

IN THE SUPREME COURT OF OHIO

MARIA MARUSA, et al.,

Plaintiffs/Appellants,

vs.

ERIE INSURANCE COMPANY,

Defendant/Appellee.

)  
) CASE NO. 2012-0058  
)  
)

) Discretionary Appeal from the Cuyahoga  
) County Court of Appeals, Eighth Appellate  
) District, Case No. 96556  
)  
)

---

**DEFENDANT/APPELLEE ERIE INSURANCE COMPANY'S  
MOTION TO DISMISS APPEAL**

---

Donald E. Caravona  
Aaron P. Berg  
Caravona & Czack, LLC  
1900 Terminal Tower  
Cleveland, OH 44113

*Attorneys for Plaintiffs-Appellants,  
Maria and Melanie Marusa*

Robert L. Tucker (0023491)  
John R. Chlysta (0059313)  
Emily R. Yoder (0084013)  
HANNA, CAMPBELL & POWELL LLP  
P.O. Box 5521  
3737 Embassy Parkway  
Akron, OH 44334  
330.670.7300  
330.670.7460 fax  
ltucker@hcplaw.net  
jchlysta@hcplaw.net  
eyoder@hcplaw.net

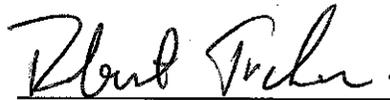
*Attorneys for Defendant-Appellee,  
Erie Insurance Company*

**RECEIVED**  
MAR 23 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

**FILED**  
MAR 23 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

Defendant/Appellee Erie Insurance Company hereby moves this Court to enter an Order dismissing this appeal on the grounds that Plaintiff/Appellant failed timely to file the February 16 order of the Court of Appeals certifying a conflict as required by S. Ct. Prac. R. 4.1. Because that failure divests this Court of jurisdiction, the appeal should be dismissed.

Respectfully submitted,



---

Robert L. Tucker (0023491)  
John R. Chlysta (0059313)  
Emily R. Yoder (0084013)  
HANNA, CAMPBELL & POWELL LLP  
P.O. Box 5521  
3737 Embassy Parkway  
Akron, OH 44334  
330.670.7300  
330.670.7460 fax  
ltucker@hcplaw.net  
jchlysta@hcplaw.net  
eyoder@hcplaw.net

*Attorneys for Defendant-Appellee,  
Erie Insurance Company*

**MEMORANDUM IN SUPPORT**

On January 12, 2012, Plaintiffs/Appellants Maria and Melanie Marusa filed a notice of appeal and a memorandum in support of claimed jurisdiction. The Marusas claimed that the judgment of the court of appeals below was in conflict with a decision of another appellate district. The Marusas filed a notice pending motion to certify the conflict.

On February 16, 2012, the court of appeals rendered its decision granting the Marusas' motion to certify a conflict (copy attached). More than 30 days have passed since that judgment

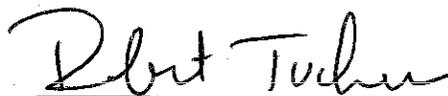
was rendered, but no notice of certified conflict was filed with this Court as required by the Supreme Court Rules of Practice.

Under S. Ct. Prac. R. 4.1, after 30 days have passed since the conflict was certified, if no notice of certified conflict has been filed; this Court is divested of jurisdiction:

When a court of appeals issues an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, any interested party to the proceeding may institute an appeal by filing a notice of certified conflict in the Supreme Court. The notice shall have attached a copy of the court of appeals order certifying a conflict, a copy of the certifying court's opinion, and copies of the conflicting court of appeals opinion. The party who files the order certifying a conflict shall be considered the appellant. *Failure to file the court of appeals order certifying a conflict within thirty days after the date of such order shall divest the Supreme Court of jurisdiction to consider the order certifying a conflict.* [Emphasis added].

Rule 4.1 is jurisdictional. Because the Appellants failed timely to file the order certifying the conflict, the appeal should be dismissed.

Respectfully submitted,



---

Robert L. Tucker (0023491)  
John R. Chlysta (0059313)  
Emily R. Yoder (0084013)  
HANNA, CAMPBELL & POWELL LLP  
P.O. Box 5521  
3737 Embassy Parkway  
Akron, OH 44334  
330.670.7300  
330.670.7460 fax  
ltucker@hcplaw.net  
jchlysta@hcplaw.net  
eyoder@hcplaw.net

*Attorneys for Defendant-Appellee,  
Erie Insurance Company*

**CERTIFICATE OF SERVICE**

A true copy of the foregoing was served by regular U.S. mail on March 22, 2012 upon:

Donald E. Caravona  
Aaron P. Berg  
Caravona & Czack, LLC  
1900 Terminal Tower  
Cleveland, OH 44113

Robert Tucker.

<<HCP #617308-v1>>



# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

MARIA MARUSA, ET AL.

Appellant

COA NO.  
96556

LOWER COURT NO.  
CP CV-739818

COMMON PLEAS COURT

-vs-

ERIE INSURANCE COMPANY

Appellee

MOTION NO. 450407

Date 02/16/12

---

## Journal Entry

---

Motion by appellants to certify a conflict is granted.

In *Marusa v. Erie Ins. Co.*, 8th Dist. No. 96556, 2011-Ohio-6276, and *Payton v. Peskins*, 12th Dist. No. CA2010-10-022, 2011-Ohio-3905, both appellate courts considered claims made by insureds for injuries sustained because of accidents, for which they were not at fault, with motor vehicles driven by governmental employees. The policies in both cases were similarly worded and both cases considered *Snyder v. Am. Family Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574.

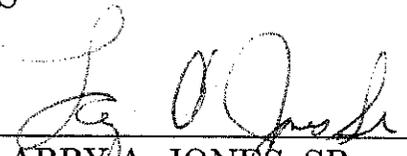
In *Marusa*, the policy defined as an uninsured motor vehicle one for which its owner or operator has immunity under the Ohio Political Subdivision Tort Liability statute or a diplomatic immunity. The policy further promised that it would pay for bodily injury that an insured was "legally entitled to recover" from the owner or operator of an uninsured vehicle. This court held that when the definition and promise sections of the policy were read together, the Marusas were not entitled to coverage because they were not "legally entitled to recover" from the officer because of his immunity.

In *Payton*, the policy also used the "legally entitled to recover" language. The policy provided that an uninsured motorist does not include an owner or operator of a vehicle that is owned by a governmental unit or agency *unless* the operator has immunity under the Ohio Political subdivision Tort Liability statute. The court found that the insured was entitled to coverage.

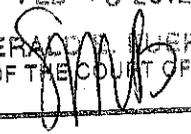
Hence, this appellate district reached a different result from that of the Twelfth Appellate District in considering a similarly worded insurance policy under a similar factual situation. In light of this, we certify the following question to the Ohio Supreme Court pursuant to Article IV, Section 3(B)(40) of the Ohio Constitution and App.R. 25:

Does the phrase "legally entitled to recover" preclude an insured from recovery under an uninsured motorist provision of an insurance policy for bodily injury sustained by a vehicle owned or operated by a person who has immunity when the policy defines an uninsured motor vehicle as a vehicle for which the owner or operator has immunity under the Ohio Political Subdivision Tort Liability statute or a diplomatic immunity?

MELODY J. STEWART, P.J, CONCURS;  
COLLEEN CONWAY COONEY, J., CONCURS  
IN JUDGMENT ONLY

  
\_\_\_\_\_  
LARRY A. JONES, SR.  
JUDGE

RECEIVED FOR FILING

FEB 16 2012  
GERALD W. BERIST  
CLERK OF THE COURT OF APPEALS  
BY  DEP.

COPIES MAILED TO COUNSEL FOR PARTIES. COSTS TAVERN