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STATEMENT OF FACTS
AND STATEMENT OF CASE

The defendant-appellant, Nationwide Insurance Company, issued a homeowner's insurance policy to the plaintiff, Dennis J. Dominish, which was effective from July 7, 2006, through July 7, 2007. A copy of the entire Nationwide policy is part of the record and is attached to defendant's brief which was filed in the Court of Appeals for the Eleventh Appellate District. The policy was also attached to the original motion for summary judgment that was filed in the Lake County Common Pleas Court. Plaintiff-Appellee, Dennis J. Dominish, made a claim under this policy claiming that he sustained loss and/or damage as a result of a tree falling onto his roof during a rain and wind storm. Nationwide, through its claims representative, Michael Rahe, investigated the claim. On September 6, 2006, Nationwide, through Mr. Rahe, sent the plaintiff a letter and enclosed an estimate in the amount of \$6,741.96 for the alleged damage to the house. See Ex. A-1 attached to the affidavit of Jennifer Short which was attached to the brief of Nationwide filed in the court of appeals (Docket #11). Also, Nationwide sent a check in that same amount to the plaintiff under separate cover. On September 6, 2006, Nationwide also sent the plaintiff a second letter that was titled "PARTIAL DENIAL OF COVERAGE" indicating that "There is no coverage available for your roof or any damage to contents of your home or any resultant mold formed as a result of your loss. There is coverage available for the resultant interior damage to your home." Further, in the same letter of September 6, 2006, Mr. Rahe of Nationwide also advised the plaintiff that "any suit you wish to file against Nationwide as a result of this claim must be done so within one year, per the following condition:

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

(Short affidavit - Ex. A-2).

The plaintiff refused Nationwide's settlement offer and returned the check to Nationwide. On April 5, 2007, Nationwide sent another letter to the plaintiff with a reservation of rights letter and a non-waiver agreement, indicating that Nationwide was not waiving any rights under the policy while it continued to investigate the loss. (Short affidavit - Ex. A-3 and Ex. A-4). On June 6, 2007, Mr. Rahe of Nationwide sent another letter to the plaintiff, once again enclosing a check in the sum of \$6,741.96 together with a copy of the original estimate. (Short affidavit - Ex. A-5). In this letter, Mr. Rahe stated the following:

The check enclosed payable to you and last known mortgage holder on the property is at this time closing the claim. If you wish to pursue the claim further, please contact my office so arrangements may be made. My business card is enclosed. (Emphasis added).

There was no further contact to or from the plaintiff after the letter of June 6, 2007, through July 28, 2007, which was the one-year anniversary of the date of loss.

In early August of 2007, the plaintiff rejected this settlement amount and returned the check, along with the letter, to Nationwide with a handwritten note and the voided check. (Short affidavit - Ex. A-6).

On August 16, 2007, Mr. Rahe once again sent a letter to the plaintiff insured with non-waiver form and indicated his willingness to consider whatever other information the plaintiff wished to present in support of the claim. (Short affidavit- Ex. A-7). There was no response to this correspondence and there was no communication between the plaintiff

and Nationwide after August 16, 2007. Copies of all of these letters are attached to the brief of appellant which was filed in the court of appeals and which is part of the record.

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

On March 9, 2009, Nationwide filed a motion for summary judgment asserting that the plaintiff's suit was barred by the one-year limitation of action provision in the policy. A certified copy of the Nationwide policy was attached to the motion for summary judgment. In response, the plaintiff argued that the policy provision was ambiguous and, in addition, plaintiff argued that Nationwide had waived the one-year limitation by continuing to investigate the claim after the one-year period had expired. Defendant submitted a reply brief in support of the motion for summary judgment, together with an affidavit of its claims representative, Jennifer Short, and copies of the various correspondence from Nationwide to the plaintiff, as referenced above. On August 24, 2009, the trial court granted the motion for summary judgment, holding that the language in the policy regarding the one-year

limitation of action clause was clear and unambiguous, and further that Nationwide did not waive the limitation of action provision.

Plaintiff subsequently filed a notice of appeal with the Eleventh District Court of Appeals, Lake County, Ohio. It is important to note that the only assignment of error set forth by the plaintiff-appellant in the court of appeals concerned the waiver issue. Plaintiff-Appellant did not appeal the decisions of the trial court to the effect that the policy provision was clear and unambiguous and/or that the policy provision was reasonable and enforceable. The court of appeals, in a 2-1 decision, reversed the trial court, holding that the policy provision was ambiguous and unenforceable; and further, that even if the policy provision was not ambiguous, Nationwide had waived the one-year provision “By sending the letter after the expiration of the limitation of action provision and indicating in that letter that it would further consider the merits of Dominish’s claim. . .”. (Court of Appeals opinion, p. 10; App.-13 attached).

In her dissenting opinion, Judge Grendell disagreed, stating that the plaintiff-appellant had not raised the issue of ambiguity as an assignment of error; that the issue was neither briefed nor argued; and that the policy provision was not ambiguous. Further, Judge Grendell was of the opinion that Nationwide did not waive the policy provision based upon the facts and circumstances of the case which were in the record.

Defendant Nationwide appealed to the Ohio Supreme Court. Initially, this Court accepted jurisdiction as to Proposition of Law No. 1 only, which raised the issue of whether the policy provision was clear, unambiguous and enforceable. Appellant Nationwide then filed a Motion for Reconsideration, requesting that this Court also accept jurisdiction

as to Proposition of Law No. 2, which involved the issue of whether Nationwide waived the one-year policy provision. This Court then granted the motion for reconsideration, and this case is now before the Court on both Proposition of Law No. 1 and also Proposition of Law No. 2.

ARGUMENT

Proposition of Law No. 1

A PROVISION IN A HOMEOWNER'S INSURANCE POLICY TITLED "SUIT AGAINST US. NO ACTION CAN BE BROUGHT AGAINST US UNLESS THERE HAS BEEN FULL COMPLIANCE WITH THE POLICY PROVISIONS. ANY ACTION MUST BE STARTED WITHIN ONE YEAR AFTER THE DATE OF LOSS OR DAMAGE" IS UNAMBIGUOUS AND IN A SUIT ON THE POLICY COMMENCED MORE THAN ONE YEAR AFTER THE DATE OF LOSS SUCH PROVISION WILL BE ENFORCED IN ACCORDANCE WITH THE PLAIN MEANING OF ITS TERMS. APPEL V. COOPER INS. CO. (1907), 76 Ohio St. 52, APPROVED AND FOLLOWED.

Section I of the Nationwide insurance policy, entitled Property Coverages, under the subheading Property Conditions, at ¶ 7 (page E2), provides as follows:

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

Despite the fact that the plaintiff did not raise the issue on appeal regarding whether the above policy provision was clear and unambiguous, and despite the fact that this issue was neither briefed nor argued, the majority of the court of appeals held that the above language was ambiguous and unenforceable. The court of appeals suggested that the word "action" did not necessarily mean a lawsuit, and the term "started" did not necessarily mean the filing of a legal action. However, as correctly stated in the dissenting opinion, the above provision, when read in its entirety, entitled "**Suit Against Us**", the "usual and ordinary" meaning of the word "action" is a legal proceeding and "No reasonable interpretation of this provision would lead anyone to conclude that the word 'action' entails the filing of an insurance claim."

It is important to note that in holding that the Nationwide policy provision was ambiguous, the court of appeals majority did not cite any prior case where such a provision had been held ambiguous. In fact, the court of appeals cited the case of Thomas v. Allstate Ins. Co. (6th Cir. 1992), 974 F.2d 706, 710, whereby the Sixth Circuit Court of Appeals held that a similar provision in an Allstate policy was not ambiguous.

It is well-settled in Ohio that the parties to an insurance contract may lawfully limit the time within which suit may be brought, so long as the period of limitation is not unreasonable. Appel v. Cooper Ins. Co. (1907), 76 Ohio St.2d 52. A limitation period of one year has been held not to be inherently unreasonable. Colvin v. Globe American Cas. Co. (1982), 69 Ohio St.2d 293; Hounshell v. American States Ins. Co. (1981), 67 Ohio St.2d 427. Further, it is well-established that any contractual limitation of action clause must be clear, unambiguous and easily understood by a reasonably intelligent person. Ady v. West American Ins. Co. (1982), 69 Ohio St.2d 593. In interpreting contract language in an insurance policy, a court must look to the plain and ordinary meaning of the language used unless another meaning is clearly apparent from the contents of the policy. Alexander v. Buckeye Pipeline Co. (1978), 53 Ohio St.2d 241. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849.

In the case of Appel v. Cooper Ins. Co. (1907), *supra*, this Court held as follows:

1. The parties to a contract of insurance may, by a provision inserted in the policy, lawfully limit the time within which suit may be brought thereon, provided the period of limitation fixed be not unreasonable.

2. A provision in a policy of fire insurance that “no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within six months next after the fire” is unambiguous, and in a suit on the policy commenced more than six months after the date of the fire, will be enforced in accordance with the plain meaning of its terms, where no extrinsic facts are alleged excusing delay in bringing the suit.

In fact, the only courts which have specifically addressed the issue of whether this provision is ambiguous, have concluded that in fact the provision is not ambiguous. In the case of Jares v. Jefferson Ins. Co. of New York, 1985 Ohio App. LEXIS 7493, decided by the Eighth Appellate District, Cuyahoga County, on March 28, 1985, the court of appeals held that a policy provision, virtually identical to the provision which is at issue in this case, was not ambiguous. In the Jares case, the policy provision at issue was as follows:

Suit Against Us. No action shall be brought unless there has been compliance with the policy provisions and the action is started within one year after the loss.

In Jares, as in the case at bar, the appellants argued that the policy provision was unenforceable because the word “action” was ambiguous and misleading. The appellants in Jares argued that by placing a telephone call to their insurance agent they took “action” within the meaning of the policy provision. The court of appeals disagreed, holding as follows:

The appellants correctly assert that words in an insurance policy are to be given their plain and ordinary meanings. In the context of a legal document, such as an insurance contract, the word action refers to a proceeding in a court of law, particularly when the word “action” appears under the heading “suit against us”. . . . Even construing the contract language most strongly in favor of the appellants, we can discern no significant ambiguity.

A copy of the opinion in Jares v. Jefferson Ins. Co. is attached in the Appendix at App-21.

Likewise, in the case of Giles v. Nationwide Mutual Fire Ins. Co., 199 Ga.App. 483, 405 S.E.2d 113 (Ga. App. 1991), the Georgia Court of Appeals was asked to construe the same insurance policy provision as was construed in Jares, *supra*, and which is at issue in the case at bar. In Giles, *supra*, the policy provision was as follows:

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

Again, the appellants in Giles contended that the clause was ambiguous because the term “action” could be interpreted to mean any action undertaken by the insured, and not necessarily the initiation of a lawsuit. The Georgia Court of Appeals disagreed, holding as follows:

There is no construction of an insurance contract required or even permissible when the language employed by the parties in the contract is plain, unambiguous, and capable of only one reasonable interpretation. . . . We find that in the clause at issue the word “action” must be read together with the clause heading, “suit against us”. The Random House Dictionary of the English Language defines “suit” as, *inter alia*, “the act, the process, or the instance of suing in a court of law; legal prosecution; lawsuit. . . . “Action” is defined in part as “law: a proceeding initiated by one party against another; the right of bringing it”. Thus, when these terms are given their ordinary meaning and viewed from the perspective of a lay person, the clear and unambiguous meaning of the clause is that lawsuits brought against the appellee must be filed within one year of the date of loss or damage. (Emphasis added).

Finally, in the case of Vogias v. Ohio Farmers Ins. Co., 177 Ohio App.3d 391, 2008-Ohio-3605, the Court of Appeals for the Eleventh Appellate District decided a case involving the same policy provision, which provided as follows:

Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.

In affirming the granting of a summary judgment in favor of Ohio Farmers Insurance Company, the court of appeals did not even address the issue of whether the policy provision was clear and unambiguous. The only issue in Vogias was whether the defendant insurance company waived the policy provision, which the court concluded that it did not. It is interesting to point out that both judges who concurred in the majority opinion in the case at bar were part of the unanimous holding in Vogias.

For all of the foregoing reasons, it is respectfully submitted that the Nationwide policy provision entitled “**Suit Against Us**”, providing that any lawsuit against the company must be brought within one year of the date of loss, is reasonable and enforceable as well as clear and unambiguous. With the exception of the majority decision below, every court which has specifically addressed this issue has reached a similar conclusion. For these reasons, it is respectfully submitted that the holding of the court of appeals below should be reversed and this Court should hold, as a matter of law, as set forth in Proposition of Law No. 1, that the Nationwide policy provision is unambiguous and should be enforced in accordance with the plain meaning of its terms.

Proposition of Law No. 2

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

The second issue presented to the Court is whether Nationwide waived the one-year limitation of action as contained in the Nationwide policy. The trial court, in granting defendant Nationwide’s motion for summary judgment, held that “reasonable minds must find that Nationwide did not waive the limitation of action provision in Dominish’s policy.” The court of appeals, in a 2-1 decision, reversed and held that “By sending the letter (of August 16, 2007), after the expiration of the limitation of action provision and indicating in that letter that it would further consider the merits of Dominish’s claim, Nationwide waived the limitation of action provision.” In her dissent, Judge Grendell held that “Construing the evidence in Dominish’s favor, there is no genuine issue of material fact as to whether Nationwide intended to waive its limitation-of-action provision. . . .”

The law of Ohio with respect to this issue was clearly stated in the cases of Hounshell v. American States Ins. Co. (1981), 67 Ohio St.2d 427, and Broadview Savings & Loan Co. v. Buckeye Union Ins. Co. (1982), 70 Ohio St.2d 47. In Hounshell, *supra*, this Court, in its syllabus, held as follows:

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

or declarations occasion the delay by the insured in filing an action on the insurance contract until after the period of limitation has expired.

In Broadview Savings & Loan, *supra*, this Court acknowledged its holding in Hounshell but concluded as follows at p. 51 of the opinion:

After a review of all the material submitted to the trial court on the motion for summary judgment, we hold that no settlement offers and actions by or on behalf of the insurance company here could have reasonably led the mortgagee Broadview to believe that the matter was being settled, and that it would be relieved of its contractual responsibility to bring legal action within the period set forth in the policy.

This Court, in Broadview Savings & Loan, *supra*, went on to state as follows at p. 52 of the opinion:

Under these circumstances, where (the insurance company's) adjuster was attempting to gather information for consideration of the claim and where no settlement offers were made or any assurances made with respect to the likelihood of future settlement offers, there is no basis for an estoppel of the insurance company's right to enforce the suit limitation provision.

In the case at bar, the evidence is undisputed that the Nationwide claims representative sent a letter to the plaintiff on September 6, 2006, which was titled "PARTIAL DENIAL OF COVERAGE", and forwarded a check in the amount of \$6,741.96 for the damages which Nationwide agreed were owed. In that same letter, Nationwide advised the plaintiff that "any suit you wish to file against Nationwide as a result of this claim must be done so within one year, per the following condition". The "Suit Against Us" provision of the policy was then set forth verbatim in this letter of September 6, 2006.

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

On June 6, 2007, Nationwide once again sent a copy of the original estimate as well as a reissued check in the same amount of \$6,741.96 to the plaintiff. This letter was sent back to Nationwide by the plaintiff, with the check marked “void” and with a handwritten note from the plaintiff rejecting the offer. The one-year limitation period then expired on or about July 28, 2007.

Finally, on August 16, 2007, after receiving the voided check and handwritten note from the plaintiff, Nationwide sent a final letter to the plaintiff, once again enclosing a non-waiver form and offering to “investigate the claim further, in an effort to handle to a proper conclusion”. There is no evidence that the plaintiff ever responded to this letter, and there is no evidence that there was any further contact between the plaintiff and Nationwide until suit was filed on July 25, 2007, nearly two years after the loss and over eleven months after the last contact between plaintiff and Nationwide.

The majority of the court of appeals held that by sending this letter of August 16, 2007, Nationwide waived the one-year limitation of action provision. For all of the reasons set forth below, it is respectfully submitted that Nationwide did not waive the policy provisions either prior to July 28, 2007, or after July 28, 2007.

In both Hounshell, *supra*, and Broadview Savings & Loan, *supra*, this Court emphasized that in order for there to be a waiver of the one-year policy provision there must

be two requirements. First, the insurance company must recognize or admit liability under the policy; and secondly, the insured must have reasonably relied on the acts or declarations of the company to delay in bringing an action on the insurance contract. Neither of these requirements is present in the case at bar. First, Nationwide issued a “PARTIAL DENIAL OF COVERAGE” in a lengthy letter dated September 6, 2006, which was slightly more than one month after the alleged loss. Nationwide tendered a check for \$6,741.96, the amount which it believed was owed, which check was rejected and never cashed by the plaintiff. Nationwide again tendered a check in the same amount by letter of June 6, 2007, over a month before the limitation period was to expire, and once again the plaintiff rejected the check and returned it to Nationwide. At that point, it was clear that Nationwide’s position was that it owed \$6,741.96 and no more. It was also clear that the plaintiff had rejected this offer and was not willing to settle the claim for that amount. There is no evidence that Nationwide did anything to cause the plaintiff not to file suit or to in any way lead the plaintiff to believe that the company would be liable for more than what it had already offered prior to July 28, 2007, the one-year anniversary of the date of loss. In *Hounshell*, *supra*, this Court went on to state as follows at pp. 432-433:

It is not our conclusion here that all offers of settlement made by insurance companies to the insured are to be construed as waivers of the time limitation. Where there is a specific denial of liability upon the policy, either totally or in part, there would generally be no waiver occasioned by an offer of settlement. We recognize and endorse the principle that a waiver comes into existence upon an offer that is an express or implied admission of liability. . . . If this company, in making its offers to the insured, had made it clear that it had concluded this was the full extent of its liability, and that it was refusing to recognize any further liability, it could have relied upon the limitation of action clause within the policy. (Emphasis added).

This is exactly the situation that is presented in the case at bar. Nationwide, in making its offer to the plaintiff-insured, made it abundantly clear that it had concluded that this was the full extent of its liability. It did so on two separate occasions in September of 2006 and in June, 2007. Nationwide clearly stated that there was a “partial denial of coverage”. Finally, in its letter of June 6, 2007, the Nationwide representative stated that “the check enclosed payable to you and last known mortgage holder on the property is at this time closing the claim”. Therefore, Nationwide made it abundantly clear to the plaintiff that the claim would be closed if the check were not accepted and the plaintiff could not have reasonably believed that Nationwide would pay more money on the claim.

In the case of Thomas v. Allstate Ins. Co., 974 F.2d 706 (6th Cir. 1992), the Sixth Circuit Court of Appeals held that Allstate did not waive the one-year policy provision which was virtually identical to the Nationwide policy provision. In Thomas, the court stated as follows at p. 710:

Thomas does not, however, point to anything that suggests that the defendant ever indicated any “recognition of liability” or ever induced, fraudulently or otherwise, Thomas to refrain from filing suit. The process of investigation in determining liability by an insurer does not constitute a waiver by that insurer. Broadview Savings & Loan Co. v. Buckeye Union Ins. Co., 70 Ohio St.2d 47 (1982).

In Vogias v. Ohio Farmers Ins. Co., 177 Ohio App.3d 391, 2008-Ohio-3605, the same Eleventh District Court of Appeals held that there was no waiver of the one-year policy provision by the defendant Ohio Farmers Insurance Company. In that case, the court of appeals stated as follows, at p. 399:

There is no time limitation in her homeowner’s policy for an investigation and payment of a claim, but there is an express

clause limiting a time within which suit can be brought. By investigating her claim, Ohio Farmers' action can in no way be construed as waiving the time limitation for a legal action.

In Giles v. Nationwide Mut. Ins. Co., 199 Ga.App. 483, 405 S.E.2d 113 (Ga. App. 1991), the Georgia Court of Appeals also addressed the waiver issue, holding as follows at p. 485:

If the insurer makes direct promises to pay or if settlement negotiations have led the insured to believe that the claims will be paid without litigation, the time requirement is waived. However, mere negotiation for settlement, unsuccessfully accomplished, is not that type of conduct designed to lull the claimant into a false sense of security so as to constitute an estoppel by conduct thus precluding an assertion of a contractual time limitation defense by the insurer. . . .

Here, the only settlement offer on record was in an amount substantially less than the sum sought by the appellants, and they unequivocally rejected that offer and threatened legal action if the entire amount claimed was not paid. . . . The undisputed evidence thus demonstrates that the parties unsuccessfully concluded settlement negotiations before the one-year period expired. (Citations omitted). The record is lacking in evidence of any affirmative promise, statement or other act of (the insurance company) or any evidence of actual or constructive fraud to lead (plaintiff) into believing that (the insurance company) intended to enlarge on the contractual limitation period.

The facts in this case are virtually identical to those in Giles. Nationwide made an offer on two occasions which was substantially less than what the plaintiff wanted, and the plaintiff clearly and unequivocally rejected those offers and in fact refused to cash the checks that had been sent by Nationwide. Under these circumstances, there is absolutely no evidence that any conduct on the part of Nationwide led the insured to believe that Nationwide would agree to pay any additional amounts.

Finally, the court of appeals held that Nationwide waived the one-year limitation of action policy provision when it sent a letter dated August 16, 2007, to the plaintiff, indicating Nationwide's "willingness to investigate the claim further". This conclusion by the court of appeals was clearly erroneous. This letter was sent after the one-year limitation of action period had already expired. As stated above, this Court held in Hounshell, *supra*, that a waiver occurs when an insurance company acts in such a way so as to "occasion the delay by the insured in filing an action on the insurance contract until after the period of limitation is expired". The Court also stated, at p. 431 of the opinion, that "the evidence reasonably shows that such expressed recognition of liability and offers of settlement have led the insured to delay in bringing an action on the insurance contract."

In Sheet Metal & Roofing Contractors Assn. v. Liskany, 369 F.Supp. 662 (S.D. Ohio 1974), District Judge Rubin stated in his opinion, at p. 668, the following:

Acts or conduct giving rise to waiver or estoppel must have occurred within the time limitation contained in the indemnity policy, rather than after such limitations have run. Such a waiver or estoppel situation will not be related back where the time limitation has lapsed. Metz v. Buckeye Union Ins. Co., 104 Ohio App. 93 (9th Dist. 1957).

In the case of Metz v. Buckeye Union Fire Ins. Co., 104 Ohio App. 93 (9th Dist. 1957), the court held as follows in the syllabus:

A claim of waiver and estoppel may not be asserted against an insurance company for a loss sustained by reason of injury covered by the terms of the contract of insurance, when the acts or conduct set out as a predicate for such claim of waiver and estoppel arose after the time limitation for bringing action on the policy had expired.

The court in Metz explained its ruling as follows:

We do not have herein the holding out of hope for an amicable adjustment, made prior to the expiration of the insured's rights under the policy, but a claim of waiver made after all right to sue had passed, and long after notice of loss should have been given. The rights of the insured were fixed at the time the insurance contract was executed, and the insured had a right to indemnity for his loss at the time fixed in that contract. . . . When the agent of the insurance company investigated the claim, it was a gratuitous act on his part, and could not change the rights between the parties which had become fixed at that time.

Accordingly, the act of the Nationwide representative in sending a letter on August 16, 2007, to the insured, after the one-year period had expired, was a gratuitous act, and could not resurrect any rights which had been lost when the one year had expired.

Finally, in Forbes Family Partnership v. Farm Family Mut. Ins. Co., 769 A.2d 366 (N.H. 2001), the New Hampshire Supreme Court stated as follows at p. 370 of the opinion:

The request for additional information could not possibly have induced the plaintiff not to file a timely action because it was made after the one year period had elapsed.

Accordingly, any action taken by Nationwide after the one-year period had elapsed could not possibly have induced or led the plaintiff to not file his lawsuit within the applicable time period. This Court must look at the actions of defendant Nationwide and the plaintiff within the one-year period between July 28, 2006, and July 28, 2007. There is no evidence whatsoever to establish that Nationwide either admitted liability beyond the sum of \$6,741.96 or, more importantly, induced or misled the plaintiff into not filing his lawsuit within the applicable time period as set forth in the policy.

CONCLUSION

In conclusion, it is respectfully submitted that the trial court properly granted summary judgment in favor of defendant-appellant Nationwide, and the court of appeals improperly reversed this judgment. Even construing all of the facts most strongly in favor of the plaintiff-appellee, there are no genuine issues of material fact and the defendant-appellant Nationwide is entitled to judgment as a matter of law. More specifically, the following facts are undisputed:

- (1) the date of loss was July 28, 2006;
- (2) Nationwide tendered a check in the sum of \$6,741.96 to the plaintiff-insured on or about September 6, 2006, after its investigation;
- (3) Nationwide also sent a letter to the plaintiff on September 6, 2006, entitled "PARTIAL DENIAL OF COVERAGE" and advising the plaintiff that suit must be brought within one year from the date of loss;
- (4) plaintiff-insured never cashed the original check that was sent by Nationwide;
- (5) Nationwide reissued the check in the same amount of \$6,741.96 and sent it again to the plaintiff by letter of June 6, 2007, which check was again rejected and returned to Nationwide by the plaintiff marked "void";
- (6) the one-year limitation on filing suit expired on July 28, 2007;
- (7) Nationwide sent a final letter on August 16, 2007, offering to "investigate the claim further, in an effort to handle to a proper conclusion"; plaintiff never responded to this letter; and
- (8) plaintiff filed suit on July 25, 2008.

Based upon the above undisputed facts, reasonable minds can come to but one conclusion, which is adverse to the plaintiff-appellee. This Court should grant final judgment in favor of the defendant-appellant, Nationwide, as a matter of law, holding as follows:

1. The provision contained in the Nationwide policy entitled “**Suit Against Us**” and providing that “no action can be brought against us unless there has been full compliance with the policy provisions. Any action must be started within one year after the date of loss or damage”, is unambiguous, reasonable and enforceable in accordance with the plain meaning of the terms of the policy; and
2. Based upon the undisputed facts, Nationwide did not waive the limitation of action provision in the policy.

For all of the foregoing reasons, it is respectfully submitted that the decision of the court of appeals should be reversed; the decision of the trial court granting summary judgment in favor of Nationwide should be reinstated; and final judgment should be entered in favor of the defendant-appellant, Nationwide Insurance Company.

Respectfully submitted,



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Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that a copy of this Brief was were sent by ordinary U.S. mail this 21st day of January, 2011, to counsel of record for appellee as follows:

David A. McGee, Esq.
Svete & McGee Co., LPA
100 Parker Court
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Ralph F. Dublikar
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APPENDIX

Notice of Appeal to the Supreme Court of Ohio
date stamped August 13, 21, 2005 App-1

Judgment Entry of the Eleventh District Court of Appeals, Lake County,
date stamped June 30, 2010 App-3

Opinion of the Eleventh District Court of Appeals, Lake County,
date stamped June 30, 2010 App-4

Jares v. Jefferson Ins. Co. of New York, 1985 Ohio App. LEXIS 7493 ... App-21

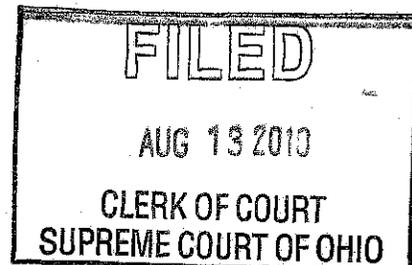
IN THE SUPREME COURT OF OHIO

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

NOTICE OF APPEAL OF APPELLANT
NATIONWIDE INSURANCE COMPANY

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DENNIS DOMINISH



**Notice of Appeal of Appellant
Nationwide Insurance Company**

Appellant Nationwide Insurance Company hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lake County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2009-L-116 on June 30, 2010.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



Ralph F. Dublikar, Counsel of Record
BAKER, DUBLIKAR, BECK,
WILEY & MATHEWS

COUNSEL FOR APPELLANT
NATIONWIDE INSURANCE COMPANY

CERTIFICATE OF SERVICE

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



Ralph F. Dublikar

COUNSEL FOR APPELLANT
NATIONWIDE INSURANCE COMPANY

STATE OF OHIO
COUNTY OF LAKE

)
)SS.
)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

DENNIS J. DOMINISH,

Plaintiff-Appellant,

- VS -

NATIONWIDE INSURANCE COMPANY,
Defendant-Appellee.

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

JUDGMENT ENTRY

CASE NO. 2009-L-116

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


JUDGE TIMOTHY P. CANNON

MARY JANE TRAPP, P.J., concurs,

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

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

DENNIS J. DOMINISH, :

OPINION

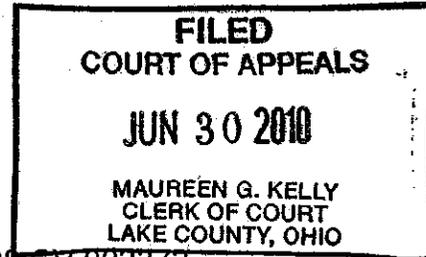
Plaintiff-Appellant, :

CASE NO. 2009-L-116

- vs - :

NATIONWIDE INSURANCE COMPANY, :

Defendant-Appellee. :



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

Judgment: Reversed and remanded.

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

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

TIMOTHY P. CANNON, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MARY JANE TRAPP, P.J., concurs,

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

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

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

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

{¶55} At issue is the following provision:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Ralph Jares, et al., Plaintiffs-Appellants -vs- Jefferson Insurance
Company of New York, et al., Defendants-Appellees**

No. 48926

**Court of Appeals, Eighth Appellate District of Ohio, Cuyahoga County,
Ohio**

1985 Ohio App. LEXIS 7493

March 28, 1985

PRIOR HISTORY: [*1] Civil appeal from Common Pleas Court, Case No. 055,200.

DISPOSITION: JUDGMENT: Affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas 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*. Exceptions.

N.B. This entry is made pursuant to the third sentence of *Rule 22(D), Ohio Rules of Appellate Procedure*. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

LexisNexis(R) Headnotes

Governments > Legislation > Statutes of Limitations > Time Limitations

Insurance Law > Claims & Contracts > Arbitration

Insurance Law > Claims & Contracts > Claims Made Policies > General Overview

[HN1] The parties to an insurance contract may lawfully limit the time within which suit (or arbitration) may be brought, so long as the period of limitation is not unreasonable. A limitation period of one year is not inherently unreasonable. An insured is presumed to know the contents of his insurance contract, and is bound by its terms, whether he has read it or not. However, language in an insurance policy will be strictly construed against the insurer, and liberally construed in favor of the insured. Therefore, any contractual limitation of action clause must be clear, unambiguous, and easily understood by a reasonably intelligent non-lawyer. When a limitation clause fails to meet those criteria, it will not be enforced by the courts of Ohio.

Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings

Insurance Law > Claims & Contracts > Policy Interpretation > Plain Language

[HN2] Words in an insurance policy are to be given their plain and ordinary meanings.

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

[HN3] In the context of a legal document, such as an insurance contract, the word "action" refers to a proceeding in a court of law, particularly when the word "action" appears under the heading "Suit Against Us."

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Harold H. Reader, Esq., 900 Bond Court Building, Cleveland, Ohio 44114, for Defendants-Appellees.

JUDGES: PRYATEL, J., and ANN McMANAMON, J., CONCUR.

OPINION BY: JACKSON

OPINION

JOURNAL ENTRY and OPINION

JACKSON, P.J.

Appellants owned real estate [*2] on East 53rd Street in the City of Cleveland. The property was insured by appellee Jefferson Insurance Co. On February 16, 1981, according to appellants' complaint, the houses on appellants' property were destroyed by fire.

Appellants brought suit against the insurer and its agent on February 15, 1983, by filing a complaint in the Court of Common Pleas.

Appellees were subsequently granted summary judgment on the basis of appellants' failure to timely file their lawsuit within the one-year contractual limitations period. Before this Court, appellants argue that summary judgment should not have been entered against them, "because the meaning of the 'suit against us' provision of the insurance contract was ambiguous and reasonable minds could differ as to its meaning."

The controversy revolves around Condition 11 of the insurance contract, which provides:

"11. Suit Against Us. ¹ No action shall be brought unless there has been compliance with the policy provisions and the action is started within one year after the loss."

1 The "Definitions" section of the insurance contract states, "'We', 'us' and 'our' refer to the Company providing this insurance."

[HN1] The [*3] parties to an insurance contract may lawfully limit the time within which suit (or arbitration) may be brought, so long as the period of limitation is not unreasonable. *Appel v. Cooper Ins. Co.* (1907), 76 *Ohio St.* 52. A limitation period of one year is not inherently unreasonable. *Colvin v. Globe American Cas. Co.* (1982), 69 *Ohio St.* 2d 293; *Hounshell v. American States Ins. Co.* (1981), 67 *Ohio St.* 2d 427. An insured is presumed to know the contents of his insurance contract, and is bound by its terms, whether he has read it or not. *Ohio Farmers' Ins. Co. v. Titus* (1910), 82 *Ohio St.* 161; *Union Central Life Ins. Co. v. Hook* (1900), 62 *Ohio St.* 249; *Florsheim v. Travelers Indemnity Co. of Illinois* (1979), 393 *N.E.* 2d 1223 (Ill. App.).

However, it is well established that language in an insurance policy will be strictly construed against the insurer, and liberally construed in favor of the insured. Therefore, any contractual limitation of action clause must be clear, unambiguous, and easily understood by a reasonably intelligent non-lawyer. See *Ady v. West American Ins. Co.* (1982), 69 *Ohio St.* 2d 593; *Globe American Cas. Co. v. Goodman* (1974), 41 *Ohio* [*4] *App.* 2d 231. When a limitation clause fails to meet those criteria, it will not be enforced by the courts of this state. See *Grange Mutual Cas. Co. v. Fodor* (Dec. 20, 1984), *Cuyahoga App.* No. 48262, unreported.

In the case at bar, appellants argue that the limitation clause in their insurance contract is unenforceable because the word "action," as used in Condition 11, is ambiguous and misleading. Appellants point out that

the word "action" does not always denote a legal proceeding.²

2 See Appendix A, for definition of action by Webster's New Collegiate Dictionary (1976).

Appellants suggest that when they placed a telephone call to their insurance agent to notify him of the fire damage, they took "action" within the meaning of Condition 11. We disagree.

The appellants correctly assert, that [HN2] words in an insurance policy are to be given their plain and ordinary meanings. [HN3] In the context of a legal document, such as an insurance contract, the word "action" refers to a proceeding in a court of law, particularly when the word "action" appears under the heading "Suit Against Us."³

3 See Appendix B (definition of "suit" by the Oxford American Dictionary (1980).

[*5] Accordingly, we find that there is no genuine issue as to any material fact, and that the appellees were entitled to judgment as a matter of law. *Civ. R. 56*. Even construing the contract language most strongly in favor of the appellants, we can discern no significant ambiguity.

The judgment of the trial court is therefore affirmed.

APPENDIX A

action 'ak-shun *n* 1 : a proceeding in a court of justice by which one demands or enforces one's right 2 : the bringing about of an alteration by force or through a natural agency 3 : the manner or method of performing: *a* : the deportment of an actor or speaker or his expression by means of attitude, voice, and gesture *b* : the style of movement of the feet and legs (as of a horse) *c* : a function of the body or one of its parts 4 : an act of will 5 *a* : a thing accomplished usu. over a period of time, in stages, or with the possibility of repetition <<an, the product and expression of exerted force -- Thomas Carlyle> *b pl* : BEHAVIOR, CONDUCT <<somber <ITALICS>s> *c* : INITIATIVE, ENTERPRISE <<a man of> 6 *a* (1) : an engagement between troops or ships (2) : combat in war <<gallantry in > *b* (1) : [*6] an event or series of events forming a literary composition (2) : the unfolding of the events of a drama or work of fiction : PLOT (3) : the movement of incidents in a plot *c* : the combination of circumstances that constitute the subject matter of a painting or sculpture 7 *a* : an operating mechanism *b* : the manner in which a mechanism operates 8 *a* : the price movement and trading volume of a commodity, security, or market *b* : the process of betting including the offering and acceptance of a bet and determination of a winner 9 : the most vigorous, productive, or exciting activity in a particular field, area, or group <<they itch to go where the is -- D. J. Henahan>

syn 1 ACTION, ACT, DEED *shared meaning element* : something done or effected

2 see BATTLE

APPENDIX B

Appellants would presumably find it noteworthy that the Oxford American Dictionary (1980), defines "suit" as follows:

suit (soot) *n*. 1. a set of clothing to be worn together, especially a jacket and trousers or skirt. 2. clothing for use in a particular activity, *a business suit*. 3. a set of armor. 4. any of the four sets (spades, hearts, diamonds, clubs) [*7] into which a pack of cards is divided. 5. a lawsuit. 6. (*formal*) a request or appeal; *press one's suit*, to request persistently. *suit* *v*. 1. to satisfy, to meet the demands or needs of. 2. to be convenient or right for. 3. to give a pleasing appearance or effect upon, *red doesn't suit her*. 4. to adapt, to make suitable, *suit your style to your audience*; *suit action to the word*, do at once the action just promised.

(Emphasis added.)