

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARIA MARUSA and.  
MELANIE MARUSA

Appellants,

v.

ERIE INSURANCE COMPANY

Appellee.

12-0058

On Appeal from the  
Cuyahoga County Court  
Appeals, Eighth Appellate  
District

Court of Appeals  
Case No. 96556

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANTS MARIA MARUSA AND MELANIE MARUSA

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Decision and Journal Entry of the Cuyahoga County Court of Appeals, Eight Appellant District Case No. No. 96556, 2011-Ohio-6276

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
OR GREAT PUBLIC INTEREST

This case is of public or great interest not only because there exists a conflict between two court of appeals decisions, but also because the case affects many insureds that have purchased uninsured/underinsured motorist coverage in this State. The case addresses the apparent conflict between two provisions in many uninsured/underinsured motorist policies. The first provision is found in the insuring agreement and states that in order to collect under the coverage the insureds must demonstrate that they are “legally entitled” collect from the uninsured/underinsured motorist. The second provision is found in the definition in the policy that an uninsured/underinsured motorist includes one who is entitled to immunity under the Ohio Political Subdivision Tort Liability Law, *i.e.* Ohio Revised Code Chapter 2744.

While at first blush this case appears similar to this Court’s decision in *Snyder v. Am. Family Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574, it is not and it is distinguishable. *Snyder* dealt with the “legally entitled” provision in an automobile policy as it related to the statutory definition of an uninsured/underinsured motorist found in R.C. 3937.18(B)(5). This case, however, deals with the two provisions found within the four-corners of the subject policy.

The Eight District Court of Appeals’ decision in this case, *Marusa, et al. v. Erie Insurance Company*, 8<sup>th</sup> District No. 96556, 2011-Ohio-6271, held that based on this Court’s decision in *Snyder*, the Marusas were not legally entitled to recover because the at-fault driver, Officer Canda, was immune from liability. The court stated that it reluctantly affirmed the trial court judgment granting summary judgment for the

defendant, Erie Insurance Company. *Id.* at ¶ 17. The court further dismissed the Marusas' argument, as without merit, that the two provisions within the same policy, requires a court to apply standard contract analysis. *Id.* at ¶ 14.

The Twelfth District Court of Appeals' decision in *Payton v. Peskins*, 12<sup>th</sup> District, No. CA2010-10-022, 2011-Ohio-3905 in a very similar case reached the opposite conclusion. In *Payton*, the court was dealing with similar provisions contained within an automobile insurance policy. In analyzing this Court decision in *Synder*, the court pointed out that this Court concluded that "our ruling here, of course, does not prevent insurers from responding to consumer demand by offering uninsured-motorist coverage without precluding recovery because of a tortfeasor's immunity." *Payton* at ¶ 10, citing *Synder* at P33. The court in *Payton* in its reasoning applied standard principles for interpreting contracts. The court held that the specific definition of an uninsured/underinsured motorists as one that is entitled to immunity under the Ohio Political Subdivision Tort Liability Law took precedence over the general "legally entitled" provision. *Id.* at ¶ 15.

Moreover, this conflict between these two provisions exists in many uninsured/underinsured motorist policies in this State. The general public is entitled to know whether their insurer is required to provide coverage under the circumstances as stated above, or are permitted to avoid its liability by the application of the circular logic where one provision in the policy grants coverage, while the other provision denies coverage. Finally, as the dissent in *Marusa* succinctly pointed out "[n]o court should condone such chicanery." *Marusa*, *supra* at ¶ 20.

## STATEMENT OF THE CASE AND FACTS

This case arose from a motor vehicle accident that occurred on November 11, 2009. Maria Marusa was driving eastbound on Edgerton Road in North Royalton, Ohio. Melanie, her daughter, was a passenger. She came to a stop at the traffic light located at the intersection of Edgerton Road and State Rt. 94. When the traffic light turned green for her, she proceeded into the intersection and was struck by Officer Canda operating a police car of the City of North Royalton. Officer Canda entered the intersection against a red light. The parties entered into a Limited Stipulation of Facts. Both parties stipulated to the fact, that the Officer Canda was negligent, and that that negligence was the sole proximate cause of the accident and injuries. They also agreed that the Plaintiffs were free from any negligence.

The parties further stipulated that the certified copy of the policy attached to the Limited Stipulation of Facts is the policy issued by Erie to the Marusas. The parties agree that Officer Canda qualifies as an "uninsured motorist" under the terms of the policy because he is immune from suit under the Ohio Political Subdivision Tort Liability Act.

Erie Insurance Company, issued a policy of insurance, policy number Q06 6507891 K on June 15, 2009 for one-year until June 15, 2010. This policy included Uninsured/Underinsured Motorist Coverage in the amount of \$100,000 per person, \$300,000 per accident. The Uninsured/Underinsured Motorist endorsement provides in pertinent part:

**"Uninsured motor vehicle" means a "motor vehicle"**

\* \* \*

- 4.. for which the owner or operator of the **"motor vehicle"** has immunity under the Ohio Political Subdivision Tort Liability Law or a diplomatic immunity.

The policy also provides:

### **OUR PROMISE**

**"We"** will pay damages for bodily injury that **"anyone we protect"** or the legal representative of **"anyone we protect"** are legally entitled *to recover* from the owner or operator of an **"uninsured motor vehicle"** or **"underinsured motor vehicle."**

### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1:** A policy provision defining an uninsured/underinsured motor vehicle as one **"for which the owner or operator of the 'motor vehicle' has immunity under the Ohio Political Subdivision Tort Liability Law [Ohio Revised Code Chapter 2744.]"** is enforceable and waives the defense of statutory immunity when read in conjunction with provision in the insuring agreement that requires an insured to be legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle.

As this Court pointed out in *Snyder*, the General Assembly in enacting the latest version of R.C. 3937.18 effective October 31, 2001, "eliminated the mandatory offering of uninsured and underinsured motorist coverage and the imposition of any such coverage implied as a matter of law." *Snyder*, supra at ¶ 14. (Citations omitted.) The effect was to change R. C. 3937.18 from a remedial statute to a non-remedial statute. By doing so, the emphasis is now on interpreting and honoring the exact language of the contract, without reference to R.C. 3937.18. Therefore, a court reviewing an insurance policy is required to apply the standard rules and principles for interpreting contracts.

A well-established principle for interpreting insurance contracts that has been in existence for well over a century, and stated by this Court when it held that, "[t]he meaning of a contract is to be gathered from a consideration of all its parts, and no provision is to be wholly disregarded as inconsistent with other provisions unless no other reasonable construction is possible" *German Fire Insurance Co. v. Roost* 55 Ohio St. 581; 45 N.E. 1097 (1897), Paragraph One of the Syllabus.

This principle was recently reaffirmed by this Court in *Saunders v. Mortensen*, 101 Ohio St, 3d 86, 2004-Ohio-24, 801 N.E.2d 452, at ¶ 16,

We have long held that a contract is to be read as a whole and the intent of each part gathered from a consideration of the whole. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361, 1997 Ohio 202, 678 N.E.2d 519. If it is reasonable to do so, we must give effect to each provision of the contract. *Expanded Metal Fire-Proofing Co. v. Noel Constr. Co.* (1913), 87 Ohio St. 428, 434, 101 N.E. 348

Additionally, another well-established principle governing contract interpretation is that a specific provision take precedence over a more general provision. *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 558, 24 S. Ct. 538, 540, 48 L. Ed. 788 (1904). The Ohio Supreme Court similarly held, "[a] special provision will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, each is to be retained." *German Fire Ins. v. Roost*, supra., Paragraph two of the Syllabus.

Applying these principles of contract interpretation to the case at bar, it is clear that the policy contract under scrutiny affords uninsured motorist coverage to the Marusas. The specific policy provision provides that the definition of an uninsured

motor vehicle is one "for which the owner or operator of the "motor vehicle" has immunity under the Ohio Political Subdivision Tort Liability Law." In the case at bar, it is stipulated that Officer Canda and the City of North Royalton were entitled to immunity pursuant to Revised Code Chapter 2744. The only remaining question, therefore, to be determined in order to be "legally entitled" to recover pursuant to the general provision, is whether the Officer Canda was negligent? The parties stipulated that he was negligent and that the negligence was proximate to the cause of the accident and injuries. This is the exact line of reasoning the court in *Payton* applied when it held that the insurer in that case "cannot now claim that the general statement made in the preamble to its uninsured motorist section subjugates the more specific statement granting coverage when the driver [of the uninsured motor vehicle] has immunity \* \* \*." *Payton*, supra at ¶ 15.

Unlike the court in *Payton*, the majority of the court in the case at bar, *Marusa*, however, did not apply the standard principles of contract interpretation when it held that the Marusas were not entitled to uninsured motorist coverage because Officer Canda was immune from liability. The majority of the court essentially permitted Erie Insurance Company to sell a policy that is illusory. Erie defined an uninsured/underinsured motorist as one who has immunity under the Ohio Political Subdivision Tort Liability Act, Revised Code Chapter 2744. Erie then excluded coverage because the insured was not "legally entitled" to recover from the uninsured/underinsured motorist because of the same statutory immunity. The use of

this circular logic prompted the dissent in the case at bar to state, “[n]o court should condone such chicanery.” *Marusa*, supra. at ¶ 20.

Finally it is important to reiterate that this Court stated that, “[a]bsent a specific statutory or common-law prohibition, parties are free to agree to the contract's terms.” *Snyder*, supra at ¶24. (Citation omitted.) Moreover, this Court stated, “[o]ur ruling here, of course, does not prevent insurers from responding to consumer demand by offering uninsured-motorist coverage without precluding recovery because of a tortfeasor's immunity.” *Id.* ¶ 33.

#### CONCLUSION

Wherefore, Appellant, Maria Marusa and Melanie Marusa, moves this Court for and ORDER granting a discretionary appeal in this matter for the purpose of determining the question of great public interest. The question of great public interest is whether an insurer that defines an uninsured/underinsured motorist as one who is entitled to immunity under the Ohio Political Subdivision Tort Liability Law effectively waives the defense of immunity when read in conjunction with a provision in the insuring agreement that requires an insured to be legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle?

Respectively submitted,



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CERTIFICATE OF SERVICE

A true copy of the foregoing Memorandum in Support of Jurisdiction was hereby served, via ordinary U.S. mail, postage prepaid, this 9 day of January, 2012, upon the following:

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Respectively,

  
\_\_\_\_\_  
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APPENDIX

Decision and Journal Entry of the Cuyahoga County  
Court of Appeals, Eight Appellant District Case No.  
No. 96556, 2011-Ohio-6276

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 96556

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**MARIA MARUSA, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**ERIE INSURANCE COMPANY**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-739818

**BEFORE:** Jones, J., Stewart, P.J., and Cooney, J.

**RELEASED AND JOURNALIZED:** December 8, 2011



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ALL PARTIES.--COSTS TAIEND

LARRY A. JONES, J.:

This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records and briefs of counsel.

Plaintiffs-appellants, Maria and Melanie Marusa, appeal the trial court's grant of summary judgment in favor of defendant-appellee, Erie Insurance Company. Reluctantly, we affirm.

I.

The Marusas initiated this action in 2010 as a result of injuries they suffered in a 2009 motor vehicle accident. Specifically, their vehicle was struck by a motor vehicle operated by Michael Canda, a North Royalton police officer who was responding to an emergency call. The Marusas filed a claim with their insurer, Erie Insurance Company. Erie denied the claim.

Erie filed a motion for summary judgment, and the Marusas filed a cross-motion for partial summary judgment. For the limited purpose of the summary judgment exercise, the parties entered into the following relevant stipulations: (1) "The accident and the Marusas' injuries were proximately caused by Officer Canda's negligent operation of his police cruiser"; (2) "The Marusas were not negligent and were not at fault for causing the collision"; (3) "Officer Canda and the City of North Royalton are immune from liability for the accident under the Ohio Political Subdivision Tort Liability Act, Ohio Revised Code Chapter 2744";

and (4) "Because Officer Canda and his employer are immune from suit under the Ohio Political Subdivision Tort Liability Act, Officer Canda qualifies as an 'uninsured motorist' under the terms of the \* \* \* Policy."

Relying on the Ohio Supreme Court's decision in *Snyder v. Am. Family Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574, the trial court granted Erie's motion for summary judgment and denied the Marusas' cross-motion for partial summary judgment. The Marusas present the following errors for our review, which will be considered together:

"[I.] The trial court erred in granting summary judgment on behalf of Defendant Erie Insurance Company and denying summary judgment on behalf of the Plaintiffs Maria and Melanie Marusa by not applying the correct rules of construction and interpretation when reviewing an insurance policy in order to determine whether an insured is entitle[d] to coverage under an insurance policy.

"[II.] The insurance policy at bar is a contract of adhesion, that is prepared and phrased by the insurer and, as such, the [ ] contract of insurance is to be liberally construed in favor of the insured and strictly against the insurer where any ambiguous or undefined terms are used in the insurance contract."

## II.

Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, as follows:

"Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no

genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274.”

### III.

In *Snyder*, the insured, a police officer, was injured when she was hit by another police officer’s cruiser during the chase of a suspect. Snyder sought coverage under her personal motor vehicle liability insurance policy with American Family Insurance, but the insurer denied coverage. The relevant language of the policy provided: “[American Family] will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle.**’ (Boldface sic.)” *Snyder* at ¶5, quoting policy.

Snyder sued American Family, arguing that she was entitled to coverage because R.C. 3937.18 includes persons who have immunity under R.C. Chapter 2744 within its definition of uninsured motorists. Snyder also contended that under the 2001 amendments to R.C. 3937.18, Ohio’s uninsured- and underinsured-motorist coverage law, there is no longer a requirement that the insured be “legally entitled to recover” from the tortfeasor and, therefore, the

term as used in American Family's policy is void because it contradicts the statute. Further, Snyder contended that the term "legally entitled to recover," which was undefined in the policy, was ambiguous and therefore must be construed in her favor.

The Ohio Supreme Court rejected Snyder's contentions. The Court ruled that:

"Removal of the 'legally entitled to recover' language from the statute does not mean that insurance contracts may not require proof that the insured is legally entitled to recover from the uninsured motorist. Absent a specific statutory or common-law prohibition, parties are free to agree to the contract's terms." *Snyder* at ¶24.

The *Snyder* Court further ruled that it was "not illogical" for the General Assembly to include tortfeasors who have immunity under R.C. Chapter 2744 in the definition of an uninsured motorist, but then also permit policy terms to exclude coverage based on that same immunity. *Id.* at ¶27. The Court held that "a policy provision limiting the insured's recovery of uninsured- or underinsured-motorist benefits to amounts which the insured is 'legally entitled to recover' is enforceable, and its effect will be to preclude recovery when the tortfeasor is immune under R.C. Chapter 2744." *Id.* at ¶29. Additionally, the *Snyder* Court held that the phrase "legally entitled to recover" is "not ambiguous and must be accorded its plain meaning." *Id.* at ¶32.

The relevant portions of the Marusas' insurance policy provided as follows:

“Uninsured motor vehicle’ means a ‘motor vehicle.’

“\*\*\*

“4. For which the owner or operator of the ‘motor vehicle’ has immunity under the Ohio Political Subdivision Tort Liability or a diplomatic immunity.

“\*\*\*

### “OUR PROMISE

“We’ will pay for bodily injury that ‘anyone we protect’ or the legal representative of ‘anyone we protect’ are legally entitled to recover from the owner or operator of an ‘uninsured motor vehicle’ or ‘underinsured motor vehicle.’” (Emphasis sic.)

The Marusas contend that *Snyder* is “significantly distinguishable” from this case. Specifically, they contend that *Snyder* dealt with the statutory definition of “uninsured motorist” under R.C. 3937.18(B)(5), as opposed to “uninsured motorist” as defined in a policy. Although the coverage issue in *Snyder* arose from the 2001 amendments to R.C. 3937.18, the *Snyder* Court also addressed coverage exclusion based on immunity as set forth in a policy. The Court held:

“We also conclude that *policy language* restricting uninsured-motorist coverage to those amounts the insured is ‘legally entitled to recover’ from the tortfeasor owner or operator of an uninsured motor vehicle unambiguously denies coverage for injuries caused by uninsured motorists who are immune from liability under R.C. Chapter 2744 or R.C. 4123.741.” (Emphasis added.) *Id.* at ¶2.

In light of the above, the Marusas’ contention that *Snyder* applies only to

the statutory definition of "uninsured motorist" is without merit.

The Marusas further contend that when the definition of an "uninsured motor vehicle" as set forth in their policy is read together with the policy's "promise," "it is obvious that the clear intent of the policy is to provide uninsured/underinsured motorist coverage to an insured when the owner and/or operator of motor vehicle, who would otherwise be immune from liability by virtue of 'the Ohio Political Subdivision Tort Liability,' is negligent." But the "promise" portion of the policy requires that the insured be "legally entitled to recover" from the operator of the uninsured vehicle. *Snyder* addressed the "legally entitled to recover" requirement and held that although the 2001 amendments to R.C. 3937.18 eliminated the phrase, that "does not mean that insurance contracts may not require proof that the insured is legally entitled to recover from the uninsured motorist." *Id.* at ¶24.

The Marusas were not legally entitled to recover from Officer Canda because of his immunity. Thus, when the definition and promise sections of the policy are read together, the Marusas were not entitled to coverage under the policy.

We do not believe that *Snyder* advances the public policy that the "predominate social purpose of liability insurance is to compensate injured persons." *Stickovich v. Cleveland*, 143 Ohio App.3d 13, 25, 2001-Ohio-4117, 757

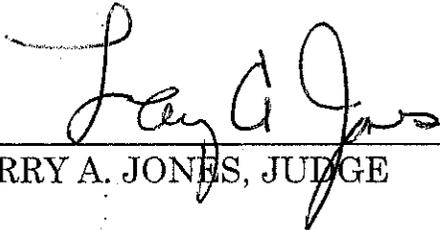
N.E.2d 50. But we are duty-bound to follow it. Reluctantly, therefore, in light of *Snyder*, the Marusas' two assignments of error are without merit and the trial court's judgment is affirmed.

It is ordered that appellee recover of appellants its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



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LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, J., CONCURS;  
MELODY J. STEWART, P.J., DISSENTS WITH  
SEPARATE OPINION

MELODY J. STEWART, P.J., DISSENTING:

The introduction to the Erie policy states that "[t]he protection provided by this policy is in keeping with the single purpose of our Founders which is, "To provide YOU with as near PERFECT PROTECTION, as near PERFECT SERVICE, as is humanly possible, and to do so at the LOWEST POSSIBLE COST." (Emphasis sic.) The UM provisions of the Marusas' policy specifically give

coverage, but then generally take it away — and do so in the definitions and promise sections of the policy, notwithstanding the fact that those sections are immediately followed by sections entitled, “Exclusions — What We Do Not Cover” and “Limitations of Protection,” both of which are completely devoid of any exclusion related to governmental immunity. This is a complete failure of the promise to provide “near PERFECT PROTECTION” and deprives the Marusas of the benefit of their bargain. I vehemently dissent from the decision reached in this case.

The majority “reluctantly” holds that the Marusas are not entitled to uninsured motorist (UM) coverage under their insurance policy “when the definition and promise sections of the policy are read together.” In reaching its decision, the majority relies on a tortured interpretation and analysis of the phrase “legally entitled to recover” set forth in *Snyder v. Am. Family Ins.*, supra. This case is distinguishable from *Snyder* because the supreme court’s decision in that case was firmly rooted in resolving what the court perceived to be a conflict between the general statement, “legally entitled to recover,” contained in the insurance policy, and provisions in Chapter 3937 of the Revised Code. The *Snyder* court rejected the insured’s argument that R.C. 3937.17, which included those immune under Chapter 2744 of the Revised Code in its definition of uninsured motorist, should prevail over the interpretation of the phrase “legally entitled to

recover” to find UM coverage. Key to the court’s analysis was its belief that provisions in Chapter 3937 of the Revised Code did not prohibit parties from setting forth the terms of their contract and the interpretation of those terms will supersede statutory language (a proposition rejected by the dissent). The court noted that, “[a]bsent a specific statutory or common-law prohibition, parties are free to agree to the contract’s terms. *Martin v. Midwestern Group Ins. Co.* (1994), 70 Ohio St.3d 478, 480, 639 N.E.2d 438 (noting that R.C. 3937.18 does not displace principles of contract law), superseded by statute on other grounds, as noted in *Baughman v. State Farm Mut. Auto. Ins. Co.* (2000), 88 Ohio St.3d 480, 484, 727 N.E.2d 1265.” *Snyder* at ¶24.

The majority in this case has, in essence, interpreted *Snyder* to say that, even if an insurance policy specifically promises to pay for injuries sustained from “a motor vehicle for which the owner or operator of the motor vehicle has immunity under the Ohio Political Subdivision Tort Liability Law\*\*\*” — as the UM definition and promise sections of the policy do in this case — the insurance company can, nonetheless, negate that specific coverage by arguing to a court of law that its inclusion of the phrase “legally entitled to recover” in the “Promise” section of the policy should be interpreted to exclude that very coverage.<sup>1</sup> No court

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<sup>1</sup>This interpretation would also have to necessarily assume that Erie has no idea what the term “immunity” means: a wholly unbelievable proposition.

should condone such chicanery.

In *Payton v. Peskins*, 12th Dist. No. CA2010-10-022, 2011-Ohio-3905, the court of appeals found that a UM policy exclusion, worded similarly to the one used in this case, did not effectively exclude UM coverage despite the policy using the “legally entitled to recover” language noted in *Snyder*. Payton’s policy stated that, the insurer, Progressive, “will pay for damages that an insured person is legally entitled to recover from an uninsured motorist or underinsured motorist because of bodily injury.” The Twelfth District noted that, “unlike *Snyder*, the Progressive policy at issue goes on to state, ‘an “uninsured motorist” does not include an owner or operator of a motor vehicle: (c) that is owned by any governmental unit or agency *unless the operator of the motor vehicle has immunity under Chapter 2744 of the Ohio Revised Code* (relating to certain political subdivisions operating a fire department, police department, or emergency medical service).” Id. at ¶11 (emphasis sic.) The court of appeals went on to state:

“The court in *Snyder* found that the general term ‘legally entitled to recover’ was an additional condition for coverage that unambiguously excluded coverage for injuries caused by a driver who is immune from liability under R.C. Chapter 2744. Payton’s Progressive policy, however, specifically took the general preamble to Section III’s uninsured/underinsured section and made a more specific coverage condition, mainly that vehicles owned by any governmental unit or agency were

not covered unless the operator of the vehicle has immunity under R.C. Chapter 2744. 'It is well-established under the generally applicable rules governing contract interpretation that specific provisions take precedence over more general provisions.' *Smith v. Littrell*, Preble App. No. CA2001-02-004, 6, 2001-Ohio-8642.

"The Ohio Supreme Court made it clear in *Snyder* that insurance companies and their customers have the right to agree to uninsured-motorist coverage without precluding recovery because of a tortfeasor's immunity. The Progressive policy did just that. It carved out an exception to the 'legally entitled to recover' language listed in *Snyder* by stating that the policy holder could not recover for uninsured motorist protection when bodily injury was caused by a government-owned vehicle unless that vehicle was driven by an operator who has immunity under R.C. Chapter 2744. The parties stipulated that Peskins and the village of Georgetown are immune under R.C. Chapter 2744, and Progressive cannot now claim that the general statement made in the preamble to its uninsured motorist section subjugates the more specific statement granting coverage when the driver has immunity, as Peskins did in this case." *Id.* at ¶14-15.

Although Erie couched its coverage in terms of what the insured was "legally obligated to recover," it created an exception to that in the UM portion of the policy by defining an "uninsured motor vehicle" as a motor vehicle "for which

the owner or operator of the 'motor vehicle' has immunity under the Ohio Political Subdivision Tort Liability Law or a diplomatic immunity." As in *Payton*, the specific inclusion of language defining an uninsured motor vehicle as one in which the operator has immunity under R.C. 2744.02 was enough to overcome the more general "legally obligated to recover" language. To read the policy differently would elevate general language over the specific and undermine the well-established legal proposition that Ohio law presumes insurance coverage, so an exclusion to coverage must be clearly expressed. See, e.g., *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶6. If Erie wished to ride on the coattails of governmental immunity to deny UM coverage to its unsuspecting and oblivious customers, the law requires that it clearly do so. This can be done in a number of ways: vehicles owned and operated by those who are immune can be removed from the definition of uninsured motor vehicles, or Erie can include such an exclusion in the "Exclusions — What We Do Not Cover" section of the policy.

The broader principle at issue here, and the one that apparently troubles the majority, too, is the prospect that an insured who specifically pays for UM coverage could be denied that coverage simply because the tortfeasor happened to be immune from liability, despite being fully at fault as is the case here. UM coverage is designed just for these types of situations, yet court decisions have

effectively denied a significant number of people insurance coverage that they pay for, and think that they have, but do not. This is an intolerable state of the law and one I hope is quickly rectified.