

IN THE SUPREME COURT OF OHIO

THOMAS BARBEE, ET AL.)	Case No. 2010-1091
)	
Appellees)	On Appeal from the Lorain
)	County Court of Appeals,
vs.)	Ninth Appellate District
)	
ALLSTATE INSURANCE COMPANY,)	Court of Appeals
ET AL.)	Case No. CA024046
)	
Appellant)	

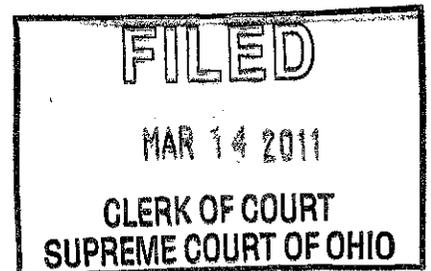
**REPLY BRIEF OF
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The issue in this matter is whether the policy provision which requires uninsured/underinsured actions to be brought against the insurer within three years from the date of the accident is rendered ambiguous and unenforceable by a provision requiring the insured to fully comply with the terms of the policy before filing suit.

The policy language at issue is found at the Nationwide Policy at Page G3:

SUIT AGAINST US

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

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

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

The language of the policy is clear and unambiguous, in order to institute suit for an uninsured/underinsured motorist claim, the insured is required to:

1. Fully comply with the terms and conditions of the policy;
including but not limited to,
2. Protecting Nationwide's subrogation rights; and,
3. File suit within three (3) years from the date of the accident.

The choice of the three (3) year contractual limitation was not arbitrary or capricious but instead was taken from the language chosen by the general assembly in enacting the controlling version of R. C. 3937.18(H) which reads in pertinent part:

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,.... (Emphasis added.)

It is this statutory language that Nationwide's brief, at p. 7, references when stating:

The version of R.C. 3937.18 that was enacted in October 2001 is radically different from the version that existed prior to that date. Insurance companies were no longer required to offer uninsured/underinsured motorist protection. The effect of this it to change R.C. 3937.18 from a remedial statute to a non-remedial statute. The effect of making R.C. 3937.18 a non-remedial statute is that ambiguities no longer have to be resolved in favor of extending coverage to insurance policyholders.

Unfortunately, at pp. 12 and 13 of their brief, the Barbees misstate Nationwide's position as applying this rule of statutory construction as a rule of policy interpretation. Therefore, to clear the misconception, it is Nationwide's position that *as a rule of statutory construction*, the effect of changing R.C. 3937.18 from a remedial to a non-remedial statute is that the statute does not require alleged ambiguities to be resolved in extensions of coverage as this Court may have felt required to do under the prior remedial versions of the statute. *Stanton v. Nationwide Mut. Ins. Co.*, 68 Ohio St. 3d 111, 113, 1993 Ohio 75.

Because the prior version of R.C. 3937.18 was remedial in nature, any ambiguity in the statute was to be construed in such a way as to effectuate the remedy. *Moore v. State Auto. Mut. Ins. Co.* (1999), 88 Ohio St.3d 27, 2000 Ohio 264, 723 N.E.2d 97. Thus ambiguities in the statute, and in insurance policies drafted pursuant to R.C. 3937.18, were

construed to effectuate coverage. *Id.*

However, on October 21, 2001, the Ohio General Assembly enacted amendments to R.C. 3937.18, which were contained in Am.Sub.S.B. No. 97, 149 Ohio Laws, Part I, 779. Senate Bill 97.

According to the uncodified Section 3 of Senate Bill 97, its express purpose was to eliminate the duty on insurers to offer uninsured/underinsured-motorist coverage, to eliminate such coverage being implied in law in any insurance contract, and to provide statutory authority for the inclusion of exclusionary or limiting provisions in policies offering such coverage. Thus, the thrust of Senate Bill 97 was to attempt to limit the power of the judiciary to construe insurance contracts in such a way as to extend coverage that was not expressly agreed to by the parties.

Pursuant to that policy, the General Assembly enacted the R.C. 3937.18(H), as set forth hereinbefore, which specifically allows insurers to require insureds to file BOTH uninsured and underinsured motorist claims within three years from the date of the accident.

Pursuant to R.C. 3937.18(H), Nationwide is permitted to draft the very limitation drafted in this contract. Even if the language contained in the Nationwide policy was ambiguous, which it is not, the statute still allows the provision and this Court should enforce the provision because the policy behind the enactment of R.C. 3937.18 is to resolve such ambiguities in favor of not finding implied uninsured/underinsured-motorist coverage.

The General Assembly expressly tied the three (3) years in which to bring suit to the date of the accident. The Barbees state at p. 11 of their brief: "The General Assembly

plainly envisioned that insureds should be afforded three years in which to bring ripened UM/UIM claim. R.C. 3937.18(H)” However, this is not the plain language of the statute. The plain language of the statute states that UM/UIM claims are to be brought within three years of the accident. The Barbees further state at p. 11, “there appears to be no serious dispute that a minimum of three years to bring suit has been mandated by R.C. 3937.18(H).” However, it is the position of Nationwide that there IS a serious dispute because it is Nationwide’s position that R.C. 3937.18(H) mandates a *maximum* of three years to bring suit not a minimum of three years. As stated herein before, because this statute is not a remedial statute, the statute need not be construed or applied in a manner that furthers a remedial objective.

Because the language of the Nationwide insurance policy does not conflict with R.C. 3937.18 (H), the next question becomes whether the policy itself is ambiguous. If it is not, then it is the function of this Court in interpreting the contract to give effect to the language of the contract.

This Court wrote the following in *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004 Ohio 24, P 9, 801 N.E.2d 452:

[P27]** "The construction of a written contract is a matter of law that we review de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 1995 Ohio 214, 652 N.E.2d 684. Our primary role is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St. 3d 270, 273, 1999 Ohio 162, 714 N.E.2d 898. We presume that the intent of the parties to a contract is within the language used in the written instrument. **[*43]** *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus. If we are able to determine the intent of the parties from the

plain language of the agreement, then there is no need to interpret the contract. [***732] *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St. 3d 51, 544 N.E.2d 920."

Both the language of the statute and the language of the policy expressly say suit must be brought within three years from the date of the accident. There is no ambiguity in this language. You cannot read this provision in any other way without torturing the English language. And as the Barbees state at p. 6 of their brief: "No one has ever disputed that motorist insurers are authorized in Ohio to 'unambiguously' require UM/UIM claims to be filed within three years of the date of the accident. R.C. 3937.18(H)."

It seems to be the position of the Barbees that, but for some alleged ambiguity between the "compliance clause" and the "exhaustion clause," the three year time period in which to bring a cause of action would be enforceable. It seems to be the position of the Barbees that if the Nationwide policy only imposed the condition precedents upon them that they bring suit within three years and not prejudice Nationwide's subrogation rights, but not include a statement that Nationwide will not pay the claim until the limits of all other liability insurance and bonds that apply have been exhausted by payments, the three year time period would be enforceable.

It is the position of the Barbees that the "compliance clause" prohibits the filing of the civil action until all the policy terms have been satisfied and that one of the policy terms the Barbees had to satisfy prior to filing suit was exhaustion of the underlying policy limits. However, nothing in the policy required the Barbees from exhausting the underlying policy limits prior to filing suit. The exhaustion clause only places a limit and condition upon the timing of any payment by Nationwide. It does not require any action on the part of the

Barbees. It is not a term or condition of the policy which must be met before a lawsuit can be filed. As in *Regula v. Paradise*, 2008 Ohio 714, the policy at issue simply states that the insured must exhaust the tortfeasor's liability limits before Nationwide *will* pay. It does not state that the insured must exhaust the tortfeasor's limits before the insured can file a lawsuit.

Counsel for the Barbees argue that the unique facts of this case mean that the general principles relied upon by the Courts in *Regula v. Paradise*, 2008 Ohio 7141, *Sarmiento v. Grange Mut. Cas. Co.*, 2005 Ohio 5410, and *Whanger v. Grange Mut. Cas. Co.*, 2007 Ohio 3187, are not applicable to the instant matter. The Barbees argue that they could not have known they had an underinsured motorist claim upon which to file suit within 3 years because of the issues surrounding apportionment of liability. However, this type of question is not unique to the facts of this case and is present in many lawsuits for underinsured motorist coverage. It is not unusual for there to be an issue regarding liability among tortfeasors with varying degrees of coverage so that whether a claim for underinsured motorist coverage is dependent upon the determination of both liability and damages in the litigation between the plaintiff and the tortfeasors. Similarly, it is not unusual for there to be an issue regarding damages between a plaintiff and a tortfeasor so it is unknown whether there is a claim for underinsured motorist coverage until such time as there has been a determination of the amount of damages due the Plaintiff. This is the exact reason it makes more sense to require the Plaintiff to file suit against Nationwide within the three year time period, preferably at the same time suit is filed against the tortfeasor. Because the amount due to the Plaintiff under the policy of insurance is intertwined with

both the amount of damages ultimately determined to be owed to the Plaintiff and the amount of liability insurance coverage available to meet those damages from the tortfeasor, it makes more sense logically, and is in the best interests of judicial economy, to require that all issues be sorted out in one lawsuit.

Counsel for the Barbees spends considerable time upon a discussion premised upon an assumption that this Court's decision to not accept the certified question meant this Court did not believe a conflict existed between the Ninth District's decision in this matter and the Tenth District Court of Appeals decision in *D'Ambrosio v. Hensinger, et al.*, 2010 Ohio 1767. Without presuming to know why this Court chose to structure the matter before it as it has, Nationwide would say that it is equally probable that this Court rejected the certified question rather than concluding that this Court did not see there to be a conflict between the districts.

This Court's recent decision in *Kincaid v. Erie Ins. Co.*, 2010-Ohio-6036 is not in conflict with Nationwide's position in this matter. In *Kincaid*, the Court stated: "A court may not issue an advisory opinion on whether an insured is entitled to insurance coverage and an advisory opinion is what is being sought in this case, since no loss has been identified and no claim has been made for payment" Nationwide agrees, a court may not issue an advisory opinion on whether an insured is entitled to insurance coverage. And that is not what Nationwide is advocating in this matter. In the structure advocated by Nationwide, there is an actual controversy between the parties. Pursuant to the policy language, the insured is to bring suit against Nationwide within three years from the date of the accident. The complaint brings into controversy the issue of whether the Plaintiff is an

underinsured motorist; and, if so, the amount of compensation to which the insured is entitled. This is a real controversy. It is not an advisory opinion. As a result of the complaint, Nationwide is required to participate in the determination of these issues. The very basic question of whether the Barbees were injured by an underinsured motorist, and thus, whether they were entitled to compensation under the underinsured motorist coverage in their policy issued by Nationwide, was an actual controversy that should have been included in the initial litigation filed in Wisconsin. There would have been nothing hypothetical about including this issue for determination in the underlying litigation. The answer may have come out, "No, the Barbees were not injured by an underinsured motorist." but the fact that the question may have been answered in the negative does not negate the validity of the controversy.

It is interesting to note that counsel for the Barbees, at p. 20, throws in a totally unrelated case to suggest that Nationwide "has shown a willingness to pursue attorney fees against its insureds in the past. See, e.g., *Nationwide Mut. Ins. Co. v. Fallon-Murphy* (June 17, 1993) 10th Dist. No. 93 AP-222, 1993 W.L. 212845 (sanctions unsuccessfully sought against insured seeking underinsured motorist coverage)." However, a review of the case reveals that it has nothing to do with the fact that the insureds brought a complaint for underinsured motorist coverage and everything to do with Nationwide's contention that Defendants sought to take the deposition of Nationwide's chief executive officer for no purpose other than to harass Nationwide. This is not even remotely related to any issue or argument in the case before this Court.

The approach espoused by Nationwide is not unique. A number of other

jurisdictions have adopted the view that the limitations period for bringing a claim against the insurer for uninsured/underinsured benefits begins to run on the date of the accident.

See, e.g., *State Farm Mut. Auto. Ins. Co. vs. Kilbreath*, 419 So.2d 632, 634 (Fla. 1982) (cause of action of UM or UIM claim arises on the date of the accident with the uninsured/underinsured motorist); *Flatt v. Country Mut. Ins. Co.*, 298 Ill. App.3d 1097, 682 N.E.2d 1228, 1233, 225 Ill. Dec. 151 (Ill. App. Ct. 1997) (same); *Shelton v. Country Mut. Ins. Co.*, 161 Ill. App. 3d 652, 515 N.E.2d 235, 238, 113 Ill. Dec. 426 (Ill. App. Ct. 1987) (holding that under policy language stating that insurer would only pay after all other policy limits had been exhausted by judgment or payment and that suit for UIM benefits against the insurer will be barred unless commenced within two years of date of accident, exhaustion clause does not govern when insured could sue insurer, but rather only qualifies when insurer will pay claim, and limitations period therefore began to run on date of accident, not date that insured settled with tortfeasor); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 594 N.W.2d 243, 245 (Minn. Ct. App. 1999) (absent language in policy stating “there is no coverage until the limits of all bodily injury liability bonds and policies . . . have been used up by payment of judgment or settlement,” limitations period begins to run on date of accident); *Weeks v. American Family Mut. Ins. Co.* 580 N.W.2d 24, 27 (Minn. 1998) (“Because liability rather than the existence of coverage is the underlying substantive issue, the cause of action for either UIM or UM benefits accrues once the accident occurs...”); *Green v. Selective Ins. Co.*, 144 N.J. 344, 676 A.2d 1074, 1079 (N.J. 1996) (same); *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525, 526 (S.C. Ct. App. 1997).

The reasoning behind this theory is that the insured's claim for uninsured/

underinsured benefits derives from the tort claim against the underinsured tortfeasor and that the insurer essentially stands in the shoes of the tortfeasor. See, *Shelton v. Country Mut. Ins. Co.*, 161 Ill. App. 3d 652, 515 N.E.2d 235, 240, 113 Ill. Dec. 426 (Ill. App. Ct. 1987); accord *State Farm Mut. Auto. Ins. Co. v. Kilbreath*, 419 So.2d 632, 634 (Fla. 1982) (cause of action for UM/UIM claim arises on date of accident because right of action stems from insured's right of action against tortfeasor). As a result, it would be inequitable to require an insurer to be exposed to liability for a longer period than that applicable to the tortfeasor and thus, the limitations period begins to run on the date of the accident. *Shelton*, 515 N.E.2d at 240

The position advanced by the Barbees, as well as the *Amicus Curiae* Ohio Association for Justice based upon *Kraly v. Vannewkirk*, (1994), 69 Ohio St. 3d 627, has already been rejected by this Court in *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St. 3d 281. In *Ross*, the question that was certified for decision was: "When does a cause of action for underinsured motorist coverage accrue so as to determine the law applicable to such a claim?" In *Ross*, the Appellee argued that an insured's right to underinsured motorist benefits accrues when certain contractual preconditions to such coverage are met. According to the Appellee in *Ross*, the contractual preconditions of the Appellant's automobile insurance policies required Appellant to exhaust all applicable liability coverage before Appellant could access their underinsured motorist coverage. Thus, Appellee contended that Appellants' claims for underinsured motorist coverage did not accrue until they had settled with the tortfeasor, thereby exhausting the tortfeasor's available liability coverage. In support of its argument Appellee relied on *Kraly v.*

Vannewkirk (1994), 69 Ohio St. 3d 627. It is interesting to note that the same firm that has filed an amicus in support of this position in this matter, Elk and Elk, filed a brief opposing this position as an amicus in *Ross*. The amicus brief in *Ross*, urging reversal of the appellate court's decision, was authored by the firm of Elk and Elk. The authors of the amicus brief were successful and the *Ross* Court rejected the *Kraly* analysis as the method for determining when the cause of action accrued for purposes of underinsured motorist claims. As stated by the *Ross* Court, "In any event, *Kraly* should not be read to stand for the proposition that claimants' rights to underinsured motorist *coverage* are contingent upon satisfaction of contractual preconditions to such coverage. An automobile liability insurance policy will typically require exhaustion of the proceeds of a tortfeasor's policy before the right to *payment* of underinsured motorist benefits will occur." The *Ross* Court then went on to state: "An underinsured claim must be paid when the individual covered by an uninsured/underinsured policy suffers damages that exceed those monies available to be paid by the tortfeasor's liability carriers." Based upon the certified question: "When does a cause of action for underinsured motorist coverage accrue so as to determine the law applicable to such a claim?", this statement by the *Ross* Court can only mean that the cause of action accrues when the damages are suffered; i.e. on the date of the accident.

CONCLUSION

Wherefore, as this Court has already rejected the premise put forth by the Barbees, the Amicus Curie and the Ninth District Court of Appeals, that the cause of action accrues when the exhaustion occurs, Appellant Nationwide requests this Court to reverse the decision of the Ninth District Court of Appeals and enter judgment in favor of Appellant

Nationwide and against the Appellees Barbees and hold as a matter of law that the language contained in the Nationwide policy of insurance requiring suit to be brought under the uninsured/underinsured motorist coverage within three (3) years from the date of the accident is valid and enforceable.

Respectfully submitted,

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