

ORIGINAL

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  
)

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MERIT BRIEF OF DEFENDANT/APPELLEE,  
ERIE INSURANCE COMPANY

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Donald E. Caravona  
Aaron P. Berg  
Caravona & Czack, LLC  
1900 Terminal Tower  
Cleveland, OH 44113  
216.696.6500  
216.696.1411 fax

*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*

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## STATEMENT OF FACTS

On November 11, 2009, Plaintiffs Maria and Melanie Marusa were traveling eastbound on Edgerton Road in North Royalton.<sup>1</sup> Maria Marusa came to a full stop at the stop light at the intersection of State Route 94. When the light turned green, she began to proceed through the intersection.<sup>2</sup> Just as her vehicle began to go through the intersection, a police cruiser driven by Officer Michael Canda came through the intersection against the red light. Officer Canda's vehicle collided with the Marusas' vehicle, which resulted in their sustaining bodily injuries.<sup>3</sup>

When the accident occurred, Officer Canda was operating his police cruiser in his capacity as a police officer with the City of North Royalton and was responding to an emergency call.<sup>4</sup> The accident and the resulting injuries were proximately caused by Officer Canda's negligent operation of his police cruiser.<sup>5</sup> The Marusas were free of negligence and were not at fault for causing the collision.<sup>6</sup> 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.<sup>7</sup>

On the date of the accident, Maria Marusa was the named insured under the Erie Insurance Company Family Auto Policy No. Q06-6507891, and Melanie Marusa qualified as an

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<sup>1</sup> See, *Limited Stipulation of Facts included as pages 5 through 41 of the Appellants' Supplement to the Merit Brief* at ¶1

<sup>2</sup> *Id.* at ¶12.

<sup>3</sup> *Id.* at ¶13.

<sup>4</sup> *Id.* at ¶14.

<sup>5</sup> *Id.* at ¶15.

<sup>6</sup> *Id.* at ¶16.

<sup>7</sup> *Id.* at ¶17.

additional insured.<sup>8</sup> Subject to the conditions, limitations, and exclusions contained therein, the Erie policy provided uninsured/underinsured motorist coverage to persons who qualify as insureds under the policy. The uninsured/underinsured motorist endorsement in the policy provided that Erie will pay damages for bodily injuries that insured persons “are legally entitled to recover” from the owner or operator of uninsured or underinsured motor vehicles. But, just like the policy before this Court in *Snyder v. Am. Fam. Ins. Co.*, 114 Ohio St. 3d 239, 2007-Ohio-4004, 871 N.E.2d 574, it also included a condition specifically requiring that the insured be “legally entitled to recover” from the uninsured motorist:

### **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.”**

On cross-motions for summary judgment, the trial court below held that because of his statutory immunity, the Marusas were not “legally entitled to recover” from Officer Canda. Applying this Court’s ruling in *Snyder*, the trial court held that the policy unambiguously negated any claim for uninsured motorist coverage:

Under the express terms of the Policy, Defendant is only required to pay damages for bodily injury that its insured is “legally entitled to recover” from the owner or operator of an uninsured motor vehicle. Here, it is undisputed that Plaintiffs are not “legally entitled to recover” from either the City of North Royalton or Office Canda because they are both immune under R.C. Chapter 2744, the Ohio Political Subdivision Tort Liability Act. Therefore, *since Plaintiffs are not “legally entitled to recover” from the owner or operator of an “uninsured motor vehicle,”* namely the City of North Royalton and Office Canda, *they are not entitled to coverage under the terms of the Policy.*

*The Ohio Supreme Court has reached this exact conclusion in Snyder v. Am. Fam. Ins. Co.*, (2007), 114 Ohio St. 3d 239. In *Snyder*, the Court examined an

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<sup>8</sup> *Id.* at ¶18 and Exhibit 1 attached thereto.

insurance policy with identical language requiring that an insured be “legally entitled to recover from the owner or operator of an uninsured motor vehicle” and held that:

[P]olicy 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.<sup>9</sup>

On appeal, the court of appeals affirmed. It too concluded that:

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<sup>10</sup>

The decisions of the trial court and the court of appeals below were correct and consistent with this Court’s holding in *Snyder*, and their rulings should be affirmed.

## LAW AND ARGUMENT

### **Proposition of Law:**

*A Policy Provision Limiting The Insured’s Recovery Of Uninsured Or Underinsured Motorist Benefits To Amounts That The Insured Is “Legally Entitled To Recover” From The Tortfeasor Is Enforceable And Precludes Recovery When The Tortfeasor Is Immune From Liability, Even Though R.C. 3937.18 And The Policy Define “Uninsured Motorist” To Include Owners Or Operators Who Are Immune From Liability.*

The Marusas argue that Officer Canda was an uninsured motorist and that they therefore are automatically entitled to UM/UIM coverage under the Erie auto policy for damages arising out of the November 11, 2009 motor vehicle accident. But for the reasons explained in greater detail below, that argument is not correct. To obtain UM/UIM policy benefits, it is not enough

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<sup>9</sup> See, February 28, 2011 Opinion and Journal Entry at 3 (emphasis added in part).

<sup>10</sup> See, December 11, 2011 Journal Entry and Opinion at 6.

that the accident be caused by an uninsured or underinsured motorist. The other policy conditions, limitations, and exclusions must also be satisfied, including the requirement that the insured be “legally entitled to recover” from that uninsured motorist. The Marusas are unable to satisfy that requirement. Therefore, they are not entitled to UM/UIM coverage under the facts of this case.

**A. *The Outcome Of This Case Is Controlled By This Court’s Decision In Snyder***

In *Snyder*, this Court held that 1) an insurer may limit UM/UIM benefits to amounts that the insured is legally entitled to recover from the tortfeasor; and 2) such policy provisions are enforceable even when they preclude coverage for injuries caused by tortfeasors who are immune under Ohio’s Political Subdivision Tort Immunity Act. That is the exact situation presented here.

Officer Canda and his employer are immune under Ohio’s Political Subdivision Tort Immunity Act, R.C. Chapter 2744. Thus, Officer Canda qualifies as an uninsured motorist under the terms of the Erie policy and relevant statute. But the Erie policy also provides that UM/UIM coverage is only available where the insured is “legally entitled to recover” from the uninsured motorist.

In *Snyder*, the officer and his municipal employer were immune from liability under R.C. Chapter 2744, which is Ohio’s Political Subdivision Tort Immunity Act. Consequently, the officer qualified as an uninsured motorist under the statutory definition. The issue presented was whether the insured was entitled to uninsured motorist coverage benefits under her American Family insurance policy.

In holding that no uninsured motorist coverage was available, this Court applied the S.B. 97 version of R.C. 3937.18, which is the same version of the statute that is in effect today. That

statute—like the Erie policy—specifically includes persons who have “immunity under Chapter 2744 of the Revised Code” within the statutory definition of “uninsured motorist.” R.C. 3937.18(B) provides in pertinent part as follows:

For purposes of any uninsured motorist coverage included in a policy of insurance, an “uninsured motorist” is the owner or operator of a motor vehicle if any of the following conditions applies:

\* \* \*

(5) the owner or operator has immunity under Chapter 2744 of the Revised Code.

Further, the American Family policy in *Snyder*—just like the Erie policy here—required that the insured be “legally entitled to recover” from the uninsured motorist. This is so even though—as the *Snyder* Court observed—the S.B. 97 version of R.C. 3937.18 deleted the statutory requirement that insureds must be “legally entitled to recover” from the tortfeasor to avail themselves of UM/UIM coverage.

In *Snyder*, this Court held that while the statute specifically includes motor vehicle owners and operators who are immune from liability within the statutory definition of “uninsured motorist,” that alone is not dispositive because the statute permits insurers to add other conditions, including the condition that they be “legally entitled to recover” from the tortfeasor.<sup>11</sup> Thus, where the owner or operator of a motor vehicle is an uninsured motorist by virtue of his or her statutory immunity, the insured is not “legally entitled” to recover.

*Snyder* held that a “legally entitled to recover” provision negates uninsured motorist coverage where the tortfeasor is immune from suit. The *Snyder* Court specifically held that 1) R.C. 3937.18 does not prohibit the enforcement of a policy that excludes claims where the tortfeasor has statutory immunity; and 2) that policy language restricting coverage to those

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<sup>11</sup> *Snyder* at ¶ 26.

amounts that the insured is “legally entitled to recovery” *unambiguously* denies coverage for injuries caused by motorists who are immune from suit:

For the reasons that follow, we conclude that R.C. 3937.18 does not prohibit enforcement of a policy that excludes claims for uninsured-motorist benefits when the tortfeasor is statutorily immune from liability. 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.<sup>12</sup>

Later in the opinion, this Court held that the presence of the “legally entitled to recover” language was the dispositive factor:

The current wording of R.C. 3937.18 neither requires nor prohibits inclusion of the “legally entitled to recover” provision at issue here. Indeed, *R.C. 3937.18(I) confirms that the parties may include terms that exclude recovery of uninsured-motorist benefits under specified circumstances. We conclude that the “legally entitled to recover” provision in the policy at issue is such a term.*

\* \* \*

Had the policy in this case not contained the “legally entitled to recover” language, the police cruiser would have been an uninsured vehicle within the meaning of R.C. 3937.18(B)(5), and, absent another policy condition excluding coverage, Snyder would have been entitled to recover. But this policy did contain an additional condition for coverage, and under the facts of this matter, Snyder did not meet that condition. Similarly, in *Estate of Nord v. Motorists Mut. Ins. Co.*, 105 Ohio St.3d 366, 2005-Ohio-2165, 826 N.E.2d 826, we noted that the city of Cleveland, which owned and operated the ambulance in which the insured was injured by a dropped syringe, was immune from liability under R.C. 2744.02, and thus, the ambulance was an “uninsured motor vehicle” by virtue of R.C. 3937.18(B)(5). *See Id.* at fn. 1. Nevertheless, the insured was not entitled to uninsured-motorist benefits because a condition of the policy required the damages to “arise out of the ownership, maintenance or use of the uninsured motor vehicle.” *Id.* at ¶ 12.

*Accordingly, 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*

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<sup>12</sup> *Snyder* at ¶ 2 (emphasis added).

*tortfeasor is immune under R.C. Chapter 2744.*<sup>13</sup>

The Erie policy contains exactly the same “legally entitled to recover” provision. The only issue presented to the courts below was whether this Court meant what it said in *Snyder*. The courts below concluded that it did, and properly granted summary judgment to Erie on the Marusas’ uninsured motorist claims.

The Marusas attempt to distinguish *Snyder* by making a distinction without a difference. They contend that the result should be different in this case because in *Snyder* the statutory definition of “uninsured motorist” was used, whereas in this case the Erie policy (in addition to the statute) supplied the definition. These cases however, cannot be distinguished because the definition contained in R.C. 3937.18 and the definition contained in Erie’s policy are equivalent.

They also contend that, when read *in pari materia*, the definition of uninsured motorist and the “legally entitled to recover” provision create an ambiguity. But as is next demonstrated, this Court already considered—and rejected—that argument in *Snyder*.

***B. There Is No Dispute About The Facts And Nothing Ambiguous About The Erie Policy***

There are two policy provisions at issue in this case. Just like R.C. 3937.18(B), the Erie policy defines “uninsured motor vehicle” to include any 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.” And just like in *Snyder*, the Erie policy explicitly limits policy protection to instances where the insured is “legally entitled to recover” from the uninsured motorist:

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<sup>13</sup> *Id.* at ¶¶ 24, 28-29 (emphasis added).

## 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**.”

Neither the definition of uninsured motorist nor the “legally entitled to recover” limitation of coverage are ambiguous, and no ambiguity is created when they are read together. *Snyder* makes clear that, under policies containing provisions like these, the insured is entitled to uninsured motorist benefits only if *both* of two conditions are satisfied: 1) the other vehicle was an “uninsured motor vehicle”; *and* 2) the insured is “legally entitled to recover” from the owner or operator of the “uninsured motor vehicle.” In *Snyder*, this Court *explicitly* stated that this construction is “unambiguous.”<sup>14</sup>

The parties stipulated that “[b]ecause 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 Exhibit 1 Policy.”<sup>15</sup> But the parties also stipulated that the insuring clause of the Erie policy extends uninsured motorist coverage only in situations where the insured is “legally entitled to recover” from that uninsured motorist.

In *Snyder*, this Court held that the phrase “legally entitled to recover” is clear, unambiguous, and enforceable.<sup>16</sup> This Court further held, “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

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<sup>14</sup> *Snyder* at ¶ 2.

<sup>15</sup> See, *Limited Stipulation of Facts included as pages 5 through 41 of the Appellants’ Supplement to the Merit Brief* at ¶10.

<sup>16</sup> *Snyder* at ¶ 33.

injuries caused by uninsured motorists who are immune from liability under R.C. Chapter 2744 or R.C. 4123.741.”<sup>17</sup>

Plaintiffs argue that “[t]he logical interpretation is that the intent of the parties was to create an exception to the ‘legally entitled’ clause when a person or entity is involved in a motor vehicle accident and is subject to statutory immunity.”<sup>18</sup> But when confronted with the same argument in *Snyder*, this Court disagreed, explaining that the General Assembly ended more than a decade of infighting about the scope of UM/UIM coverage by defining “uninsured motorist” but also allowing insurers to limit UM/UIM coverage any way they wished under their policies:

*Snyder* argues that it would be illogical and inconsistent for R.C. 3937.18(B) to include tortfeasors immune under R.C. Chapter 2744 within the definition of “uninsured motorists” but then also permit policy terms to exclude coverage because of that same immunity. But in revising the statute to remove the mandatory-offering requirement and *in seeking to end more than a decade of uncertainty and instability regarding its interpretation and application, it was not illogical for the General Assembly to define statutorily the term “uninsured motorist” as it did but also to provide flexibility for uninsured- and underinsured-motorist policies to contain additional provisions modifying that definition.*<sup>19</sup>

The Marusas argue that the Erie policy was issued almost two years after the *Snyder* decision, but that Erie did not revise its policy to render *Snyder* applicable.<sup>20</sup> But there was nothing that needed “revision” in the Erie policy. The dispositive “legally entitled to recover”

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<sup>17</sup> *Id.* at ¶ 2 (emphasis added).

<sup>18</sup> *Plaintiffs’ Merit Brief* at 6.

<sup>19</sup> *Snyder* at ¶¶ 26-28 (emphasis added).

<sup>20</sup> *Plaintiffs’ Merit Brief* at 10 (“The fact that Erie Insurance Co. chooses not to modify its policy demonstrates its intent to issue a policy that defined an uninsured motorist as one who was subject to immunity under R.C. Chapter 2744. Erie is responsible for the language of the policy, and is responsible for the consequences of its interpretation.”).

provision discussed in *Snyder* was at all pertinent times included in the Erie policy. The notion that Erie need to “revise” its policy to make *Snyder* applicable is simply unsupportable.

The Marusas cite two appellate decisions in support of their argument. But as shown below, these two decisions involved different policy language that excluded government-owned vehicles from the definition of “uninsured motor vehicle,” then added an exception to that exclusion if the owner or operator had statutory immunity. The Erie policy had neither of these provisions, so both of the cases upon which the Marusas rely are distinguishable. Even more to the point, both of these decisions simply refused to follow the clear commands of this Court’s decision in *Snyder*.

In *Payton v. Peskins*, the policy provided that Progressive would pay for damages the insured was legally entitled to recover from an uninsured motorist because of bodily injury.<sup>21</sup> The policy defined “uninsured motorist” and to exclude vehicles owned by any governmental unit or agency.<sup>22</sup> However, there was an exception to the exclusion if the operator of the motor vehicle had statutory immunity.<sup>23</sup> The twelfth district held that the highly unusual language in the Progressive policy (which is not found in the Erie policy) distinguished that policy from the one addressed in *Snyder*. The *Payton* court held that the Progressive policy’s unique exclusion-and-exception language:

...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

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<sup>21</sup> *Payton v. Peskins*, 12th Dist. No. CA2010-10-022, 2011-Ohio-3905, 2011 WL 3433027, ¶ 11.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

that vehicle was driven by an operator who has immunity under R.C. Chapter 2744.<sup>24</sup>

Thus, the *Payton* court concluded that the “legally entitled to recover” language could not be used to subjugate the more specific statement granting coverage when the driver has immunity.

*Payton* does not apply here for several reasons. First, unlike the policy before the court in *Payton*, the Erie policy neither excludes vehicles owned by governmental units or agencies from the definition of uninsured motorist, nor does it “carve out an exception” to that exclusion where the owner or operator enjoys statutory immunity. For that reason alone, the court’s analysis in *Payton* is inapplicable.

Further, *Payton* is not persuasive because the court’s conclusion is incorrect. The definition of “uninsured motorist” does not grant coverage; it merely defines who does or does not qualify as an uninsured motorist. The fact that a tortfeasor meets the policy (or statutory) definition of uninsured motorist does not automatically mean that the insured is entitled to UM/UIM benefits. Indeed, that is just the first step in the analysis. Once it has been determined that an uninsured motorist was involved in the accident, then the court must decide whether the loss falls within the insuring clause. If it does, then the court must next determine whether any conditions or exclusions apply.

In essence, the court in *Payton* held that the insured was entitled to UM/UIM as long as an “uninsured motorist” was involved in the accident, regardless of the other policy conditions, limitations, or exclusions. That is not now, and never has been, the law in Ohio.

Exactly the same fact pattern (including the exclusion-and-exception language for government vehicles) was presented in *Thom v. Perkins Twp.* As in *Payton* (but unlike the Erie policy in the case at bar), the Western Reserve policy at issue in *Thom* defined

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<sup>24</sup> *Id.* at ¶15.

“uninsured/underinsured motor vehicle” to exclude vehicles owned by any governmental unit or agency, but contained an exception to the exclusion where the owner or operator had immunity. Relying on *Payton*, the *Thom* court held that the exclusion of government-owned vehicles, when read in conjunction with an exception to that exclusion when the owner or operator has statutory immunity, created “a conflict in policy provisions [that] distinguishes this case from *Snyder*.”<sup>25</sup>

*Thom* is distinguishable for the same reasons as *Payton*. The Erie policy in this case did not exclude government vehicles from the definition of “uninsured motor vehicle,” nor did it contain any exception to an exclusion for cases where the driver of a government vehicle was statutorily immune from suit. And as in *Payton*, the *Thom* court simply disregarded the “legally entitled to recover” provision of the Western Reserve policy and this Court’s discussion of that controlling limitation found in *Snyder*.

In sum, this Court’s *Snyder* decision is controlling and is directly in point. In *Snyder*, as here, a statutorily-immune police officer qualified as an “uninsured motorist,” but the policy also imposed a requirement that the insured be “legally entitled to recover” from the tortfeasor. In *Snyder*, as here, the police officer and his municipal employer were immune under Chapter 2744. Under these circumstances, this Court in *Snyder* held that the policy provisions *unambiguously* precluded uninsured motorist coverage. There is no difference between the provisions at issue in *Snyder* and those at issue here. The courts below properly applied *Snyder* and determined that the Marusas are not entitled to uninsured motorist benefits under the Erie policy.

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<sup>25</sup> *Thom v. Perkins Twp.*, 6th Dist. No. E-10-069, 2012-Ohio-1568, 2010 WL 1154578, ¶ 23.

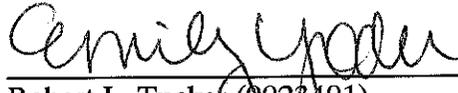
## CONCLUSION

Officer Canda and his employer are immune from liability. Consequently, Officer Canda qualified as an “uninsured motorist” under the definition found in both R.C. 3937.18 and the Erie policy. But under the Erie policy, uninsured motorist coverage is *only* available where the insureds are “*legally entitled to recover*” from the uninsured motorist. In *Snyder*, this Court held that the “legally entitled to recover” requirement was a valid precondition to coverage. Because the Marusas are not “legally entitled to recover” from Officer Canda or his employer, no uninsured motorist coverage is available under the Erie policy.

There is no dispute about the facts of this case, and there is nothing ambiguous about the Erie policy. This is simply an instance where the Marusas are dissatisfied with the effect of the lower courts’ proper application of the clear rule of law announced in *Snyder*. The Marusas do not claim that *Snyder* was wrongly decided, nor do they urge that it be overturned. Instead, they ask this Court to find an ambiguity where none exists, even though the *Snyder* Court quite explicitly held that no ambiguity was created by reading *in pari materia* the same definition of “uninsured motorist” and the same “legally entitled to recover” limitation found in the case at bar. This Court should decline the Marusas’ invitation to introduce confusion and uncertainty into the law by finding an “ambiguity” that the *Snyder* Court explicitly and emphatically rejected.

For these reasons, the court of appeals properly affirmed the trial court’s decision granting summary judgment to Erie. The decisions of the courts below should be affirmed.

Respectfully submitted,



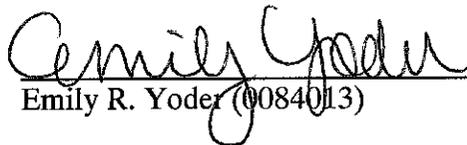
Robert L. Tucker (0023491)  
John R. Chlysta (0059313)  
Emily R. Yoder (0084013)  
HANNA, CAMPBELL & POWELL LLP  
P.O. Box 5521  
3737 Embassy Parkway  
Akron, OH 44334  
330.670.7300  
330.670.7460 fax  
ltucker@hcplaw.net  
jchlysta@hcplaw.net  
eyoder@hcplaw.net  
*Attorneys for Defendant,  
Erie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

**CERTIFICATE OF SERVICE**

A copy of the foregoing was served by regular U.S. mail this 20<sup>th</sup> day of July, 2012 upon:

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

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



Emily R. Yoder (0084013)

<<HCP #633239-v1>>