[Cite as *Barbee v. Allstate Ins. Co.*, 2010-Ohio-2016.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

MATTHEW BARBEE Appellee v. ALLSTATE INSURANCE COMPANY Appellant	C. A. Nos. 09CA009594 09CA009596 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 07CV149278

DECISION AND JOURNAL ENTRY

Dated: May 10, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Two cars collided on a Wisconsin highway in October 2002. As a result of the collision, one of those cars traveled across the median and collided with two other cars in which members of the Barbee family were riding. Because one of the drivers involved in the first collision was employed by the United States military, the Barbees sued him and the driver of the other car involved in the original collision in federal court. In June 2005, the judge in that case determined that the military employee was 30 percent at fault for the Barbees' injuries and that the other driver was 70 percent at fault. Because the Barbees had insurance policies with Allstate Insurance Company and Nationwide Mutual Fire Insurance Company with underinsurance coverage that was greater than the non-military driver's liability coverage, they brought this action against Allstate and Nationwide in January 2007, seeking a declaration that they can recover under those policies. Allstate and Nationwide moved for summary judgment,

arguing that the Barbees' claims were barred under the policies' three-year contractual limitations period and by the doctrine of res judicata. The trial court denied their motions and granted summary judgment to the Barbees. This Court affirms because the ambiguous language of the insurance policies must be construed in a light most favorable to the Barbees, and the Barbees could not have made their claims for underinsurance benefits in the federal case.

FACTS

{¶2} On October 12, 2002, Edward Barbee, Darlene Barbee, Thomas Barbee, Margaret Barbee, Matthew Barbee, and Harvey Barbee were travelling in two cars on a highway near Madison, Wisconsin, when a car came across the median and collided with them. The reason the car came across the median was because of a collision between it and another car. One of the cars involved in the first collision was being driven by an employee of the United States military.

{¶3} At the time of the collisions, Edward, Darlene, Thomas, and Margaret Barbee were riding in a Honda Accord that was insured by Nationwide with underinsurance limits of $300,000 per person, $300,000 per occurrence. Matthew and Harvey Barbee were riding in a Buick LeSabre that was insured by Allstate with underinsurance limits of $100,000 per person, $300,000 per occurrence.

{¶4} The Barbees sued the drivers of the two cars involved in the first collision in the United States District Court for the Western District of Wisconsin. They joined Allstate and Nationwide because those companies had paid them for medical expenses and had a subrogated right to repayment. In June 2005, the judge in that case determined that the United States was 30 percent liable for the Barbees' injuries and the other driver was 70 percent liable. In December 2005, the court entered judgment awarding damages to the Barbees. The United States paid its

pro rata share of the damages, and the other driver's $75,000 in liability coverage was split among all the injured parties.

{¶5} While the federal case was pending, the Barbees' lawyer informed Allstate and Nationwide that, if the district court found that the United States was not liable, the Barbees would have an underinsured motorist claim against them because the remaining liability coverage would be inadequate. In January 2007, the Barbees separately sued Allstate and Nationwide in Lorain County Common Pleas Court, seeking a declaration that they could recover on the underinsurance coverage. The cases were consolidated by the trial court.

{¶6} Allstate and Nationwide moved for summary judgment, arguing that the Barbees' claims were time-barred because they were not brought within three years of the incident. They also argued that the Barbees' claims were barred by the doctrine of res judicata because they could have been brought as part of the federal case. The Barbees opposed the motions, arguing that enforcement of the limitations period would violate public policy. They argued that, under the insurance policies, they did not have an underinsurance claim until the liability coverage of the drivers who caused the collisions was exhausted. Because that coverage was not exhausted until the district court entered its judgment in December 2005, the Barbees argued that it was impossible for them to have sued Allstate and Nationwide within three years of the date of the collisions or as part of the federal case. They noted that they filed their claims within two years of discovering that they were entitled to underinsurance benefits.

{¶7} The trial court denied Allstate's and Nationwide's motions. It noted that, if the United States had been found 51 percent or more liable in the federal case, then, under Wisconsin law, the Barbees would have been able to enforce the entire judgment against it, eliminating their need for underinsurance benefits. See Wis. Stat. § 895.045(1) (2001). It,

therefore, determined that the Barbees' underinsurance claims did not accrue until the federal court determined liability in June 2005. It noted that the Barbees brought their actions against Allstate and Nationwide within three years of that date.

{¶8} The trial court also determined that the underinsurance policies were ambiguous. It noted that one of the conditions for payment of underinsurance benefits was exhaustion of all other liability insurance. The policies also provided that no suit could be brought against Allstate or Nationwide until there had been full compliance with all of the terms and conditions of the policies. It concluded that it would be unfair to enforce a limitations period against policyholders who did not know whether they had an underinsurance claim until all other insurance had been exhausted. It resolved the ambiguity in the policies in favor of the Barbees and concluded that their claims were not time-barred. It also concluded that, because the Barbees did not know they had an underinsurance claim against Allstate and Nationwide until liability was decided in the federal case, they were not able to bring a claim for underinsurance benefits in that case. Accordingly, their claims were not barred by the doctrine of res judicata. The court later granted summary judgment to the Barbees. Allstate and Nationwide have appealed, assigning two errors.

LIMITATIONS PERIOD

{¶9} Allstate and Nationwide's first assignment of error is that the trial court incorrectly denied their motions for summary judgment. They have argued that the court should have enforced the insurance policies' three-year contractual limitations period. In reviewing a ruling on motions for summary judgment, this Court applies the same standard the trial court is required to apply in the first instance: whether there are any genuine issues of material fact and

whether the moving parties are entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶10} Although the Barbees' claims are for underinsurance, that coverage is included within the "Uninsured Motorist" sections of the Allstate and Nationwide policies. "[T]he legal basis for recovery under the uninsured motorist coverage of an insurance policy is contract and not tort." *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193, at ¶10 (quoting *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, 632 (1994)). The Ohio Supreme Court has recognized that, "[i]n Ohio, the statutory limitation period for a written contract is 15 years. . . . However, the parties to a contract may validly limit the time for bringing an action on a contract to a period that is shorter than the general statute of limitations for a written contract, as long as the shorter period is a reasonable one. A contract provision that reduces the time provided in the statute of limitations must be in words that are clear and unambiguous to the policyholder." *Id.* at ¶11 (quoting *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St. 3d 403, 2005-Ohio-5410, at ¶11).

{¶11} Allstate and Nationwide have argued that the policies unambiguously provide that the Barbees had three years to sue them after the collision. Allstate's policy provides that "[a]ny legal action against Allstate must be brought within three years of the date of the accident. No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions." Nationwide's policy provides that "[n]o lawsuit may be filed against us . . . until the said person has fully complied with all the terms and conditions of this policy . . . . Subject to the preceding . . . , under the Uninsured Motorists coverage of this policy, any lawsuit must be filed against us: a) within three (3) years from the date of the accident . . . ."

{¶12} The Barbees have argued that the trial court correctly concluded that the policies are ambiguous. They have noted that one of the "terms" of both policies is that the insurer has

no obligation to pay until all other liability insurance is exhausted. Allstate's policy provides that "[w]e are not obligated to make any payment for bodily injury under this coverage . . . until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been fully and completely exhausted . . . ." Nationwide's policy provides that "[n]o payment will be made until the limits of all other liability insurance and bonds that apply have been exhausted by payments." The Barbees have argued that the "full compliance" language in the lawsuit provision of the policies has been drafted as broadly as possible and creates the impression "that exhaustion must occur for full compliance, which in turn must occur to file suit." They have argued that the ambiguity regarding whether exhaustion is a pre-condition to their right to sue should be construed in their favor.

{¶13} In *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627 (1994), the Kralys were involved in an automobile collision caused by Collin Vannewkirk. They sued him for their injuries. At the time the case began, Mr. Vannewkirk had liability insurance, but his insurance company became insolvent while the Kralys' case was pending. After learning of the insolvency, the Kralys sought to recover from State Farm under their uninsured motorist coverage. State Farm denied coverage because the Kralys did not sue it within two years of the collision, as required by the policy.

{¶14} The Ohio Supreme Court noted that "the present case involves a limitations period which commences before the contractual obligation of [State Farm] to provide uninsured motorist coverage arises." *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, 633 (1994). It noted that, under the terms of the policy, the Kralys had "no right of action against [State Farm] . . . until all the terms of [the] policy have been met." *Id.* "Obviously encompassed within this language are the events that are a condition precedent to coverage." *Id.* It noted that one of the "condition[s]

precedent to uninsured motorist coverage of the [Kralys] is a determination that, for the reasons identified in the policy, the tortfeasor is uninsured. One such circumstance is the insolvency of the insurer of the tortfeasor. This insolvency was therefore the triggering event for uninsured motorist coverage. Without such an event, uninsured motorist coverage would not be operative." *Id*. at 633-34. It concluded that the two year limitations clause was not enforceable, noting that, "[i]nasmuch as this court has rejected legislative attempts to foreclose a right of action before it accrues on the basis of Section 16, Article I of the Ohio Constitution, we are required to be equally resolute with respect to contractual provisions which presume to extinguish the rights of insureds before they arise and, as a result, violate the public policy of this state." *Id*. at 634. It held that "[t]he validity of a contractual period of limitations governing a civil action brought pursuant to the contract is contingent upon the commencement of the limitations period on the date that the right of action arising from the contractual obligation accrues." *Id*. at paragraph two of the syllabus. It also held that "[a] provision in a contract of insurance which purports to extinguish a claim for uninsured motorist coverage by establishing a limitations period which expires before or shortly after the accrual of a right of action for such coverage is *per se* unreasonable and violative of the public policy of the state of Ohio . . . ." *Id*. at paragraph four of the syllabus.

{¶15} *Kuhner v. Erie Ins. Co.*, 98 Ohio App. 3d 692 (1994), involved a similar issue. The Kuhners were injured in an automobile collision in 1987. Mrs. Kuhner's condition deteriorated over the next few years and the cost of her treatment eventually exceeded the tortfeasor's liability coverage. Erie Insurance denied coverage under the Kuhners' underinsured motorist coverage because the policy required that any legal action against Erie begin within two years of the collision.

{¶16} The Tenth District concluded that the policy was ambiguous. *Kuhner v. Erie Ins. Co.*, 98 Ohio App. 3d 692, 695-96 (1994). It noted that there was a "clear inconsistency" between the policy's limitiations clause and its exhaustion clause. *Id*. at 696. The exhaustion clause provided that, "[if] the accident involves underinsured motor vehicles, we will not pay until all other forms of insurance applicable at the time of the accident have been exhausted by payment of their limits." *Id*. It noted that it was unlikely that the limits of all other insurance policies would be exhausted within two years of the collision. *Id*. at 698. The court also noted the holdings from *Kraly*. It concluded that, because the Kuhners' right to payment for underinsured motorist coverage did not accrue under the policy until the tortfeasor's policy limits were exhausted, "[u]nder the rule of the second paragraph of the syllabus of *Kraly*, . . . the two-year limitation created by the policy cannot commence prior to that time. Accordingly, that limitation period cannot preclude the instant action, which was commenced within two years of the exhaustion of the other policies." *Id*.

{¶17} The terms of the Allstate and Nationwide policies at issue in this case are similar to the policy at issue in *Kuhner*. One of the conditions precedent for payment for underinsurance is exhaustion of all other liability coverage. It is not disputed that the liability insurance of the drivers who caused the collisions with the Barbees was not exhausted until December 2005.

{¶18} As this Court has previously noted in this opinion, underinsured motorist coverage is governed by contract law. *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193, at ¶10. "Generally, a breach of contract action is pleaded by stating (1) the terms of the contract, (2) the performance by the plaintiff of his obligations, (3) the breach by the defendant, (4) damages, and (5) consideration." *American Sales Inc. v. Boffo*, 71 Ohio App. 3d 168, 175 (1991). To succeed on their claims, the Barbees had to prove that they performed their

contractual obligations and that Allstate and Nationwide failed to fulfill their obligations without legal excuse. *Laurent v. Flood Data Serv. Inc.*, 146 Ohio App. 3d 392, 398 (2001).

{¶19} The Ohio Supreme Court has explained that, if an automobile insurance policy contains an exhaustion clause, "the exhaustion requirement functions as a precondition to application of the underinsured motorist coverage. [The insurer] is not obligated and the claim is not matured . . . until the exhaustion requirement is satisfied." *Bogan v. Progressive Cas. Ins. Co.*, 36 Ohio St. 3d 22, 27 (1988), overruled on other grounds by *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St. 3d 186, 2002-Ohio-7217. The Barbees, therefore, did not have a right to coverage or a mature claim against Allstate and Nationwide until the liability insurance of the two drivers in the initial collision was exhausted.

{¶20} The liability insurance of the drivers involved in the first collision was exhausted in December 2005. Exhaustion was the triggering event that gave the Barbees a right to underinsurance benefits. See *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, 633-34 (1994). The Allstate and Nationwide insurance policies, however, purported to only give the Barbees until October 2005 to sue them. In such circumstances, in which there is a conflict between a policy's exhaustion clause and limitations clause, there is an ambiguity in the contract. *Bradford v. Allstate Ins. Co.*, 5th Dist. No. 04CA9, 2004-Ohio-5997, at ¶29 (concluding that there was an ambiguity in underinsured motorist policy because there was a conflict between contract provisions requiring an action to be brought within two years, an "other insurance" provision making the Allstate coverage excess, and language requiring complete exhaustion of all limits of liability protection in effect at the time of the collision). Ambiguities in insurance contracts must be construed strictly against the insurer and liberally in favor of the insured. *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, syllabus (1988). The trial court, therefore, correctly determined

that the policies should be construed in the Barbees' favor and that the limitations periods did not begin to run at the time of the collision. *Bradford*, 2004-Ohio-5997, at ¶29; see also *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, paragraph four of the syllabus (holding that policy provision that purports to extinguish a claim for uninsured motorist coverage by establishing a limitations period that expires before the accrual of a right to such coverage is "*per se* unreasonable.").

{¶21} Allstate and Nationwide have argued that the limitations provisions are enforceable under *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193. In *Angel*, Teresa Angel was injured in a June 2001 motor vehicle collision caused by the negligence of Eric Reed. Mr. Reed indicated on a police report that he had liability insurance, but, actually, his policy had been cancelled. Ms. Angel did not discover that the policy had been cancelled until May 2004 and did not sue her insurer, Allstate, until 2005. Allstate argued that her claim was barred by her policy's two-year contractual limitations period.

{¶22} The Ohio Supreme Court first examined whether the two year limitations period was reasonable. It concluded it was under *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St. 3d 619, 624 (1994). *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193, at ¶12-13. It next examined when the two years began to run. Allstate argued that it ran from the date of the collision, while Ms. Angel argued that it ran from the date she discovered that Mr. Reed was uninsured. The Supreme Court concluded that the express language of the contract controlled. *Id*. at ¶15. It rejected Ms. Angel's argument that she could not have discovered that Mr. Reed was uninsured earlier, noting that all that she would have had to do was contact his insurer. *Id*. at ¶17. It distinguished *Kraly* as presenting unique facts. *Id*. at ¶19 ("Unlike *Kraly*, this case presents a standard uninsured-motorist claim in which the tortfeasor was uninsured at the time of

the accident. No subsequent event rendered Reed uninsured; he already was uninsured."). It, therefore, concluded that Ms. Angel's claim was untimely. *Id*.

{¶23} Like the Allstate policy in this case, the insurance policy at issue in *Angel* contained language that "[n]o one may sue us . . . unless there is full compliance with all the policy terms and conditions." *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193, at ¶3. *Angel* is distinguishable, however, for two reasons. First, the Ohio Supreme Court did not analyze whether the "full compliance" provision or an exhaustion requirement created an ambiguity in the policy. Second, unlike in that uninsured motorist case, in this case the Barbees could not have determined that they had an underinsurance claim simply by contacting the tortfeasors' insurers. Because there were multiple tortfeasors, one of whom had unlimited liability coverage, the Barbees could not know that they had a claim under their policies until the federal court determined liability. Accordingly, the facts of this case are closer to *Kraly* than *Angel*.

{¶24} Allstate and Nationwide have next argued that this case is similar to *Griesmer v. Allstate Ins. Co.*, 8th Dist. No. 91194, 2009-Ohio-725. In that case, the Griesmers were injured in a motor vehicle collision. After they settled with the tortfeasor, they sought benefits under the underinsured motorist coverage that they had with Allstate. Allstate denied coverage because the Griesmers had not sued them within two years, as required by their policy. The trial court granted summary judgment to Allstate. On appeal, the Griesmers argued that they did not have standing to make a claim against Allstate until they settled with the tortfeasor. *Id*. at ¶24. The Eighth District determined that the case presented a standard underinsured motorist claim like the claim in *Angel*. *Id*. at ¶30. It noted that *Angel* had determined that a two-year limitations period was reasonable. *Id*. It also noted that the Griesmers had learned that the tortfeasor had

only $25,000 in liability coverage during the two years following the collision. *Id*. It, therefore, enforced the contractual limitations period. *Id*. at ¶43.

{¶25} Although the Eighth District correctly analyzed whether the two-year limitations period was reasonable, it did not examine whether the contract contained a full compliance or exhaustion clause that made the policy ambiguous. That case also involved only one tortfeasor, whose liability insurance was limited.

{¶26} Allstate and Nationwide have next argued that this case is similar to *Pottorf v. Sell*, 3d Dist. No. 17-08-30, 2009-Ohio-2819. In 2005, Mrs. Pottorf was injured in a motor vehicle collision. In 2007, she sued the tortfeasor, and, in 2008, more than three years after the collision, she joined Nationwide, her underinsured motorist carrier. Her policy provided that any lawsuits against Nationwide had to be filed within three years of the date of the collision. The Third District concluded that, under *Angel* and *Miller* and Section 3927.18(H) of the Ohio Revised Code, the three-year limitations period was reasonable. *Id*. at ¶12. Citing *Angel*, it rejected the Pottorfs' argument that they did not know the limits of the tortfeasors' liability coverage until June 2008, noting that all they had to do was contact his insurer. *Id*. at ¶14-15. As in *Angel* and *Griesmer*, however, the Third District did not consider whether the policy had a "full compliance" or exhaustion provision that created an ambiguity in the contract.

{¶27} Allstate and Nationwide have next argued that the limitations provisions are enforceable under *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St. 3d 403, 2005-Ohio-5410. In *Sarmiento*, the Ohio Supreme Court considered whether a two-year contractual limitations period for filing uninsured- or underinsured-motorist claims was reasonable and enforceable when the underlying tort claim was governed by the laws of another state. *Id*. at ¶1. The Sarmientos were injured in a motor vehicle collision in New Mexico. New Mexico had a three-year statute of

limitations for personal injury claims. When the Sarmientos sued Grange three years after the date of the collision seeking to recover under their uninsured/underinsured motorist coverage, Grange sought to enforce the policy's two-year contractual limitations provision. The Ohio Supreme Court determined that, under *Miller*, the two-year period was reasonable and enforceable. *Id*. at ¶20. It noted that "[an] insured is not foreclosed from commencing an action for [uninsured or underinsured] coverage so long as the insured satisfies the policy's conditions precedent to coverage, including commencing an action against the [insurer] within the contractual limitation period." *Id*. at ¶20. It also noted that "nothing prevented the Sarmientos from commencing an action against [their insurer] for [uninsured motorist] benefits within the two-year contractual limitation period and then assigning their rights against the tortfeasor to [their insurer]." *Id*. at ¶21.

{¶28} In *Sarmiento,* the Ohio Supreme Court recognized that insurance contracts contain conditions that must be satisfied before the insurer is required to provide coverage. It is not mentioned in the Supreme Court's opinion or the decision appealed from whether the insurance policy at issue in that case contained an exhaustion provision similar to the ones in this case. Even if it contained a similar provision, it was not analyzed.

{¶29} Allstate and Nationwide have next argued that Section 3937.18(H) specifically allows insurance contracts to limit the time to bring claims for underinsurance to three years. Under Section 3937.18(H), "[a]ny policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both . . . may include terms and conditions requiring that . . . each claim or suit . . . be made or brought within three years after the date of the accident causing the bodily injury . . . or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the insured has become the subject of insolvency proceedings in any state,

whichever is later." This Court agrees that, under Section 3937.18(H), a three-year contractual limitations period is reasonable. Section 3937.18(H), however, does not cure the ambiguity in the Allstate and Nationwide policies.

{¶30} Allstate and Nationwide have further argued that their obligation to pay under the policies and the Barbees' accrual of a cause of action are separate and distinct concepts. They have noted that, in *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St. 3d 281 (1998), the Ohio Supreme Court wrote that "[a]n automobile liability policy will typically require exhaustion of the proceeds of a tortfeasor's policy before the right to payment of the underinsured motorist benefits will occur. However, the date that exhaustion of the tortfeasor's liability limits occurs is not determinative of the applicable law to a claim for underinsured motorist coverage." *Id*. at 287. This Court agrees that an insurer's obligation to pay on a contract and an insured's right to sue for breach of that contract are separate concepts. They are related, however, in that the Barbees have no right to sue Allstate and Nationwide until those companies have failed to perform their obligations under the insurance contract, and that Allstate and Nationwide have no obligations under the contract until all other liability insurance has been exhausted. *Ross*, is distinguishable because the question in that case was "[w]hen does a cause of action for underinsured motorist coverage accrue so as to determine the law applicable to such a claim?" *Id*. at 284. The Supreme Court did not consider in that case whether a limitations provision is enforceable if the time for filing a lawsuit would expire before the insured is able to satisfy the conditions for coverage under the policy.

{¶31} This Court's decision is consistent with its decision in *Mowery v. Welsh*, 9th Dist. No. 22849, 2006-Ohio-1552. In that case, Brent Welsh caused an automobile collision that injured William Mowery. Mr. Mowery sued Mr. Welsh for his injuries. While the case was

pending, Mr. Mowery's doctor determined that he would need surgery. The cost of the surgery increased Mr. Mowery's damages beyond the limits of Mr. Welsh's liability policy. Mr. Mowery, therefore, amended his complaint to assert an underinsured motorist claim against Allstate. Allstate moved for summary judgment because Mr. Mowery did not sue it until more than two years after the collision. Mr. Mowery's insurance policy provided that "[a]ny legal action against Allstate must be brought within two years of the date of the accident. No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions." *Id*. at ¶14. The trial court denied Allstate's motion.

{¶32} This Court affirmed the trial court's decision regarding the limitations provision. While it did not examine whether the contract was ambiguous, it noted that the two-year contractual limitations period expired prior to the exhaustion of the Mr. Welsh's policy limits. *Mowery v. Welsh*, 9th Dist. No. 22849, 2006-Ohio-1552, at ¶22. It concluded that, "[g]iven the particular facts of this case, it is unreasonable to require the insured to exhaust these limits within two years of an accident." *Id*. It distinguished *Sarmiento* because the plaintiff in *Sarmiento* knew he had an uninsured motorist claim within two years of the date of the collision, while Mr. Mowery did not. *Id*. at ¶24.

{¶33} The exhaustion and limitations period provisions of the Allstate and Nationwide underinsured motorist coverages conflict, creating an ambiguity under the facts of this case. Accordingly, the limitations provisions are not enforceable as to the Barbees' claims. The trial court correctly denied Allstate and Nationwide summary judgment on that ground. Allstate's and Nationwide's first assignment of error is overruled.

RES JUDICATA

{¶34} Allstate and Nationwide's second assignment of error is that the trial court incorrectly denied their motions for summary judgment on the doctrine of res judicata. "In Ohio, '[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel.'" *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St. 3d 526, 2009-Ohio-1704, at ¶27 (quoting *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, at ¶6). "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action." *Id*. (quoting *O'Nesti*, 2007-Ohio-1102, at ¶6). "The previous action is conclusive for all claims that were or that could have been litigated in the first action." *Id*.

{¶35} Allstate and Nationwide have argued that the Barbees' claims are barred by the doctrine of res judicata because they could have been presented in the federal court action. They have noted that that action was concluded by a final judgment on December 7, 2005.

{¶36} The trial court correctly determined that the Barbees did not have a claim for underinsurance coverage until all other liability insurance was exhausted and that that did not occur until the federal district court entered its December 7, 2005, judgment. It correctly concluded that, because the Barbees did not have an underinsurance claim until after the federal case was decided, they were not able to raise the claims that they have brought in this action in that case. Allstate and Nationwide's second assignment of error is overruled.

CONCLUSION

{¶37} The trial court properly denied Allstate and Nationwide's motions for summary

judgment. The judgment of the Lorain County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant/cross-appellee.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

PERRIN I. SAH, and IAN R. LUSCHIN, attorneys at law, for appellant/cross-appellee.

PETER D. JANOS, attorney at law, for appellee/cross-appellant.

HENRY W. CHAMBERLAIN, attorney at law, for appellees.