

**TWINGING
ORIGINAL**

IN THE SUPREME COURT OF OHIO

THOMAS BARBEE, ET AL.)	Case No. 10-1091
)	
Appellees)	On Appeal from the Lorain
)	County Court of Appeals,
vs.)	Ninth Appellate District
)	
ALLSTATE INSURANCE COMPANY,)	Court of Appeals
ET AL.)	Case No. CA024046
)	
Appellant)	

**MERIT BRIEF OF APPELLANT,
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STATEMENT OF THE CASE AND FACTS

A. Statement of the Case.

This appeal arises from two consolidated lawsuits which arise from a motor vehicle accident occurring on October 12, 2002 in Madison, Wisconsin. As a result of the motor vehicle accident, the Plaintiffs, Edward Barbee, Darlene Barbee, Thomas Barbee, Margaret Barbee, Matthew Barbee and Harvey Barbee, allege personal injuries.

In 2005, Plaintiffs Barbee brought an action against various tortfeasors, including the United States of America and the Estate of Danielle Skatrud in United States District Court for the Western District of Wisconsin (Case No. 05-C-249-S). Plaintiffs later amended their complaint to bring in Nationwide and other insurers for medical payments coverage subrogation but no claim for uninsured/underinsured motorist coverage was presented in this lawsuit.

On December 7, 2005, the Court entered judgment in favor of Plaintiffs, including Plaintiffs Barbee, and against Defendants, United States of America and Estate of Diane Skatrud, in the amount of \$467,191.55, apportioning the award between the parties plaintiff and liability between parties defendant

This case was commenced by the Plaintiffs against Nationwide for underinsured motorist benefits on January 18, 2007 in Case No. 07CV149277 captioned *Matthew Barbee v. Nationwide Insurance Company*. Defendant Nationwide timely answered, and asserted its policy language as a bar to recovery along with the applicable statute of limitations. Soon after Nationwide answered the Complaint, the case was consolidated with Case No. 07CV149278 captioned *Matthew Barbee v. The Allstate Insurance Company*.

With leave of Court, Defendant Nationwide, along with Defendant Allstate filed Motions for Summary Judgment based on the expiration of the contractual limitations, as well as issues of res judicata arising from the Wisconsin Federal Court lawsuits. The Defendants' Motions for Summary Judgment were denied by the trial court. During the pendency of this lawsuit, the Supreme Court ruled on the case of *Angel v. Reed*, 119 Ohio St.3d 73, 2008 Ohio 3193. As a result of the Ohio Supreme Court's ruling in *Angel*, Defendant Nationwide, along with Allstate, with leave of Court, re-filed their Motions for Summary Judgment on the contractual limitations period based on this ruling. The trial court again denied the Defendants' Motions for Summary Judgment.

On February 6, 2009, the parties entered into extensive stipulations of fact and ultimately the Plaintiffs filed a Motion for Summary Judgment. Defendants filed a response to Plaintiffs' Motion for Summary Judgment. In their response to the Plaintiffs' Motion for Summary Judgment, Defendants filed, for a third time, Motions for Summary Judgment based on current Ohio law and the contractual limitations.

On May 5, 2009, the trial court, in issuing an Opinion and Order, granted the Plaintiffs' Motion for Summary Judgment and denied for a third time the Defendants' Motions for Summary Judgment.

In doing so, the trial court entered judgment for the Plaintiffs and against the Defendants in its final appealable Order of February 5, 2009.

On June 3, 2009, the Defendant, Nationwide Mutual Insurance Company, timely appealed the trial court's Order and Judgment.

On May 10, 2010 the Ninth District Court of Appeals issued its Decision and Journal Entry in *Barbee v. Allstate Ins.*, 2010-Ohio-2016. In this decision, the Court determined that the exhaustion and limitations period provisions of the Allstate and Nationwide underinsured motorist coverages conflict, creating an ambiguity under the facts of this case. Therefore, the court found the limitations provisions not enforceable as to the Barbees' claims.

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

On May 20, 2010, Nationwide filed with the Ninth District Court of Appeals a Motion to Certify this matter as in conflict with the decision of the Tenth District Court of Appeals in *D'Ambrosio v. Hensinger, et al.*, 2010 Ohio 1767. This motion was granted by the Ninth District Court of Appeals but the Certified Appeal, Case No. 2010-1314, was not accepted by the Ohio Supreme Court.

On June 23, 2010, Nationwide filed a Notice of Appeal to the Ohio Supreme Court from the decision of the Ninth District Court of Appeals together with a Memorandum in Support of Jurisdiction. This matter, Case No. 2010-1091, was accepted by the Ohio Supreme Court on September 29, 2010. The record was forwarded to the Supreme Court by the Clerk of the Ninth District Court of Appeals on November 4, 2010.

B. Statement of Facts

The facts of this case as set forth in the Stipulations contained in the Supplement to the Merit Brief of Appellant Nationwide at No. 1 are not in dispute. The motor vehicle accident occurred on October 12, 2002 on Interstate 90/94 in Wisconsin. At the time of the motor vehicle accident, Edward Barbee, Thomas Barbee, Margaret Barbee and Darlene

Barbee were riding in a Honda Accord owned by Margaret Barbee and operated by Edward Barbee. The Honda Accord owned and operated by Margaret and Edward Barbee, was insured by the Defendant, Nationwide Mutual Insurance Company. Said policy of insurance provided for underinsured motorist coverage. At the time of this accident, the passengers, Thomas Barbee and Darlene Barbee, had their insurance coverage through Allstate Insurance Company which provided them underinsured motorist coverage.

It is further undisputed that the policy of insurance issued by Nationwide (Supplement to the Merit Brief of Appellant Nationwide at No. 2), to Plaintiffs Barbee contains the following language in pertinent part:

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.

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 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 Motorist coverage of this policy, any lawsuit must be filed against us:

- a) within three (3) years from the date of the accident;

(Nationwide Policy at Page G 3)

This language is substantially similar to the language found in the Allstate policies

of insurance at issue. (Supplement to the Merit Brief of Appellant Nationwide at Nos. 3 and 4).

It is the application of this policy language to the facts of this case that give rise to this litigation.

LAW AND ARGUMENT

Proposition of Law No. 1:

A policy provision that requires uninsured/underinsured actions to be brought against the insurer within three years from the date of the accident is unambiguous and enforceable even when read in conjunction with the exhaustion provision and the provision requiring the insured to fully comply with the terms of the policy before filing suit.

Under Ohio law, a contractual limitations provision that reduces the available time period to bring an action on a contract is enforceable so long as it is reasonable and is stated in words that are "clear and unambiguous." *Angel v. Reed*, 119 Ohio St.3d 73.

An examination of the contractual limitations clause contained in the Nationwide policy of insurance reveals that it is reasonable and stated in words that are "clear and unambiguous":

**** 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; ..."

The issue raised by this appeal is whether prefacing this clear and unambiguous language with "Subject to the preceding paragraph" renders this clause ambiguous when the preceding paragraph reads:

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 terms and conditions of this policy, including but not limited to the protection of our subrogation.

This is not a novel issue. Going as far back as *Regula v. Paradise*, 2008 Ohio 7141,

Plaintiff's issue on appeal was:

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 [?]

Plaintiffs argued that the policy 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.

In *Regula*, the Court considered cases relied upon by the Plaintiffs that seemed to support their position and noted that those cases were premised upon an outdated version of R.C. 3937.18.

R. C. 3937.18(H) was amended on October 31, 2001 to read:

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. (Emphasis added.)

The version of R.C. 3937.18 that was enacted in October 2001 is radically different from the version that existed prior to that date. Insurance companies were no longer

required to offer uninsured/underinsured motorist protection. The effect of this it to change R.C. 3937.18 from a remedial statute to a non-remedial statute. The effect of making R.C. 3937.18 a non-remedial statute is that ambiguities no longer have to be resolved in favor of extending coverage to insurance policyholders.

After a review of this Court's decision in *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 835 N.E.2d 692, 2005 Ohio 5410, and Seventh District's own decision in *Whanger v. Grange Mut. Cas. Co.*, 7th Dist. No. 06-JE18, 2007 Ohio 3187, the *Regula* court concluded that the three-year statute of limitations at issue was unambiguous. The Court stated:

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 this court explicitly addressed whether the exhaustion provisions rendered the limitations provisions ambiguous, both found the limitations provisions unambiguous and enforceable.

Such is also the case in the instant matter. The policy language relied upon by the Plaintiffs to create the ambiguity:

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.

states only that no payment will be made until other limits have been exhausted. It does not state that the insured must exhaust the tortfeasor's limits before the insured can file suit.

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. This goal is undermined by a reading of the policy which introduces ambiguity where none need be found.

As stated by Justice Lundberg Stratton in *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004 Ohio 24 at P 16-19:

We have long held that a contract is to be read as a whole and the intent of each part gathered from a consideration of the whole. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361, 1997 Ohio 202, 678 N.E.2d 519. If it is reasonable to do so, we must give effect to each provision of the contract. *Expanded Metal Fire-Proofing Co. v. Noel Constr. Co.* (1913), 87 Ohio St. 428, 434, 101 N.E. 348.

This approach has been consistently applied by most of the appellate courts throughout the State of Ohio.

In *Chalker v. Steiner*, 2009 Ohio 6533, the Seventh District again considered the issue, and, relying on *Regula*, reiterated that the requirements listed in the exhaustion provision were conditions precedent to Grange's duty to pay underinsured motorist benefits, not to Chalker's right to file the lawsuit. *Regula* at p.49. As the Court concluded

in *Regula*, exhaustion of the tortfeasor's policy limits is a condition precedent to payment by the insurer rather than a condition precedent to legal action by the insured. Therefore, the legal action provision does not render the limitations provision unenforceable.

In *Lynch v. Hawkins*, 175 Ohio App.3d 695, 2008 Ohio 1300, the Court recognized that in enacting R.C. 3937.18(H), the General Assembly clearly knew that underinsured motorist coverage policy provisions routinely require exhaustion of the underinsured motorist's liability insurance coverage. The Ohio Supreme Court had commented on that fact in *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281, 1998 Ohio 381, 695 N.E.2d 732 in 1998. *Ross v. Farmers*, 82 Ohio St.3d at 287. Both statute and case law recognize that consideration of available liability insurance coverage is necessary to determine underinsured motorist coverage. With this knowledge, the general assembly included specific language allowing any policy of insurance to 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*.

In *Griesmer v. Allstate Ins. Co.*, 2009 Ohio 725, the Court rejected the insureds argument that they did not have standing to make their underinsured motorist claim until after the court proceedings resulted in a settlement with the tortfeasor. The Eighth District upheld the two year limitations period provided by the policy, and held that the unambiguous language of the provision was enforceable.

In *Pottorf v. Sell*, 2009 Ohio 2819, the Third District rejected the insureds argument

that the three year limitations provision in the policy was tolled because they did not know the amount of the tortfeasor's policy limits until a court-ordered mediation was conducted approximately three years after the accident.

As stated by Tenth District Court of Appeals in *D'Ambrosio v. Hensinger, et al.*, 2010 Ohio 1767.

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.

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[*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.

Most recently, the Eighth District considered this issue in *Longly v. Thailing*, 2010 Ohio 5012. The Longleys argued that they could not file their UM claim until the appellate court determined that the City was protected by sovereign immunity. The *Longly* court found that while the policy does state that: "There is no right of action against us * *

* until all terms of this policy have been met,”

The absence of the court's determination whether sovereign immunity applied would not prevent the filing of a claim for uninsured coverage.

Thus, the determination of whether immunity applies pertains to the payment of the claim, not the bringing of a suit. Cf. *Chalker v. Steiner*, 7th Dist. No. 08-MA-137, 2009 Ohio 6533 (requirement that conditions of policy be met prior to bringing an action did not prevent the plaintiffs from filing a suit within the contractual time limit as the condition to exhaust remedies applied to the payment of the claim). Accordingly, we overrule the Longleys' sole assigned error.

The Ninth District Court of Appeals has come to a different conclusion. In the instant matter, the Ninth District went back to the reasoning in their prior case of *Mowery v. Welsh*, 2006 Ohio 1552. The *Mowery* Court relied on the Ohio Supreme Court's decision in *Kraly v. Vannewkirk* (1994), 69 Ohio St. 3d 627, 635 N.E.2d 323 for the rule of law that provision in an insurance agreement that attempts to extinguish an uninsured/underinsured motorist 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 p.16, citing *Kraly* at 635.

The Ninth District's reliance upon *Kraly* is unfounded for several reason. First, the language of the policy under consideration in *Kraly* is significantly different from that under consideration in the instant matter. The uninsured motorist coverage section of the *Kraly* policy stated that there is no coverage until the issues relating to the liability of the tortfeasor are resolved. There is no such language in either the Nationwide or Allstate policies.

The *Kraly* policy stated elsewhere that there is "no right of action against [it] * * *

until all the terms of [the] policy have been met."

As a result of these two sections of the Kraly policy, it could reasonably be determined that there could be no cause of action against the insurance company until issues relating to the liability of the tortfeasor have been resolved.

In *Ross v. Farmers*, 82 Ohio St.3d at 287, the Ohio Supreme Court explained its reasoning in *Kraly*: "*Kraly* unarguably involved a unique factual situation, and this court accordingly fashioned a remedy based upon concepts of fairness and public policy." *Id.*, at 287. The Ohio Supreme Court also stated in the opinion that *Kraly* 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 the underinsured motorist benefits will occur." *Id.*

Because the Ohio Supreme Court has recognized that *Kraly* is decided upon the unique factual situation found therein, which is not present herein, the Ninth District's reasoning which is founded in *Kraly* is inapplicable.

Further, the policy condition that the *Kraly* court found to create an ambiguity "there is no coverage until the issues relating to the liability of the tortfeasor are resolved," is a condition precedent to coverage.

The policy language in the instant matter, "No payment will be made until the limits of all other liability insurance and bonds that apply have been exhausted by payments" is a condition precedent to payment, not coverage.

Finally, the *Kraly* decision dealt with a situation in which an insured became

uninsured as a result of the insolvency of the tortfeasor's liability carrier. This specific situation was addressed by the changes to R.C. 3937.18(H), which became effective on October 31, 2001. The statutory provision specifically authorizes a three year contractual limitations period in uninsured and underinsured motorist insurance policies commencing from the date of the accident **unless underinsured status is predicated on the insolvency of the liability insurer**. Therefore, the unique situation which *Kraly* sought to address has now been dealt with statutorily and *Kraly* is no longer necessary to the analysis of issues on when the contractual limitations period in uninsured and underinsured motorist insurance policies begins to run following the date of the accident.

The decision of the Ninth District Court of Appeals is founded upon an inaccurate premise: that the language of the insurance policy is ambiguous. As noted hereinbefore, the Ninth District's primary analysis involves an application of *Kraly* which is inapplicable to the facts of this case for the reasons set forth herein above. In addition to *Kraly*, the Ninth District looks to *Kuhner v. Erie Ins. Co.* 98 Ohio App.3d 692 (1994). However, as the decision in *Kuhner* is primarily based upon *Kraly* as well, the reliance on *Kuhner* is likewise unpersuasive.

The Ninth District then comes to the conclusion that because the exhaustion requirement functions as a precondition to the application of the underinsured motorist coverage, the Barbees did not have a right to coverage under the Nationwide policy until the liability insurance of the tortfeasors was exhausted. This conclusion is presumably drawn from paragraph 4 of the syllabus of *Bogan v. Progressive Cas. Ins Co.*, 98 Ohio St.3d 22, which states: "Based upon the established common law and further strengthened

by the specific statutory provision, R.C. 3937.18, a subrogation clause is reasonably includable in contracts providing underinsured motorist insurance. Such a clause is therefore both a valid and enforceable precondition to the duty to provide underinsured motorist coverage.” However, in *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186 this court stated:

Therefore, paragraph four of the syllabus of *Bogan v. Progressive Cas. Ins. Co.* (1988), 36 Ohio St.3d 22, is overruled in part to the extent that it held that a consent-to-settle provision is an absolute precondition to recovery that is materially breached whenever it is not complied with. Any reasoning within *Bogan*, *Ruby v. Midwestern Indian Co.* (1988), 40 Ohio St.3d 159, and *McDonald v. Republic-Franklin Ins. Co.* (1989), 45 Ohio St.3d 27, that is inconsistent with this holding is also disapproved.

Therefore, it can be inferred that it is recognized that exhaustion clauses are preconditions to payment not necessarily preconditions to coverage.

The only other appellate court that expressed an opinion similar to the Ninth District was the Fifth District in 2004, pre-*Sarmiento*, *supra*. In *Bradford v. Allstate Ins. Co.*, 2004 Ohio 5997, the Fifth District determined that the Bradford’s claim for the Allstate underinsured motorist coverage did not arise until the settlement with State Farm had occurred.

Both the statute, R.C. 3937.18(H) and the policy have one goal: create certainty about when an insured should file suit under the Uninsured Motorist coverage of the policy. Both the statute and the policy say the exact same thing: suit must be brought within three years from the date of the accident. Both the policy and the statute also provide that the insured should not prejudice the insurer’s subrogation rights.

As indicated at the beginning of this discussion, this is not a new or novel area of the law. With the exception of the Ninth District Court of Appeals, most appellate courts have enforced the contractual filing limits since *Sarmiento, supra*, in 2005.

Plaintiffs have been represented since at least April of 2005 by competent counsel. The decision to wait and not file the suit for underinsured motorist coverage until 2007 had to be the result of a strategic decision, not lack of knowledge. Evidence of this is the fact that another person injured in the accident, Faith C. Donely, did file an action in both Federal Court in Wisconsin against the alleged tortfeasors, as well as in state court in Lorain County against Allstate Insurance for underinsured motorist coverage. While this action was stayed pending the outcome of the action in Wisconsin, Allstate took no action to have the case dismissed on the grounds that it could not be filed for failure to meet the exhaustion requirement. Further evidence of the fact that counsel for the Barbees made a strategic decision not to file the action for underinsured motorist coverage rather than the argument that they did not know if they had a claim for underinsured motorist coverage, is the stipulation that within one year from the date of the accident, Plaintiffs' counsel placed both Nationwide and Allstate on notice of potential underinsured motorist claims. The fact of the matter is, Plaintiffs' counsel knew they had potential underinsured motorist claims and chose to wait for four years and three months after the date of the accident, or one year and one month after receiving a judgment in the Wisconsin case. There is no evidence that Plaintiffs were unaware of the three year contractual limitation or that either Nationwide or Allstate took any action to lead Plaintiffs to believe that they could not file their lawsuit at any time within the three year contractual limitation or that Allstate took any action to have

the Donely complaint dismissed because she had not yet “complied with the terms of the contract” even though her claims were in the same postural procedure as those of the Barbees. The only conclusion which can be drawn is that counsel for the Barbees chose to take a calculated risk and not file the underinsured motorist lawsuit within the three year contractual time limit. We may never know why they chose to take this risk but we know it was not because they thought they had to wait until after receipt of the proceeds from the underlying tortfeasors because this is contradicted by both the law of the various appellate courts as well as the example shown by the filing of a complaint by Faith C. Donely.

This entire litigation could have been avoided if counsel for the Barbees had simply followed the sequence of events followed by the vast majority of Plaintiff’s counsel presently, the same sequence of events followed by counsel for Faith Donely. Where it appears that there is a potential uninsured or underinsured motorist claim, suit is brought against the tortfeasor and the potential source of UM/UIM insurance within the applicable statute of limitations, usually two years. This protects both any potential subrogation interests and ensures suit is brought within the contractual limitation period. During the pendency of the litigation, while all entities that will be ultimately affected are parties, liability, injuries and damages are determined. During this period of time, the parties sort out the appropriate insurance coverages. If it turns out that the tortfeasor’s liability coverage is insufficient to cover the damages as determined to be owed by a tortfeasor, then that liability coverage is exhausted by the payment of the tortfeasor’s insurance carrier to the Plaintiff and then payment is made to the Plaintiff by the uninsured/underinsured motorist insurance carrier up to the limits of the available uninsured/underinsured motorist

coverage, allowing for set off of the tortfeasor's policy limits or payment against the uninsured/underinsured motorist coverage as set forth by contract. If it turns out that the tortfeasor's liability coverage is sufficient to cover the damages owed by the tortfeasor, then the claim against the underinsured motorist coverage carrier is dismissed.

The interpretation of the contract by most of the Appellate Courts is much more in line with the post-2001 line of reasoning as suggested by Justice Lundberg Stratton in *Saunders*. This interpretation recognizes that the purpose of the contract provisions is to bring certainty as to when the litigation is to be filed by providing a logical sequence of events:

1. You cannot file suit against us until you have complied with all policy terms and conditions, including protection of our subrogation rights.
2. In any event, suit must be brought within three years from the date of the accident.
3. Payment will not be made until determinations are made concerning liability and exhaustion of other applicable policy limits.

As recognized in the other cases, exhaustion is not a policy term or condition precedent to the filing of the claim by the insured but rather a condition precedent to the payment by the insurer under the uninsured/underinsured motorist coverage.

The interpretation of these policy provisions by the Ninth District Court of Appeals makes no sense and turns this logical sequence of events on its head by making #3 the starting point for analysis which would invalidate #1 because the subrogation rights would

be lost by now and #2 would be meaningless. This is completely contrary to the approach as set forth by Justice Lundberg Stratton and common sense. Under the approach suggested by the Ninth District, plaintiffs would first bring suit against the tortfeasors and would not be required to bring suit against the insurance carrier for uninsured or underinsured motorist coverage until there had been an exhaustion of the underlying policy limits by either settlement or judgment. By then the insurance company's rights of subrogation against the tortfeasor would be compromised and the insurance company would have no right to participate in the litigation and no method of controlling the size of the judgment it might ultimately be called upon to pay. The disposition of the litigation would impair or impede the insurer's ability to protect its interest and there would be no other party to adequately represent the insurer's particular interest. As recognized by this Court in prior decisions, issues determined in one proceeding at times may be given preclusive effect in a later proceeding. See *Grange Mut. Cas. Co. v. Uhrin* (1990), 49 Ohio St.3d 162, 550 N.E.2d 950; *Howell v. Richardson* (1989), 45 Ohio St.3d 365, 544 N.E.2d 878. Under the analysis set forth by the Ninth District, the UM/UIM carrier would be precluded from participating in the litigation by which the amount of their later contractual obligation to pay damages would be determined.

CONCLUSION

Applying the above principles to the present case, Appellant Nationwide asks this court to find that the provision of the contract that contains the three-year limitation in which to bring a lawsuit against Nationwide for uninsured or underinsured benefits imposes a clear and unambiguous duty to bring the lawsuit for uninsured or underinsured

motorist claims within three years of the accident.

This is a matter of public and great general interest because it is necessary to bring certainty on the issue of when a lawsuit for a claim for underinsured motorist coverage must be brought.

It was the goal of the general assembly to bring clarity and certainty to this issue when it enacted R.C. 3937.18(H) in 2001. Failure to create a bright line test by the courts in line with this goal of the general assembly will only increase confusion on the part of the general public and bar. Persons with potentially valid claims may lose their right to recover under the policy due to uncertainty when to file the claim. Failure to enforce the plain language of both the statute and the policy which provide that claims are to be brought within three years from the date of the accident, creates a whole new issue to be litigated of when the cause of action accrued so that the contractual time limitation began to run.

The approach advocated by the Ninth District basically holds that, until such time as the liability of the tortfeasor and the amount of damages have been determined and the underlying policy of insurance is extinguished, the insured has no claim for underinsured motorist coverage. Hundreds, if not thousands, of current lawsuits in which the Plaintiff sued both the tortfeasor and their own underinsured motorist carrier will be affected.

It will become impossible for insurers to intervene into causes of action filed by the Plaintiff against the tortfeasor as allowed by the policy of insurance because there will not yet be any justiciable controversy between the Plaintiff and the insurance company. Neither could either the insurance company or the Plaintiff file a declaratory judgment action to determine the rights and obligations of each under the contract because the

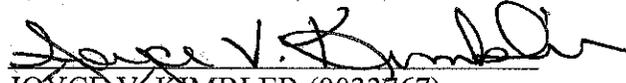
Plaintiff would not yet have a claim and there would not yet be any controversy for the court to determine.

Rather than reading the various parts of the policy together as a whole and gathering the intent of each part from a consideration of the whole, the approach of the Ninth District sets the various parts of the policy at war against each other. The result of this approach could require the Plaintiff to re-litigate each issue again because the underinsured motorist carrier Plaintiff seeks to bind by the litigation would not have been a party to the original action.

The approach of the Ninth District is a conceptual exercise which does not work in practice. The approach of the general assembly and the other courts of appeal is conceptually sound and practically viable.

Wherefore, Appellant Nationwide requests this Court to reverse the decision of the Ninth District Court of Appeals and enter judgment in favor of Appellant Nationwide and against the Appellees Barbees and hold as a matter of law that the language contained in the Nationwide policy of insurance requiring suit to be brought under the uninsured/underinsured motorist coverage within three (3) years from the date of the accident is valid and enforceable.

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 31st day of December, 2010:

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APPENDIX

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,
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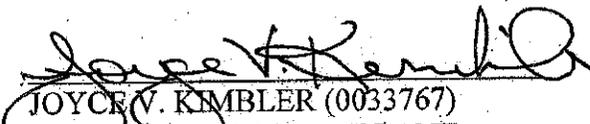
ATTORNEY FOR APPELLEES BARBEE

FILED
JUN 23 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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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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 22nd day of June, 2010:

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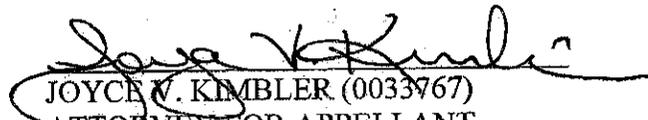
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[Cite as *Barbee v. Allstate Ins. Co.*, 2010-Ohio-2016.]

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,

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

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,

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

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 precondition 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 Kuhners 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 Kuhners’ underinsured motorist coverage because the policy required that any legal action against Erie begin within two years of the collision.

{¶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

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

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

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.

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.

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.

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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 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 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.