coverage under the policy.

{¶31} This Court’s decision is consistent with its decision in *Mowery v. Welsh*, 9th Dist. No. 22849, 2006-Ohio-1552. In that case, Brent Welsh caused an automobile collision that injured William Mowery. Mr. Mowery sued Mr. Welsh for his injuries. While the case was

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pending, Mr. Mowery's doctor determined that he would need surgery. The cost of the surgery increased Mr. Mowery's damages beyond the limits of Mr. Welsh's liability policy. Mr. Mowery, therefore, amended his complaint to assert an underinsured motorist claim against Allstate. Allstate moved for summary judgment because Mr. Mowery did not sue it until more than two years after the collision. Mr. Mowery's insurance policy provided that "[a]ny legal action against Allstate must be brought within two years of the date of the accident. No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions." *Id.* at ¶14. The trial court denied Allstate's motion.

{¶32} This Court affirmed the trial court's decision regarding the limitations provision. While it did not examine whether the contract was ambiguous, it noted that the two-year contractual limitations period expired prior to the exhaustion of the Mr. Welsh's policy limits. *Mowery v. Welsh*, 9th Dist. No. 22849, 2006-Ohio-1552, at ¶22. It concluded that, "[g]iven the particular facts of this case, it is unreasonable to require the insured to exhaust these limits within two years of an accident." *Id.* It distinguished *Sarmiento* because the plaintiff in *Sarmiento* knew he had an uninsured motorist claim within two years of the date of the collision, while Mr. Mowery did not. *Id.* at ¶24.

{¶33} The exhaustion and limitations period provisions of the Allstate and Nationwide underinsured motorist coverages conflict, creating an ambiguity under the facts of this case. Accordingly, the limitations provisions are not enforceable as to the Barbees' claims. The trial court correctly denied Allstate and Nationwide summary judgment on that ground. Allstate's and Nationwide's first assignment of error is overruled.

## RES JUDICATA

{¶34} Allstate and Nationwide's second assignment of error is that the trial court incorrectly denied their motions for summary judgment on the doctrine of res judicata. "In Ohio, '[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel.'" *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St. 3d 526, 2009-Ohio-1704, at ¶27 (quoting *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, at ¶6). "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action." *Id.* (quoting *O'Nesti*, 2007-Ohio-1102, at ¶6). "The previous action is conclusive for all claims that were or that could have been litigated in the first action." *Id.*

{¶35} Allstate and Nationwide have argued that the Barbees' claims are barred by the doctrine of res judicata because they could have been presented in the federal court action. They have noted that that action was concluded by a final judgment on December 7, 2005.

{¶36} The trial court correctly determined that the Barbees did not have a claim for underinsurance coverage until all other liability insurance was exhausted and that that did not occur until the federal district court entered its December 7, 2005, judgment. It correctly concluded that, because the Barbees did not have an underinsurance claim until after the federal case was decided, they were not able to raise the claims that they have brought in this action in that case. Allstate and Nationwide's second assignment of error is overruled.

## CONCLUSION

{¶37} The trial court properly denied Allstate and Nationwide's motions for summary

judgment. The judgment of the Lorain County Common Pleas Court is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant/cross-appellee.

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CLAIR E. DICKINSON  
FOR THE COURT

WHITMORE, J.  
MOORE, J.  
CONCUR

APPEARANCES:

PERRIN I. SAH, and IAN R. LUSCHIN, attorneys at law, for appellant/cross-appellee.

PETER D. JANOS, attorney at law, for appellee/cross-appellant.

HENRY W. CHAMBERLAIN, attorney at law, for appellees.

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LORAIN COUNTY COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

**COPY**

RON NABAKOWSKI, Clerk  
JOURNAL ENTRY  
James L. Miraldi, Judge

Date 05/04/09

Case No. 07CV149278

MATTHEW BARBEE  
Plaintiff

HENRY W CHAMBERLAIN  
Plaintiff's Attorney (216)575-9000

VS

ALLSTATE INSURANCE COMPANY  
Defendant

JAMES E BURNS  
Defendant's Attorney (216)771-3336

The matter before this court is the plaintiffs' motion for summary judgment as well as defendants' motion to reconsider their summary judgment motions. As this court has already denied the defendants' Motion for Summary Judgment twice, it will not revisit this issue again. The plaintiffs' Motion to Strike the defendants' Motion for Summary Judgment is granted. However, the court will consider the contents of the defendants' motions in so far as the arguments respond to the plaintiffs' Motion for Summary Judgment.

The parties have entered into factual stipulations which will not be repeated in their entirety here but are incorporated by reference. (The court acknowledges and thanks the parties for their co-operative efforts in fashioning the stipulations. This will enable the court to make a ruling which will become a final appealable order.)

In general, Plaintiffs are various insureds under policies with either or both Defendants Allstate and Nationwide. Plaintiffs claim entitlement to underinsurance benefits allegedly due as a result of an auto collision in Wisconsin on October 12, 2002. Within one year of the accident, plaintiffs' counsel put both Nationwide and Allstate on

notice of potential underinsurance claims. Some of the plaintiffs made medical pay claims with the same two defendant insurers.

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The plaintiffs filed suit against defendant Danielle Skatrud's estate and co-defendant United States of America on April 22, 2005 within the applicable statute of limitations. Under Wisconsin law, plaintiffs had to add both Allstate and Nationwide as parties in an amended complaint due to both insurers' subrogated interests for having paid medical payment claims.<sup>1</sup>

On June 7, 2005, the verdict in federal court in Wisconsin determined that between the two potential tortfeasors, the underinsured tortfeasor was 70% responsible and the U.S. government defendant was 30 % responsible.<sup>2</sup> Had the federal court case determined that the co-defendant U.S. government was 50% or more responsible, the plaintiffs would have been able to enforce the entire judgment against the U.S. government. Under those circumstances, the plaintiffs would have had no underinsurance claim to pursue.

The court concludes that per the terms of the insurance policies, the plaintiffs' cause of actions for underinsurance accrued no earlier than June 7, 2005 (when liability was determined between the two tortfeasors ) or as late as December 7, 2005 (when damages exceeding the available liability limits were determined for each plaintiff). Shortly after December 7, 2005, plaintiffs received partial payments of the judgment.<sup>3</sup> Plaintiffs received 30% of their damages by the co-defendant United States of America

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<sup>1</sup> The course of the pleadings in related matters are explained in the stipulations. For simplicity's sake, the court has subsumed the activities of related cases as though these events occurred in one case. In this court's decision, the result and rationale would be unaffected by the additional details of the collateral litigation.

<sup>2</sup> Damages were determined in a separate trial on December, 7, 2005.

<sup>3</sup> Consistent with this court's rationale, it could be argued that the cause of action did not actually accrue until these payments were made and the 'exhaustion' requirement literally met. However, for purposes of this opinion, the court has used the June 7, 2005 date as it is the earliest possible date that the cause of action could be deemed to have accrued.

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and a pro-rata share of the entire \$75,000 of insurance limits available from the estate of  
the underinsured tortfeasor Danielle Skatrud.

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Although there is no dispute as to the extent of: 1) each plaintiff's underinsured portion of the judgment or 2) each of the defendant insurers' pro-rata share of each judgment (in those cases where both policies applied), the claims could not be settled. Plaintiffs filed this suit on January 18, 2007. This was within the time limitations of the policies if the critical date to measure the policy's time limit is the accrual of the cause of action of either June 7, 2005 or December 7, 2005. However, if the date of the accident is the date by which a timely action is measured, then the plaintiffs have allowed their underinsurance claims to expire.

Defendants Allstate and Nationwide filed summary judgment motions. Both claimed that the statute of limitations had run because lawsuits had not been filed within the three year "from the date of the accident" time period specified in the policies. Allstate also claimed that because Allstate had been joined in the lawsuit as an involuntary plaintiff due to its medical pay claim subrogation right, the plaintiffs failure to include the underinsurance claim barred the instant case under the doctrine of *res judicata*.

Because the existence of an underinsurance claim could not be determined until either a settlement or a judgment, this court denied the defendants' motion for summary judgment. The cause of action for an underinsurance claim had not accrued on the date of the accident. The court allowed the defendants an opportunity to have their motions reconsidered on the basis of the Supreme Court's ruling in the case of *Angel v. Reed*, 119 Ohio St.3d 73 (2008). Once again, this court denied defendants' Summary Judgment

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motions. The *Angel* case involved a purely *uninsured* motorist claim. This court distinguished the *Angel* case because of the inherent difficulty in reconciling the accrual of an *underinsurance* claim, (as distinguished from an *uninsured* motorist claim) with the limitations period in the policy.



This same rationale supporting the court's denials of the defendants' motion for summary judgment, combined with the language of both the Allstate and Nationwide policies, supports the plaintiffs' own motion for summary judgment. In order to decide this case, the court refers to the language of the two insurance policies.<sup>4</sup>

The Allstate policy includes the following relevant provisions:

[UNINSURED MOTORIST COVERAGE- EXHAUSTION OF TORTFEASOR'S POLICY] - AMENDMENT OF POLICY PROVISIONS - Ohio - PDU89-3 at page 4:

[Exhaustion of Tortfeasors' Liability Policy] "We are not obligated to make any payment for bodily injury under this coverage which arises out of the ownership, maintenance or use of an **underinsured motor vehicle until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been fully and completely exhausted by payment of judgments or settlements.**" (emphasis added)

Legal Actions - AMENDMENT OF POLICY PROVISIONS - Ohio - PDU89-3 at page 8: Any legal action against Allstate must be brought within three years of the date of the accident. **No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions.** (emphasis added)

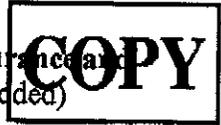
ACTION AGAINST ALLSTATE (General Provisions)  
 "No suit or action may be brought against us unless there has been full compliance with all policy terms and conditions." Allstate policy p. 6 (emphasis added)

The Nationwide policy contains similar language:

<sup>4</sup> The court takes judicial notice that Allstate and Nationwide have previously attached copies of the language of their respective insurance contracts in the prior motions for summary judgment. Therefore these policies are part of the pleadings and materials properly before this court for consideration as part of the instant motion for summary judgment.

## LIMITS AND CONDITIONS OF PAYMENT

No payment will be made **until the limits of all other liability insurance and bonds that apply have been exhausted by payments.** (emphasis added)



## SUIT AGAINST US

No lawsuit may be filed against us by anyone claiming any of the coverages provided in this policy until the said person has fully complied with all the terms and conditions of this policy, including but not limited to the protection of our subrogation rights. (emphasis added)

Subject to the preceding paragraph, under the Uninsured Motorist coverage of this policy, any lawsuit must be filed against us:

- a) within three (3) years from the date of the accident; or
- b) within one (1) 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. (emphasis added)

Both policies contain provisions and language which create an ambiguity as to whether the three year time limit for filing an *underinsurance* claim runs from the date of the accident or when the cause of action accrues. The latter date comports with both the exhaustion requirement and the policy requirement that before any lawsuit is filed, there must be full compliance with the policy provisions.

By way of background, *underinsurance* coverage language was apparently added almost as an afterthought to the Uninsured Motorist Coverage section of many companies' auto insurance policies. Historically, insurers initially offered *uninsured* motorist coverage only. Therefore coverage was available only where the tortfeasor was completely uninsured. Involved in an accident with a tortfeasor who had low limits of coverage, insureds found themselves limited to the tortfeasor's low limits. This created the anomalous situation where the insured would have been better off to have been in a collision with a totally uninsured motorist than one with some minimal coverage.

The legislature addressed this by expanding the definition of an "uninsured motorist" to include the situation where the tortfeasor had less coverage than the insured. Insurers were then required to offer this coverage to make up the difference as well as

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offer the traditional uninsured motorist coverage. In that fashion the insured would be  
equally and similarly treated and protected regardless of whether the tortfeasor was  
uninsured or underinsured.

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Similar to the approach used by the legislature when it amended the statute, insurance companies amended their policies by redefining "uninsured motorist" to include the "underinsured" situation. The result was that the policies' terms and conditions originally written and designed only for the purely uninsured motorist situation were amended by having the "underinsured" situation stuffed inside them. Unfortunately, the ill tailored definitions and conditions are not a custom fit for the frame of an underinsurance claim.

Allstate and Nationwide specifically prohibit filing a suit on an underinsurance claim. "[N]o payment will be made" until the liability policies have been exhausted by payment [by the tortfeasor's entire insurance policy limit.] - (hereinafter referred to as the "exhaustion requirement."). Both policies expressly prohibit filing lawsuits unless and until the insured has complied with all policy provisions. At the same time, the policies state that uninsured, (which in reality includes both uninsured and underinsurance), motorist claims litigation must be brought within three years of the date of the accident. How can an insured comply with the three year time limit for uninsured and underinsurance claims when there is this condition precedent of an "exhaustion requirement?" As a practical matter, this condition precedent applies before a valid underinsurance claim can be said to exist under the terms of the policy. While it is simple to determine within three years of the date of the accident whether a tortfeasor is or is not insured, not so with respect to determining whether a tortfeasor is *underinsured*. That may not happen until a settlement is obtained or a judgment rendered as was the case

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here. The insured does not have control over the timing of these events that meet the policy condition of the "exhaustion requirement," the necessary predicate for the existence of an underinsurance claim.

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Given the stipulation that the plaintiffs are insureds under the policies, it is clear that both insurers here collected premiums to provide underinsurance coverage. It is also clear that both insurers were put on notice of the potential claims well within three years of the date of the collision so that adequate claims investigation could occur. Furthermore, these insurers were parties to the underlying claim against the potential tortfeasors. These insurers were not prejudiced by the necessary delay occasioned by the very nature of when and how an underinsurance claim accrues.

How fundamentally unfair it would be to interpret the insurance policy in a manner which would create a "Catch 22." In effect, the defendants want the court's blessing to an insurer who says to its insured, "Sorry, by waiting to fulfill the required policy provisions you are now too late to file the claim." The insurer may not have it both ways. A denial of plaintiffs' motion for summary judgment would be tantamount to allowing an insurer to pick and choose those portions of the insurance agreement that benefit the insurer and ignore those provisions that would benefit the insured. The defendants' arguments in this case contravene their own carefully marketed corporate identities as being "On Your Side" or as safely cradling the insured in the insurer's "Good Hands."

The very nature of underinsurance claims is that they may not accrue until some unpredictable time in the future when a tortfeasor finally pays a settlement or judgment. Insurers have a wealth of experience to know that indeed this is the case and can take that uncertainty into account when setting premiums. Simply because uninsured and

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underinsured motorist coverage is no longer mandatory does not mean that insurers are free to take advantage of their insureds. If there is an ambiguity in the policy provision is read in context of the entire policy, that ambiguity should be resolved in favor of the coverage for the insured and against the insurer who has drafted the policy and deals from a position of superior bargaining power. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 138. This rule of construction has not been legislatively abolished.

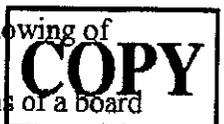
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This court also rejects Allstate's argument that the underinsurance claims are barred under the doctrine of *res judicata*. The federal court case in Wisconsin required the joinder of the insurers because of their *med pay subrogation interests*. Otherwise the insurers might not have even been parties to that litigation. Regardless, the *underinsurance claims* had not yet accrued and therefore this court will not extend *res judicata* to apply to unaccrued underinsurance claims. Insurers and the courts have treated different coverages as different, independent contracts bundled together. For example, when insurers resolve a disputed property damage liability claim arising out of a motor vehicle collision, the prosecution of that claim including the insured's deductible does not lead to the application of *res judicata* in a later lawsuit for the insured's personal injury claim. *Nationwide Ins. Co. v. Steigerwalt* (1970), 21 Ohio St.2d 87.

Allstate cites the case of *Grava v. Parkman Twp.* 73 Ohio St.3d 379, 653 N.E.2d 226 (1995) in support of its *res judicata* argument. Although the general propositions about *res judicata* are accurate in the abstract, the facts are more illustrative of when the doctrine applies. More appropriately, a contrast of facts show why the doctrine should not be contorted to bar the plaintiffs' claims here.

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In *Grava* the issue certified to the Court was whether, "[a]bsent a showing of changed circumstances, the doctrine of res judicata is applicable to decisions of zoning appeals denying a request for a variance, even when the subsequent action seeks a zoning certificate based on the property's alleged status as a prior legal nonconforming use as provided for in a zoning resolution." Certainly a party that keeps trying to retry an unfavorable zoning ruling should be barred from reinstituting the same claim brought under a different theory. Nowhere did the discussion in this case cited by Allstate refer to insurance claims that had not yet accrued.



The only claim in federal court that was ripe for adjudication at that time was Allstate's med pay subrogation interest which had already accrued by virtue of payment. The med pay claim was a separate and distinct coverage under the policy. The thrust of the underlying litigation in federal court was essentially a tort claim between the plaintiffs and two defendants. The insurers were only required to be joined to see that their subrogation interest was protected. See 803.03 Wis. Stat. If plaintiffs were now trying to litigate an issue regarding their medical pay claims, then one might find *res judicata* among the defenses raised.

Lastly, the defendants point out that Faith Donley, another litigant involved in this collision in Wisconsin, filed both a suit in federal court in Wisconsin and as well as an underinsurance claim in Lorain County. This is not persuasive. Although Ms. Donley's attorney used an alternative approach, it was not required as a matter of law. Indeed, the underinsurance litigation in Lorain County was stayed and placed on the trial court's inactive docket until the federal court case was concluded.<sup>5</sup> What sense would it make to

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<sup>5</sup> The court takes judicial notice of that the stipulations erroneously omit the term "inactive" when indicating that the case "was stayed" and "placed upon the [inactive] docket." Stipulation paragraph 15

interpret the insurance ambiguities in a way that required an additional suit which would by necessity have to be placed on the court's inactive docket?

to be filed  
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Accordingly, in the context of all the evidentiary material included in the Defendants earlier Summary Judgment Motions and the addition of the stipulations of fact, this court finds that the plaintiffs are entitled to judgment as a matter of law under the standards of Ohio Civil Rules of Procedure Rule 56(C). **The court holds that where the underinsurance provisions require that an insured exhaust all available liability policies before filing a lawsuit against the insurer, the policy's provision requiring that suit against the insurer be filed within three years of the date of the accident is tolled until the exhaustion requirement is satisfied.**

As there is no dispute as to: 1) the total damages awarded the plaintiffs, 2) the amounts of those damages which were not paid by other applicable liability policies, or 3) how such amounts should be prorated between them if this court finds that the plaintiffs are entitled to underinsurance benefits under both the Nationwide and Allstate underinsurance provisions, the court awards judgment to the plaintiffs as follows:

Edward Barbee \$55,192.58 against defendants Allstate and Nationwide pro rata share

Margaret Barbee \$29,428.83 against defendant Nationwide

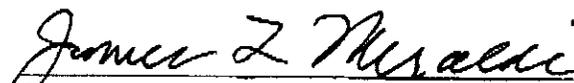
Thomas Barbee \$42,798.67 against defendant Nationwide

Darlene Barbee \$36,100.84 against defendants Allstate and Nationwide pro rata share

Matthew Barbee \$46,295.78 against defendant Allstate

Harvey Barbee \$53,834.03 against defendant Allstate.

Case closed. Costs to Defendants.

  
James L. Miraldi, Judge

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LEXSEE 2010 OHIO 1767



Analysis  
As of: Dec 31, 2010

**Ruth D'Ambrosia, Plaintiff-Appellant, v. David J. Hensinger et al.,  
Defendants-Appellees.**

No. 09AP-496

**COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN  
COUNTY**

*2010 Ohio 1767; 2010 Ohio App. LEXIS 1474*

**April 22, 2010, Rendered**

**SUBSEQUENT HISTORY:** Discretionary appeal not allowed by *D'Ambrosio v. Hensinger, 2010 Ohio 4542, 2010 Ohio LEXIS 2367 (Ohio, Sept. 29, 2010)*

**PRIOR HISTORY:** [\*\*1]  
APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 07CVC-02-2627).

**DISPOSITION:** Judgment affirmed.

**COUNSEL:** Margaret Blackmore and Siobhan R. Boyd, for appellant.

Caborn & Butauski Co., LPA, and Joseph A. Butauski, for appellee Erie Insurance Company.

**JUDGES:** CONNOR, J. SADLER and FRENCH, JJ., concur.

**OPINION BY:** CONNOR

**OPINION**

CONNOR, J.

[\*P1] Plaintiff-appellant, Ruth D'Ambrosio ("appellant"), appeals the decision of the Franklin County Court of Common Pleas granting summary judgment to defendant-appellee, Erie Insurance Company ("appellee"). For the following reasons, we affirm the judgment of the trial court.

[\*P2] On September 2, 2001, appellant was a passenger in a vehicle that was struck by a vehicle operated by David J. Hensinger. At the time of the accident, appellant held an automobile insurance policy issued by appellee, which included uninsured/underinsured motorist ("UM/UIM") coverage. On August 13, 2003, appellant filed a complaint asserting a negligence claim against Hensinger. In the suit, Hensinger was the only named defendant. On March 3, 2006, appellant voluntarily dismissed her suit, before refiling it again on February 27, 2007. On June 6, 2008, after having ascertained Hensinger's liability limits, appellant amended [\*\*2] her complaint to assert a claim for UM/UIM coverage against appellee.

[\*P3] On October 6, 2008, appellee filed a motion for summary judgment based upon the two-year contractual limitation period specified in the policy. Appellant filed a memorandum contra, and appellee filed a reply. On February 9, 2009, the trial court granted appellee's motion because appellant had initiated her UM/UIM claim six-years and nine-months after the date of the accident, which was well beyond the two-year contractual limit. Appellant has appealed and raises the following assignment of error:

I. The Trial Court erred by granting Defendant-Appellee's Motion for Summary Judgment as there remained genuine issues of material fact and the Defendant-Appellee was not entitled to a judgment as a matter of law.

[\*P4] Appellate courts review decisions on summary judgment motions de novo. *Helton v. Scioto Cty. Bd. Of Comm'rs* (1997), 123 Ohio App.3d 158, 162, 703 N.E.2d 841. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103, 701 N.E.2d 383. We must affirm the trial court's judgment [\*\*3] if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42, 654 N.E.2d 1327.

[\*P5] Summary judgment is proper only when the party moving for summary judgment demonstrates that (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. *Civ.R. 56(C)*; *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St. 3d 181, 183, 1997 Ohio 221, 677 N.E.2d 343. Additionally, a moving party cannot discharge its burden under *Civ.R. 56* by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264. Rather, the moving party must affirmatively demonstrate by affidavit or other

evidence allowed by *Civ.R. 56(C)* that the nonmoving party has no evidence to support its claims. Id.

[\*P6] "An insurance policy is a contract, and the relationship [\*\*4] and rights of the insurer and insured are contractual in nature; therefore, a claim for UM/UIM coverage sounds in contract, not in tort." *Sarmiento v. Grange Mutual Cas. Co.*, 106 Ohio St.3d 403, 2005 Ohio 5410, P8, 835 N.E.2d 692, citing *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 480, 2001 Ohio 100, 747 N.E.2d 206. In accordance with *R.C. 2305.06*, the statutory limitation period for a written contract is 15 years. However, the parties to a contract may reduce this limit, provided that the shorter period is reasonable. *Sarmiento at P11*, citing *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 624, 1994 Ohio 160, 635 N.E.2d 317. Further, a provision that reduces the statutory limitation period must be written in words that are clear and unambiguous. Id. To be clear and unambiguous, a policy provision must tell policyholders the amount of time they have to file suit in addition to informing policyholders when that time begins to run. *Lane v. Grange Mut. Cos.* (1989), 45 Ohio St.3d 63, 64, 543 N.E.2d 488. As a result, our initial inquiry must focus on the insurance policy's contractual language. *Sarmiento at P9*, citing *Gomolka v. State Auto Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-68, 436 N.E.2d 1347.

[\*P7] The policy defines an underinsured motor [\*\*5] vehicle as:

[A] motor vehicle that has liability insurance in effect, but the sum of the applicable limits of liability \* \* \* is less than the applicable limit shown on the Declarations for Uninsured/Underinsured Motorists Coverage for one auto.

Under the policy, appellee promised to:

[P]ay damages for bodily injury that the law entitles you or your legal representative to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle.

The section "Other Insurance" provides:

When the accident involves underinsured motor vehicles, we will not pay until all other forms of insurance \* \* \* have been exhausted by payment of their

limits.

Finally, the section "Lawsuits Against Us" provides:

You must comply with the terms of the policy before you may sue us.

Legal action to recover under Uninsured/Underinsured Motorist Coverage must be initiated within two years from the date of the accident.

(Motion for Summary Judgment, exhibit No. A-1.)

[\*P8] In this appeal, appellant cites the foregoing policy provisions in support of her argument that the two-year limitation period is unreasonable and ambiguous. First, appellant argues that her UM/UIM claim accrued when she first learned [\*6] of Hensinger's underinsured status, which occurred in November 2008. Additionally, appellant argues that the policy is ambiguous because other policy provisions render meaningless the reference to the date of the accident specified in the limitation period. Further, appellant argues that the policy required her to raise her UM/UIM claim before she could prove it. Accordingly, appellant argues the trial court erred by enforcing the two-year limitation period.

[\*P9] The Supreme Court of Ohio has generally upheld as reasonable UM/UIM provisions with two-year contractual limitation periods. See *Sarmiento*, paragraph one of syllabus ("two-year contractual limitation period for filing uninsured- and underinsured-motorist claims is reasonable and enforceable"). Indeed, the Supreme Court of Ohio has expressly provided:

[A] two-year limitation period would be a "reasonable and appropriate" period of time in which to require an insured who has suffered bodily injury to commence an action under the uninsured/underinsured-motorist provisions of an insurance policy. [*Miller at 625*]; *Sarmiento [at P16]*.

Our precedent controls, and the two-year limitation period in the Allstate policy is enforceable.

*Angel v. Reed*, 119 Ohio St.3d 73, 2008 Ohio 3193, P12-13, 891 N.E.2d 1179.

[\*P10] [\*7] In the instant matter, appellant argues that the case law does not establish a per se rule on the reasonableness of a two-year limitation period, but rather a court must consider the unique facts and circumstances of each individual case. While we agree that courts typically engage in this type of analysis, appellant has given us no reason to conduct such an analysis. Indeed, appellant has failed to present any relevant facts or circumstances demonstrating that the provision is unreasonable. Instead, appellant merely argues that her UM/UIM claim accrued when she first discovered Hensinger's status as an underinsured motorist. When presented with this same argument in *Angel*, the Supreme Court of Ohio held:

[T]his case presents a standard uninsured-motorist claim in which the tortfeasor was uninsured at the time of the accident. No subsequent event rendered Reed uninsured; he already was uninsured. Consistency with precedent requires the application of the unambiguous language in the Allstate policy. Appellee failed to make her uninsured-motorist claim within the limitations period designated in the Allstate policy.

*Id. at P19.*

[\*P11] Similarly, we find that the instant matter presents a standard [\*8] underinsured motorist claim. Appellant offers no explanation as to why it took more than six years to determine Hensinger's underinsured status. Further, she fails to explain why she was unable to obtain information regarding Hensinger's policy limits during the two years following the accident. Inasmuch as appellant references Hensinger's failure to timely respond to discovery requests sent in July 2005, we see this fact to be irrelevant. Indeed, these discovery requests were first served four years after the date of the accident. Whether Hensinger timely responded to these discovery requests had no bearing on appellant's ability to meet the two-year contractual limit. Indeed, she had already missed the deadline.

[\*P12] Accordingly, we see no reason why it should have taken appellant more than six years to determine that Hensinger was underinsured. *Id. at P17*, quoting *Angel v. Reed*, 11th Dist. No. 2005-G-2669, 2007 Ohio 1069, P27 ("There is no reason why it should have

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taken Angel three years to realize Reed was uninsured"); see also *Pottorf v. Sell*, 3d Dist. No. 17-08-30, 2009 Ohio 2819, P15 ("At any time [the tortfeasor's] insurance company could have been contacted to determine the policy [\*\*9] limits."); see also *Lynch v. Hawkins*, 175 Ohio App.3d 695, 2008 Ohio 1300, P60, 888 N.E.2d 1149 ("Plaintiff's contention that he was not aware of the tortfeasor's limited liability coverage \* \* \* in the original suit that he filed simply indicates that he had not used the discovery tools available to him in that suit to have discovered the tortfeasor's insurance coverage earlier.").

[\*P13] As a result, we find that the two-year contractual limitation period set forth in appellant's policy is reasonable. The trial court did not err in reaching this same finding.

[\*P14] With regard to appellant's argument that the policy is ambiguous, we again note that the policy provides that a UM/UIM claim "must be initiated within two years from the date of the accident." (Motion for Summary Judgment, exhibit No. A-1.) Appellant argues that this provision is ambiguous when read in conjunction with the exhaustion provision and the provision requiring her to fully comply with the terms of the policy before filing suit. We disagree.

[\*P15] Ohio courts have considered and rejected this same argument. See *Lynch*; see also *Chalker v. Steiner*, 7th Dist. No. 08 MA 137, 2009 Ohio 6533. In this regard, we agree with the well-reasoned analysis set [\*\*10] forth in *Chalker*. In that case, the Seventh Appellate District described the trends in deciding issues regarding the enforceability of limitations provisions. *Id.* at P9-19. In response to the insured's argument that the exhaustion provision created an ambiguity in the policy, the *Chalker* court held that the exhaustion provision was

a condition precedent to an insurer's duty to make UM/UIM payments, rather than being a condition precedent to an insured's right to commence a legal action for UM/UIM coverage. *Id.* at P50-51, citing *Regula v. Paradise*, 119 Ohio St.3d 1413, 2008 Ohio 7141, P49, 891 N.E.2d 771. Consequently, the court held that the full compliance provision similarly did not render the policy unenforceable. *Id.* at P51. Based upon these analyses, the court held that the policy, even when considering the contractual limitation in conjunction with these other provisions, was not ambiguous. *Id.* at P64.

[\*P16] We similarly find that the exhaustion provision and the full compliance provision did not render the policy ambiguous. Nothing prevented appellant from filing suit within two years from the date of the accident. See *Chalker* at P21, citing *Regula* at P49. The policy clearly and unambiguously established [\*\*11] the time appellant had to file suit in addition to informing her when that time began to run. See *Lane* at 64.

[\*P17] Based upon the foregoing analysis, we find that the two-year contractual limitation period was reasonable and was unambiguous. As a result, the two-year contractual limitation period was enforceable. Because appellant undisputedly failed to file her UM/UIM claim within this time frame, we find that the trial court did not err in granting summary judgment. As a result, we overrule appellant's only assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

SADLER and FRENCH, JJ., concur.

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LEXSEE 2009 OHIO 6533



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As of: Dec 31, 2010

**RONNIE CHALKER, PLAINTIFF-APPELLANT VS. DARLENE STEINER, et al.,  
DEFENDANTS-APPELLEES**

**CASE NO. 08 MA 137**

**COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT,  
MAHONING COUNTY**

*2009 Ohio 6533; 2009 Ohio App. LEXIS 5455*

**December 8, 2009, Decided**

**SUBSEQUENT HISTORY:** Discretionary appeal not allowed by *Chalker v. Steiner*, 124 Ohio St. 3d 1542, 2010 Ohio 1557, 924 N.E.2d 844, 2010 Ohio LEXIS 976 (Ohio, Apr. 14, 2010)

**PRIOR HISTORY:** [\*\*1]

**CHARACTER OF PROCEEDINGS:** Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio. Case No. 05 CV 1668.

**DISPOSITION:** Affirmed.

**COUNSEL:** For Plaintiff-Appellant: Atty. Angela J. Mikulka, The Mikulka Law Firm, Youngstown, Ohio.

For Defendants-Appellees: Atty. William E. Pfau, III, Pfau, Pfau & Marando, Youngstown, Ohio.

**JUDGES:** Hon. Cheryl L. Waite, Hon. Gene Donofrio, Hon. Joseph J. Vukovich, Donofrio, J., concurs. Vukovich, P.J., concurs.

**OPINION BY:** Cheryl L. Waite

**OPINION**

WAITE, J.

[\*P1] Appellant, Ronnie Chalker, appeals the entry of summary judgment against him and in favor of Appellee, Grange Mutual Casualty Insurance Company. In this breach of contract action, Appellant seeks underinsured motorist ("UIM") benefits under an automobile insurance policy issued by Appellee. According to the judgment entry, the trial court entered summary judgment in favor of Appellee because Appellant failed to file an action for his UIM benefits within the three-year limitations period set forth in the policy. For the following reasons, the judgment of the trial court is affirmed.

**Facts**

[\*P2] On May 23, 2003, Appellant was injured in a motor vehicle collision caused solely by the negligence of Darlene Steiner. Appellant was operating a motor vehicle [\*\*2] owned by his employer and was acting within the scope of his employment when he was injured. The

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vehicle was insured through an automobile policy issued by Appellee, bearing limits of \$ 100,000.00/\$ 300,000.00 of UIM coverage.

[\*P3] Appellant filed a lawsuit alleging negligence against Steiner on May 9, 2005, and the Bureau of Workers Compensation ("BWC") was joined as a party to reflect its subrogated interest. Although Steiner initially denied liability for the motor vehicle accident, a settlement offer of Steiner's policy limit of \$ 25,000.00 was received by Appellant on October 4, 2006. The settlement offer was tendered approximately four and a half months after the three-year limitations period in the insurance policy had expired.

[\*P4] On or about October 9, 2006, Appellant forwarded the settlement offer to Appellee and requested permission to settle the claim against Steiner or, in the alternative, for advancement of the funds. In a letter dated October 25, 2006, Appellee refused to authorize the settlement or to advance the settlement funds. Instead, Appellee requested additional documentation regarding the settlement offer as well as evidence that Appellant had filed an action for UIM [\*\*3] benefits within the limitations period specified in the insurance contract.

[\*P5] Appellant amended his complaint on December 29, 2006 to include a subrogation claim for Appellee and a claim against Appellee for UIM benefits. On February 12, 2007, Appellee informed Appellant's counsel that no UIM coverage would be provided due to Appellant's failure to file an action within the limitations period set forth in the insurance policy. As a consequence, Appellee stated through a representative that it was not in a position to grant or deny permission to settle the action against Steiner, but that it would not use the settlement with Steiner as a defense in the pending action.

[\*P6] On February 20, 2007, Appellee filed its motion for summary judgment premised on Appellant's breach of the limitations clause. On July 11, 2007, Appellant filed his brief in opposition. Appellee filed a reply brief on June 28, 2007. Appellant filed a response to the reply brief on June 28, 2007.

[\*P7] After the issues and intervening caselaw had been fully briefed, the magistrate issued his decision to grant summary judgment in favor of Appellee in this case on April 4, 2007. Appellant filed his objections to the magistrate's [\*\*4] decision on April 18, 2008. The trial

court entered summary judgment in favor of Appellee on May 14, 2008. This timely appeal followed.

[\*P8] Some of the additional briefing in this matter was undoubtedly due to recent decisions in this district. On June 21, 2007, we issued our decision in *Whanger v. Grange Mutual Casualty Company*, 7th Dist. No. 06-JE-18, 2007 Ohio 3187. Appellee filed a brief with supplemental authority on August 20, 2007. Then, on March 18, 2008, we issued our decision in *Regula v. Paradise*, 7th Dist. No. 07-MA-40, 2008 Ohio 7141. Appellant filed a second brief with supplemental authority on April 1, 2008.

[\*P9] *Whanger* and *Regula* constitute a shift of view as to the enforceability of limitations provisions for uninsured/underinsured motorist ("UM/UIM") coverage in insurance contracts in this district. These decisions were not, however, unforeseeable. They were based on changes in Ohio Supreme Court cases and on caselaw from other districts seeking to follow Supreme Court mandates. A review of the caselaw on this issue is instructive.

[\*P10] In 1998, we excused an insured's failure to file an action for UIM benefits within the stated policy limitations period in *Phillips v. State Auto. Mut. Ins. Co.* (1998), 127 Ohio App.3d 175, 711 N.E.2d 1080. [\*\*5] This Court held that an otherwise unambiguous limitations provision in an insurance policy is ambiguous and unenforceable when read in conjunction with an exhaustion provision that authorizes an insurer to withhold payment of UIM benefits until the insured exhausts by payment of judgments or settlement of any claim against the tortfeasor. *Id.* at 180.

[\*P11] In *Phillips*, the insured timely sued the tortfeasor but was unable to conclude the suit and exhaust the tortfeasor's liability coverage through judgment or settlement within the two-year limitations period found in the insurance contract. We held that, "[t]he reasonable interpretation of the policy language is that [the insured] has two years from judgment or settlement to seek underinsured motorist coverage through [her insurer's] policy." *Id.*

[\*P12] *Phillips* was decided following a series of cases in Ohio that sought to determine a reasonable time limitation to place on actions for UM/UIM coverage. See e.g., *Lane v. Grange Mut. Cos.* (1989), 45 Ohio St.3d 63, 543 N.E.2d 488; *Miller v. Progressive Cas. Ins. Co.*

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(1994), 69 Ohio St.3d 619, 624, 1994 Ohio 160, 635 N.E.2d 317. Then, in 2001, the General Assembly amended the UM/UIM statute in an effort to resolve [\*\*6] the uncertainty surrounding the amount of time that constitutes a reasonable period in which to file a claim for UM/UIM benefits.

[\*P13] R.C. 3937.18(H) reads, in its entirety:

[\*P14] "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."

[\*P15] In 2005, the Ohio Supreme Court decided a pre-amendment case, *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 2005 Ohio 5410, 835 N.E.2d 692. In that case, Ohio plaintiffs, who were involved in a car accident in New Mexico and failed to satisfy a two-year limitations period in an [\*\*7] insurance policy, argued that the limitations period was unreasonable and unenforceable because it was shorter than New Mexico's three-year statute of limitations for personal injuries.

[\*P16] The *Sarmiento* Court held that the limitations provision 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" and, "[t]he 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 limitation period." *Id.* at P20. The Court reasoned that "nothing prevented the Sarmientos from commencing an action against Grange for UM benefits within the two-year contractual limitation period and then assigning their rights against the tortfeasor to Grange." *Id.* at P21.

[\*P17] We first interpreted the Ohio Supreme

Court's decision in *Sarmiento* in *Whanger*, *supra*. In apparent reliance on our decision in *Phillips*, *supra*, the Whangers argued that, despite the fact that they did not file an action for UIM benefits within the limitations period [\*\*8] prescribed by their insurance policy, they did file the action within one year of having exhausted the limits of the tortfeasor. *Whanger* at P12. They further argued that the facts in *Sarmiento*, which was decided during the pendency of their case, were distinguishable from their own facts, because they were seeking UIM benefits whereas the Sarmientos filed an action for UM benefits.

[\*P18] At the outset, we rejected the alleged distinction between UM and UIM coverage because the *Sarmiento* syllabus specifically refers to both types of coverage. *Id.* at P41. Next, we concluded that the limitations provision in the insurance contract was not ambiguous because such an interpretation, "would be at odds with part of the Ohio Supreme Court's decision in *Sarmiento*," that is, that nothing prevented the *Whanger* plaintiffs from filing an action within two years of the accident. *Id.* at P51.

[\*P19] In *Regula*, the plaintiffs alleged that the limitations period for the UM/UIM coverage in their insurance policy expired before they learned the policy limits of the tortfeasor's insurance coverage. Thus, they argued that their action against their insurance company did not accrue until they became aware that the tortfeasor [\*\*9] was underinsured. They claimed that the limitations provision was ambiguous when read in concert with the exhaustion provision. We note that the limitations provision and the exhaustion provision addressed in *Regula* are identical to the provisions in the above-captioned case.

[\*P20] Based on *Sarmiento* and its progeny, we held that while the exhaustion requirement was a condition precedent to payment of benefits by the insurance company, it was not a condition precedent to filing an action against the insurance company. *Regula* at P49. With respect to the claim that the insureds had initially been misled into believing that the tortfeasor had sufficient coverage, we encouraged a preemptive action for UM/UIM benefits, which could be dismissed in the event that the tortfeasor's policy limits were identical to the UM/UIM policy limits. *Id.* at P54. We also admonished the *Regulas* for failing to determine the tortfeasor's policy limits through the discovery process

within the time allowed by the limitations provision.

[\*P21] In *Regula*, this Court acknowledged that while neither *Sarmiento* nor *Whanger* addressed the exact claim that the limitations clause read in conjunction with the exhaustion clause created [\*\*10] ambiguity in the insurance contract (the issue addressed in *Phillips*) we concluded that first as in those cases, "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 P49.

[\*P22] Turning to the matter before us, several provisions of the insurance policy are at issue in this case. The limitations provision reads, in its entirety:

[\*P23] "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**, 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." (Policy, p. C-4(OH).)

[\*P24] Appellant contends that the limitations provision is ambiguous and unenforceable when read in conjunction with two other contract provisions. The "Insuring Agreement" provision reads, in pertinent part:

[\*P25] "The owner's or operator's liability for these damages [\*\*11] must arise out of the ownership, maintenance, or use of the **uninsured motor vehicle**. We will pay under this coverage only if 1. or 2. below applies:

[\*P26] "1. The limits of liability under any **bodily injury** liability bonds or policies applicable to the underinsured motor vehicle have been exhausted by payment, with **our** consent, of judgments or settlements; or

[\*P27] "2. A tentative settlement has been made between an **insured** and the insurer, or the insured operator of a vehicle described in Paragraph C. of the definition of **uninsured motor vehicle** and we:

[\*P28] "a. Have been given prompt written notice of such settlement; and

[\*P29] "b. Advanced payment to the **insured** in an amount equal to the tentative settlement within 90 days after receipt of notification." ["the exhaustion provision"]. (Policy, p. C-1(OH).)

[\*P30] The "Legal Action Against Us" provision reads, in pertinent part, "[n]o legal action may be brought against us until there has been full compliance with all the terms of this policy." ["legal action provision"]. (Policy, p. F-2(OH).)

[\*P31] In his first assignment of error, Appellant argues that the doctrine of substantial performance, as it was applied in *Ferrando v. Auto Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002 Ohio 7217, 781 N.E.2d 927, [\*\*12] governs this case. In other words, Appellant claims that his failure to satisfy the limitations provision does not constitute a material breach of the contract, and that Appellee suffered no prejudice as a result of the non-material breach.

[\*P32] In his second and third assignments of error, Appellant argues that the limitations provision is ambiguous when read in conjunction with the exhaustion provision and the legal action provision, and that it is technically impossible to comply with all three of the provisions.

[\*P33] Because the limitations provision in this case is unambiguous and enforceable, and the exhaustion provision is a condition precedent to payment rather than the right to file an action for UM/UIM benefits, Appellant's assignments of error are overruled, and the entry of summary judgment in favor of Appellee is affirmed.

#### Standard of Review

[\*P34] An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court pursuant to *Civ.R. 56(C)*. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 1996 Ohio 336, 671 N.E.2d 241. Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as [\*\*13] 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 the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the

conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 364 N.E.2d 267. When a court considers a motion for summary judgment the facts must be taken in the light most favorable to the non-moving party. *Id.*

[\*P35] "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis in original.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 1996 Ohio 107, 662 N.E.2d 264. If the moving party carries its burden, the nonmoving party has the reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293, 662 N.E.2d 264. In other words, in the face of a properly supported motion for summary judgment, the nonmoving party must produce some evidence that suggests that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 386, 701 N.E.2d 1023.

#### FIRST ASSIGNMENT OF ERROR

[\*P36] "Summary Judgment was improper because under general principles of contract law, the substantial performance of a party is sufficient to entitle it to recover under a contract, and a non-material breach which causes no damage or prejudice does not preclude such recovery."

[\*P37] Relying on the rule of law announced in *Ferrando*, supra, Appellant contends that his failure to satisfy the limitations provision in the insurance policy did not constitute a material breach and Appellee suffered no prejudice. Therefore, Appellant claims, summary judgment was inappropriate. In *Ferrando*, the Ohio Supreme Court held that violations of notice or subrogation clauses do not preclude recovery as a matter of law, but, instead, present a question of fact regarding whether the insureds acted reasonably and whether the insurance company was actually prejudiced. Appellant argues that the same standard should apply to violations of the limitations provision of an insurance contract. [\*15]

[\*P38] Appellee counters that Appellant waived this argument on appeal because he failed to raise it in his objections to the magistrate's decision. In the alternative, Appellant argues that the rule of law announced in *Ferrando* should not be applied to violations of

limitations provisions.

[\*P39] *Civ.R. 53(D)(3)(b)(ii)* reads, in pertinent part, "[a]n objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." The rule further states that a party is barred from raising any error on appeal, other than plain error, pertaining to a trial court's adoption of any finding of fact or conclusion of law by a magistrate unless that party timely objected to that finding or conclusion as required under the rule. *Civ.R. 53(D)(3)(b)(iv)*.

[\*P40] Appellant did not raise this substantial performance argument in his opposition to the motion for summary judgment, nor did he advance the argument in his objections to the magistrate's decision. In fact, he raises the substantial performance argument for the first time on appeal. Therefore, pursuant to *Civ.R. 53*, Appellant has waived all but plain error of his substantial performance argument by failing to raise it [\*16] in his objections to the magistrate's decision.

[\*P41] Plain error is recognized in a civil case only in an, "extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004 Ohio 5719, P43, 816 N.E.2d 1049, quoting *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 1997 Ohio 401, 679 N.E. 2d 1099, syllabus.

[\*P42] That said, we note that the Fifth District Court of Appeals declined to apply the *Ferrando* rule to UM/UIM limitations provisions in *Shirley v. Republic-Franklin Ins. Co.*, 5th Dist. No., 166 Ohio App. 3d 590, 2006 Ohio 1848, 852 N.E.2d 231. In that case, the Shirleys argued that their failure to satisfy various notice and limitations provisions of an insurance policy did not bar their UM/UIM claim based upon the holding in *Ferrando*.

[\*P43] The Fifth District concluded that, although the Ohio Supreme Court has held that violations of notice and subrogation clauses do not preclude recovery as a matter of law, the same rule cannot be applied to limitations provisions. The *Shirley* Court reasoned [\*17] that, "[i]n *Sarmiento*, the Supreme Court found that a two-year limitation is per se reasonable and enforceable, without any equitable test or interpretation.

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This holding removes it from *Ferrando*." *Id.* at P17.

[\*P44] We agree with our sister district. In fashioning the rule of law announced in *Sarmiento*, as well as in applying it in a subsequent case, the Ohio Supreme Court neither invoked nor even considered the application of the actual prejudice test announced in *Ferrando*. See *Angel v. Reed*, 119 Ohio St.3d 73, 2008 Ohio 3193, 891 N.E.2d 1179. In both cases, the Court enforced the limitations provision without any demonstration of prejudice.

[\*P45] Accordingly, Appellant's first assignment of error is overruled. Because Appellant's second and third assignments of error both advocate the reversal of our decision in *Regula*, *supra*, they shall be treated together for the purpose of judicial economy.

#### SECOND ASSIGNMENT OF ERROR

[\*P46] "Summary Judgment was improper because the Grange contract of insurance contained conditions precedent which contractually prohibited its insured from filing suit against it until all policy conditions were met."

#### THIRD ASSIGNMENT OF ERROR

[\*P47] "Summary Judgment was improper because [\*\*18] the GRANGE policy contained provisions which were impossible of performance, contradictory and ambiguous, and *R.C. 3937.18(H)* did nothing to eliminate such impossibility, ambiguity or conflict."

[\*P48] "[A] claim for UM/UIM coverage sounds in contract, not in tort." *Sarmiento* at P8. For the purpose of determining the scope of coverage of an underinsured motorist claim, the statutory law in effect at the time of entering into a contract for automobile liability insurance controls the rights and duties of the contracting parties. *Ross v. Farmers Ins. Group of Companies* (1998), 82 Ohio St.3d 281, 1998 Ohio 381, 695 N.E.2d 732, syllabus.

[\*P49] The exact issue presented by this case was addressed in *Regula*, that is, whether the identical three-year limitations provision of Appellee's automobile policy is enforceable when the clause is read in conjunction with other provisions of the policy. Like the *Regulas*, Appellant contends that certain conditions precedent are created by the contract, which essentially prevent an insured, or at least this insured, from filing a

lawsuit for UIM benefits within the contractual limitations period. Because Appellant did not receive authorization from Appellee to accept Steiner n' [\*\*19] s settlement offer until February 12, 2007, three years and seven and a half months after the accident, Appellant contends that the limitations provision should not be enforceable.

[\*P50] However, in *Regula*, we held that the requirements listed in the exhaustion provision were conditions precedent to Appellee's duty to pay UIM benefits, not to Appellant's right to file a lawsuit. *Regula* at P49. Appellee concedes that the time for filing a lawsuit is not affected by the exhaustion requirement, which is a condition precedent only to the payment of benefits. (Appellee's Brf., p. 12.)

[\*P51] Admittedly, we did not directly address the effect of the "Legal Action Against Us" provision in *Regula*. As stated earlier, that provision does not authorize legal action against Appellee, "until there has been full compliance with all the terms of [the] policy." (Policy, p. F-2(OH).) Appellant contends that, "no language or term in the GRANGE policy reconciled the three year limitation period (running from the date of accident) with the General Provisions term prohibiting action against the insurer until there was full compliance with all of the terms of the policy, including exhaustion." (Appellant's Brf., p. [\*\*20] 20.) However, as we concluded in *Regula* that exhaustion is a condition precedent to payment by the insurer rather than a condition precedent to legal action by the insured, it is clear that the legal action provision does not render the limitations provision unenforceable.

[\*P52] Next, Appellant argues that the rule announced in *Sarmiento* should not be applied to UIM claims. However, as we stated in *Regula*, in *Sarmiento* the Ohio Supreme Court clearly and specifically referred to both UM and UIM claims in the syllabus.

[\*P53] Appellant does not cite any change in the law that warrants a reversal of our decision in *Regula*. As a matter of fact, Ohio appellate courts examining the enforceability of UM/UIM limitations provisions *post-Sarmiento* have engaged in the same fact based test that we employed in *Regula* to determine whether the insured knew or should have known that the tortfeasor's liability limits would be insufficient prior to the expiration of the limitations period.

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[\*P54] In *Mowery v. Welsh*, 9th Dist. No. 22849, 2006 Ohio 1552, the insured learned that she required elbow surgery after the limitations period in her insurance policy expired. The *Mowery* Court relied on the Ohio Supreme Court's decision [\*\*21] in *Kraly v. Vannewkirk* (1994), 69 Ohio St. 3d 627, 635 N.E.2d 323 for the rule of law that a provision in an insurance agreement that attempts to extinguish a UM claim by creating a time limitation that terminates either before or shortly after a right of action arises is per se unreasonable and violates public policy. *Mowery* at P16, citing *Kraly* at 635.

[\*P55] Although the Ninth District acknowledged that the Ohio Supreme Court limited *Kraly* to its factual situation, the Court concluded that the same public policy considerations compelled its decision in *Mowery*[:] only where the insured, despite due diligence, could not have known that the tortfeasor's liability limits would be insufficient before the expiration of the limitations period is the limitation invalid. *Id.* at P19.

[\*P56] In *Lynch v. Hawkins*, 6th Dist. No. H-07-026, 175 Ohio App. 3d 695, 2008 Ohio 1300, 888 N.E.2d 1149, the Sixth District adopted the same approach to determine whether to enforce a limitations provision for UIM coverage. In that case, the Sixth District was confronted with the exact same policy language that is presented in this case, including the "Legal Action Against Us" provision. Although the insured claimed that the policy language [\*\*22] was ambiguous, the Court focused instead on the enactment of R.C. 3937.18(H), which authorized three year limitations provisions for UM/UIM coverage.

[\*P57] The *Lynch* Court acknowledged that the General Assembly, in enacting R.C. 3937.18(H), knew that UIM provisions routinely required exhaustion of the tortfeasor's liability limits. The Court then concluded that the case presented no, "unique facts or circumstances that make application of the limitations period, commencing on the date of the accident, rather than on the date of exhaustion of liability coverages, unreasonable under the particular circumstances of this case." *Id.* at P58.

[\*P58] Approximately one week after we released *Regula v. Paradise*, the Supreme Court of Ohio issued *Angel v. Reed*, 119 Ohio St.3d 73, 2008 Ohio 3193, 891 N.E.2d 1179. Angel was injured in a motor vehicle accident in June of 2001 that was caused by the negligence of Reed. Angel was a passenger in Reed's vehicle. Reed indicated in the accident report that he had

liability insurance with Nationwide. In fact, Reed's Nationwide policy had lapsed three months before the accident.

[\*P59] In May 2004, Angel learned that Reed was uninsured, and, in June of 2004, she notified her [\*\*23] insurance company, Allstate, that she was making a claim for uninsured motorist benefits. Angel argued that the two-year limitations period in the policy did not begin to run until her claim for uninsured motorist coverage accrued in May, 2004, when she learned that Reed did not have a valid insurance policy with Nationwide.

[\*P60] Angel filed an action against Allstate, but the trial court entered summary judgment in favor of the insurance company based upon the limitations provision in the policy. In a 2-1 decision, the Eleventh District Court of Appeals reversed the decision of the trial court. *Angel v. Reed*, 11th Dist. No. 2005-G-2669, 2007 Ohio 1069. The majority reasoned that Reed had avoided service several times, making it "essentially impossible" for Angel to discover Reed's uninsured status within the two year limitations period. *Id.*, P13. The majority ultimately concluded 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." *Id.*, P14.

[\*P61] The Ohio Supreme Court, quoting the dissent from the Eleventh District decision, wrote that, "all that was necessary [\*\*24] to determine Reed's insurance status was to contact Nationwide. There is no reason why it should have taken Angel three years to realize that Reed was uninsured." *Id.*, P17. As a consequence, the Supreme Court reinstated summary judgment in favor of Allstate.

[\*P62] While Appellant would undoubtedly argue that the holding in *Angel* should be limited to UM coverage, two Ohio appellate courts have extended the holding in *Angel* to underinsured motorist cases. In *Griesmer v. Allstate Ins. Co.*, 8th Dist. No. 91194, 2009 Ohio 725, the insureds argued that they did not have standing to make their underinsured motorist claim until after the court proceedings resulted in a settlement with the tortfeasor. *Id.*, P24. The Eighth District cited *Angel* for the proposition that the Griesmers discovered that the tortfeasor had only \$ 25,000 in coverage from which to pay six claimants within the two year limitations period provided by the policy, and that the unambiguous

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language of the provision was enforceable.

[\*P63] In *Pottorf v. Sell*, 3d Dist. No. 17-08-30, 2009 Ohio 2819, the insureds argued that the three year limitations provision in the policy was tolled because they did not know the amount of the tortfeasor's [\*\*25] policy limits until a court-ordered mediation was conducted approximately three years after the accident. The Third District rejected the insureds' argument, holding instead that the mechanisms in the discovery portions of the civil rules could have been utilized to determine the limits of Sell's liability coverage. *Id.*, P15.

[\*P64] Recent Ohio appellate courts, as well as the Supreme Court of Ohio, have consistently enforced

limitations provisions for UM/UIM coverage where the insured knew or could have known that the tortfeasor's liability limits were insufficient prior to the expiration of the limitations period. Therefore, our decision in *Regula* is not inconsistent with the current state of the law in Ohio and, in fact, accurately reflects the determinations of the Ohio Supreme Court and our sister districts. Accordingly, Appellant's second and third assignments of error are overruled and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.

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LEXSEE 2008 OHIO 7141



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As of: Dec 31, 2010

**NORMA REGULA, ET AL., PLAINTIFFS-APPELLANTS, VS. JOHN PARADISE,  
ET AL., DEFENDANTS-APPELLEES.**

**CASE NO. 07-MA-40**

**COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT,  
MAHONING COUNTY**

*2008 Ohio 7141; 2008 Ohio App. LEXIS 5905*

**March 18, 2008, Decided**

**SUBSEQUENT HISTORY:** Affirmed by *Regula v. Paradise, 119 Ohio St. 3d 1413, 2008 Ohio 3880, 891 N.E.2d 771, 2008 Ohio LEXIS 2159 (2008)*

Vukovich, Hon. Cheryl L. Waite. Vukovich, J., concurs. Waite, J., concurs.

**PRIOR HISTORY:** [\*\*1]

· **CHARACTER OF PROCEEDINGS:** Civil Appeal from Common Pleas Court. Case No. 05CV2446.

**OPINION BY:** Gene Donofrio

**OPINION**

DONOFRIO, J.

**DISPOSITION:** Affirmed.

[\*P1] Plaintiffs-appellants, Norma and Robert Regula, appeal from a Mahoning County Common Pleas Court decision granting summary judgment in favor of defendant-appellee, Grange Mutual Casualty Insurance Company.

**COUNSEL:** For Norma Regula, Plaintiff-Appellant: Attorney Lynn A. Maro, Maro & Schoenike Co., Youngstown, Ohio.

For Grange Mutual Casualty Co., Defendant-Appellee: Attorney John A. Ams, Pfau, Pfau & Marando, Youngstown, Ohio.

[\*P2] On July 16, 2003, Norma was driving in Campbell, Ohio when, according to her complaint, defendant John Paradise failed to yield and the car he was driving collided with Norma's vehicle causing injury to her and her vehicle. Appellants filed a lawsuit against Paradise on July 8, 2005, asserting claims for negligence and loss of consortium.

For John Paradise, Defendant-Appellee: Attorney Constant A. Prassinos, Creekside Professional Centre, Building B, Canfield, Ohio.

**JUDGES:** Hon. Gene Donofrio, Hon. Joseph J.

[\*P3] At the time of the accident, appellants were

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covered by an uninsured/underinsured motorist [\*\*2] (UM/UIM) policy with appellee with limits of \$ 100,000 per person/\$ 300,000 per accident. On September 18, 2006, appellants filed an amended complaint adding appellee as a defendant and asserting a UIM claim. In their motion for leave to file the amended complaint, appellants asserted they had just learned on August 31, 2006, that Paradise's insurance limits were only \$ 15,000 per person/\$ 30,000 per accident.

[\*P4] Appellee filed a motion for summary judgment. It stated that appellants' policy expressly required that any UM/UIM claims had to be made within three years of the date of the accident and argued that appellants did not meet this deadline in filing their claim. The trial court agreed with appellee and entered summary judgment in its favor on January 5, 2007.

[\*P5] Appellants then requested that the trial court file an amended judgment entry including the words "no just reason for delay" so that they could file an appeal even though their claims against Paradise were still pending. They stated that Paradise consented and agreed to this request. The trial court granted this request and entered another judgment entry granting summary judgment to appellee and this time finding that "there [\*\*3] is no just cause for delay." <sup>1</sup>

1 *Civ.R. 54(B)* provides that "when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay."

[\*P6] Appellants filed a timely notice of appeal on February 28, 2007.

[\*P7] Appellants raise a single assignment of error, which states:

[\*P8] "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THAT ENFORCEMENT OF THE THREE YEAR FROM DATE OF ACCIDENT PROVISION BARS APPELLANT'S CLAIM FOR UM/UIM COVERAGE BEFORE IT ACCRUED."

[\*P9] In reviewing an award of summary judgment, appellate courts must apply a de novo standard of review. *Cole v. American Indus. & Resources Corp.* (1998), 128

*Ohio App. 3d 546, 552, 715 N.E.2d 1179.* Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. *Civ.R. 56(C)* provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Fleming* (1994), 68 *Ohio St. 3d 509, 511, 1994 Ohio 172, 628 N.E.2d 1377.* [\*\*4] A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assocs., Inc.* (1995), 104 *Ohio App. 3d 598, 603, 662 N.E.2d 1088*, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 *U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202.*

[\*P10] Appellants break their assignment of error into two issues for review, the first of which asks:

[\*P11] "When an insurance policy contains a provision requiring exhaustion of the tortfeasor's policy limits as a condition precedent to payment of a UM/UIM claim, can a contractual limitation period be enforced when such period expires before exhaustion of the tortfeasor's policy limits [?]"

[\*P12] Appellants' policy contains a contractual statute of limitations, which provides:

[\*P13] "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 that 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." [\*\*5] (Policy, C-4) (Emphasis sic.).

[\*P14] Appellants point to other provisions in the policy to support their argument that they were not required to file their claim against appellee until they became aware that Paradise was underinsured. They note that the policy provides that the insured must exhaust the tortfeasor's liability limits before appellee will pay UIM benefits. (Policy, C-1). Additionally, the policy provides that UIM coverage only applies if the liability "coverage available for bodily injury liability is less than the limit of liability for this coverage." (Policy, C-2).

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[\*P15] Appellants argue that their cause of action did not accrue against appellee until they became aware that Paradise was underinsured and they exhausted his policy limits. They argue that appellee's requirement that a suit must be commenced within three years after an accident is unreasonable because it is inconsistent with the policy language that requires exhaustion of the tortfeasor's policy limits, which in this case did not occur within three years of the accident.

[\*P16] Appellants rely on *Bradford v. Allstate Ins. Co.*, 5th Dist. No. 04CA9, 2004 Ohio 5997, and *Phillips v. State Auto. Mut. Ins. Co.* (1998), 127 Ohio App.3d 175, 711 N.E.2d 1080.

[\*P17] [\*\*6] In *Bradford*, Augusta Eads was killed in an automobile accident. Her insurer paid the policy limits. Eads' grandson, Frederick Bradford, then filed a UIM claim with his insurer, Allstate, more than two years after the accident. Allstate refused to pay, citing a two-year contractual statute of limitations in the policy. Bradford filed a complaint for a declaration of coverage and the trial court granted him summary judgment. Allstate appealed, arguing that the trial court erred in failing to find that Bradford was required to bring his legal action within two years from the date of the accident.

[\*P18] The Fifth District agreed with the trial court. It concluded that the provision requiring that Bradford bring the action within two years was in conflict with an "other insurance" provision making the Allstate coverage excess, and UM/UIM limits language requiring complete exhaustion "by payment of judgments or settlements" of all limits of liability for all liability protection in effect and applicable at the time of the accident. *Id.* at P29. Therefore, the court concluded that the policy was ambiguous, which precluded enforcement of the two-year limitations period. *Id.* Accordingly, the court [\*\*7] determined that Bradford's claim for UIM coverage against Allstate did not arise until the original settlement was reached, thus starting the running of the two-year limitations period. *Id.* at P31.

[\*P19] In *Phillips*, 127 Ohio App.3d 175, 711 N.E.2d 1080, Gloria Phillips was injured in an automobile accident. She sued the tortfeasor and settled with him for \$ 5,000 less than his policy limits. One month after the settlement, and three years and six months after the accident, Phillips filed suit against her UIM insurer, State Automobile. Both parties moved for

summary judgment. The trial court granted judgment in Phillips' favor finding that the two-year limitations period set forth in the State Automobile policy was ambiguous and, therefore, unenforceable. It read the policy's limitations period in concert with another policy provision providing: "[W]e will pay under this coverage only after the limits of liability under any applicable bodily injury, liability bonds or policies have been exhausted by payment of judgments or settlements." State Automobile appealed arguing that its contractual statute of limitations requiring the insured to bring her claim within two years of the accident was unambiguous and [\*\*8] enforceable, which barred her claim as untimely.

[\*P20] This court held that the exhaustion requirement was a precondition that activated UIM coverage. *Id.* at 179. We found that when construing the two provisions at issue against State Automobile and in favor of Phillips, the exhaustion clause made ambiguous an otherwise clear and unambiguous limitations clause. *Id.* at 180. We noted that Phillips timely sued the tortfeasor but was unable to conclude that suit and exhaust the tortfeasor's liability coverage through judgment or settlement within the two-year limitations period. *Id.* Therefore, we concluded that the reasonable interpretation of the policy language was that Phillips had two years from judgment or settlement to seek UIM coverage through her State Automobile policy. *Id.*

[\*P21] In response, appellee argues that appellants' arguments are based on an outdated version of *R.C. 3937.18* and outdated case law.

[\*P22] *R.C. 3937.18*, which governs UM/UIM claims, was amended on October 31, 2001. *R.C. 3937.18(H)* now reads:

[\*P23] "Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions [\*\*9] 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." (Emphasis

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added.)

[\*P24] Prior to *R.C. 3937.18*'s amendment in 2001, the statute was silent as to what limits insurers could place on the time to file a UM/UIM suit. Under the current statute, appellee argues, its three-year limitations period is expressly permitted.

[\*P25] It is clear that the three-year limitations period in the policy is permitted under *R.C. 3937.18(H)*. Prior to *R.C. 3937.18*'s amendment, courts were faced with determining whether various one-year and two-year contractual limitations periods in insurance contracts were reasonable. See *Miller v. Progressive Cas. Ins. Co.* (1994), 69 Ohio St.3d 619, 1994 Ohio 160, 635 N.E.2d 317; *Miller v. American Family Ins. Co.*, 6th Dist. No. OT-02-011, 2002 Ohio 7309. [\*\*10] According to the uncodified law accompanying *R.C. 3937.18*, one of the purposes for amending the statute was to provide statutory authority for provisions limiting the time period within which an insured may make a claim for UM/UIM coverage to three years after the date of the accident causing the injury. Thus, the Legislature was trying to eliminate the uncertainty surrounding what limitations periods were reasonable in insurance policies.

[\*P26] But that is not the key issue here. We must determine whether the three-year limitations period in this particular policy is ambiguous in light of the rest of the policy language.

[\*P27] The Fifth District in *Bradford* and this court in *Phillips* did not conclude that the two-year limitations periods at issue were unreasonable. Instead, both courts determined that in light of other policy provisions providing that the insured must exhaust all other limits of liability insurance before the insurer would pay UM/UIM benefits, the policies were ambiguous as to when the insured must file suit against the insurer.

[\*P28] But since the *Bradford* and *Phillips* decisions, the Ohio Supreme Court decided *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 835 N.E.2d 692, 2005 Ohio 5410, [\*\*11] and this court subsequently decided *Whanger v. Grange Mut. Cas. Co.*, 7th Dist. No. 06-JE18, 2007 Ohio 3187.

[\*P29] In *Sarmiento*, the plaintiffs were driving/riding in a pickup truck on November 5, 1998, in New Mexico when their vehicle was struck by another vehicle. The driver of the other vehicle was uninsured.

[\*P30] At the time of the accident, Maria Sarmiento, the owner of the pickup truck was insured under a policy issued by Grange that included UM/UIM coverage. On November 5, 2001, the plaintiffs filed a complaint in Ohio, seeking UM coverage under the Grange policy. The trial court granted summary judgment in favor of Grange. It concluded that Grange was not obligated to provide UM coverage, because the plaintiffs had not filed suit within two years from the date of the accident as required by the policy.

[\*P31] The plaintiffs appealed arguing that Grange's two-year limitation period was unreasonable and unenforceable because it was shorter than New Mexico's three-year statute of limitations for personal injuries, which applied to the underlying tort claim. The Eighth District Court of Appeals, applying Ohio law, determined that Grange's two-year limitation period was reasonable and enforceable [\*\*12] and affirmed the trial court's judgment on that issue.

[\*P32] The plaintiffs appealed to the Ohio Supreme Court, which framed the issue as: "[W]hether a two-year contractual limitation period for filing uninsured- and underinsured-motorist \* \* \* claims is reasonable and enforceable when the underlying tort claim is governed by the laws of another state, whose statute of limitations for the claim is longer than two years." *Id. at P1*.

[\*P33] The Court stated there was no dispute that the policy clearly and unambiguously limited to two years the time in which an insured could sue Grange for UM/UIM benefits. *Id. at P 12*. However, it went on to address the plaintiffs' contention that the policy's two-year limitation should not bar their lawsuit for UM coverage that was filed within three years of the accident, because their claims against the tortfeasor were subject to a three-year statute of limitations under New Mexico law. The Court found that *Lane v. Grange Mut. Cos.* (1989), 45 Ohio St.3d 63, 543 N.E.2d 488, read in conjunction with *Miller*, 69 Ohio St.3d 619, 1994 Ohio 160, 635 N.E.2d 317, was dispositive.

[\*P34] In *Lane*, the Court construed language in a Grange policy that prohibited the filing of UM/UIM claims "'unless \* \* \* commenced [\*\*13] within the time period allowed by the applicable statute of limitations for bodily injury or death actions in the state where the accident occurred.'" *Sarmiento*, 2005 Ohio 5410 at P15, citing *Id. at 63*. The Court concluded that the provision was unclear and ambiguous because it failed to tell

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policyholders the amount of time available for commencing an action and when the limitation period began to run. *Sarmiento*, 2005 Ohio 5410 at P15, citing *Id.* at 64.

[\*P35] In *Miller*, the Court held that a contractual one-year limitation period for filing UM/UIM claims, when Ohio's statute of limitations for bodily injury in *R.C. 2305.10* was two years, was unreasonable and void as against the public policy behind former *R.C. 3937.18*. *Sarmiento*, 2005 Ohio 5410 at P16, citing *Miller*, 69 Ohio St.3d at 623-24. But the Court noted that a two-year limitation period would be a reasonable and appropriate time period in which to require an insured to commence an action under the UM/UIM provisions of an insurance policy. *Sarmiento*, 2005 Ohio 5410 at P16, citing *Miller*, 69 Ohio St.3d at 624-625.

[\*P36] Based on these cases, the *Sarmiento* Court held:

[\*P37] "Therefore, pursuant to *Miller v. Progressive*, the two-year limitation [\*\*14] period in the Grange policy is reasonable and enforceable. 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 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 limitation period.

[\*P38] "Despite the three-year statute of limitations for torts in New Mexico, nothing prevented the *Sarmientos* from commencing an action against Grange for UM benefits within the two-year contractual limitation period and then assigning their rights against the tortfeasor to Grange. Therefore, we hold that a two-year contractual limitation period for filing UM/UIM claims is reasonable and enforceable, regardless of whether the foreign state in which the accident occurred provides a longer statute of limitations for the underlying tort claim." *Id.* at P20-21. (Internal citation omitted.)

[\*P39] In *Whanger*, 7th Dist. No. 06-JE18, 2007 Ohio 3187, the *Whangers* argued, in part, that language [\*\*15] requiring them to file their action against Grange within one year of when they were aware, or should have been aware of their UIM claim, was ambiguous and did

not advise them of how long they had to file a claim. We pointed out that:

[\*P40] "The *Sarmiento* Court examined the identical contractual statute of limitations as the one at issue here. However, the issue in *Sarmiento* focused on the 'within two years of the accident' language, and not the 'within one year after you were aware or should have been aware' language. The Court quoted the entire statute of limitations clause. It then stated that there was no dispute that the policy clearly and unambiguously limited the time in which an insured may sue Grange for UM/UIM benefits to two years from the time the accident occurred. *Sarmiento*, 2005 Ohio 5410 at P12. The Court did not separately comment on the 'within one year after you were aware or should have been aware' language." *Whanger*, at P45.

[\*P41] We found the "within one year of when you knew or should have known" language to be unambiguous. We reasoned that to find otherwise would be at odds with *Sarmiento*, where the Court stated, "[d]espite the three-year statute of limitations for torts [\*\*16] in New Mexico, nothing prevented the *Sarmientos* from commencing an action against Grange for UM benefits within the two-year contractual limitation period and then assigning their rights against the tortfeasor to Grange." *Whanger*, at P51, quoting *Sarmiento*, 2005 Ohio 5410 at P 21.

[\*P42] In both *Sarmiento* and *Whanger*, the policy language stated that it would only pay UM/UIM coverage if:

[\*P43] "1. The limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment, with our consent, of judgments or settlements; or

[\*P44] "2. A tentative settlement has been made."

[\*P45] The UIM clause at issue here is nearly identical to this provision.

[\*P46] In *Sarmiento* and *Whanger*, the policies' contractual statute of limitations stated:

[\*P47] "Any arbitration or suit against us will be barred unless commenced within **2 years (TWO YEARS)** from the date of the accident or **1 year (ONE YEAR)** after the date that you were aware, or should

have been aware, of a claim for which coverage would apply whichever is later." (Emphasis sic.)

[\*P48] In the case at bar however, the policy sets out a three-year statute of limitations, with no exceptions. It does not contain a provision allowing for the filing of [\*\*17] a claim one year after the claimant knew or should have known of the claim as in *Sarmiento* and *Whanger*.

[\*P49] Neither *Sarmiento* nor *Whanger* addressed the specific language at issue here. However, based on these two cases, we can conclude that the three-year statute of limitations at issue here is likewise unambiguous. 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. 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 [\*\*18] this court explicitly addressed whether the exhaustion provisions rendered the limitations provisions ambiguous, both found the limitations provisions unambiguous and enforceable.

[\*P50] For these reasons, we must reach the same conclusion in this case and find that the limitations provision at issue is unambiguous and enforceable.

[\*P51] Appellants' second issue for review asks:

[\*P52] "Can a contractual limitation period be

enforced when enforcement extinguishes the UM/UIM claim before the injured party is aware the UM/UIM claim exists?"

[\*P53] Here appellants assert that they were initially advised that Paradise's liability policy limits were identical to their policy limits (\$ 100,000/\$ 300,000). If this had been true, they would not have had a UIM claim against appellee. They claim that they filed suit against appellee as soon as they learned that Paradise's policy limits were only \$ 15,000/\$ 30,000. Appellants argue that the limitations period did not begin to run until they learned of Paradise's lower policy limits.

[\*P54] As stated above, the three-year limitations period is unambiguous and enforceable. And nothing precluded appellants from filing a claim against appellee within the allotted time period. Had [\*\*19] they later learned that they would not need UIM benefits, they could have simply dismissed appellee from the lawsuit. 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.

[\*P55] Based on our analysis, appellants' sole assignment of error is without merit.

[\*P56] For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, J., concurs.

Waite, J., concurs.

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LEXSEE 2009 OHIO 725



Caution  
As of: Dec 31, 2010

**DOLORES J. GRIESMER, ET AL., PLAINTIFFS-APPELLANTS vs. ALLSTATE  
INSURANCE COMPANY, DEFENDANT-APPELLEE**

**No. 91194**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*2009 Ohio 725; 2009 Ohio App. LEXIS 610*

**February 19, 2009, Released**

**PRIOR HISTORY: [\*\*1]**

Civil Appeal from the Cuyahoga County Common Pleas Court. Case No. CV-571095.

**DISPOSITION:** Judgment affirmed.

**COUNSEL:** For APPELLANTS: Brian Kraig, Kraig & Kraig, Cleveland, Ohio.

For APPELLEE: Darrel A. Bilancini, Savoy & Bilancini, Elyria, Ohio.

**JUDGES:** BEFORE: Trapp, J., Rocco, P.J., and Sweeney, J. KENNETH A. ROCCO, P.J., and JAMES J. SWEENEY, J., CONCUR.

**OPINION BY:** MARY JANE TRAPP

**OPINION**

**JOURNAL ENTRY AND OPINION**

N.B. This entry is an announcement of the court's

decision. See *App.R. 22(B)*, and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(C)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(C)*. See, also, *S.Ct. Prac.R. II, Section 2(A)(1)*.

**MARY JANE TRAPP, J.:**

[\*P1] Dolores and Walter Griesmer and Richard and Evelyn Frayer appeal from the March 6, 2008 judgment entry of the Cuyahoga County Court of Common Pleas, which denied their motion for relief from judgment pursuant to *Civ.R. 60(B)*. After [\*\*2] reviewing the facts of the case and pertinent law, we affirm.

**Substantive and Procedural History**

[\*P2] The tortured procedural history of this case

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begins on June 9, 1999, when the Griesmers and the Frayers were involved in a three car motor vehicle accident caused by James Moore III. Both couples were injured, as was the driver of the third car, in this chain reaction accident. The Frayers were passengers in the Griesmers' car, which was insured by Allstate Insurance Company. The Frayers also were Allstate insureds. Both couples' Allstate policies contained underinsured motorist coverage and a two-year limitations period in which to file suit against Allstate.

[\*P3] [\*\*3] One day before the statute of limitations ran, on June 8, 2001, the couples jointly filed suit against Mr. Moore, in Case No. CV-441463. Also named as defendants in that suit were two individual John Does and two John Doe insurance companies. Good service was made on Mr. Moore within the month. The driver of the third car had already filed suit against Mr. Moore and perfected service upon him, but unlike the Griesmers and Frayers, the third driver named and served Allstate as an additional defendant. The two cases were consolidated.

[\*P4] On May 14, 2002, the couples dismissed the action (Case No. CV-441463) without prejudice, and in December 2002, they settled with Mr. Moore's insurance company for the sum of \$ 16,666.68. The balance of the policy limit of \$ 25,000 was paid to the third driver.

[\*P5] In either October or November 2002 (the record is unclear), the couples made an underinsured motorist claim against their respective Allstate policies. During 2003, the couples' counsel received the standard form status letters from the Allstate adjuster indicating that the claim was "pending" or that the "investigation is continuing." Allstate failed to settle the underinsured claims, and, on January [\*\*4] 8, 2004, Allstate formally denied the UIM claims, as suit had not been filed against Allstate within the contractual limitations period of two years. The couples then filed the instant suit on August 29, 2005, in Case No. CV-571095, and filed an amended complaint on September 2, 2005, advising in their pleading that "pursuant to *Ohio Rule of Civil Procedure 15(C)* \*\*\* [realleging] all statements made on their original *Complaint for Money Damages (Jury Demand Endorsed Hereon)* \*\*\* and hereby files their Amended Complaint to relate back to the original filing, Cuyahoga County Common Pleas Court Case Number 441463 in order to add John Does I-III, and state additional claims against Defendant, Allstate Insurance Company." Case

No. CV-441463 was the couples' first suit, filed on June 8, 2001, against the tortfeasor, individual John Does, and John Doe insurance companies only.

[\*P6] On June 15, 2006, the trial court granted Allstate's summary judgment motion finding that the statute of limitations had run. The court's docket reflects that "notice issued" as to the judgment entry. No appeal was taken, but the couples did, however, file a "motion for reconsideration, or in the alternative, motion [\*\*5] for final appealable order" two months later, which the trial court denied. That denial was appealed, and we dismissed the appeal without opinion for lack of a final appealable order based on the Supreme Court of Ohio's holding in *Pitts v. Ohio Dept. of Transp. (1981)*, 67 Ohio St. 2d 378, 379, 423 N.E.2d 1105, that "motions for reconsideration of a final judgment in the trial court are a nullity."

[\*P7] The couples then filed a motion for relief from judgment pursuant to *Civ.R. 60(B)* on June 15, 2007, which was summarily denied. A timely appeal was taken, raising one assignment of error:

[\*P8] "The trial court erred in denying the plaintiffs-appellants' motion for relief from judgment pursuant to *Civil Rule 60(B)* in order that the merits of the plaintiffs' case against defendant-appellee Allstate Insurance Company may be considered."

#### Standard of Review

[\*P9] At the outset, we note that an order denying a motion for relief from judgment is reviewed by this court under an abuse of discretion standard. *Rose Chevrolet, Inc. v. Adams (1988)*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564. "An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore (1983)*, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140.

[\*P10] [\*\*6] Relief from judgment may be granted pursuant to *Civ.R. 60(B)*, which states, in part:

[\*P11] "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under *Civ.R. 59(B)*; (3) fraud

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(whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken."

[\*P12] "Generally, to prevail on a *Civ.R. 60(B)* motion, the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) [\*\*7] the party is entitled to relief under one of the grounds stated in *Civ.R. 60(B)(1) through (5)*; and (3) the motion is made within a reasonable time, and where the grounds of relief are *Civ.R. 60(B)(1), (2), or (3)*, not more than one year after judgment." *First Merit Bank, N.A. v. NEBS Fin. Servs., Cuyahoga App. No. 87632, 2006 Ohio 5260, P14*, citing *GTE Automatic Electric v. ARC Industries (1976), 47 Ohio St.2d 146, 351 N.E.2d 113*, paragraph two of the syllabus. Failure to satisfy any one of the three prongs of the GTE decision is fatal to a motion for relief from judgment. *Rose Chevrolet, Inc. at 20*.

#### **A Motion for Relief from Judgment is No Substitute for an Appeal**

[\*P13] In the Griesmers' and Frayers' sole assignment of error, they argue that they were unable to appeal in a timely fashion from the adverse summary judgment because "[a]ppellants' counsel, either through mistake, inadvertence, or excusable neglect of any number of sources, never received notice of the dismissal of the action" even though the docket reflects that "notice issued." Specifically, the couples seek relief under *Civ.R. 60(B)(1), (3), and (5)*.

#### **Mistake, Inadvertence, Surprise, Excusable Neglect, or Any Other Reason Justifying Relief**

[\*P14] [\*\*8] First, the couples argue that, pursuant to *Civ.R. 60(B)(1) and/or (5)*, they are entitled to relief because their counsel did not receive the postcard notice of the judgment from the clerk's office.

[\*P15] The Griesmers and Frayers are not challenging that notice was issued by the clerk; rather,

they assert that they never received the notice from the clerk and that they discovered the adverse ruling when counsel checked the docket "weeks later." Their assertion was supported with the affidavit of the managing partner of the firm that represented them, in which counsel stated that "[a]t no time within the next 30 days following the Court's order did I or any employee of Kraig & Kraig receive a postcard notice or any other formal notice from the Cuyahoga Court of Common Pleas as to it's [sic] granting of Summary Judgment in the Defendants' [sic] favor in Case No. [CV-571095.]"

[\*P16] *Civ.R. 58(B)* provides:

[\*P17] "(B) Notice of filing.

[\*P18] "When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, [\*\*9] the clerk shall serve the parties in a manner prescribed by *Civ.R. 5(B)* and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in *App.R. 4(A)*."

[\*P19] This case is procedurally similar to *Leonard v. Delphia Consulting, LLC, Franklin App. No. 06AP-874, 2007 Ohio 1846*. In *Leonard*, the court granted summary judgment to the plaintiff on April 3, 2006. On April 5, 2006, the clerk of courts noted on the court's electronic docket that notice of a final appealable order was served on the parties. The defendant did not appeal this order. Rather, on July 20, 2006, the defendant filed a motion for relief from judgment, alleging that it never received the notice of the adverse summary judgment ruling. The trial court denied defendant's motion and defendant appealed. *Id. at P1-5*.

[\*P20] On appeal, the Tenth District Court of Appeals of Ohio affirmed the trial court's denial of the defendant's motion for relief from judgment, holding that the defendant "failed to demonstrate [\*\*10] a meritorious defense that could not have been raised on appeal." *Id. at P18*. The court also noted that "once the clerk serves a notice of judgment on the parties in a manner prescribed by *Civ.R. 5(B)* (which includes

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mailing a notice to the last known address of the person to be served), and the clerk notes that service on its docket, the service is deemed complete. Moreover, the failure of any party to actually receive the notice does not affect the validity of the judgment or the running of the time for appeal." *Id. at P11* (citing *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851 and *Civ.R. 58(B)*). See, also, *MBA Realty v. Little G, Inc.* (1996), 116 Ohio App.3d 334, 338, 688 N.E.2d 39 ("the burden is on the parties to follow the progress of their own case"); *P. Maynard v. C. Maynard* (Feb. 11, 1982), *Cuyahoga App. No. 43642*, 1982 Ohio App. LEXIS 12307, (appellant "was duty bound to keep abreast of the docket entries"); *In re Adoption of J.H., Lorain App. No. 06CA008902*, 2006 Ohio 5957, P8 (noting that it is "well established that the parties to the case have a duty to keep apprised of the progress of the case on the docket").

[\*P21] While practitioners have come to rely on receipt of *Civ.R. 58(B)* notices to trigger further [\*\*11] action, the vicissitudes of mail service mandate regular inspection of the electronic docket because the case law is quite unforgiving on this point. The couples' arguments are not well taken as they failed to demonstrate that notice was not actually sent by the clerk. *Cf. DeFini v. Broadview Hts.* (1991), 76 Ohio App.3d 209, 214, 601 N.E.2d 199 (this court held that an appellant should be afforded additional time to appeal when the appellant submitted an affidavit from a deputy clerk that after checking the clerk's mail records the deputy clerk determined that no mail service had been issued).

#### **Fraud, Misrepresentation, or Other Misconduct of an Adverse Party**

[\*P22] The Griesmers and Frayers next argue that, under *Civ.R. 60(B)(3)*, Allstate's actions involved fraud and bad faith. They essentially assert that Allstate "sandbagged" its insureds by delaying the claims investigation process and by refusing to provide its insureds with a copy of the insurance policy until after the two-year statute of limitations expired.

[\*P23] While the claims investigation process described by the insureds may be less than forthright and could have been litigated had the suit been timely brought, the fact remains that the insurance [\*\*12] policies in question were the Griesmers' and Frayers' own automobile policies and they are bound by the contractual two-year statute of limitations. Moreover, there is no evidence in the record that the claims adjuster led the

insureds to believe that the statute of limitations would be waived.

#### **When Does the Two-Year Statute Begin to Run?**

[\*P24] The couples also argue that they did not have "standing" to make a claim "until after the court proceedings resulted in settlement with the tortfeasor."

[\*P25] The Supreme Court of Ohio recently addressed similar issues in its decision in *Angel v. Reed*, 119 Ohio St.3d 73, 2008 Ohio 3193, 891 N.E.2d 1179. In *Angel*, the plaintiff was injured in a motor vehicle accident in June 2001, and timely filed suit against the tortfeasor. She dismissed the suit without prejudice. The plaintiff discovered in May 2004 that the tortfeasor was uninsured and made an uninsured motorist claim under her Allstate policy, arguing that her claim did not accrue until she discovered that the tortfeasor was uninsured. Suit against Allstate was dismissed via summary judgment on the grounds that it was time-barred by contractual language that is identical to that in this case.

[\*P26] The court upheld the summary [\*\*13] judgment and reaffirmed prior precedent that is directly controlling in this case, as it stated, "This court has previously stated that the legal basis for recovery under the uninsured motorist coverage of an insurance policy is contract and not tort." *Id. at P10*, citing *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 632, 635 N.E.2d 323, quoting *Colvin v. Globe Am. Cas. Co.* (1982), 69 Ohio St.2d 293, 295-296, 432 N.E.2d 167, overruled on other grounds, *Miller v. Progressive Cas. Ins. Co.* (1994), 69 Ohio St.3d 619, 624, 1994 Ohio 160, 635 N.E.2d 317.

[\*P27] Chief Justice Moyer explained that "[i]n Ohio, the statutory limitation period for a written contract is 15 years. \*\*\* However, the parties to a contract may validly limit the time for bringing an action on a contract to a period that is shorter than the general statute of limitations for a written contract, as long as the shorter period is a reasonable one." *Id. at P11*, quoting *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 2005 Ohio 5410, P11, 835 N.E.2d 692, citing *Miller at 624* and *Colvin at 295 296*. "A contract provision that reduces the time provided in the statute of limitations must be in words that are clear and unambiguous to the policyholder." *Angel at P11*, quoting *Sarmiento at P11*, citing *Colvin at 296*.

[\*P28] [\*\*14] The court held that a two-year

limitation period would be a "reasonable and appropriate" period of time in which to require an insured who has suffered bodily injury to commence an action under the uninsured/underinsured-motorist provisions of an insurance policy, and declared that "[o]ur precedent controls, and the two-year limitation period in the Allstate policy is enforceable." *Id. at P13.*

[\*P29] In addressing the question of when the two-year period begins to run, the *Angel* court found that the facts presented a "standard uninsured-motorist claim in which the tortfeasor was uninsured at the time of the accident," thus, applying the "unambiguous" and "express language" of the Allstate policy, suit should have been filed within two years from the date of the accident. *Id. at P15, 19.*

[\*P30] This case, too, presents a standard underinsured motorist case. During the two-year period following the accident, the Griesmers and the Frayers discovered that Mr. Moore had only \$ 25,000 of coverage from which to pay six claimants. Although their suit was timely filed against Mr. Moore and an uninsured motorist claim was presented to Allstate, Allstate was never made a party to the first lawsuit filed by [\*\*15] the couples. That lawsuit was dismissed without prejudice; thus, it was as if it had never been filed because "when a party files a voluntary dismissal pursuant to *Civ.R. 41(A)(1)(a)*, the case ceases to exist. In effect, it is as if the case had *never been filed.*" (Emphasis added.) *Sturm v. Sturm (1991)*, 61 *Ohio St.3d* 298, 302, 574 *N.E.2d* 522.

[\*P31] The second suit naming Allstate was filed after the two-year period expired. Even though their first suit was consolidated with the suit filed by the third driver who did name Allstate as a defendant and perfected service on the company, Allstate was not a named party nor served in the first suit brought by the couples and cannot, through consolidation, somehow be considered as a named defendant in the first suit instituted by the couples.

#### **Claimed Application of *Civ.R. 15(C)***

[\*P32] The Griesmers and the Frayers claim that their second complaint filed in 2005, which was amended, "avails itself of *Rule 15(C)* to name Allstate as a Defendant and assert additional claims."

[\*P33] *Civ.R. 15(C)* provides: "Whenever the claim or defense asserted in the amended pleading arose out of

the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, [\*\*16] the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

[\*P34] The couples ask that we read *Civ.R. 15(C)* "in conjunction" with *Civ.R. 3(A)* which gives the plaintiff a year to perfect service. They argue that their complaint filed on August 29, 2005 was amended to add Allstate on September 2, 2005; that the "claims asserted were that of the original pleading"; that "Allstate was not prejudiced by the action given their knowledge of the litigation from day one"; and that Allstate "knew that they could potentially be parties to this action."

[\*P35] While the "relation back" theory of *Civ.R. 15(C)* may be employed when amendments concerning the pleadings or amendments concerning [\*\*17] parties to the action must be made in order to correct an inadvertent omission, error, or in the case of a party, an inadvertent misnomer while the applicable statute of limitation has already passed, it cannot be used when a case was never "commenced" pursuant to *Civ.R. 3(A)* against a party before the statute expired.

[\*P36] If the couples had sought leave to amend to name Allstate as a defendant in their first lawsuit, the amendment would have related back to the time of the original filing of the action. As the staff notes to *Civ.R. 15(C)* make clear, "[b]ecause of relation back, the intervening statute of limitation does not interfere with the opportunity to amend." But they chose to voluntarily dismiss their complaint after the statute of limitations had expired without ever naming and serving Allstate.

[\*P37] This court has held that *Civ.R. 15(C)* cannot be used to relate back to a complaint in another case. *Dietrich v. Widmar, Cuyahoga App. No. 85069, 2005 Ohio 2004, P12.* In *Dietrich*, a complaint was timely filed against the owner but not the driver of the car involved in the accident. That complaint was voluntarily dismissed. A second complaint was filed after the statute of

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limitations expired, [\*\*18] and the plaintiffs wanted to amend this complaint to add the driver of the car.

[\*P38] This court explained that while "[t]he spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies," *Dietrich at P11*, citing *Hardesty v. Cabotage (1982)*, 1 *Ohio St.3d 114, 117*, 1 *Ohio B. 147, 438 N.E.2d 431*, and *Peterson v. Teodosio (1973)*, 34 *Ohio St.2d 161, 175, 297 N.E.2d 113*, "there is no authority to subject a party in whose favor the statute of limitations has run to liability in a second lawsuit after dismissing an earlier lawsuit in which that party was neither originally named as a party defendant nor made so by amendment." *Dietrich at P11*, citing *Devine v. Phi Gamma Delta Fraternity (June 22, 2001)*, *Clark App. No. 2001 CA 5, 2001 Ohio App. LEXIS 2753*.

[\*P39] As this court recognized, "the savings statute applies when the original suit and the new action are substantially the same." *Dietrich at P11*, quoting *Children's Hosp. v. Ohio Dept. of Public Welfare (1982)*, 69 *Ohio St. 2d 523, 525, 433 N.E.2d 187*. "The actions are not substantially the same, however, when the parties in the original action and those in the new action are different." *Dietrich at P11*, quoting *Children's Hosp.*, citing, e.g., *Larwill v. Burke (1900)*, 10 *Ohio Cir. Dec. 579, 19 Ohio C.C. 449*, [\*\*19] affirmed without opinion, 66 *Ohio St. 683, 65 N.E. 1130*.

#### **Timeliness of the Civ.R. 60(B) Motion**

[\*P40] For a *Civ.R. 60(B)* to be considered timely it must meet two standards: the motion must have been made "within a reasonable time, and \*\*\* not more than one year after the judgment." The movant may have up to one year from the date of the judgment to file the motion, but the movant must also satisfy the "reasonable time" provision. *Adomeit v. Baltimore (1974)*, 39 *Ohio App.2d 97, 106, 316 N.E.2d 469*. Thus, a motion to vacate a judgment may be filed within one year, but still may not be considered within a "reasonable time." *Id.*

[\*P41] The movant bears the burden of proof to present factual material that, on its face, establishes the timeliness or justifies delays in filing the motion to vacate. *Novak v. CDT Dev. Corp., Cuyahoga App. No. 83655, 2004 Ohio 2558, P14*. To meet this burden, the movant must present allegations of operative facts to demonstrate that he is filing his motion within a reasonable period of time. *Adomeit at 103*. Where there is

no explanation for the delay in filing the *Civ.R. 60(B)* motion, as in this case, the movant has not met the burden of establishing timeliness, and the motion to vacate should be denied. [\*\*20] *Youssefi v. Youssefi (1991)*, 81 *Ohio App.3d 49, 53, 610 N.E.2d 455*.

[\*P42] The motion for summary judgment was granted on June 15, 2006. A "motion for reconsideration, or in the alternative, motion for final appealable order" was filed two months later and denied. That denial was appealed, and the appeal was dismissed. The couples then filed a motion for relief from judgment on June 15, 2007, exactly one year after the grant of summary judgment. While the one year prong is met, the couples failed to provide the trial court or this court with any factual explanation for why the delay in filing was reasonable; therefore, the trial court, in the exercise of its discretion, appropriately denied the motion for relief from judgment.

[\*P43] We find no abuse of discretion in the trial court's denial of appellants' motion for relief from judgment because all three prongs of the GTE test were not met. Suit was not brought against Allstate within the contractual limitations period; thus, the couples do not have a meritorious claim. They failed to demonstrate they were entitled to relief under one of the grounds stated in *Civ.R. 60(B)(1) through (5)*, and they failed to establish that their motion was made within a reasonable [\*\*21] amount of time. If any of the three GTE requirements are not met, a motion for relief from judgment should be denied. *Rose Chevrolet at 20*.

[\*P44] Accordingly, appellants' assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recovers from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

MARY JANE TRAPP,\* JUDGE

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KENNETH A. ROCCO, P.J., and

JAMES J. SWEENEY, J., CONCUR

\* Sitting by assignment: Judge Mary Jane Trapp  
of the Eleventh District Court of Appeals.

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LEXSEE 2004 OHIO 5997



Caution  
As of: Dec 31, 2010

**FREDERICK R. BRADFORD, Plaintiff-Appellee -vs- ALLSTATE INSURANCE  
CO., Defendant-Appellant**

**Case No. 04CA9**

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, FAIRFIELD  
COUNTY**

*2004 Ohio 5997; 2004 Ohio App. LEXIS 5437*

**November 8, 2004, Date of Judgment Entry**

**PRIOR HISTORY:**      **[\*\*1] CHARACTER OF  
PROCEEDING:** Civil Appeal from the Court of  
Common Pleas, Case No. 02-CV-924.

**[\*P1]** Appellant Allstate Insurance Company  
appeals the June 10, 2003, decision of the Fairfield  
County Court of Common Pleas which granted summary  
judgment on behalf of Appellee Frederick R. Bradford.

**DISPOSITION:** Judgment of the Court of Common  
Pleas affirmed.

**STATEMENT OF THE FACTS AND CASE**

**COUNSEL:** For Plaintiff-Appellant: MARK R.  
RIEGEL, Lancaster, Ohio.

**[\*P2]** The following facts are pertinent to this  
appeal:

For Defendant-Appellee Wayne Mutual Ins.: RICK E.  
MARSH, Columbus, Ohio.

**[\*P3]** The accident giving rise to this case occurred  
on March 17, 1999, wherein Augusta Eads was a  
passenger in a vehicle being driven by her husband,  
Glenn Eads. Said vehicle was involved in an automobile  
accident caused by Mr. Eads. Augusta Eads died the  
following day as a result of the injuries she sustained in  
the accident.

**JUDGES:** Hon. W. Scott Gwin, P. J., Hon. Julie A.  
Edwards, J., Hon. John F. Boggins, J. By: Boggins, J.  
Gwin, P. J., and Edwards, J., concur.

**OPINION BY:** John F. Boggins

**[\*P4]** At the time of the accident, the automobile  
involved in the accident was insured under a policy of  
insurance issued by **[\*\*2]** State Farm Mutual  
Automobile Insurance, with limits of \$ 100,000.00,  
which State Farm paid.

**OPINION**

*Boggins, J.*

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[\*P5] Appellee Frederick R. Bradford is the grandson of the Augusta Eads. At the time of the accident, Appellee had in effect his own personal auto policy with Appellant Allstate Insurance Company.

[\*P6] On May 29, 2001, Appellee gave notice to Allstate of his claim for UM/UIM.

[\*P7] On August 27, 2001, Appellant Allstate denied Appellee's claim citing language in the policy requiring that legal action be brought within two years from the date of the accident.

[\*P8] On December 10, 2002, Appellee filed a complaint against State Farm seeking a declaration of coverage.

[\*P9] Appellee filed a Motion for Partial Summary Judgment.

[\*P10] The trial court, in a judgment entry filed on June 10, 2003, granted summary judgment in favor of Appellee.

[\*P11] Appellant timely filed a notice of appeal and sets forth the following assignments of error for our consideration:

#### ASSIGNMENTS OF ERROR

[\*P12] "I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE HE FAILED TO BRING A LEGAL ACTION AGAINST DEFENDANT-APPELLANT [\*\*3] WITHIN TWO YEARS OF THE ACCIDENT THAT GAVE RISE TO HIS SEXTON CLAIM.

[\*P13] "II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE OHIO SUPREME COURT'S HOLDING IN *FERRANDO V. AUTO OWNERS MUTUAL INSURANCE COMPANY* (2002), 98 OHIO ST. 3d 186, 2002 Ohio 7217, 781 N.E.2d 927, DOES NOT APPLY TO CONTRACTUAL LIMITATIONS PROVISIONS.

[\*P14] "III. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE "OTHER INSURANCE" PROVISION IN HIS POLICY OF INSURANCE DOES NOT RENDER THE POLICY'S

CONTRACTUAL LIMITATIONS PROVISION AMBIGUOUS."

#### [\*P15] SUMMARY JUDGMENT STANDARD

[\*P16] Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 30 Ohio B. 78, 506 N.E.2d 212. As such, we must refer to *Civ.R. 56* which provides, in pertinent part:

[\*P17] "\* \* \* Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if [\*\*4] any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. \* \* \*

[\*P18] A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor. \* \* \*

[\*P19] Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this [\*\*5] requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St. 3d 421, 429, 1997 Ohio 259, 674 N.E.2d 1164, citing *Dresher v. Burt*, (1996), 75 Ohio St.3d 280, 1996 Ohio 107, 662 N.E.2d 264.

[\*P20] It is based upon this standard that we review appellant's assignments of error.

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**I, III.**

[\*P21] In the first and third assignments of error, Appellant argues that the trial court erred in failing to find that Appellee was required to bring his legal action within two years from the date of the accident. We disagree.

[\*P22] The relevant portions of the Allstate insurance policy reads in relevant part:

[\*P23] **"Legal Actions**

[\*P24] "Any legal action against Allstate must be brought within two years of the date of the accident. No one may sue us under this coverage unless there is full compliance with all of the policy terms and conditions.

[\*P25] **"If there is other insurance**

[\*P26] "If the insured person was in, on, getting into or out of, or on or off a vehicle you do not own which is insured for uninsured motorists, or a similar type [\*6] of coverage under another policy, then coverage under uninsured motorist insurance part 3 of this policy will be excess.

[\*P27] **"Uninsured Motorists Insurance- Limits of Liability**

[\*P28] "We are not obligated to make payment for bodily injury under this coverage which arises out of the ownership, maintenance or use of an underinsured motor vehicle until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been fully and completely exhausted by payment of judgments or settlements."

[\*P29] Upon review of these policy provisions, we agree with the trial court that under the facts of this case, the provisions requiring that Appellee bring the action within two years, the "other insurance" provision making the Allstate coverage excess, and the UM/UIM limits language requiring complete exhaustion "by payment of judgments or settlements" of all limits of liability for all liability protection in effect and applicable at the time of the accident are in conflict and therefore create an ambiguity, precluding enforcement of the two year commencement provision.

[\*P30] In the case sub judice, the State [\*7] Farm policy was the primary insurance carrier. Allstate's policy provided excess coverage.

[\*P31] We therefore find that Appellee's claim against Allstate for excess UIM coverage did not arise until the settlement with State Farm occurred, that being December 4, 2001.

[\*P32] As such, we find that Appellee's claim was brought within two years from the date of settlement with the primary UM/UIM insurance carrier.

[\*P33] Appellant's first and third assignments of error are overruled.

**II.**

[\*P34] In its second assignment of error, Appellant argues that the trial court erred in holding that *Ferrando v. Auto-Owners Mutual Ins. Co.* (2002), 98 Ohio St.3d 186, 2002 Ohio 7217, 781 N.E.2d 927, applied to contractual limitations provisions.

[\*P35] In light of our disposition of assignments of error I and III, we find Appellant's assignment of error II moot.

[\*P36] Appellant's third assignment of error is overruled.

[\*P37] The decision of the Fairfield County Court of Common Pleas is affirmed.

By: Boggins, J.

Gwin, P. J., and

Edwards, J., concur.

**JUDGMENT ENTRY**

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of [\*8] Common Pleas of Fairfield County, Ohio, is affirmed.

Costs assessed to Appellant.

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LEXSEE 2009 OHIO 2819



Caution

As of: Dec 31, 2010

**SHERRY Y. POTTORF, ET AL., PLAINTIFFS-APPELLANTS, v. TRACY L. SELL, ET AL., DEFENDANTS-APPELLEES.**

**CASE NO. 17-08-30**

**COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, SHELBY COUNTY**

*2009 Ohio 2819; 2009 Ohio App. LEXIS 2386*

**June 15, 2009, Decided**

**PRIOR HISTORY:** [\*\*1]

Appeal from Shelby County Common Pleas Court.  
Trial Court No.: 07 CV 00224.

Defendant-Appellee Nationwide Mutual Fire Insurance Company ("Nationwide").

**DISPOSITION:** Judgment Affirmed.

[\*P2] Appellant Sherry Pottorf was injured in a motor vehicle accident caused by the negligence of Defendant Tracy Sell ("Sell") on July 19, 2005. At the time of the accident, Pottorf had uninsured/underinsured-motorist ("UM/UIM") coverage with Nationwide. She also had medical payments coverage through the same policy. Sell had liability insurance through American Family Insurance Company with a policy limit of \$ 50,000.00, at the time of the accident. In July of 2006, Nationwide paid \$ 20,000.00 to Sherry Pottorf for the injuries she sustained as a result of the accident.

**COUNSEL:** Richard S. Davis, for Appellants.

Edward T. Mohler, for Appellees.

**JUDGES:** SHAW, J. PRESTON, P.J. and WILLAMOWSKI, J., concur.

**OPINION BY:** SHAW

**OPINION**

**SHAW, J.**

[\*P1] Plaintiffs-Appellants Sherry and Douglas Pottorf appeal from the November 10, 2008 judgment of the Court of Common Pleas of Shelby County, Ohio, granting summary judgment in favor of

[\*P3] On July 18, 2007, Sherry Pottorf and her husband, Douglas, filed a complaint in the Shelby County Court of Common Pleas, naming Sell as the sole defendant. [\*\*2] In the complaint, the Pottorfs claimed damages in excess of \$ 150,000.00. The matter proceeded to mediation in June of 2008, and a pretrial scheduling conference was had on July 16, 2008. The trial court set a final pretrial date and jury trial date for later in the year.

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On August 26, 2008, an agreed judgment entry was filed, permitting the Pottorfs to file an amended complaint. That same date, the Pottorfs filed an amended complaint. In addition to naming Sell as a defendant, the amended complaint also named Nationwide as a defendant based upon the UM/UIM provision of the Pottorfs' insurance policy. On September 26, 2008, Nationwide filed a motion for summary judgment based upon a provision in the insurance policy it issued to the Pottorfs, which stated:

**No lawsuit may be filed against us by anyone claiming any of the coverages provided in this policy until the said person has fully complied with all the terms and conditions of this policy . . . under the Uninsured Motorists coverage of this policy, any lawsuit must be filed against us: a) within three (3) years from the date of the accident[.]**

[\*P4] The Pottorfs timely responded on October 24, 2008, and Nationwide filed a reply to that [\*\*3] response on October 31, 2008. The trial court granted summary judgment in favor of Nationwide on November 10, 2008. This judgment was certified as a final appealable order pursuant to *Civ.R. 54(B)* on November 21, 2008.

[\*P5] The Pottorfs now appeal, asserting one assignment of error.

**THE TRIAL COURT ERRED IN GRANTING APPELLEE' [sic] MOTION FOR SUMMARY JUDGMENT AS IS [sic] DID NOT APPLY THE PROPER STANDARD FOR DECIDING A MOTION FOR SUMMARY JUDGMENT; IT DID NOT APPLY THE PROVISION OF CIVIL RULE 15, NOR WAS APPELLANT PROVIDED AN OPPORTUNITY TO DEMONSTRATE THE UNFAIR AND DECEPTIVE PRACTICES OF APPELLEE.**

[\*P6] An appellate court reviews a grant of summary judgment independently, without any deference to the trial court. *Conley-Slowinski v. Superior Spinning*

*& Stamping Co. (1998)*, 128 Ohio App.3d 360, 363, 714 N.E.2d 991. The standard of review for a grant of summary judgment is de novo. *Hasenfratz v. Warnement*, 3rd Dist. No. 1-06-03, 2006 Ohio 2797, citing *Lorain Nat'l. Bank v. Saratoga Apts. (1989)*, 61 Ohio App.3d 127, 572 N.E.2d 198. A grant of summary judgment will be affirmed only when the requirements of *Civ.R. 56(C)* are met. This requires the moving party to establish: (1) that there are no genuine [\*\*4] issues of material fact, (2) that the moving party is entitled to judgment as a matter of law, and (3) that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party, said party being entitled to have the evidence construed most strongly in his favor. *Civ.R. 56(C)*; see *Horton v. Harwick Chem. Corp. (1995)*, 73 Ohio St.3d 679, 1995 Ohio 286, 653 N.E.2d 1196, paragraph three of the syllabus.

[\*P7] The party moving for summary judgment bears the initial burden of identifying the basis for its motion in order to allow the opposing party a "meaningful opportunity to respond." *Mitseff v. Wheeler (1988)*, 38 Ohio St.3d 112, 116, 526 N.E.2d 798. The moving party also bears the burden of demonstrating the absence of a genuine issue of material fact as to an essential element of the case. *Dresher v. Burt (1996)*, 75 Ohio St.3d 280, 292, 1996 Ohio 107, 662 N.E.2d 264. Once the moving party demonstrates that he is entitled to summary judgment, the burden shifts to the non-moving party to produce evidence on any issue which that party bears the burden of production at trial. See *Civ.R. 56(E)*. In ruling on a summary judgment motion, a court is not permitted to weigh evidence or choose among [\*\*5] reasonable inferences, rather, the court must evaluate evidence, taking all permissible inferences and resolving questions of credibility in favor of the non-moving party. *Jacobs v. Racevskis (1995)*, 105 Ohio App.3d 1, 7, 663 N.E.2d 653.

[\*P8] On appeal, the Pottorfs argue that the trial court erred in granting summary judgment in favor of Nationwide for three reasons. First, they maintain that genuine issues of material fact exist. Second, the Pottorfs assert that they filed suit within the required three-year time period because of the "relation back" provision in *Civ.R. 15(C)*, which involves amending a complaint. Lastly, the Pottorfs contend that summary judgment was improper because the trial court should have held a hearing to determine whether the contractual limitations period was void due to unfair or deceptive practices

and/or provisions by Nationwide.

[\*P9] Initially, we note that there appears to be no dispute that Sell was negligent, causing the accident. Nor does there appear to be any dispute that the Pottorfs had a valid insurance policy with Nationwide on the date of the accident, which included UM/UIM coverage, and that Sherry Pottorf's physical injuries totaled at least \$ 20,000.00, [\*\*6] as evidenced by the subrogation claim made by Nationwide to Sell's insurer. In addition, the parties do not dispute that the Pottorfs' policy with Nationwide limited the time to bring suit against Nationwide to three years from the date of the accident.

*Claimed Issues of Material Fact as to the Application of the Three-Year Period to the Circumstances of This Case*

[\*P10] The Supreme Court has repeatedly held that "the legal basis for recovery under the uninsured motorist coverage of an insurance policy is contract and not tort." *Angel v. Reed*, 119 Ohio St. 3d 73, 2008 Ohio 3193, 891 N.E.2d 1179, at P 10, quoting *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 632, 635 N.E.2d 323 (other citations omitted). Ordinarily, causes of action based on contracts have a fifteen year statutory time limitation. *Miller v. Progressive Cas. Ins. Co.* (1994), 69 Ohio St.3d 619, 624, 1994 Ohio 160, 635 N.E.2d 317. "However, the parties to a contract may validly limit the time for bringing an action on a contract to a period that is shorter than the general statute of limitations for a written contract, as long as the shorter period is a reasonable one." *Id.*

[\*P11] In *Miller*, the Court found that a two-year limitation [\*\*7] period was a "reasonable and appropriate" period of time in which to require an insured who has suffered bodily injury to commence an action under the uninsured/underinsured-motorist provisions of an insurance policy." *Angel*, 119 Ohio St. 3d 73, 2008 Ohio 3193, at P 12, 891 N.E.2d 1179, quoting *Miller*, 69 Ohio St.3d at 625, 635 N.E.2d 317. This same time limitation in an insurance contract with an UM/UIM provision was once again found valid in *Angel*. *Angel*, 119 Ohio St. 3d 73, 2008 Ohio 3193, at P13, 891 N.E.2d 1179. Additionally, *R.C. 3937.18(H)* permits a policy of insurance that includes UM/UIM coverage to include a limitations period of three years from the date of the accident within which to bring suit under a UM/UIM provision.

[\*P12] In the case sub judice, the policy states that

any suit filed against Nationwide under the uninsured motorist provision, which also includes underinsured motorist coverage, must be brought within three years from the date of the accident. In light of *Angel*, *Miller*, and *R.C. 3937.18(H)*, the Nationwide policy appears to be a reasonable and appropriate period. Thus, pursuant to the terms of the contract, the suit against Nationwide should have been brought within three years from the accident, i.e. by July 19, 2008.

[\*P13] Nevertheless, [\*\*8] the Pottorfs maintain that they did not know the policy limits of Sell's liability coverage until the court-ordered mediation was held in June of 2008. Accordingly, they claim they were unaware that they would need to make a claim under their UM/UIM provision until such time, which is why their suit against Nationwide was not filed until after they learned of Sell's policy limits. As a result, the Pottorfs claim these circumstances tolled the running of the three-year period until the discovery of the relevant information in June of 2008, or at the least, these circumstances create a genuine issue of material fact as to when the three-year period should have commenced.

[\*P14] However, the Ohio Supreme Court rejected a similar argument in *Angel*. See *Angel*, 119 Ohio St. 3d 73, 2008 Ohio 3193, at P 17-19, 891 N.E.2d 1179. In *Angel*, the tortfeasor, *Reed*, reported that he had liability insurance, but after three years, the plaintiff discovered *Reed's* policy was cancelled three months before the accident. *Id.* at PP 2, 16. The plaintiff argued that she had no way of knowing that *Reed* did not have insurance and that the two-year limitation period in her uninsured motorist coverage could not begin to run until she learned of his status. [\*\*9] *Id.* at P 16. The Court rejected this contention, noting that "all that was necessary to determine *Reed's* insurance status was to contact Nationwide. There is no reason why it should have taken *Angel* three years to realize *Reed* was uninsured." *Id.* at P 17, quoting *Angel v. Reed*, *Geauga App. No. 2005-G-2669*, 2007 Ohio 1069, at P 27 (*Grendell, J.*, dissenting).

[\*P15] The same is true for the Pottorfs. At any time Sell's insurance company could have been contacted to determine the policy limits. In addition, the mechanisms in the discovery portions of the Civil Rules could have been utilized to determine Sell's liability coverage, if any. To the contrary, the record is devoid of any interrogatories, requests for admissions, and/or

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requests for production of documents, whereby a copy of Sell's insurance policy could have been obtained and any limits thereon ascertained. Therefore, there is no genuine issue of material fact as to whether there should be a deviation in the date of filing against Nationwide to some date other than that of the accident, July 19, 2005, as the contract requires. See *Angel*, 119 Ohio St. 3d 73, 2008 Ohio 3193, at P 19, 891 N.E.2d 1179.

*Relation Back under Civil Rule 15(C)*

[\*P16] The next question is whether the [\*\*10] amendment of the Pottorfs' complaint on August 26, 2008, relates back to the original date of the filing of the complaint on July 18, 2007. If it does, then the suit against Nationwide would have been deemed commenced within the three-year limitations period and summary judgment would have been inappropriate.

[\*P17] *Civil Rule 15* governs the amendment of a complaint. Specifically, *Civ.R. 15(A)*, in relevant part, allows a party to amend a complaint only by leave of court or by written consent of the adverse party. This Rule also allows claims and defenses based upon the same conduct, transaction, or occurrence of the original pleading to relate back to the date of the original pleading. *Civ.R. 15(C)*. However,

**[a]n amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would [\*\*11] have been brought against him.**

*Id.* Various courts have held that "*Civ.R. 15(C)(2)* permits an amendment to relate back only where there was a mistake in the identity of the party originally named[.]" *Kimble v. Pepsi-Cola General Bottlers (1st Dist. 1995)*, 103 Ohio App.3d 205, 207, 658 N.E.2d 1135; *Beavercreek Local Schools v. Basic, Inc. (2nd Dist.*

*1991)*, 71 Ohio App.3d 669, 690, 595 N.E.2d 360; *Columbus Bd. of Edn. v. Armstrong World Industries, Inc. (10th Dist. 1993)*, 89 Ohio App.3d 846, 855, 627 N.E.2d 1033; see also *Maloney v. Callahan (1933)*, 127 Ohio St. 387, 188 N.E. 656. "A mistake of party does not exist merely because a 'party who may be liable for conduct alleged in the original complaint was omitted as a party defendant.'" *Beavercreek Local Schools, 71 Ohio App.3d at 690*, quoting *Jenkins v. Carruth (E.D. Tenn.1982)*, 583 F.Supp. 613, 615-616.

[\*P18] In this case, the parties do not dispute that the Pottorfs' amended complaint satisfied the first requirement that it arise out of the same conduct, transaction, or occurrence as the original complaint. Further, when construing the evidence in a light most favorable to the Pottorfs, Nationwide received notice of the institution of the [\*\*12] action prior to the expiration of the three-year limitations period.

[\*P19] More specifically, the Pottorfs submitted a letter from their attorney to Nationwide, dated June 20, 2008, which informed the company of the suit the Pottorfs filed against Sell, Sell's policy limits, and their claim under the UM/UIM coverage of the Nationwide policy. Receipt of this letter was acknowledged in a letter from Nationwide Representative Kristie Eilerman, dated July 9, 2008. Additionally, there is nothing in the record to indicate that Nationwide would be prejudiced in maintaining a defense on the merits. Thus, the second requirement is satisfied when construed in a light most favorable to the Pottorfs.

[\*P20] Nevertheless, the "relation back" theory fails on the third requirement. The Pottorfs do not contend that their original complaint contained a misnomer or that they made a mistake as to the identity of the proper party. Rather, they assert that they did not know Sell's policy limitations and that they would need to make a claim for UM/UIM coverage. This circumstance is not the kind of problem *Civ.R. 15(C)* was created to remedy. See [\*\*13] *Andre v. Chillicothe Jeep Sales, Inc. (Dec. 8, 1983)*, 10th Dist. No. 83AP-780, 1983 Ohio App. LEXIS 15198, 1983 WL 3814.

[\*P21] The Pottorfs were aware of their UM/UIM coverage with Nationwide. They also filed their original complaint against Sells an entire year prior to the expiration of the contractual limitations period in their Nationwide policy, which gave them ample opportunity to ascertain what, if any, and how much insurance

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coverage Sells had. Lastly, the Pottorfs did not file a motion for leave of court to amend the complaint once counsel for the Pottorfs learned of Sell's policy limits in June of 2008. Rather, they sought an agreement by Sell to amend, which was not filed until August 26, 2008.

[\*P22] In any event, there was no mistake in identity as to the proper party to sue as provided for in *Civ.R. 15(C)*. Therefore, we must conclude that the Pottorfs did not meet the requirements of *Civ.R.15(C)* in order for the amended complaint to relate back as to Nationwide.

*Claimed "Unconscionability" of the Three-Year Contract Provision*

[\*P23] Lastly, the Pottorfs assert that summary judgment was improper without first addressing whether the limitations period in the policy with Nationwide was void due to the unfair or deceptive practices and/or provisions by Nationwide. In support, the Pottorfs maintain [\*\*14] that the limitations period for suit to invoke the UM/UIM coverage in the policy is in a portion separate from the UM/UIM provisions, which is a deceptive and unfair act. More particularly, they contend that the UM/UIM portion of the policy appears to be complete and thus creates the impression that following that section alone is all an insured needs to do in order to make a claim.

[\*P24] Notably, the Pottorfs failed to raise this issue in its response to Nationwide's summary judgment motion in the trial court. "A party's failure to raise an issue in response to an adverse party's motion for summary judgment waives that issue for purposes of an appeal." *Minster Farmers Coop. Exch. Co. v. Meyer*, 3rd Dist. No. 17-08-31, 2009 Ohio 1445, at P 22, citing *Grieshop v. Hoyng*, 3rd Dist. No. 10-06-27, 2007 Ohio 2861, at P 36, citing *Hood v. Rose*, 153 Ohio App.3d 199, 2003 Ohio 3268, 792 N.E.2d 736, at PP 9-11. Therefore, this issue is not properly before this Court. However, we note that upon reviewing the policy, we are not convinced the Pottorfs would prevail on this issue.

[\*P25] The policy contains a Table of Contents immediately following the declarations page and two endorsements. There are four areas [\*\*15] of coverage listed in this table, including "Uninsured Motorists" coverage, pages U1-U5. Immediately thereafter is a section entitled "General Policy Conditions." Included in this list is a sub-section entitled "Suit Against Us" at page

G3, which is located three pages after the UM coverage section. As previously noted, this sub-section states:

**10. SUIT AGAINST US**

No lawsuit may be filed against us by anyone claiming any of the coverages provided in this policy until the said person has fully complied with all the terms and conditions of this policy, including but not limited to the protection of our subrogation rights.

Subject to the preceding paragraph, under the Uninsured Motorists coverage of this policy, any lawsuit must be filed against us:

(a) within three (3) years from the date of the accident; or (b) within one (1) 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.

[\*P26] This language is substantially similar to the policy provisions found to be valid by the Ohio Supreme Court in *Angel, supra*, and *Miller, supra*. Further, the words used are clear and unambiguous [\*\*16] as required to limit the time for bringing an action on a contract to a period that is shorter than the general statute of limitations for a written contract. See *Angel*, 119 Ohio St. 3d 73, 2008 Ohio 3193, at P 11, 891 N.E.2d 1179, citing *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 2005 Ohio 5410, 835 N.E.2d 692, at P 11. Moreover, the three year limitations period has been expressly endorsed by the Ohio General Assembly in enacting *R.C. 3937.18(H)*. Thus, the court did not err in failing to have a hearing on this matter.

[\*P27] Accordingly, we find that the trial court did not err in granting summary judgment in favor of Nationwide. Therefore, the Pottorfs' sole assignment of error is overruled, and the November 10, 2008 Judgment Entry of the Shelby County Court of Common Pleas is affirmed.

*Judgment Affirmed*

concur.

PRESTON, P.J. and WILLAMOWSKI, J.,

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED  
WITH THE SECRETARY OF STATE THROUGH FILE 54 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JULY 1, 2010 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 \*\*\*

TITLE 39. INSURANCE  
CHAPTER 3937. CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE

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*ORC Ann. 3937.18 (2010)*

§ 3937.18. Uninsured and underinsured motorist coverage

(A) Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state that insures against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.

Unless otherwise defined in the policy or any endorsement to the policy, "motor vehicle," for purposes of the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, means a self-propelled vehicle designed for use and principally used on public roads, including an automobile, truck, semi-tractor, motorcycle, and bus. "Motor vehicle" also includes a motor home, provided the motor home is not stationary and is not being used as a temporary or permanent residence or office. "Motor vehicle" does not include a trolley, streetcar, trailer, railroad engine, railroad car, motorized bicycle, golf cart, off-road recreational vehicle, snowmobile, fork lift, aircraft, watercraft, construction equipment, farm tractor or other vehicle designed and principally used for agricultural purposes, mobile home, vehicle traveling on treads or rails, or any similar vehicle.

(B) For purposes of any uninsured motorist coverage included in a policy of insurance, an "uninsured motorist" is the owner or operator of a motor vehicle if any of the following conditions applies:

(1) There exists no bodily injury liability bond or insurance policy covering the owner's or operator's liability to the insured.

(2) The liability insurer denies coverage to the owner or operator, or is or becomes the subject of insolvency

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proceedings in any state.

(3) The identity of the owner or operator cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of division (B)(3) of this section, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(4) The owner or operator has diplomatic immunity.

(5) The owner or operator has immunity under Chapter 2744. of the Revised Code.

An "uninsured motorist" does not include the owner or operator of a motor vehicle that is self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

(C) If underinsured motorist coverage is included in a policy of insurance, the underinsured motorist coverage shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the underinsured motorist coverage. Underinsured motorist coverage in this state is not and shall not be excess coverage to other applicable liability coverages, and shall only provide the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured. For purposes of underinsured motorist coverage, an "underinsured motorist" does not include the owner or operator of a motor vehicle that has applicable liability coverage in the policy under which the underinsured motorist coverage is provided.

(D) With respect to the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance, an insured shall be required to prove all elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured or underinsured motor vehicle.

(E) The uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance shall not be subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(F) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(G) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages and that provides a limit of coverage for payment of damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily

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injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(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.

(I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(4) While any employee, officer, director, partner, trustee, member, executor, administrator, or beneficiary of the named insured, or any relative of any such person, is operating or occupying a motor vehicle, unless the employee, officer, director, partner, trustee, member, executor, administrator, beneficiary, or relative is operating or occupying a motor vehicle for which uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided in the policy;

(5) When the person actually suffering the bodily injury, sickness, disease, or death is not an insured under the policy.

(J) In the event of payment to any person under the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, and subject to the terms and conditions of that coverage, the insurer making such payment is entitled, to the extent of the payment, to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of that person against any person or organization legally responsible for the bodily injury or death for which the payment is made, including any amount recoverable from an insurer that is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer that is or becomes the subject of insolvency proceedings, to the extent of those rights against the insurer that the insured assigns to the paying insurer.

(K) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage included in a policy of insurance.

(L) The superintendent of insurance shall study the market availability of, and competition for, uninsured and underinsured motorist coverages in this state and shall, from time to time, prepare status reports containing the superintendent's findings and any recommendations. The first status report shall be prepared not later than two years after the effective date of this amendment. To assist in preparing these status reports, the superintendent may require insurers and rating organizations operating in this state to collect pertinent data and to submit that data to the superintendent.

The superintendent shall submit a copy of each status report to the governor, the speaker of the house of representatives, the president of the senate, and the chairpersons of the committees of the general assembly having primary jurisdiction over issues relating to automobile insurance.

#### HISTORY:

131 v 965 (Eff 9-15-65); 132 v H 1 (Eff 2-21-67); 133 v H 620 (Eff 10-1-70); 136 v S 25 (Eff 11-26-75); 136 v S 545 (Eff 1-17-77); 138 v H 22 (Eff 6-25-80); 139 v H 489 (Eff 6-23-82); 141 v S 249 (Eff 10-14-86); 142 v H 1 (Eff 1-5-88); 145 v S 20 (Eff 10-20-94); 147 v H 261 (Eff 9-3-97); 148 v S 57 (Eff 11-2-99); 148 v S 267 (Eff 9-21-2000); 149 v S 97. Eff 10-31-2001.

#### NOTES:

##### Section Notes

The provisions of § 3 of SB 97 (149 v --) read as follows:

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

(A) Protect and preserve stable markets and reasonable rates for automobile insurance for Ohio consumers;

(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;

(2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;

(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;

(4) Eliminate any requirement of a written offer, selection, or rejection form for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages from any transaction for an insurance policy;

(5) Ensure that a mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages not be construed to be required by the provisions of *section 3937.181 of the Revised Code*, as amended by this act, that make uninsured motorist property damage coverage available under limited conditions.

(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;

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