

ORIGINAL

IN THE SUPREME COURT OF OHIO

DENNIS J. DOMINISH

Plaintiff-Appellant,

v.

**NATIONWIDE INSURANCE
COMPANY, et al.**

Defendant-Appellee.

) **On Appeal from the Lake County Court**
) **of Appeals Eleventh Appellate District**

) **Court of Appeals**
) **Case No. 2009-L-116**
) **Supreme Court of Ohio**
) **Case No. 2010-1431**

**MERIT BRIEF OF APPELLEE
DENNIS J. DOMINISH**

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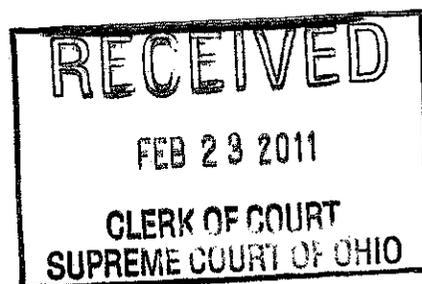
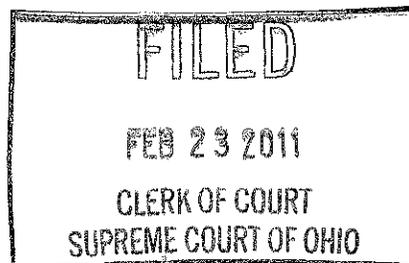


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Ninth New Collegiate Dictionary, copyright 1986.

STATEMENT OF FACTS
AND STATEMENT OF CASE

The facts and issues now before this Court are remarkably narrow and straight forward. A tree fell on Mr. Dominish's roof on July 28, 2006. Nationwide twice tendered, and Mr. Dominish twice refused, \$6,741.96 to settle the claim. The parties argued about the value of the claim, each estimating the same allowed loss differently. Nationwide promised to get an expert out to review the loss and estimate, and never did so. As the one year anniversary of the loss approached, and Nationwide failed to have the promised expert review the loss, Mr. Dominish hired an Engineer to do so and forwarded his report to Nationwide. Nationwide confirmed receipt of the report and promised Mr. Dominish that they would re-evaluate the claim and indicated their good faith intent to settle the claim. Shortly after the one year anniversary of the claim, Nationwide confirmed these ongoing representations to Mr. Dominish in writing:

[Your Engineer] has been contacted by myself, and I have asked him to set or try to set an appointment for reinspection of the premises...The cause of loss needs better defined, as do the damages caused by the covered cause of loss. Another estimate applying proper unit cost to recover damages, may then need to be written. [This letter and enclosed non-waiver form] ... indicate Nationwide's wish and willingness to investigate the claim further, in an effort to handle to a proper conclusion.

Nationwide's letter of August 16, 2007, see Exhibit "B" to Plaintiff's Brief in Opposition to Motion for Summary Judgement, Deposition Exhibit "Q", *emphasis added* (Td. 24).

Instead, Nationwide did nothing and, as the second anniversary of the loss

approached, Mr. Dominish, now realized that Nationwide had refused to undertake these promised acts, that they were now deadlocked and sought, for the first time, the assistance of counsel, see Mr. Dominish's Affidavit in support of his Brief in Opposition to the Motion for Summary Judgment (Td. 24). Declaratory Judgment Action was filed on July 25, 2008 relating to a storm loss occurring July 28, 2006 (Td. 2).

Nationwide filed for Summary Judgment, asserting its one (1) year contractual limitation of actions:

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 added)

Nowhere in the Policy are the words "action" or "started" defined nor does it address events, as here, where the "damage" is ongoing. Mr. Dominish opposed the Motion for Summary Judgment asserting, essentially, that the policy language in question was "ambiguous" and, even if unambiguous, Nationwide had "waived" the provision under *Hounshell v. American States Ins. Co.* (1981) 67 Ohio St.2d 427,432-433.

The Trial Court granted Nationwide's Motion for Summary Judgment and Mr. Dominish appealed asserting, as his sole assignment of error:

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 JUDGEMENT

The Court of Appeals reversed the grant of Summary Judgment, holding:

{¶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.

Dominish v. Nationwide, Case No. 2009-L-116, Opinion filed June 30, 2010

As to the first issue of the ambiguity of the Policy's one (1) year limitation, the Court of Appeals found:

- {¶31} ... 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.*, ... (C.A.6, 1992), 974 F.2d 706 ... 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 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. ... 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.

Dominish v. Nationwide, Case No. 2009-L-116, Opinion filed

June 30, 2010

Now, some six (6) years later, this underlying, simply and modest property damage claim has never been subjected to judicial review and remains unresolved. Mr. Dominish was never able to repair, nor permitted to return to, his home and, never will. He died on December 17, 2010.

ARGUMENT

Nationwide's Proposed 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 ON 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.

Neither Nationwide's First Proposition of Law, nor its Brief, take issue with the Court of Appeals *de novo* review of the Summary Judgment issue of the ambiguity of the policy's one (1) year limitation of action provision raised before the Trial Court although not assigned as error in the Court of Appeals. As to the ambiguity issue itself, therefore, it is worth noting that every one of the three (3) cases cited to this Court by Nationwide contain identical policy language to each other but distinctly different, however, to the policy language now before this Court:

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 the loss or damage.

Jares v. Jefferson Ins. Co. Of New York, 1985 Ohio App. LEXIS 7493; Giles v. Nationwide Mutual Fire Ins. Co., 199 Ga. App. 483,405 S.E.2d 113 (Ga. App. 1991); Vogias v. Ohio Farmers Ins. Co., 177 Ohio App.3d 391, 2008-Ohio-3605

In the case at bar, however, the language is without the benefit of a conjunction which would have otherwise more clearly joined the now separate sentence at issue to the header of "Suit" and the separate sentence following the header referencing "action ... brought against us".

Unlike the policy language of *Jares*, *Giles*, and *Vogias*, *ibid.*, the language setting forth a one year limitation stands alone and is specifically not joined to the language “action ... brought against us”. Instead, the header and the first sentence speak of action “against us” and makes it clear that “Suit” can not “be brought against us unless there has been full compliance with the policy provisions”.

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.

Nationwide Insurance Company Policy

The separate sentence of the policy at bar at issue, however, references neither “Suit” nor “brought against us” which are the clear and common theme of the first two sentences. Instead, a new and, structurally, different, sentence adds that a “action must be started” within a year. The policy offers no explanation why it shifted from the words “Suit” and “brought against us” when compliance with the policy terms is set forth as a prerequisite, to “action” and “started” when one year is now a prerequisite. Further, the policy makes no attempt to define “action” or “started”.

There are many terms reasonably associated with the specific act of filing a law suit: “filing”, “commence”, “bring/brought” but “start” certainly is not one of them, even among the parlance of the bar. Rather, one would be more likely to be said to “open” or “start” a claim, not a lawsuit.

The benchmark, however, is not the bar but the insured layman. 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.*, 106 Ohio St.3d

403, 2005-Ohio-5410, *Colvin v. Globe Am. Cas. Ins. Co.* (1982), 69 Ohio St.2d 293, 296.

While an “action” certainly encompasses the filing of a lawsuit, it is equally defined as “the manner or method of performing ... an act of will ... a thing done ...”, *Webster’s Ninth New Collegiate Dictionary*, copyright 1986.

In this regard, the “action” of filing a proof of loss, pursuing, and disputing the claim with and against Nationwide “within one year after the date of loss”, as is the case at bar, could reasonably be interpreted to apply to the act of filing, and pursuing, a claim against ones own insurance company. In this regard, Nationwide chose the policy language and could have easily defined “action” or “started”, simply used the conjunction “and” (as in the cases referenced by Nationwide) or, in choosing to write a separate sentence, used the words “Suit” and/or “brought against us” to more clearly tie this separate thought and sentence to the header and first sentence. The language at bar is reasonably subject to two meanings and must, therefore, be construed in favor of the insured and against the scribner.

Language of a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer.

Buckeye Union Ins. Co. v. Price (1974), 70 Ohio St.2d 95 (syllabus)

Nationwide’s Proposed 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 issue of ambiguity of the policy is, however, entirely moot. The Court of Appeals specifically held that even if the policy limitation of action were enforceable, Nationwide's very actions had waived this provision of the policy:

{¶150} 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.

Dominish v. Nationwide, Case No. 2009-L-116,
Opinion filed June 30, 2010

The real issue of this case, as set forth in Mr. Dominish's assignment of error below and sustained by the Court of Appeals, is:

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 JUDGEMENT

Nationwide's Second Proposition of Law now before this Court is nothing more than an ongoing effort to distract the Court from this essential issue of whether the record demonstrates that a genuine issue of fact exists as to whether Nationwide's actions waived the policy limitation of action.

Convention compels the undersigned to state the rule of law governing Summary Judgement which this Court is already well aware and which states that all evidence must be viewed most strongly in favor of Mr. Dominish.:

Civ.R. 56 (C) specifically provides that before summary judgment may be granted, it must be determined that: (1) no 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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

Nationwide continues, however, to ignore the Rule 56 evidence before the Court wherein Mr. Dominish specifically asserts that, as the one year anniversary of the claim, and the contractual limitation of action, approached, he “was led to believe that a settlement was likely” and, only as the second anniversary of the claim approached did it even “appear necessary to consult with an attorney”:

4. Nationwide sent me two settlement check offers of 9/06/06 and 6/06/07, I refused these settlement offers, and Nationwide and I continued to exchange information, estimates, reports in what I was led to believe were ongoing negotiations that would ultimately resolve the claim by agreement.
 5. This ongoing exchange and negotiations, wherein I was led to believe that a settlement of my claim was likely, continued throughout the first year after the occurrence of the storm damage to my home and continued throughout most of the second year after the storm damage
 6. Only as the second anniversary of the claim approached did Nationwide and I appear to be deadlocked in our previous efforts toward an agreed resolution, and only then did it appear necessary to consult with an attorney.
- ***
8. Nationwide’s letter of August 16, 2007 is typical of Nationwide’s ongoing admission of liability and/or coverage of the claim and the continued claimed need, however, to further inspect and receive more precise

estimates before they could settle the claim which they represented they fully intended to do.

Mr. Dominish's Affidavit in support of his Brief in Opposition to the Motion for Summary (Td. 24)

More specifically, Nationwide's own letter of August 16, 2007, after receiving Mr. Dominish's Engineer's Report (because Nationwide failed to have an expert review the claim as promised), and shortly after the now claimed one year limitation of action passed on July 28, 2007, states:

[Your Engineer] has been contacted by myself, and I have asked him to set or try to set an appointment for reinspection of the premises... The cause of loss needs better defined, as do the damages caused by the covered cause of loss. Another estimate applying proper unit cost to recover damages, may then need to be written. [This letter and enclosed non-waiver form] ... indicate Nationwide's wish and willingness to investigate the claim further, in an effort to handle to a proper conclusion.

Nationwide's letter of August 16, 2007, see Exhibit "B" to Plaintiff's Brief in Opposition to Motion for Summary judgement, Deposition Exhibit "Q", *emphasis added* (Td. 24).

This Court has held that where the actions of an insurance company evidence an admission of liability upon which the insured relied, "the company is deemed to have waived the limitation":

... where there has been activity by the insurance company which evidences an admission of liability upon the policy, and resulting reliance by the insured thereupon and failure to file within the time limitation of the contract, the company is deemed to have waived the limitation.

...

We recognize and endorse the principle that a waiver comes into existence upon an offer that is an express or implied admission of liability.

Hounshell v. American States Ins. Co. (1981) 67 Ohio St.2d 427,432-433.

It is hard to imagine how Nationwide could have more clearly “admi[tted] ... liability upon the policy” than to have twice proffered settlement checks to Mr. Dominish. In rebuttal, Nationwide asserts that its prior, and *pro forma*, reservation of rights letter of September 6, 2006 includes a partial denial of coverage and, therefore, exempts Nationwide from waiver of its limitation of action under *Hounshell*.

Although Nationwide certainly may have denied coverage for some other portion of the loss (mold and other such excluded items of damage) that does not alter the uncontested fact that Nationwide specifically, and both verbally and in writing, represented that the extent of their liability or damages under the covered portion of the claim... **“needs better defined, as do the damages caused by the covered cause of loss. ... [and] Nationwide’s wish and willingness to investigate the claim further, in an effort to handle to a proper conclusion.”** Nationwide’s letter of August 16, 2007 (Td. 24). In fact, this same letter of August 16, 2007 requests “an appointment for reinspection of the premises” with Mr. Dominish’s engineer and “another engineering firm” (never retained) on behalf of Nationwide.

Incredibly, against these uncontested facts, Nationwide continues to claim that the holding of *Hounshell* exempts them from waiver:

“The [*Hounshell*] Court [held] that if the defendant insurance 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 it was refusing to recognize any further liability, it could

have relied upon the limitation of action clause within the policy.” Id. at 433

(p. 5 of Nationwide’s Appellate Brief and, now somewhat reworded, at pp. 14-15 of Nationwide’s Brief before this Court).

Indeed, *Hounshell* holds:

If this company, in making its offers to the insured, had made it clear that it had concluded this was the fullextent 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.

Hounshell, supra pp.432-433 (emphasis as added in Nationwide’s Brief at p. 14).

The facts in this case, indeed Nationwide’s own words, establish that Nationwide had [not] “concluded this was the full extent of its liability and it was [not] “refusing to recognize any further liability”, *Hounshell, ibid.* By contrast, *Hounshell* addresses the issue actually before this Court:

If defendant [Insurance Co.] had intended to rely on the limitation provision, it should have paid plaintiff [Insured] what it considered to be the reasonable value of plaintiff’s loss and denied liability for anything in excess of that.

Hounshell v American States Ins. Co. (1981), 67 Ohio St.2d. 427, at 432.

Accordingly, Nationwide has no right to *rely*, nor even assert, its “limitation provision” where it never asserted that it would not pay “anything in excess of” their offer of settlement upon the “covered ... loss” but, rather, promised, both verbally and in writing, to “reinspect...the premises”, to “better define”, and obtain “another estimate” and, thereupon, its “wish and willingness to investigate the claim further, in an effort to

handle to a proper conclusion”, Nationwide’s letter of August 16, 2007 (Td. 24).

When the actual facts of this case, as set forth in Mr. Dominish’s unrebutted Affidavit and Nationwide’s own written words, are examined rather than ignored, the holding of *Hounshell* and every one of its progeny as cited in Nationwide’s brief, establish that Nationwide waived its claimed limitation of action.

Distinctly opposite to the facts in this case, the *Thomas* Court points out that:

[The insured] does not, however, point to anything that suggests that the [insurance company] ever indicated any “recognition of liability” ...

Thomas v. Allstate Ins. Co., 974 F.2d 706 (6th Cir. 1992)

Also distinctively opposite to the facts in this case, the Giles Court points out:

The undisputed evidence thus demonstrates that the parties unsuccessfully concluded settlement negotiations ...

Giles v Nationwide Mut. Ins. Co., 199 Ga.App 483, 405 S.E.2d 113 (Ga. App. 1991)

Both of these cases refute Nationwide’s attempt to reverse the 11th District Court of Appeals holding in this case where Nationwide “indicated [twice, its] “recognition of liability” and “the undisputed evidence [demonstrates that] settlement negotiations” were ongoing.

CONCLUSION

Nationwide simply continues to ignore the *unrefuted facts of this case* which demonstrate that Nationwide had twice acknowledged its liability (offers of settlement) and repeatedly acted so as to communicate that negotiations of the settlement amount

were ongoing beyond the one year limitation of action:

[Your Engineer] has been contacted by myself, and I have asked him to set or try to set an appointment for reinspection of the premises. ... The cause of loss needs better defined, as do the damages caused by the covered cause of loss. Another estimate applying proper unit cost to recover damages, may then need to be written. [This letter and enclosed non-waiver form] ... indicate Nationwide's wish and willingness to investigate the claim further, in an effort to handle to a proper conclusion.

Nationwide's letter of August 16, 2007, see Exhibit "B" to Plaintiff's Brief in Opposition to Motion for Summary Judgement, Deposition Exhibit "Q", *emphasis added* (Td. 24).

When the *unrefuted facts of this case* are applied to *Hounshell* and its prodigy, it is clear that:

... where there has been activity by the insurance company which evidences an admission of liability upon the policy, and resulting reliance by the insured thereupon and failure to file within the time limitation of the contract, the company is deemed to have waived the limitation.

...

We recognize and endorse the principle that a waiver comes into existence upon an offer that is an express or implied admission of liability.

Hounshell v. American States Ins. Co. (1981) 67 Ohio St.2d 427,432-433.

For all of the reasons set forth here and above Appellant, Dennis J. Dominish petitions this Honorable Court to sustain the Court of Appeals reversal of the Trial Courts grant of Appellee, Nationwide Insurance Company's, Motion for Summary Judgement by Journal Entry of August 24, 2009 (Td. 28).

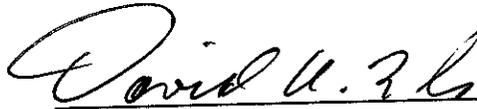
Respectfully submitted,



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PROOF OF SERVICE

The original of the foregoing was sent by regular U.S. mail, postage prepaid, to Attorney for Appellee, Ralph F. Dublikar, 400 South Main Street, North Canton, OH 44720 on this 22nd day of February, 2011.



David A. McGee, Esq. (#0001267)



Nationwide®
On Your Side™

P.O. Box 2996 * ASHTABULA, OH 44005 **

August 16, 2007

Dennis J Dominish
Po Box 13
Perry, OH 44081-0013

By regular and certified mail

OUR INSURED: Dennis J Dominish
OUR CLAIM NUMBER: 92 34 HP 198393 07282006 01
DATE OF LOSS: 07-28-2006

Dear Mr. Dominish:

The letter written you on June 6, 2007, by myself, sent to you, has been sent back and received by this office. Enclosed was a copy of the report from the engineer you hired, Mr. Eric A. Satler, another copy of a 'lump sum' type estimate, the voided check that had been sent to you the second time, and the handwritten memo at the bottom of my original letter.

Mr. Satler has been contacted by myself, and I have asked him to set or try to set an appointment for reinspection of the premises, which to date has not been done. Previous dates have been offered to you, which you indicated you were not available, and then you were asked to pick some date and time (with a two week lead time) that we could all meet for a reinspection. I am again asking you to contact my office with at least a two week lead time, to set an appointment so we can reinspect the premises. Mr. Satler, yourself and others you choose, can and should be present, as well as another engineering firm, myself, perhaps other Nationwide staff, and perhaps another roofing person. My business card is enclosed, you can call collect if need be, if I am in the office I will accept the charges, if not you may leave a message, or you may write the confirmation and send it via mail.

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

The enclosed Non-Wavier 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 Nationwide's wish and willingness to investigate the claim further, in an effort to handle to a proper conclusion.

If you have questions you may call, if I am not available you may always leave a message. You may call the office to set an appointment, or write to the address on my enclosed business card.

Nationwide Mutual Fire Insurance Company
Michael L. Rahe, CPCU
Claims Department
(440)964-7871

**DEFENDANT'S
EXHIBIT**

Q

Ohio law requires the following: Any person who, with intent to defraud or knowing that he/she is facilitating a fraud against an insurer, submits an application or files a claim containing a false or deceptive statement is guilty of insurance fraud.

EXHIBIT B

App 1

STATE OF OHIO
COUNTY OF LAKE

)
)SS.
)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

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

DENNIS J. DOMINISH,

Plaintiff-Appellant,

- vs -

MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

JUDGMENT ENTRY

CASE NO. 2009-L-116

NATIONWIDE INSURANCE COMPANY,

Defendant-Appellee.

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. GRENDELL, 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 -

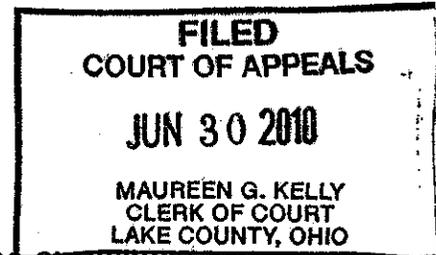
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NATIONWIDE INSURANCE COMPANY,

:

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.