

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2010-1091

THOMAS BARBEE, et al.,	)	On Appeal from the Lorain County
	)	Court of Appeals, Ohio Ninth
Plaintiffs-Appellees,	)	Appellate District
	)	
vs.	)	Court of Appeals Case Nos.
	)	09-CA-9594 & 09-CA-9596
NATIONWIDE INS. COMPANY, et al.,	)	
	)	
Defendant-Appellant.	)	

**BRIEF OF AMICUS CURIAE OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF THE BARBEE APPELLEES**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTERESTS OF *AMICUS CURIAE* OHIO ASSOCIATION FOR JUSTICE ..... 1

STATEMENT OF FACTS ..... 3

ARGUMENT ..... 4

Alternative Proposition of Law: The 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. *Kraly v. Vannewkirk* (1994), 69 Ohio St. 3d 627, syllabus 2.

I. UNDER *KRALY v. VANNEWKIRK*, A CONTRACTUAL LIMITATIONS PERIOD CAN ONLY RUN FROM THE ACCRUAL OF THE CLAIM.

II. THE ACCRUAL APPROACH IS SOUND IN UNDERINSURED CASES AND AVOIDS THE NEED TO FILE SUIT ON CLAIMS THAT ARE NOT RIPE.

CONCLUSION ..... 12

SERVICE ..... 13

## TABLE OF AUTHORITIES

### **Cases:**

<i>Angel v. Reed</i> (2008), 119 Ohio St. 3d 73 .....	<i>passim</i>
<i>Clark v. Scarpelli</i> (2001), 91 Ohio St.3d 271 .....	8
<i>Haney v. Motorist Mut. Ins. Co.</i> (Tuscarawas Ct. App., 2003), 2003 Ohio 3412 .....	9
<i>Kraly v. Vannewkirk</i> (1994), 69 Ohio St. 3d 627 .....	<i>passim</i>
<i>Kuhner v. Erie Ins. Co.</i> (Franklin Ct. App. 1994), 98 Ohio App. 3d 692 .....	9
<i>Kurtz v. Wayne Mut. Ins. Co.</i> (Richland Ct. App. 1999), Case No. 99CA24, 1999 Ohio App. Lexis 5844 .....	9-10
<i>Longly v. Thailing</i> (Cuyahoga Ct. App. 2010), 2010 Ohio 5012 .....	11
<i>Miller v. Gunckle</i> (2002), 96 Ohio St. 3d 359 .....	10
<i>Reeser v. City of Dayton</i> (Montgomery Ct. App. 2006), 167 Ohio App. 3d 41 .....	11
<i>State ex rel. Huron Cty. Bd. of Edn. v. Howard</i> (1957), 167 Ohio St. 93 .....	8
<i>Verhovec v. Motorists Ins. Cos.</i> (Tuscarawas Ct. App. 1998), Case No. 97AP120080, 1998 Ohio App. Lexis 2505 .....	1, 9

### **Statutes and Rules:**

R.C. 3937.18(H) .....	6-8, 12
Ohio Civ. R. 24(A) .....	11

## INTERESTS OF *AMICUS CURIAE* OHIO ASSOCIATION FOR JUSTICE

The Ohio Association for Justice is Ohio's largest professional association of attorneys dedicated to representing injured persons. As in this case, OAJ frequently advocates on behalf of consumers in insurance coverage disputes. OAJ also participates in cases pending in this Court to illustrate concerns for the health of the civil justice system in Ohio.

OAJ's primary interest in this case is to call this Court's attention to one disturbing outcome that would result if this Court were to adopt the position advanced by the Appellant.<sup>1</sup> The Appellant's approach would mandate that lawsuits be filed before the claimant has any way of knowing whether he or she even has a claim. Ohio courts have refused in cases like this to conclude that "a party's right to file suit is entirely divorced from their right to recover." See *Verhovec v. Motorists Ins. Cos.* (Tuscarawas Ct. App. 1998), Case No. 97AP120080, 1998 Ohio App. Lexis 2505, and its progeny.

This Court should be mindful of the considerable wasteful effects of a rule of law that requires parties to file lawsuits before they have claims. Both plaintiffs and defendants would be required to retain attorneys, draft and file pleadings, and incur costs and fees. Cases involving deceased persons would carry the additional costs of probate court actions and representation. Oftentimes the only reason an estate is opened or maintained is pending litigation. It is also wasteful for Ohio courts of Common Pleas to be required to clutter their dockets and schedules with cases that cannot be determined. No one should draft a contract that foists these burdens upon the system, and

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<sup>1</sup> Although merit briefs are filed for Appellant Nationwide and by Allstate as an Appellant, Allstate never invoked this Court's jurisdiction by filing a notice of appeal. See S. Ct. R. Prac. II, Sec. 2(A)(1)(b). Nationwide's Notice and jurisdictional memorandum are submitted only in Nationwide's name, and do not indicate that the parties proceeded jointly under S. Ct. R. Prac. 2.4. Allstate did not seek review, and is not a party to this case.

this Court should not require the system to accept them.

Because of these concerns, Ohio law recognizes that *underinsured* motorist claims are distinct from *uninsured* motorist claims in one important way: an underinsured claim does not accrue until someone meets the definition of an underinsured motorist. No underinsured motorist, no UIM claim. Decisions from this Court and from the courts of appeals have already solved the problem that Nationwide would revive.

The *Amicus* writes to stress that the proposition of law urged by Nationwide was settled for good reasons, and reasons that go beyond even the rights of the insurance carrier and policy holder. They go to the concerns of the civil system. It wasteful for a written instrument to require court involvement under circumstances where no one can be sure there is even a controversy. It is at best presumptuous for any party to draft a contract believing that the bargain can require a court case regardless of whether there is anything to litigate, and that the courts will go along with that. This Court should simply follow the decided law of Ohio, and decline its imprimatur on the proposition urged by Nationwide.

## STATEMENT OF FACTS

The facts concerning the multi-vehicle collision in Wisconsin that gave rise to this case are as stated by the Barbee Appellees. It is undisputed that a vehicle driven by Vaughn Larson made contact with the vehicle driven by Danielle Skatrud. Ms. Skatrud's vehicle then crossed into oncoming traffic, where she collided with the Barbees head on. Ms. Skatrud was killed.

Nationwide's statement is materially incomplete. Nationwide omits the fact that no claim for underinsured motorist benefits was cognizable in this case until June 7, 2005. The Appellees' tort claims were litigated in a bench trial in Wisconsin against two defendants. One of them was an employee of the United States, Mr. Larson. Had he been found 51% or more at fault, the United States would have been liable for payment of the entire claim. Wisconsin's comparative fault statute provides, in relevant part, "A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed." Wis. Stat. § 895.045(1). The United States is self insured, and would have paid all damages awarded in this case, had Mr. Larson been held 51% or more at fault. The United States could not have been found to be "underinsured" on these facts, and under Wisconsin law.

The apportionment of fault in this case was made in Wisconsin on June 7, 2005. The apportionment was 30% fault to the United States, and 70% fault to the Estate of Danielle Skatrud. Only then did it become knowable that the Barbees had underinsured motorist claims to be pursued. This is because the allocation of fault could have gone against Mr. Larson. Had that been the case, the United States would have been obligated to answer for all damages, because that is the law of the jurisdiction where the accident happened. These facts are central to the conclusions of the courts below in this case, but Nationwide does not even mention them.

## ARGUMENT

There is no such thing as a claim for underinsured motorist benefits until an underinsured motorist can be identified. UIM policies universally require two things: (1) a tortfeasor against whom the policy holder may recover, and (2) that the tortfeasor's limits be less than the limits purchased by the claimant. That is what a UIM claim is under the Nationwide policy at issue in this case, and under every other UIM policy issued in Ohio. When no one satisfies the definition of an underinsured motorist, there is no claim for UIM benefits.

Nationwide has suggested that this case would have easily been resolved but for the lower courts' refusal to follow *Angel v. Reed* (2008), 119 Ohio St. 3d 73. In *Angel*, this Court held that a contractual limitations period in an *uninsured* motorist case runs from the date of the accident. But there was prior case law saying that a contractual limitations period could only begin to run from accrual of the claim, under at least some circumstances. This Court distinguished those circumstances in *Angel*:

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.

*Id.* at 76.

Nationwide fastidiously avoids the fact that one of the two tortfeasors in this case would have been obligated to pay all the damages, under the law of the jurisdiction where the claim arose. Paraphrasing this Court in *Angel*, in this case there most certainly was a subsequent event that rendered an underinsured tortfeasor. Ohio case law often distinguishes *underinsured* cases from *uninsured* cases on this issue. In Ohio, a contractual limitation period does not run until the claim accrues. This is the rule that avoids the absurd result Nationwide urges in this case, of initiating litigation of a UIM claim that may or may not ever exist.

**I. UNDER *KRALY* v. *VANNEWKIRK*, A CONTRACTUAL LIMITATIONS PERIOD CAN ONLY RUN FROM THE ACCRUAL OF THE CLAIM.**

It has been the syllabus law of this Court since 1994 that a contractual shortening of the statute of limitations is permissible, but it has to run from the time the claim accrues:

2. The 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.

*Kraly v. Vannewkirk* (1994), 69 Ohio St. 3d 627, syllabus.

*Kraly* involved a liability carrier that, at first, appeared able to pay for damages attributed to its insured. That changed when the carrier became financially insolvent. This Court held that, under those facts, the UM contract provision was valid, but had to run from the time that particular UM claim accrued.

Nationwide avoids the word “accrual” while discussing *Kraly*, even though it is central to this Court’s reasoning in *Kraly*, and central to the syllabus. Accrual is the key concept at issue in this case, as in *Kraly*. Where there is no controversy, or none that has ripened, parties ought not to be filing lawsuits. A contract provision that requires litigation before there is any controversy essentially makes the courts a party to the contract. Not only is the policy holder required to take action without a mature claim, but the court is required to participate in that exercise in futility. Ohio law has consistently solved this problem with the concept of accrual.

This Court has never abandoned *Kraly*, only distinguished *Kraly* when faced with different facts. *Kraly* and *Angel* harmonize perfectly well. The holding in *Angel* was essentially that the facts did not present an issue as to when the claim accrued because the tortfeasor in that case was uninsured from the beginning. Obviously this case is different because under the law of the jurisdiction where the claims arose, there was the potential for a complete recovery from one of the

two tortfeasors. There was no way of knowing in this case whether there would be a UIM claim at all by the time Nationwide says the contractual limitation ran. The lower courts correctly distinguished *Angel*, and applied *Kraly*.

Nationwide points to a subsection of the UM/UIM statute, R.C. 3937.18(H), that was not in effect at the time *Kraly* was decided. Nationwide comes to the bold conclusion, “The effect of this is to change [the UM/UIM statute] 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 policyholders.” (Nationwide Brief, p. 7.) How this follows from the addition of the (H) subsection is not clear, but this Court need not rule on this over-reaching conclusion.

The (H) subsection allows insurance carriers to include a contractual limitations period in their policies, and settles a different controversy as to the number of years the contract can shorten the limitations period to:

(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.

R.C. 3937.18(H), as amended by S.B. 97, eff. 10/31/01.

The (H) subsection could not possibly have been meant to alter the *Kraly* rule that a contract limitation period is valid, so long as it begins when the claim accrues. All section (H) says is what language the carrier can *include*. It is *Kraly* that says how that language *applies*. The statute says that carriers may include a limit not shorter than three years. *Kraly* says that “the 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.” *Kraly*, 69 Ohio St. 3d at 635. The statute says limitation language can be included, but *Kraly* says how it is enforced. The alternative is what would have happened in *Kraly*, and this case, that the right to sue would be divorced from the right to recover.

Nationwide will argue that the phrase “date of the accident” in subsection (H) saves Nationwide’s argument. But all this Court’s several prior cases dealing with UM/UIM contractual periods also dealt with policy terms that set a limitation period from the “date of the accident.” *See, e.g., Angel*, 119 Ohio St. 3d 73, at \*P15; *Kraly*, at 628. This Court’s holding in *Angel* is that there is no separate accrual date for UM claims because an uninsured tortfeasor is uninsured on the date of the accident. Nevertheless, this Court still said, in *Angel*, “We next determine when the two-year limitation period began to run.” *Angel* at \*P14. The fact that the phrase “date of the accident” was present in the policy did not eliminate the need to consider whether accrual occurred on some different date. *Kraly* required then, and requires now, an examination of the facts to determine if the claim accrued on the date of the accident or not.

The statute does not change this rule because it does not speak to it. The statute says that certain language is *allowed*, but is silent as to how it will be *applied* when accrual of the claim occurs after the accident. The point of *Kraly* is that there are some circumstances where the time of accrual is not the same as the date of the accident. *Angel* did not present such circumstances, but this case certainly does. Subsection (H) cannot have un-done *Kraly* without addressing the matter of accrual.

Moreover, the (H) subsection shows explicit approval of *Kraly*, rather than an intention to

supercede *Kraly*. First, the statute grafts on an “insolvency” rule that is an express incorporation of the *Kraly* holding. Second, Section 3 of S.B. 97 is the uncodified portion of the amendment to the statute. Section 3 identified the holdings of five cases that S.B. 97 was meant to supercede, but *Kraly* is not one of them. There is no question that the General Assembly knew about *Kraly*. “It is presumed that the General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment.” *State ex rel. Huron Cty. Bd. of Edn. v. Howard* (1957), 167 Ohio St. 93, 96; *see also Clark v. Scarpelli* (2001), 91 Ohio St.3d 271, 278.

Here, there is no need to presume, because the General Assembly wrote the specific factual problem of *Kraly* into subsection (H). Far from superceding *Kraly*, it is clear that the General Assembly knew of *Kraly* and approved when the General Assembly enacted subsection (H). The General Assembly knows how to write statutory amendments to supercede this Court’s decisions, but did quite the opposite when drafting subsection (H).

The statute now says that a three year limitation from the “date of the accident” may be included in the contract. Nothing in the statute changes *Kraly*’s rule or rationale. Sometimes a claim does not accrue at the time of the accident. Under those unusual circumstances, the contractual limitation remains valid, but applies the same way after subsection (H) as before. It runs from the date of accrual, not necessarily the accident. *Angel* was not one of those cases, but this case is.

## **II. THE ACCRUAL APPROACH IS SOUND IN UNDERINSURED CASES AND AVOIDS THE NEED TO FILE SUIT ON CLAIMS THAT ARE NOT RIPE.**

Ohio case law has long acknowledged that an *underinsured* claim does not accrue immediately like an *uninsured* claim does. After quoting the syllabus of *Kraly*, the Tenth District Court of Appeals stated:

Under the policy provision, an insured's rights to payment by Erie for underinsured motorist coverage does not accrue until the tortfeasor's policy limits are exhausted. Under the rule of the second paragraph of the syllabus of *Kraly*, supra, the two-year

limitation created by the policy cannot commence prior to that time.

*Kuhner v. Erie Ins. Co.* (Franklin Ct. App. 1994), 98 Ohio App. 3d 692, 698.

The Fifth District has made this explanation:

"This is based upon the fact that underinsured coverage is only available when the damages suffered exceed those monies available under the tortfeasor's liability carrier." 1995 Ohio App. Lexis 5988 at 5. It is only then that a cause of action for underinsured motorist benefits accrues. [cite omitted.] **To require insureds to sue their underinsurance carriers before they know that they are in an underinsured situation, "taken to its logical conclusion ... would mean a party's right to file suit is entirely divorced from their right to recover."** *Verhovec v. Motorist Ins. Cas.* [Emphasis added.]

*Haney v. Motorist Mut. Ins. Co.* (Tuscarawas Ct. App., 2003), 2003 Ohio 3412, P41, *reversed on other grounds, In re Uninsured & Underinsured Motorist Coverage Cases* (2003), 100 Ohio St. 3d 302.

The language emphasized above from the *Haney* decision was first articulated in a party brief in the *Verhovec* case:

Herein, appellants argue none of the appellees' policies clearly or unambiguously require exhaustion of the tortfeasor's liability limits as a condition precedent to the insured's ability to file a claim for underinsured benefits. The basis of appellants' argument is that the respective exhaustion clauses only create a condition precedent to the insurer's obligation to pay underinsurance benefits, not a condition precedent to the insured's initiating of litigation for the underinsured benefits. We find this argument unpersuasive. We agree with National Mutual that **"taken to its logical conclusion, this would means [sic] a party's right to file suit is entirely divorced from their right to recover. . . Moreover, it is axiomatic that a right of action presupposes a remedy exists."** (National Mutual Brief at 18). To conclude otherwise could result in a waste of judicial time and also in inconsistent judgments as to liability and/or amount of damages.

*Verhovec v. Motorists Ins. Cos.* (Tuscarawas Ct. App. 1998), Case No. 97AP120080, 1998 Ohio App. Lexis 2505; *see also Kurtz v. Wayne Mut. Ins. Co.* (Richland Ct. App. 1999), Case No. 99CA24, 1999 Ohio App. Lexis 5844, 10-11 ("To require insureds to sue their underinsurance carriers before they know that they are in an underinsured situation 'taken to its logical conclusion

... would mean a party's right to file suit is entirely divorced from their right to recover',” quoting *Verhovec*.)

It is axiomatic that a right of action presupposes a remedy exists. That is why courts do not give advisory opinions, or hear from litigants without standing, or rule on controversies that are not ripe. It is also why there is no UIM claim until there is an underinsured motorist.

Nationwide, though, demands that suit be filed before anyone meets the most basic definition in its policy, that of an underinsured motorist. To divorce the requirement of filing suit from the right to recover is not just nonsensical, it is also wasteful. Nationwide might be willing to assume unto itself the necessity of hiring counsel and preparing pleadings on a claim that is not ripe. It is unreasonable and perhaps unconscionable to burden the policy holder also with the obligation to file a suit when there is no chance of winning or losing until some future determination.

But the third actor who would be bound by Nationwide’s three-year, *per se* rule is the judiciary. Nationwide is simply not entitled to burden the courts with an obligation to receive, keep filings on, schedule pre-trials on, and then hold in limbo cases that cannot be adjudicated. Courts do not long keep any other controversy that is non-justiciable. A contract provision that requires judicial involvement in a matter that *cannot* be determined should not be countenanced.

Justice Lundberg-Stratton has stated that no *underinsured* claim exists on the date of the accident:

It is illogical to award interest beginning on the date of the accident when no UIM claim then existed.

\*\*\* (There can be no money owed on the date of the accident until it is known that the tortfeasor's policy is exhausted.)

*Miller v. Gunckle* (2002), 96 Ohio St. 3d 359, 368 (holding that an arbitration panel could award pre-judgment interest on a UIM claim), J. Lundberg-Stratton, dissenting.

The thread that runs through Justice Lundberg-Stratton's dissent in *Miller*, and through *Haney*, *Kurtz*, *Kuhner*, and *Verhovec* is that *underinsured* claims sometimes present a ripeness issue that is not common with *uninsured* claims. That is the reason why the Court of Appeals in this case appropriately distinguished *Angel*. One of the cases cited by the Appellant highlights this point, that uninsured cases like *Angel* do not present the accrual issue often presented by *underinsured* claims:

Thus, *Angel* concerns the situation where the tortfeasor has always been uninsured, but the plaintiff does not discover this until the time to sue under the policy has elapsed. The *Angel* Court held that the discovery rule does not apply to uninsured coverage and that the date of the limitations period starts on the date of the accident and not when the plaintiff discovers the tortfeasor is uninsured. [cites omitted.]

[\*P19] This is the precise situation we have before us. The City was immune on the day of the accident; it did not become immune by virtue of our decision.

*Longly v. Thailing* (Cuyahoga Ct. App. 2010), 2010 Ohio 5012, \*P18-19. See also *Reeser v. City of Dayton* (Montgomery Ct. App. 2006), 167 Ohio App. 3d 41, 46 (UIM case law on accrual was not applicable to a UM claim based on tortfeasor's immunity).

By contrast, in this case, the Estate of Danielle Skatrud did not become obligated to pay until she was found more than 50% at fault. From time to time, Ohio Courts have had to distinguish *underinsured* cases from *uninsured* cases. This case presents one of those occasions. The appropriate rule in this case is stated by *Kraly*, not by *Angel*.

In its conclusion, Nationwide states a concern for insurers who may not be able to intervene on the basis that there is no justiciable controversy. That concern is misplaced. Intervention is a matter of right when a party claims an interest in another matter, and is not represented by the parties who *do* have the controversy. Ohio Civ. R. 24(A). Any underinsured carrier who wishes not to have damages determined by the parties to the underlying litigation is free to intervene by Rule. That is exactly what the Rule is for, the protection of interests of outsiders to the live controversy. Rule 24 provides the mechanism to avoid the horrors Nationwide imagines.

## CONCLUSION

Nationwide fears “a whole new issue to be litigated of when the cause of action accrued so that the contractual time limitation began to run.” (Brief at 19.) Actually, the Nationwide policy is like all UIM policies, and makes that issue quite simple. The UIM claim accrues when there is an underinsured motorist. That happens when someone is obligated to pay, who has lower limits than the insured. And in this case, that happened when at least 51% of the liability fell on the Estate of Danielle Skatrud, rather than on the United States.

Nationwide insists on the filing of lawsuits for underinsured motorist benefits before there is an underinsured motorist. No contract should demand judicial involvement before there is a justiciable controversy. Nationwide’s lament for the inability to file a declaratory judgment action where there is not yet any controversy is puzzling. Isn’t that exactly how litigation *should* work?

Far from superceding the rule and reasoning of *Kraly*, R.C. 3937.18(H) embraces *Kraly*. Subsection (H) is an enabling provision. It allows language to be included. It does not negate existing law on the effect of that language, under circumstances like these.

For these reasons, in addition to those stated by the Appellees, the Ohio Association for Justice asks this Court to AFFIRM the decision of the Ninth Appellate District herein.

Respectfully submitted,



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