

IN THE SUPREME COURT OF OHIO

12-0058

MARIA MARUSA and.)
MELANIE MARUSA)

Appellants)

v.)

ERIE INSURANCE COMPANY)

Appellee)

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

Court of Appeals
Case No. 96556

**REPLY BRIEF OF APPELLANTS
MARIA MARUSA AND MELANIE MARUSA**

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The issue in this matter is whether 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 the general provision provision in the insuring agreement requiring an insured to be 'legally entitled' to recover from the owner or operator of an uninsured or underinsured motor vehicle.

It is uncontroverted that the subject policy of insurance issued by Erie Insurance Company to Maria Marusa was in force at the time of the motor vehicle accident of November 11, 2009 and provided the following;

"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.

See, Erie Insurance Group Policy, form AFOU01 (ed.3/07) UF-3801, page 1, attached to the Limited Stipulation, filed with the trial court on December 29, 2010. Also, see Supplement to Merit Brief page 1.

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."

See, Erie Insurance Group Policy, form AFOU01 (ed.3/07) UF-3801, page 2, attached to the Limited Stipulation, filed with the trial court on December 29, 2010. Also, see Supplement to Merit Brief page 2.

Erie Insurance Company argues that this Court's decision in *Snyder v. American Family Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574, is dispositive of the issue in this case – clearly, it is not. The essential facts before this Court in *Snyder* are different from the essential facts in this case. Moreover, decision of *Snyder* actually bolsters the appellant's position herein.

The issue in *Snyder* was whether an insurer may include in its uninsured motorist policy terms and/or conditions that would limit coverage. The court in *Snyder* held that the insurer may include such terms and condition since R.C. 3937.18(I) permitted such inclusion. *Snyder*, ¶ 14, 15 and 34. The American Family Insurance policy at issue in *Snyder* did not define an uninsured motorist as one who had statutory immunity under Chapter 2744 of the Revised Code, even though R.C. 3937.18(B)(5) did define such an uninsured motorist. The court held that R.C. 3937.18 as amended in 2001 by S.B. 97 removed the mandatory offering requirement of uninsured/underinsured motorist coverage. The court further noted that “[t]he General Assembly expressly stated that its intention was to eliminate the mandatory offering of uninsured- and underinsured-motorist coverage and the imposition of any such coverage implied as a matter of law. See S.B. 97, Sections 3(B)(1), (2), and (4), 149 Ohio Laws, Part I, 779, 788-789.” *Snyder*, ¶ 14. The effect is that American Family cannot be required to include the definition of uninsured motorists provided by R.C. 3937.18(B)(5) in its policy. Further, the court essentially held that the plaintiff could not avail herself of the statutory definition for an uninsured motorist. *Snyder*, at ¶ 15 and ¶29.

Additionally, the net effect of this amended version of R. C. 3937.18 is to change it 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. The language under scrutiny before this Court is contained and confined to the four-corners of the policy. Therefore, a court reviewing an insurance policy is required to apply the standard rules and principles for interpreting contracts.

The Supreme Court in *Snyder* reaffirmed the inviolability of contracts when it stated that, "[a]bsent a specific statutory or common-law prohibition, parties are free to agree to the contract's terms." *Snyder*, at ¶24. (Citation omitted.) Moreover, the 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.

The provisions under consideration before this Court are confined within the four-corners of the policy without any influence or consideration of R.C. 3937.18. As the Ohio Supreme Court observed the General Assembly amended R.C. 3937.18 to "eliminate the mandatory offering of uninsured and underinsured-motorist coverage and the imposition of any such coverage implied as a matter of law. *Snyder*, at ¶ 14.

In the instant matter, the policy and its provisions under consideration were written, issued and sold by Erie Insurance Company on "as is basis." Thus, the policy is a contract of adhesion and it is to be construed against the writer. See Black's Law Dictionary (8th Ed. 1999) 342; *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003 Ohio 5849, ¶ 13-14. The Ohio Supreme Court has 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. * * *.” *Saunders v. Mortensen*, 101 Ohio St, 3d 86, 2004-Ohio-24, 801 N.E.2d 452, at ¶ 16. Therefore, applying the well-established principles and rules for interpreting insurance contracts to the present case the reading the two provisions, as noted in the Merit Brief, would effectively waive the defense of immunity under Chapter 2744. Thus, Officer Canda is an uninsured motorist by definition.

Contrary to Erie’s assertion, the Marusas are not contending they are automatically entitled to uninsured motorist coverage. All other defenses and elements remain to be proved. Only the defense of statutory immunity is waived. An insured must still prove that they are “legally entitled” to recover damages from the uninsured motorist (i.e. the remaining issues such as negligence, proximate cause, nature and extent of injuries, etc., remain to be proved). However, in the case before this Court, the parties have stipulated to the issues of negligence, proximate cause and comparative negligence. As a result, the only remaining issue is proximate cause and damages.

Furthermore, Erie is plainly wrong in its assertion that the decisions in *Payton v. Peskins*, 12th Dist. No. CA2010-10-022, 2011-Ohio-3905 and *Thom v. Perkins Township*, 6th Dist., No. E-10-069, 2012-Ohio-1568 is not persuasive. Erie has misinterpreted, misstated and inaccurately portrayed the decisions in these two cases. The cases essentially stand for the proposition that the definitions in the policies have carved out an exception to the “legally entitled” provision when the alleged tortfeasor may claim immunity under Chapter 2744 of the Revised Code. See, *Payton*, ¶ 15. While, the definitions in those policies are worded somewhat differently from the definition found in

the Erie policy, the result is the same – that a tortfeasor who may claim immunity under Chapter 2744 of the Revised Code is defined as an uninsured motorist. This is the same result in the case before this Court. The definition found in Erie policy clearly and unambiguously carves out an exception to the “legally entitled” clause and effectively waives the defense of statutory immunity.

CONCLUSION

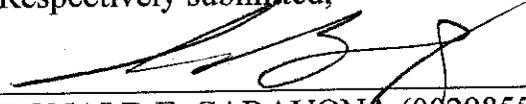
For the reasons stated above and in their Merit, Appellants, Maria Marusa and Melanie Marusa, asks this court to find the definition contained in the Erie policy that an uninsured motorist is one “for which the owner or operator of the ‘motor vehicle’ has immunity under the Ohio Political Subdivision Tort Liability” 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. After all, the Supreme Court in *Snyder* 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.” *Snyder* at ¶ 33. Further, as seen above at least two appellate courts have addressed this issue and resolved the issue by applying the well-established principles and rules of contract interpretation.

This is a matter of public and great general interest because it is necessary to bring certainty to this issue. To permit an insurer to issue a policy that contains a clearly worded specific definition and then permit it to deny coverage based on another general

provision is unconscionable and as the dissent stated in *Marusa*, “[n]o court should condone such chicanery.” *Marusa v. Erie Insurance Company*, 8th District Court of Appeal, No 96556, 2011-Ohio-6276 at ¶ 20.

Therefore, for the reasons stated above and in their Merit Brief, the Appellants, Maria Marusa and Melanie Marusa, asks this court to reverse the Eight District Court of Appeals decision and grant summary judgment in their favor.

Respectively submitted,



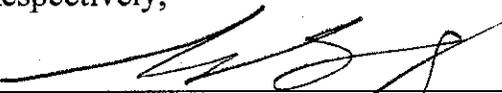
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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was via ordinary U.S. mail, postage prepaid, this 31 day of July, 2012, upon the following:

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