

**IN THE SUPREME COURT OF OHIO**

DENNIS J. DOMINISH

Appellee,

vs.

NATIONWIDE INSURANCE  
COMPANY

Appellant.

CASE NO: 2010-1431

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

Court of Appeals  
Case No. 2009-L-116

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**REPLY BRIEF OF APPELLANT  
NATIONWIDE INSURANCE COMPANY**

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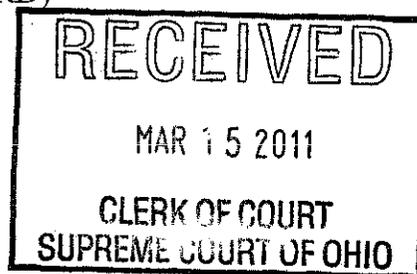
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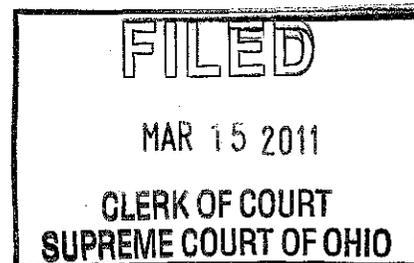
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## I. STATEMENT OF FACTS

The following represents a detailed timeline as to the undisputed facts in this case which are in support of appellant Nationwide's appeal.

1. **July 28, 2006**                      **Date of loss**
2. **September 6, 2006**              **Letter from Nationwide to plaintiff-appellee  
Dennis J. Dominish**

In its letter of September 6, 2006, which is attached as Exhibit A-1 to defendant's reply brief in support of motion for summary judgment and which is also attached to Nationwide's brief in the court of appeals, the Nationwide claim representative states as follows:

Enclosed is a copy of the estimate written for the covered interior damages to your (sic) house at 3028 River Road, Perry, Ohio 44081. You will receive or have received, a partial denial letter, indicating the roof damage is **NOT** part of the covered loss, nor is any damage to personal property, nor is there any covered cause of loss for any mold-related issues. All of these issues are discussed in the partial denial letter. You will also be receiving a check payable to you and Bank One . . . for the actual cash value of the enclosed estimate, which is \$6,741.96. . . .

3. **September 6, 2006**              **Partial denial of coverage letter**

Under separate cover, Nationwide sent a second letter to the plaintiff-appellee titled "**PARTIAL DENIAL OF COVERAGE**". The letter stated, in part, as follows:

The purpose of this letter is to advise you that the Nationwide Mutual Fire Insurance Company has decided, based upon the investigation into the circumstances surrounding a claim made by you, 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 or any resultant mold

formed as a result of your loss. There is coverage available for the resultant interior damage to your home. I will contact you to make final arrangements and payment regarding the interior damage.

In that same letter, the Nationwide representative also called to the attention of the plaintiff-appellee the provision of the policy requiring that any suit be filed against Nationwide within one year. In the letter, the Nationwide representative stated as follows:

Finally, 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, per the following condition:

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

The reasons set forth for the partial denial of coverage are not exhaustive and do not preclude Nationwide from asserting any other valid reason for denying coverage.

**4. April 5, 2007 Letter from Nationwide to plaintiff-appellee Dominish**

On April 5, 2007, Nationwide's representative sent another letter to the plaintiff-appellee enclosing a reservation of rights letter and a non-waiver agreement. In that letter, Nationwide references its attempts to set an appointment with the plaintiff in order to meet an engineer. Nationwide gave the plaintiff-appellee three dates, all of which were refused. Plaintiff-Appellee did not advise Nationwide of any alternative dates.

**5. June 6, 2007 Letter from Nationwide to plaintiff-appellee Dominish**

On June 6, 2007, Nationwide sent another letter to the plaintiff-appellee forwarding

another copy of the original estimate of damages, together with another check for the same amount of \$6,741.96. At that point, plaintiff-appellee had not provided Nationwide with any dates for an inspection with an engineer, and had not returned the non-waiver agreement. Nationwide then went on to state in its correspondence as follows:

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

6. **July 28, 2007**                      **One year anniversary of the date of loss and last date for filing suit**
7. **August 7, 2007**                      **Plaintiff-Appellee returns Nationwide's letter of June 6, 2007, with a handwritten note returning the check.**

In his handwritten note, plaintiff-appellee states as follows:

“Please find the completely unrealistic check voided back to you.”

8. **August 16, 2007**                      **Letter from Nationwide to plaintiff-appellee Dominish**

Finally, on August 16, 2007, Nationwide wrote one final letter to plaintiff-appellee, stating in pertinent part as follows:

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 . . . , 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.

Nationwide then again offered to meet with the engineer in order to reinspect the premises. However, plaintiff-appellee at no time responded to this correspondence,

nor did plaintiff-appellee return the non-waiver form which had been once again sent by Nationwide.

**9. July 25, 2008                      Plaintiff files suit**

## II. ARGUMENT

### **A. Proposition of Law No. 1**

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

There is no dispute that plaintiff-appellee Dominish did not file his lawsuit against Nationwide within the one-year period of time required under the clear and unambiguous language of the policy. The trial court granted summary judgment in favor of defendant-appellant Nationwide, holding that the policy provision requiring suit to be filed within one year was clear and unambiguous and barred plaintiff-appellee's action. The court of appeals reversed, holding that the policy provision was ambiguous and therefore could not be enforced. For the reasons which follow, together with all of the reasons and arguments set forth in the merit brief of appellant Nationwide, it is respectfully submitted that the policy language in question is clear and unambiguous, and the plaintiff-appellee's action is time barred.

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

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

Plaintiff-Appellee argues that the above language is ambiguous. In its merit brief, appellant Nationwide cited three separate cases, all of which held that nearly identical policy language was clear and unambiguous. Those cases were Jares v. Jefferson Ins. Co. of New York 1985 Ohio Approximately. LEXIS 7493 (Cuyahoga Cty. March 28, 1995); Giles v. Nationwide Mutual Fire Ins. Co., 199 Ga.App. 483, 405 S.E.2d 113 (Ga. App. 1991); and Vogias v. Ohio Farmers Ins. Co., 177 Ohio App.3d 391, 2008-Ohio-3605 (Eleventh Dist.) A copy of the Jares opinion is attached to appellant's merit brief.

In each of the above-cited cases, the same language was contained in the insurance policy to be interpreted by the Court. That language was as follows:

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

Plaintiff-Appellee attempts to distinguish the above three cases by resorting to a tortured interpretation of what is a clear and straightforward policy provision. Plaintiff-Appellee argues that the Nationwide policy provision in the case at bar is ambiguous and distinguishable from the language in the other three cases because the Nationwide provision contains a period and is separated into two sentences instead of being connected with the word "and". In fact, the relevant portions of the provisions are identical.

First, the policy provisions in each of the cases cited by defendant-appellant Nationwide begin with the title "Suit Against Us". Secondly, all of the policy provisions begin with the language: "no action shall be brought". Finally, all of the provisions contain

the language that “any action must be started within one year”. Plaintiff-Appellee argues that the word “action” is ambiguous and that the word “started” is also ambiguous. However, plaintiff-appellee cites to no case in which a court has held that such language and wording was ambiguous. Likewise, the court of appeals below did not cite to any case holding that the words “action” and “started” were ambiguous in the context of the policy provision.

Finally, the applicable law was clearly and succinctly set forth and summarized by the court in the case of Giles v. Nationwide Mutual Fire Ins. Co., *supra*, where the court stated as follows:

There is no construction of an insurance contract required or even permissible when the language employed by the parties in the contract is plain, unambiguous, and capable of only one reasonable interpretation . . . . We find that in the clause at issue the word “action” must be read together with the clause heading “suit against us”. . . . Thus, when these terms are given their ordinary meaning and viewed from the perspective of a lay person, the clear and unambiguous meaning of the clause is that lawsuits brought against the appellee must be filed within one year of the date of loss or damage. (Emphasis added).

In Jares, *supra*, the Court of Appeals for Cuyahoga County correctly stated as follows:

The appellants correctly assert that words in an insurance policy are to be given their plain and ordinary meanings. In the context of a legal document, such as an insurance contract, the word action refers to a proceeding in a court of law, particularly when the word “action” appears under the heading “suit against us”.

For all of these reasons, it is respectfully submitted that this Court should hold that the language contained in the Nationwide policy was clear and unambiguous which required the plaintiff-appellee to file any lawsuit against Nationwide within one year. Since plaintiff-appellee admittedly did not file suit within one year, this action should be barred, the court

of appeals decision should be reversed, and final judgment should be entered in favor of appellant Nationwide.

**B. 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.

With respect to Proposition of Law No. 2, the issue of waiver, the trial court granted summary judgment in favor of defendant-appellant Nationwide, holding that there was no genuine issue of material fact and that Nationwide, as a matter of law, did not waive the one-year policy provision. The Eleventh District Court of Appeals reversed, holding, as a matter of law, that Nationwide did waive the policy provision. The court of appeals, at page 12 of the opinion, ¶¶ 48 and 49, held as follows:

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.

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.

It is clear from the above language from the court of appeals opinion that the court of appeals did not determine that there was a genuine issue of material fact regarding the waiver, but instead held, as a matter of law, that Nationwide had waived the one-year

limitation of action provision in the policy. It is the position of defendant-appellant Nationwide that this constituted reversible error.

Plaintiff-Appellee first argues that Nationwide admitted liability by twice sending checks to the plaintiff-appellee, which checks were refused, not cashed and returned marked void. This argument of plaintiff-appellee is totally misplaced, based upon the clear language of this Court as set forth in Hounshell v. American States Ins. Co. (1981), 67 Ohio St.2d 427 at pp. 432-433, where this Court stated as follows:

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

This is exactly the situation that is presented in the case at bar. In the letter of September 6, 2006, entitled "PARTIAL DENIAL OF COVERAGE", the Nationwide representative stated as follows:

The purpose of this letter is to advise you that the Nationwide Mutual Fire Insurance Company has decided, based upon the investigation into the circumstances surrounding a claim made by you, 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 or any resultant mold formed as a result of your loss. There is coverage available for the resultant interior damage to your home. I will contact you to make final arrangements and payment regarding the interior damage.

On June 6, 2007, the Nationwide representative sent another letter to the plaintiff-appellee in which the Nationwide representative stated as follows:

Enclosed is a copy of the original estimate written to damages to the house at 3028 River Road, Perry, Ohio, that could have been sustained July 28, 2006. Also enclosed is a check for the actual cash value amount (depreciated amount) of the estimate less the deductible. . . .

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

It could not have been stated any more clearly that Nationwide was paying the amount which it felt was owed under the policy, denying coverage for anything over and above that amount, and “closing the claim”. In response to this correspondence, plaintiff did nothing until he returned the check, marked void, rejecting the claim and enclosing an engineer’s report. This was subsequent to the one-year period having expired on July 28, 2007. Accordingly, Nationwide had made it very clear prior to the one-year deadline that this was the extent of its liability, that it was not paying any additional damages, and that it was closing the claim. Under Hounshell supra, and Broadview Savings & Loan Co. v. Buckeye Union Ins. Co. (1982), 70 Ohio St.2d 47, this clearly did not constitute a waiver on the part of Nationwide.

Plaintiff-Appellee also argues extensively with respect to correspondence which the Nationwide representative sent on August 16, 2007. First, it must be pointed out that this letter was sent nearly three weeks after the one-year limitation had expired. Further, nowhere in this letter does Nationwide acknowledge any further liability for the claim. At best, the

letter indicates Nationwide's good faith willingness to investigate the claim further. It has been held in Broadview Savings & Loan Co., *supra*, by this Court that a willingness to investigate a claim further does not constitute a waiver. This Court went on to state at page 52 of the opinion as follows:

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

Accordingly, even if this Court were to consider the correspondence of August 16, 2007, from Nationwide to the plaintiff-appellee, this correspondence did not make any settlement offers and did not make any assurances with regard to the likelihood of any future settlement offers.

However, the most compelling reason for this Court to disregard the correspondence of August 16, 2007, lies in the fact that this letter could not possibly have occasioned the delay by the insured or reasonably led the insured to believe that the matter would be resolved within the limitation period. As stated in Hounshell, *supra*, and Broadview Savings & Loan, *supra*, there must be some detrimental reliance on the part of the insured during the limitation period. This Court, in Hounshell, *supra*, stated as follows in its syllabus:

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. (Emphasis added).

Further, as stated in Nationwide's merit brief, courts have held that whatever acts or conduct which allegedly give rise to a claim of waiver or estoppel "must have occurred within the time limitation contained in the indemnity policy, rather than after such limitations have run". Sheet Metal & Roofing Contractors Assn. v. Liskany, 369 F.Supp. 662 (S.D. Ohio 1974), Metz v. Buckeye Union Fire Ins. Co., 104 Ohio App. 93 (9th District 1957). As stated in Metz:

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

Accordingly, all of the plaintiff's arguments regarding the letter of August 16, 2007, must necessarily be disregarded by this Court as being "after the fact". When considering the undisputed facts which are of record and which took place between the date of loss, July 28, 2006, and July 28, 2007, it is abundantly clear that Nationwide made a determination that the amount of covered loss was \$6,741.96, and Nationwide denied coverage and denied the claim for anything over and above that amount. On two separate occasions, Nationwide sent the plaintiff-appellee a check in the amount that Nationwide determined was owed. On the first occasion, the plaintiff never cashed the check. On the second occasion, the check was returned "marked void". On June 6, 2007, when Nationwide sent the check a second time, Nationwide clearly stated that the claim was being closed. There is nothing in the record that indicates that the plaintiff made any effort to contact Nationwide or to pursue the claim further until after the limitation period had expired on July 28, 2007. Simply stated, there is no evidence in the record from which it can be held that Nationwide admitted liability

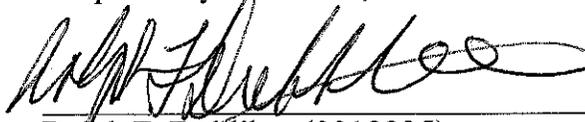
beyond the amount of the check that had been tendered; there is no evidence of any kind by which Nationwide could have been determined to hold out any reasonable hope of adjustment; nor can it be said that any acts on the part of Nationwide “occasioned the delay by the insured”. Simply stated, there is nothing in the record to indicate that Nationwide did anything during the one-year period from the date of loss, July 28, 2006, through July 28, 2007, which would have caused the plaintiff to delay filing his lawsuit until nearly two years after the date of loss.

## CONCLUSION

In summary, it is respectfully submitted that the decision of the court of appeals, holding that the one-year limitation clause in the Nationwide policy was ambiguous and unenforceable, and further holding that Nationwide waived the one-year limitation clause, should be reversed. Further, the decision of the trial court granting summary judgment in favor of defendant-appellant Nationwide on the one-year limitation of action provision of the policy, and further holding that there was no waiver of the one-year policy provision, should be affirmed and reinstated. It is respectfully submitted that this Court should hold as follows:

- (1) that the provision of the Nationwide policy entitled "Suit Against Us" requiring that suit be filed within one year from the date of loss is clear and unambiguous, and enforceable according to its terms;
- (2) that Nationwide did not waive the one-year policy provision; and
- (3) that final judgment be rendered in favor of Nationwide, based upon the summary judgment which was granted by the Lake County Court of Common Pleas.

Respectfully submitted,



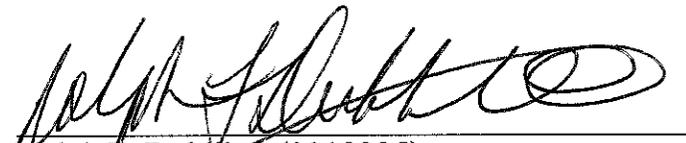
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**CERTIFICATE OF SERVICE**

I certify that a copy of this Brief was were sent by ordinary U.S. mail this 14<sup>th</sup> day of March, 2011, to counsel of record for appellee as follows:

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