IN THE SUPREME COURT OF OHIO
CASE NO. 2007-0758

TERESA L. ANGEL	:	ON APPEAL FROM THE
	:	GEAUGA COUNTY COURT OF APPEALS
Plaintiff-Appellee,	:	ELEVENTH APPELLATE DISTRICT
	:	
vs	:	Court of Appeals
	:	Case No. C.A. 2005-G-2669
ERIC J. REED, et al.	:	
	:	
Defendants/Appellants.	:	

MERIT BRIEF OF APPELLANT ALLSTATE INSURANCE COMPANY

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STATEMENT OF FACTS

This case arises from a motor vehicle accident and the resultant lawsuit where a personal injury plaintiff filed an action for UM benefits more than one year and eight months after the expiration of the time limitation period stated in the relevant insurance policy. Appellee Teresa L. Angel was a passenger in a vehicle driven by Eric J. Reed, on June 14, 2001. (Supp. 3, 41, 52). At that time, a motor vehicle accident occurred as a result of the negligence of Eric J. Reed. (Supp. 3, 42, 52). Appellee initially filed suit against Eric Reed on May 16, 2003 alleging personal injury and damages as a result of Mr. Reed's negligence. (Appendix 1).

It is undisputed that Appellee did not bring a claim against Appellant Allstate Insurance Company in her original lawsuit filed on May 16, 2003. (Appendix 1). On March 4, 2004, Appellee voluntarily dismissed the original lawsuit without prejudice. (Appendix 2). Appellee then re-filed her Complaint on February 17, 2005, asserting for the first time a claim against Appellant Allstate Insurance Company based upon uninsured motorist (hereinafter "UM") coverage. (Appendix 3, 4 and Supp. 3).

It is further undisputed that on the date of the subject accident, tortfeasor Eric Reed had no liability insurance. (Supp. 42) Mr. Reed did claim to have liability insurance with Nationwide at the scene of the accident as confirmed in the pleadings filed below. (Supp. 42, 52) There has been no evidence presented or argument advanced that Appellee Teresa Angel or any of her counsel ever contacted Nationwide in order to verify tortfeasor's contention that he did, in fact, have liability insurance at the time of the accident.

At the time of the subject accident, Appellee Teresa Angel was insured under a policy of automobile liability insurance, that being Allstate Automobile Insurance Policy 626654064. (Supp. 7-40). Included in that automobile insurance policy was a provision for uninsured motorist coverage. (Supp. 13, 28-34). The policy defined an "uninsured auto" as "a motor vehicle which

has no bodily injury liability bond or insurance policy in effect at the time of the accident." (Supp. 28). The policy also stated that "any legal action against Allstate must be brought within two years of the date of the accident." (Supp. 33).

As Appellee had waited more than three years and eight months after the accident to bring a claim for UM benefits, a summary judgment motion was filed by Appellant Allstate on the basis that the time limitation period stated in the insurance policy had expired. (Supp. 1-6). The Geauga County Common Pleas Court granted Appellant Allstate summary judgment on the basis that Appellee did not bring her suit within the contractual two-year time limitation. (Appendix 19). Appellee appealed the trial court's decision to the Eleventh District Court of Appeals and in a two to one decision the Appellate Court reversed the trial court's granting of summary judgment. (Appendix 9-18). The Eleventh District held that, even when a tortfeasor is uninsured at the time of the accident, "a cause of action for uninsured motorist benefits accrues when the injured party knows, or has reason to know, with the exercise of due diligence, that the tortfeasor was uninsured." (Appendix 14). In doing so, the Eleventh District adopted a "discovery rule" despite prior decisions of other courts in this state that have found that a "discovery rule" is not appropriate in a situation where the insured or uninsured status of a tortfeasor is readily ascertainable.

Appellant Allstate Insurance Company filed its Notice of Appeal to the Supreme Court of Ohio on April 26, 2007. (Appendix 7-8). On August 29, 2007 the Supreme Court granted jurisdiction to hear the case and allowed the appeal.

LAW AND ARGUMENT

I. A CAUSE OF ACTION FOR UNINSURED MOTORIST BENEFITS ACCRUES ON THE DATE OF THE ACCIDENT WHEN THE TORTFEASOR HAS NO LIABILITY INSURANCE ON THAT DATE.

Under standard insurance policies containing UM coverage such as the one issued by Appellant Allstate in the instant case, the insured has a claim for UM benefits on the date he or she is involved in an accident and allegedly injured by an uninsured motorist, i.e. the driver of an "uninsured auto." No determination, adjudication or "discovery" of the tortfeasor's uninsured status is necessary. The simple question to be answered is: did the tortfeasor have insurance on the date of the accident? If not, a cause of action for UM benefits accrues on the date of said accident. The decision of the Court of Appeals below has thrown what is a simple and orderly analysis into disarray.

Appellant Allstate Insurance Company's policy of insurance in this case included language defining an "uninsured auto" as "a motor vehicle which has no bodily injury liability bond, or insurance policy in effect **at the time of the accident.**" This definition is standard throughout the insurance industry and it is consistent with the statutory definition set forth in current R.C. § 3937.18(B)(1) ("an 'uninsured motorist' is the owner or operator of a motor vehicle if...there exists no bodily injury liability bond or insurance policy covering the owners or operators liability to the insured.") There is no requirement in the Allstate policy, or in R.C. § 3937.18 that the claimant must know or prove that the tortfeasor is uninsured before the tortfeasor is considered an "uninsured motorist." Again, the only relevant question is whether the tortfeasor actually had insurance on the date of the accident. The claimant's knowledge of the tortfeasor's status or any incorrect statements made by the tortfeasor are immaterial.

Similarly, there is no requirement in the Allstate policy that before the applicable time limitations period begins to run that the claimant must learn that the tortfeasor is uninsured. The

language in Appellant Allstate's policy states "any legal action against Allstate must be brought within two years of the date of the accident." Again, Appellant's policy language in this regard is consistent with that generally used in the insurance industry and as indicated by the current version R.C. 3937.18(H), which specifically allows insurance carriers to include in their policies time limitations period of "three years after the date of the accident" to bring a UM claim.

It must be noted that there has been no argument below disputing the enforceability of the two year suit provision that was contained in Allstate's policy language. As this Court is aware, effective October 31, 2001, Senate Bill 97 substantially rewrote R.C. 3937.18, the uninsured and underinsured motorist coverage statute. In enacting Senate Bill 97, the general assembly did not specify that it be applied retroactively, therefore the statute must be applied prospectively. R.C. 1.48. As the subject motor vehicle accident of June 14, 2001 occurred prior to the effective date of Senate Bill 97 (October 31, 2001), Allstate's two year suit provision was valid and enforceable. ***See, Miller v. Progressive Cas. Ins. Co.*** (1994), 69 Ohio St.3d 619. In ***Miller*** the Court invalidated a one year suit requirement but held that a two year suit requirement would be reasonable and appropriate when it found that:

> "A two year period, such as that provided for bodily injury actions in R.C. 2305.10, would be a reasonable and appropriate period of time for an insured who has suffered bodily injuries to commence an action or proceeding for payment of benefits under the uninsured or underinsured motorist provision of an insurance policy." ***Id.*** at 624-625. ***See also, Sarmiento v. Grange Mut. Cas. Co.*** (2005), 106 Ohio St.3d 403, Reconsideration denied by, clarified by ***Sarmiento v. Grange Mut. Cas. Co.*** (2005), 107 Ohio St.3d 1701.

In holding that a cause of action for UM benefits does not "accrue" until the claimant becomes aware that the tortfeasor did not have any insurance at the time of the accident, the Court of Appeals disregarded the express contractual provisions of Appellant's policy of insurance. In addition to being contrary to the terms of Appellant's policy, the Court of Appeals decision is contrary to that of this Court's opinion in ***Kraly v. Vannewkirk*** (1994) 69 Ohio St.3d 627. In ***Kraly***,

this Court considered a claim for UM coverage when the tortfeasor **had** a valid liability policy at the time of the accident, but the liability carrier **subsequently became insolvent**, rendering the coverage ineffective. This Court differentiated the ***Kraly*** situation, where UM coverage required a "triggering event" to become effective, from the standard UM situation involving a tortfeasor who simply had no insurance at the time of the accident. The Court in ***Kraly*** stated:

> "In both ***Colvin v. Globe Am. Cas. Co.*** (1980), 69 Ohio St.2d 293 and ***Duriak v. Globe Am. Cas. Co.*** (1986), 28 Ohio St.3d 70, the tortfeasor was uninsured on the date that the injury was sustained by the injured insureds. Thus the cause of action for uninsured motorist coverage accrued on the same date that the injury occurred..." (***Kraly*** at 633).

When a tortfeasor is uninsured at the time of the accident, there can be no question that UM coverage exists (where said coverage is a part of the subject policy). The tortfeasor either has insurance on the date of the accident, or he does not. All a claimant needs to do in order to determine whether he can make a valid UM claim is to ask the tortfeasor at the scene who his insurance carrier is or look at the traffic crash report, and then follow up by calling the purported liability carrier if the tortfeasor claims to be insured. Clearly, if an individual wishes to make a claim for injury following a motor vehicle accident and they are told either by the tortfeasor or learned from the Ohio Traffic Crash Report that the tortfeasor has liability insurance with a certain company, the validity of that insurance is one that can be readily ascertained and confirmed by contacting that purported insurance carrier.

The Court of Appeals stated that Appellant Allstate Insurance Company's policy imposed a "condition precedent" requiring a "determination" that the tortfeasor had no insurance coverage. The "condition" imposed by the Court of Appeals "must be fulfilled prior to the (UM) claim's ripening." Nowhere in Appellant Allstate Insurance Company's policy is there any language that contains any such "condition." In fact, the Court of Appeals decision did not reference any specific language or section of the applicable policy to support its conclusion.

The Court of Appeal's decision did make an unexplained reference to the underinsured motorist (hereinafter "UIM") set-off in the Allstate policy. The quoted provision states as follows:

> "We are not obligated to make any payment for bodily injury under this coverage which arises out of the ownership, maintenance or use of an underinsured motor vehicle 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 by payment of judgments or settlements." (Emphasis added.)

The above provision has no relevance to UM coverage. When UM coverage is involved ("uninsured motorist coverage"), there is no liability policy to exhaust. Even with respect to UIM coverage, the set-off provision does not create any sort of "condition precedent" that would prohibit a claimant from making a claim for UIM benefits. That set-off language only requires exhaustion of the tortfeasor's available liability coverage before Allstate is responsible for tendering payment of any amount due under its UIM coverage. This Court has already established that there is a clear distinction between the right to receive payment and the right to assert a claim based upon UIM coverage. ***See, Ross v. Farmers Insurance Group of Companies*** (1998), 82 Ohio St.3d 281. In ***Ross***, this Court stated that:

> "An automobile liability insurance policy will typically require exhaustion of the proceeds of a tortfeasor's policy before the right to payment of 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." (***Ross*** at 287).

If this set-off language were a precondition to filing a claim as advanced by the Court of Appeals below, then the following course of events must take place for UIM claim to exist:

(1) Claimant sues tortfeasor;
(2) Claimant obtains judgment against tortfeasor;
(3) Claimant obtains payment on that judgment;
(4) Claimant files separate action to recover any remaining damages from the UIM carrier.

Clearly, a tedious and untenable process that would serve only to further burden already busy civil dockets.

It is evident from the language of Appellant Allstate's policy as well as the language of the current UM/UIM statute, that no "condition precedent" exists that requires a "determination" that the tortfeasor is uninsured before a claim for UM benefits ripens. A claim for UM is triggered on the date the claimant allegedly sustains bodily injury caused by a motorist who has no insurance, such as in this case.

In this case, Appellee claims to have been unaware that she had a cause of action for UM benefits at the time of the accident because the tortfeasor claimed to be insured by Nationwide, however, there is nothing in the record to suggest that the claimant ever called Nationwide to verify whether or not the tortfeasor was or was not, in fact, insured. It appears that the "condition precedent" rationale was a pretext for the Court of Appeals to impose a "discovery rule" to extend the valid contractual limitations. The Court of Appeals improperly imposed a "discovery rule" and this Court should unequivocally state that where a tortfeasor has no liability insurance at the time of the accident, a claimant's cause of action for uninsured motorist benefits accrues on that same date.

II. A COURT CANNOT APPLY A "DISCOVERY RULE" TO EXTEND THE VALID CONTRACTUAL LIMITATIONS PERIOD WHEN THE FACTS GIVING RISE TO A CAUSE OF ACTION ARE READILY ASCERTAINABLE.

The application of a "discovery rule" in a UM claim is inappropriate where a tortfeasor is uninsured at the time of an accident. This tenet has been confirmed in the other Appellate Courts of Ohio that have considered this issue. For example, in ***Miller v. Am. Family Ins. Co.***, the Sixth District Court of Appeals directly addressed this situation and determined:

> "In light of these cases, it is clear that a two-year contractual limitations period that begins to run when a cause of action for uninsured motorist benefits accrues is reasonable. In the present case, the tortfeasor was uninsured on the date of the accident. **Although the tortfeasor indicated to the trooper on the scene of the accident that he was insured, the validity of that insurance could have been readily determined.** Accordingly, under the circumstances of this case, the day of the accident, June 22, 1999, is the day on which the contractual limitations period began to run. Appellants did not file their Amended Complaint adding CIC as a

party defendant until June 25, 2001, and therefore did not timely assert their claim for uninsured motorist benefits." ***Miller v. Am. Family Ins. Co.*** (6th App. Dist., 2002), No. OT-02-011, unreported, at Paragraph 34. (Emphasis added).

In ***Marsh v. State Automobile Ins. Co.*** (Second App. Dist., 1997), 123 Ohio App.3d 356, 361, the Court of Appeals distinguished situations such as medical or legal malpractice, in which Ohio courts have applied a discovery rule, stating:

> "In the usual situation the insured has ample time to discover the insured status of the tortfeasor within the two-year contractual period. Indeed the insured will usually learn on the date of the accident or shortly thereafter whether the tortfeasor was insured under an automobile liability policy."

The Tenth Appellate District has also spoke on the issue of the obligation of a claimant in ascertaining whether or not a tortfeasor had applicable liability insurance at the time of an accident. ***Davis v. Allstate Insurance Co.*** (Tenth App. Dist. 2003), No. 02AP-1322, unreported. In ***Davis***, the Tenth District found:

> "Allstate's failure to share with Appellants any information it had regarding the insurance status of (tortfeasor) does not negate the fact that **appellant's had a duty to determine this status for themselves.**" ***Id.*** at Paragraph 18. (Emphasis added).

In ***Reeser v. City of Dayton*** (Second App. Dist., 2006), 167 Ohio App.3d 41, the Court of Appeals for the Second District again addressed the same issues of determining the existence of liability coverage presented in the ***Marsh*** decision. The Court in ***Reeser***, found that:

> "Although ascertaining the insurance status of the city may be more difficult than determining the insurance status of a tortfeasor who produces an insurance card at the scene, we nevertheless conclude, as we did in ***Marsh***, that two years from the date of the accident was ample time for Reeser to investigate the issue and to file an uninsured motorist action against (the insurance company)." ***Id.*** at 44.

Throughout the pendency of this matter and the courts below, Appellee has not demonstrated any attempts, other than for service of process for her original Complaint that was not filed until almost two years after the accident, that she made in order to confirm whether or not the tortfeasor was insured at the time of the accident. Appellee has not made any claim that she ever attempted to make contact with the tortfeasor or the tortfeasor's purported liability carrier

at any time prior to the filing of her original lawsuit on May 16, 2003 or when she originally dismissed that lawsuit on March 4, 2004. Even if Appellee did contact Nationwide in an attempt to verify liability coverage prior to the expiration of Allstate's two year supervision, there has been no evidence presented nor any argument made below that the tortfeasor Eric Reed's purported liability carrier Nationwide misrepresented in anyway the existence of any liability coverage nor that Nationwide delayed a response to inquiry by Appellee as to the issue of whether or not liability coverage was in effect for tortfeasor Eric Reed. In fact, there has been no evidence or argument presented below that Appellee took any action whatsoever to contact Nationwide or any other entity in order to confirm the existence of any liability coverage prior to the expiration of the two year time limitation stated in the Allstate policy.

In Appellee Teresa Angel's appeal filed to the Eleventh District Court of Appeals, she relied primarily upon this Court's decision in ***Kraly v. Vannewkirk,*** a decision that presented a unique set of circumstances which allowed application of a "discovery rule" in a UM claim. 69 Ohio St.3d 627. The defendant tortfeasor in ***Kraly*** in fact **had insurance coverage on the date of the accident** that was rendered ineffective by the subsequent insolvency of the liability insurance carrier. This is a different fact scenario than presented in the instant matter. It was simply not reasonably foreseeable that the tortfeasor's insurance carrier would become insolvent. The insolvency of an insurance company is something that could easily occur without the claimant being notified or becoming aware of the insolvency.

The insolvency of a liability insurance carrier as in ***Kraly*** may be analogized to a medical or legal malpractice situation where the malpractice does not become apparent until some complication or damages arise from it. For example, a medical patient would have no way of knowing that a surgical instrument had been left in their body until a complication arose. The facts giving rise to the cause of action in such a case are not foreseeable and could remain latent

until well after the statute of limitations expires if that time limitation would begin to run on the date of the negligent act. These issues raised with the insolvency of a liability insurer are so unique that it is specifically addressed in R.C. § 3937.18(B)(2).

Policy considerations supporting a "discovery rule" in the context of medical malpractice or legal malpractice do not apply in this situation involving a UM claim based upon the tortfeasor's lack of liability insurance at the time of an accident. In the case presented here, the facts giving rise to Appellee Teresa Angel's claim for uninsured motorist benefits are not hidden and unforeseeable, as they may be in a malpractice claim. Getting into an accident with an uninsured tortfeasor is foreseeable as it is a fact that there are individuals who drive in the State of Ohio without insurance. That is why individuals are afforded the opportunity to obtain uninsured motorist coverage.

It is also foreseeable that an uninsured tortfeasor would claim, at the scene of the accident, to have insurance when he actually does not as it is illegal to drive without insurance. A simple phone call or letter to the tortfeasor's purported insurance carrier would easily answer the question of whether the tortfeasor, in fact, had liability insurance in effect at the time of the accident and consequently, whether the claimant has an uninsured motorist claim.

If the purported liability carrier of a tortfeasor refuses to respond or provides false information, then there could possibly be extenuating circumstances which justify an extension of the time limitations period. In the instant case, however, there is no question that the tortfeasor was uninsured at the time of the accident. The facts giving rise to the UM claim are readily ascertainable, regardless of any representations made by the tortfeasor at the scene. Once again, a simple phone call or letter to the tortfeasor's purported liability carrier would result in confirmation or denial of the existence of liability coverage for that tortfeasor. Appellee has not demonstrated any "due diligence" in an attempt to confirm the tortfeasor's claim of liability coverage. Therefore,

the "discovery rule" does not apply.

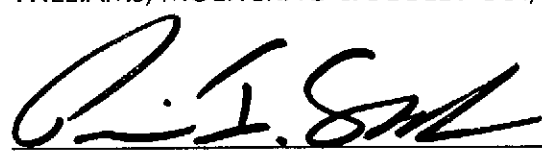
CONCLUSION

The Court of Appeals below in this case misapplied the accrual date of a cause of action for uninsured motorist benefits when the tortfeasor in fact had no liability insurance on the date of the accident. It inappropriately applied a "discovery rule" where the uninsured status of the tortfeasor was readily ascertainable. Where a tortfeasor is, in fact, uninsured on the day of an accident, there can be no question that an individual's UM claim accrues on that date. Even if a tortfeasor misrepresents the fact that he was insured, the validity of that insurance can be readily ascertainable merely by contacting the purported liability insurance carrier.

The Court of Appeals below mistakenly applied a "discovery rule" in this fact scenario and its decision must be reversed.

Respectfully submitted,

WILLIAMS, MOLITERNO & SCULLY CO., L.P.A.

By: 

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CERTIFICATE OF SERVICE

A true copy of the foregoing **Merit Brief of Appellant Allstate Insurance Company** was forwarded by regular U.S. mail, postage prepaid, on this 26th day of October, 2007, to:

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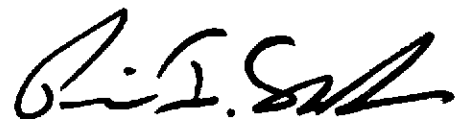
By: 

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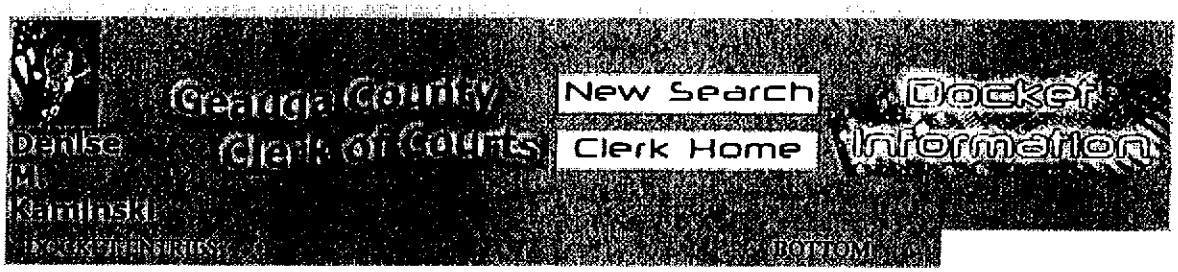

Date: 10/16/2007 Geauga County **Time:** 8:31:36 AM
General Division
Denise M. Kaminski

DOCKET SHEET

STYLE: ANGEL vs. REED **CASE:** 03P000471

ACTION: OTHER TORT **FILE DATE:** 5/16/2003

JUDGE : H F INDERLIED

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JOHN DOES 1 THRU 5 ADDRESSES UNKNOWN	**DEFENDANT**		

****** DOCKET ENTRIES ******	
5/16/2003	CASE DESIGNATION SHEET FILED.
5/16/2003	COMPLAINT FOR MONEY FILED
5/19/2003	DEPOSIT ON CIVIL CASE: $150.00 RECEIPT #G02200 PAID BY ELK & ELK CO LPA(MARTIN DELAHUNTY/ATTY)
5/21/2003	SUMMONS AND COMPLAINT SENT TO DEFENDANT,CERTIFIED MAIL,RRR.
5/27/2003	CERTIFIED MAIL RETURNED FOR ERIC REED; NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD (SUMMONS & COMPLAINT)
5/27/2003	NOTICE OF FAILURE OF SERVICE SENT TO MARTIN DELAHUNTY III. RE: ERIC J REED

7/16/2003	TEN DAY LETTER ISSUED TO ATTY DELAHUNTY
7/22/2003	INSTRUCTIONS FOR SERVICE FILED.
7/22/2003	INSTRUCTIONS FOR SERVICE FILED.
8/13/2003	CERTIFIED MAIL RETURNED FOR ERIC J. REED UNCLAIMED.
8/19/2003	NOTICE OF FAILURE OF SERVICE SENT TO MARTIN S. DELAHUNTY III RE: ERIC J. REED.
10/14/2003	TEN DAY LETTER ISSUED TO ATTY DELAHUNTY
10/16/2003	NOTICE OF GOOD CAUSE FILING FILED.
10/16/2003	INSTRUCTIONS FOR SERVICE FILED.
10/23/2003	SUMMONS AND COMPLAINT RE-SENT TO DEFENDANT, ERIC J. REED, CERTIFIED MAIL,RRR.
12/17/2003	DEFAULT LETTER ISSUED TO ATTY DELAHUNTY
12/31/2003	PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT ERIC J. REED FILED.
1/13/2004	SCHEDULED FOR 02/25/04 AT 1:30 PM - DEFAULT HEARING
2/26/2004	PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL OF ALL DEFENDANTS PURSUANT TO RULE 41(A)(1)(a)OF THE OHIO RULES OF CIVIL PROCEDURE FILED.
3/4/2004	ORDER FILED. DISMISSAL -S- VOLUME # 82 PAGE # 26633

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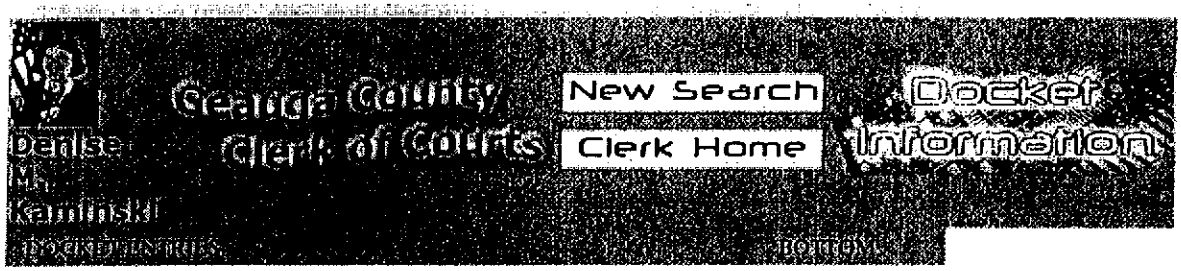
New Search



Date: 10/16/2007 Geauga County General Division Denise M. Kaminski **Time:** 8:32:15 AM

DOCKET SHEET

STYLE: ANGEL vs. REED **CASE:** 05P000146

ACTION: OTHER TORT **FILE DATE:** 2/17/2005

JUDGE : DAVID L. FUHRY

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JOHN DOES 1-5 ADDRESS UNKNOWN	DEFENDANT		
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****** DOCKET ENTRIES ******	
2/17/2005	DEPOSIT ON CIVIL CASE: $150.00 RECEIPT #G14130 PAID BY ELK & ELK CO LPA
2/17/2005	CASE DESIGNATION SHEET FILED.
2/17/2005	COMPLAINT FOR MONEY, DECLARATORY JUDGMENT AND UNINSURED/UNDERINSURED MOTORIST BENEFITS FILED
2/17/2005	SUMMONS AND COMPLAINT SENT TO DEFENDANTS, ERIC J REED AND ALLSTATE INSURANCE COMPANY CERTIFIED MAIL, RRR.
2/17/2005	****** CONVERTED OPEN ITEMS AS OF 09/29/05 ****** $122.00 Party from: ELK & ELK CO LPA
2/25/2005	CERTIFIED MAIL RETURNED FOR ERIC J. REED - FORWARDING EXPIRED.
3/2/2005	NOTICE OF FAILURE OF SERVICE SENT TO MARTIN S. DELAHUNTY III RE: ERIC J. REED.
3/7/2005	RETURN RECEIPT FROM ALLSTATE INSURANCE COMPANY SIGNED ON 2/22/05.
3/24/2005	STIPULATION FOR LEAVE TO PLEAD FILED.
3/28/2005	INSTRUCTIONS FOR SERVICE FILED.
3/30/2005	STIPULATION FOR LEAVE TO PLEAD FILED. IT IS SO ORDERED/ 04/20/05 VOLUME # 83 PAGE # 52700
4/4/2005	SUMMONS AND COMPLAINT RE-SENT TO ERIC J REED, CERTIFIED MAIL,RRR.
4/6/2005	NOTICE OF SERVICE OF DISCOVERY MATERIALS FILED.
4/6/2005	SEPARATE ANSWER AND CROSS CLAIM OF DEFENDANT ALLSTATE INSURANCE COMPANY (JURY DEMAND ENDORSED HEREON) FILED.
4/7/2005	CERTIFIED MAIL RETURNED FOR ERIC J. REED - NO SUCH STREET/NUMBER.
4/7/2005	NOTICE OF FAILURE OF SERVICE SENT TO MARTIN S. DELAHUNTY III RE: ERIC J. REED.
4/29/2005	INSTRUCTIONS FOR SERVICE OF COMPLAINT ON ERIC J. REED BY CERTIFIED MAIL FILED.
5/3/2005	SUMMONS AND COMPLAINT SENT TO DEFENDANT, ERIC J. REED, BY CERTIFIED MAIL,RRR.
5/9/2005	CERTIFIED MAIL RETURNED FOR ERIC J. REED - NOT DELIVERABLE AS ADDRESSED - UNABLE TO FORWARD.
5/11/2005	NOTICE OF FAILURE OF SERVICE SENT TO MARTIN S. DELAHUNTY III RE: ERIC J. REED.
6/14/2005	LETTER FROM JUDGE FUHRY TO ATTORNEY MARTIN S. DELAHUNTY REGARDING FAILURE OF SERVICE ON ERIC J. REED.
	DEFENDANT ALLSTATE INSURANCE COMPANY'S

6/23/2005	MOTION FOR SUMMARY JUDGMENT FILED.
6/29/2005	ORDER OF THE COURT FILED. PARTIES RESPOND 30 DAYS VOLUME # 83 PAGE # 58614
7/25/2005	INSTRUCTIONS FOR SERVICE FILED. (ERIC REED @ 204 PARK)
7/25/2005	INSTRUCTIONS FOR SERVICE FILED. (ERIC REED @ 9769 MENTOR RD)
7/28/2005	SUMMONS AND COMPLAINT RE-SENT TO DEFENDANT, ERIC J. REED CERTIFIED MAIL,RRR AT 204 PARK AVENUE AND 9769 MENTOR RD.
8/1/2005	PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT ALLSTATE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT FILED.
8/2/2005	CERTIFIED MAIL RETURNED FOR ERIC J REED MOVED LEFT NO ADDRESS.
8/11/2005	NOTICE OF FAILURE OF SERVICE SENT TO ATTORNEY MARTIN S DELAHUNTY III RE: ERIC J REED
8/11/2005	ORDER OF THE COURT FILED. DEFS GRANTED 14 DAYS TO REPLY VOLUME # 83 PAGE # 61744
8/15/2005	MOTION FOR LEAVE TO FILE DEFENDANT ALLSTATE'S REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO ALLSTATE'S MOTION FOR SUMMARY JUDGMENT FILED.
8/16/2005	DEFENDANT ALLSTATE'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO ALLSTATE'S MOTION FOR SUMMARY JUDGMENT FILED.
8/18/2005	CERTIFIED MAIL RETURNED FOR ERIC J. REED - UNCLAIMED.
8/19/2005	NOTICE OF FAILURE OF SERVICE SENT TO MARTIN S. DELAHUNTY III RE: ERIC J. REED.
8/26/2005	JUDGMENT ENTRY FILED. GRANTED MOTION VOLUME # 83 PAGE # 62879
9/1/2005	INSTRUCTIONS FOR ORDINARY MAIL SERVICE OF COMPLAINT ON ERIC J REED FILED.
9/7/2005	SUMMONS AND COMPLAINT RE-SENT TO DEFENDANT, ERIC J. REED, AT 9769 MENTOR RD, CHARDON, OH 44024, BY ORDINARY MAIL.
9/8/2005	PLAINTIFFS' MOTION FOR LEAVE TO FILE SERVICE BY PUBLICATION ON DEFENDNAT ERIC J REED FILED.
9/20/2005	JUDGMENT ENTRY FILED. PLAINTIFF GRANTED LEAVE FILE SERVICE BY PUBLICATION VOLUME # 83 PAGE # 64314
10/20/2005	CLERK FEES
1/10/2006	PROOF OF PUBLICATION FROM NEWS HERALD FILED (ELK & ELK CO., LPA).
	MOTION FOR DEFAULT JUDGMENT FILED. Attorney:

2/22/2006	DELAHUNTY III, MARTIN S (0039014)
3/1/2006	DEFENDANT ALLSTATE INSURANCE COMPANY'S RESPONSE TO PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT ERIC J. REED FILED.
3/15/2006	CASE SCHEDULED Event: HEARING (MISC) Date: 05/08/2006 Time: 1:30 pm Judge: FUHRY, DAVID L. Location:
3/31/2006	ORDER OF THE COURT FILED. HRG SET FOR 05/08/06 IN RE: DEFAULT JUDG
4/28/2006	FAX RECEIVED FROM MELANIE ALVADO
5/1/2006	MOTION TO CONTINUE HEARING FILED.
5/8/2006	ORDER FILED. *DENIED MOTION TO CONTINUE HEARING
5/10/2006	ADDITIONAL BRIEF AND AFFIDAVIT IN SUPPORT OF DEFAULT JUDGMENT AGAINST DEFENDANT ERIC REED FILED. Attorney: DELAHUNTY III, MARTIN S (0039014)
5/18/2006	SUPREME COURT CLOSED
5/18/2006	JUDGMENT ENTRY FILED. DEFAULT JUDGMENT -A18-
5/2/2007	CASE SCHEDULED Event: STATUS CONFERENCE Date: 05/31/2007 Time: 10:30 am Judge: FUHRY, DAVID L. Location:
5/2/2007	SUPREME COURT REOPEN
5/2/2007	YELLOW SCHEDULING NOTICE
6/8/2007	SUPREME COURT CLOSED
6/8/2007	ORDER FILED. STAYED -A15-

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New Search

IN THE SUPREME COURT OF OHIO

TERESA L. ANGEL Plaintiff-Appellee, vs ERIC J. REED, et al. Defendants/Appellants.	:	ON APPEAL FROM THE GEAUGA COUNTY COURT OF APPEALS ELEVENTH APPELLATE DISTRICT Court of Appeals Case No. C.A. 2005-G-2669

07-0758

NOTICE OF APPEAL OF APPELLANT
ALLSTATE INSURANCE COMPANY

PERRIN I. SAH (0065090)
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Email: mdelahunty@elkandelk.com
Attorney for Plaintiff-Appellee
Teresa L. Angel

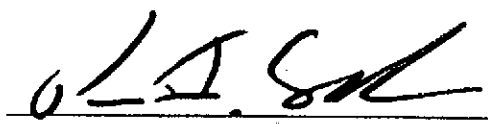
Notice of Appeal of Appellant Allstate Insurance Company

Appellant Allstate Insurance Company hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Geauga County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2005-G-2669 on March 12, 2007, attached hereto.

This case raises a question of public or great general interest.

Respectfully submitted,

WILLIAMS, MOLITERNO & SCULLY CO., L.P.A.

By: 

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CERTIFICATE OF SERVICE

A true copy of the foregoing **Notice of Appeal of Appellant Allstate Insurance Company** was forwarded by regular U.S. mail, postage prepaid, on this 25th day of April, 2007, to:

Martin S. Delahunty III, Esq.
6110 Parkland Blvd.
Mayfield Heights, Ohio 44124

Attorney for Plaintiff-Appellee

WILLIAMS, SENNETT & SCULLY CO., L.P.A.

By: 

PERRIN I. SAH (0065090)
Attorney for Defendant/Appellant
Allstate Insurance Company

STATE OF OHIO)
) SS:
COUNTY OF GEAUGA)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

TERESA L. ANGEL,

Plaintiff-Appellant

- vs -

ERIC J. REED, et al.,

Defendants,

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

JUDGMENT ENTRY

CASE NO. 2005-G-2669

For the reasons stated in the opinion of this court, the sole assignment of error is with merit. It is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Colleen Mary O'Toole
JUDGE COLLEEN MARY O'TOOLE

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

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THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

TERESA L. ANGEL,	:	**OPINION**
Plaintiff-Appellant,	:	**CASE NO. 2005-G-2669**
- vs -	:	
ERIC J. REED, et al.,	:	
Defendants,	:	
ALLSTATE INSURANCE COMPANY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 05 P 000146.

Judgment: Reversed and remanded.

Martin S. Delahunty, III, Elk & Elk Co., L.P.A., Landerhaven Corporate Center, 6110 Parkland Boulevard, Mayfield Heights, OH 44124 (For Plaintiff-Appellant).

Perrin I. Sah, Williams, Sennett & Scully Co., L.P.A., 2241 Pinnacle Parkway, Twinsburg, OH 44087-2537 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Teresa L. Angel appeals the judgment of the Geauga County Court of Common Pleas, granting summary judgment to Allstate Insurance Company. Angel is

seeking uninsured/underinsured motorist coverage under a policy issued to her by Allstate. We reverse and remand.

{¶2} June 14, 2001, Angel was injured when the vehicle in which she was a passenger struck another vehicle from behind in Cleveland, Ohio. The operator of the vehicle occupied by Angel was defendant, Eric Reed. Reed indicated on the police report of the accident that he had liability insurance with "Nationwide."

{¶3} Angel had uninsured/underinsured motorist insurance with Allstate. According to the terms of the Allstate policy, an "uninsured auto" includes, "*** a motor vehicle which has no bodily injury liability bond or insurance policy in effect at the time of the accident." The Allstate policy further provides that Allstate is not obligated to make any payments under the UM/UIM provisions of its policy, "*** 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 by payment of judgments or settlements." Finally, it provides, "[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." (Emphasis sic.)

{¶4} May 16, 2003, Angel filed suit against Reed. March 4, 2004, Angel dismissed the suit, without prejudice, pursuant to Civ.R. 41(A)(1)(a).

{¶5} May 2, 2004, counsel for Angel was informed by Nationwide that Reed's liability policy had been cancelled approximately three months prior to the accident involving Angel. July 30, 2004, Angel notified Allstate that she was making a claim for uninsured motorist benefits.

{¶6} February 17, 2005, Angel again filed suit against Reed, including Allstate as an additional defendant. Allstate moved for summary judgment. August 26, 2005, the trial court granted Allstate's motion on the grounds that Angel failed to bring suit against Allstate within the contractual two-year limitations period following the accident.[1] The court further found that there was no just reason for delay. Angel timely appealed, raising one assignment of error:

{¶7} "The trial court erred by granting summary judgment to Allstate because a valid two-year contractual limitation on filing suit for UM benefits can only be counted from the time the claim accrues."

{¶8} Angel raises a number of arguments under her assignment of error, but the axis upon which this case revolves is simply whether the two year limitation period for bringing a cause of action for uninsured motorist benefits under the subject Allstate policy is enforceable under the facts in this case. We hold that it is not.

{¶9} The legal basis for recovery of uninsured motorist benefits of an insurance policy is contract. *Motorists Mut. Ins. Co. v. Tomanski* (1971), 27 Ohio St.2d 222, 223. The limitations period for most written contracts, including insurance policies, is fifteen years. R.C. 2305.06. "**** [T]he 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." *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 2005-Ohio-5410, at ¶11.

1. This court notes that Allstate has maintained this particular interpretation of its policy language throughout the state, and denied payment on first party UM/UIM claims as a consequence. Due to varying appellate decisions, some claims have, ultimately, been paid, others not.

Generally, a contractual two-year limitation period for filing UM/UIM claims is reasonable and enforceable. Cf. Id., paragraph one of the syllabus.

{¶10} However, "[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." *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, paragraph two of the syllabus. For purposes of this case, therefore, the question presented is: "when did Angel's cause of action for uninsured motorist benefits accrue?" To find the two year limitation period in the subject Allstate policy valid requires finding that the cause of action for uninsured motorist benefits accrued on the date of the accident. In *Kraly*, the Supreme Court stated, in dicta, that if a tortfeasor was uninsured on the date of the accident, then the cause of action for uninsured motorist benefits accrued on that date. Id. at 633. Accepting this view, the grant of summary judgment to Allstate herein was correct, since the tortfeasor, Reed, had been uninsured for some three months prior to the accident.

{¶11} *Kraly* is distinguishable on this point. The *Kraly* court was merely distinguishing its prior decisions in *Colvin v. Globe American Cas. Co.* (1982), 69 Ohio St.2d 293; and *Duriak v. Globe American Cas. Co.* (1986), 28 Ohio St.3d 70. *Kraly* at 633. Nothing in *Colvin* or *Duriak* indicates that the contractual issues we believe prevented accrual of the uninsured claim at the time of the accident in this case were fully presented or considered in those cases. Thus, in *Colvin*, it was clear that the uninsured status of the alleged tortfeasor was at issue well within the contractual limitation period. Id. at 296. In this case, it was not.

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{¶12} Since an uninsured motorist claim arises in contract, courts must look to the provisions of the contract to determine when a cause of action accrues. The subject Allstate contract imposes various legitimate conditions precedent to an uninsured motorist claim, all of which must be fulfilled prior to the claim's ripening. In particular, it requires a determination that the claim arose from the use of a vehicle without insurance coverage. In this case, the tortfeasor, Reed, informed the police at the time of the accident that he was insured with Nationwide. The record indicates that Angel vigorously pursued her claim against Reed, but without success, seven attempts at service having failed by the time summary judgment was granted Allstate. It was only on May 2, 2004 – almost one year following the filing of the original action in this case and nearly three years following the accident – that Nationwide informed Angel's attorney that Reed was uninsured.

{¶13} In sum, Angel had every reason to believe the tortfeasor was insured, and made every reasonable effort to sue and serve him within the two year period required for personal injury claims – and the Allstate uninsured coverage. Due to Reed's success in avoiding service, it was essentially impossible for Angel to discover his uninsured status within that two year period. A contractual limitation period cannot be used to void a valid condition precedent to uninsured motorist coverage: a determination that the tortfeasor is uninsured. This is black letter contract law.

{¶14} Consequently, we hold that a cause of action for uninsured motorist benefits accrues when the injured party knows, or has reason to know, with the exercise of due diligence, that the tortfeasor was uninsured.

{¶15} The sole assignment of error is with merit.

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{¶16} For the foregoing reasons, the judgment of the Geauga County Court of Common Pleas is reversed, and this matter remanded for further proceedings consistent with this opinion.

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶17} The facts of the present case are relatively simple.

{¶18} On June 14, 2001, Angel was injured while occupying a vehicle operated by Reed. At the time of the injury, Reed claimed to have liability insurance with Nationwide. In fact, Reed's policy with Nationwide was cancelled about three months prior to the accident.

{¶19} At the time of the injury, Angel had uninsured/underinsured motorist insurance with Allstate. According to the policy's terms, Angel had two years, from the date of accident, to bring legal action against Allstate.

{¶20} Angel did not bring suit against Allstate until February 17, 2005, well after the two-year period for initiating legal action.

{¶21} Accordingly, Angel's uninsured/underinsured motorist claim is time-barred. As the majority acknowledges, "a contractual two-year limitation period for filing UM/UIM claims is reasonable and enforceable." See *Sarmiento v. Grange Mut. Cas. Co.*, 106

Ohio St.3d 403, 2005-Ohio-5410, at paragraph one of the syllabus ("[a] two-year contractual limitation period for filing uninsured- and underinsured-motorist claims is reasonable and enforceable"); *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 624-625, 1994-Ohio-160 ("a *two-year* period *** would be a reasonable and appropriate period of time for an insured who has suffered bodily injuries to commence an action or proceeding for payment of benefits under the uninsured or underinsured motorist provisions of an insurance policy") (emphasis sic).

{¶22} The majority, however, raises the issue "when did Ms. Angel's cause of action for uninsured motorist benefits accrue?" The obvious answer to this question is that Angel's cause of action accrued when she was injured by an uninsured motorist, i.e. June 14, 2001. As the Ohio Supreme Court has stated, in such cases "the cause of action for uninsured motorist coverage accrued ***on the same date the injury occurred.***" *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 633 (emphasis added), discussing *Colvin v. Globe Am. Cas. Co.* (1982), 69 Ohio St.2d 293, and *Duriak v. Globe Am. Gas. Co.* (1986), 28 Ohio St.3d 70.

{¶23} The majority determines otherwise. The majority states that the Allstate insurance policy imposes, as a "condition precedent" to accrual, "a determination that the claim arose from the use of a vehicle without insurance coverage." However, no such language exists in the Allstate policy. The unequivocal language of the policy states that "[a]ny legal action against **Allstate** must be brought within two years of the date of the accident," not the date on which the tortfeasor is determined to be uninsured.

{¶24} Despite the lack of foundation in the language of the policy, Angel urges this court to adopt the "discovery rule" and hold that she had two years from the date she discovered Reed was uninsured to file suit against Allstate. This argument has been consistently rejected by Ohio's courts.

{¶25} In *Marsh v. State Auto. Mut. Ins. Co.* (1997), 123 Ohio App.3d 356, as in this case, the plaintiff filed suit against her uninsured motorist carrier more than two years after the date of the accident and, thus, after the expiration of the limitations period for bringing suit contained in the insurance agreement. The plaintiff in *Marsh* argued that the two-year period only began to run after she learned the tortfeasor was uninsured. Id. at 359. The Second Appellate District rejected her argument, holding that two years from the date of the accident is a reasonable period of time for a policyholder to determine a tortfeasor's insurance status. Id. at 361.

{¶26} "In the usual situation the insured has ample time to discover the insured status of the tortfeasor within the two year contractual period. Indeed the insured will usually learn on the date of the accident or shortly thereafter whether the tortfeasor was insured under an automobile liability policy. It is unlawful to operate a motor vehicle in this state unless proof of financial responsibility is maintained. See R.C. 4509.101. Proof of financial responsibility is ordinarily provided by use of financial responsibility identification cards which every insurer writing motor vehicle insurance in Ohio is required to provide to every policyholder. See, R.C. 4509.103. Discovering the insurance status of a tortfeasor is quite unlike discovering medical or legal malpractice. In the latter situation the Ohio Supreme Court has been willing to toll the short statute of

limitations period for bringing such actions while the malpractice remains undiscovered. *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 512 N.E.2d 337." Id. at 361.

{¶27} In the present case, the majority alleges that it was "virtually impossible for *** Angel to discover [Reed's] uninsured status within that two year period." On the contrary, all that was necessary to determine Reed's insurance status was to contact Nationwide. There is no reason why it should have taken Angel three years to realize Reed was uninsured. See *Reeser v. Dayton*, 167 Ohio App.3d 41, 2006-Ohio-2333, at ¶13 ("Reeser certainly could have obtained the information about the City's insurance status within two years of the accident"); *Davis v. Allstate Ins. Co.*, 10th Dist. No. 02AP-1322, 2003-Ohio-4186, at ¶18 ("Allstate's failure to share with appellants any information it had regarding the insurance status of [the tortfeasor] does not negate the fact that appellants had a duty to determine this status for themselves"); *Miller v. Am. Family Ins. Co.*, 6th Dist. No. OT-02-011, 2002-Ohio-7309, at ¶34 ("[a]lthough the tortfeasor indicated to the trooper on the scene of the accident that he was insured, the validity of that insurance could have been readily determined").[2]

{¶28} For the foregoing reasons, the decision of the court below should be affirmed.

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2. In *Kraly*, the Ohio Supreme Court sanctioned the application of the discovery rule in the unique situation that the tortfeasor had valid liability insurance on the date of accident, but subsequently became uninsured when the liability insurer became insolvent. "Where the liability insurer of a tortfeasor has been declared insolvent, a right of action of an insured injured by the tortfeasor against his insurer under the uninsured motorist provision of his automobile insurance contract accrues on the date that the insured receives notice of the insolvency." 69 Ohio St.3d 627, at paragraph three of the syllabus. As the Ohio Supreme Court later recognized, "*Kraly* unarguably involved a unique factual situation, and this court accordingly fashioned a remedy based upon concepts of fairness and public policy." *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St.3d 281, 287, 1998-Ohio-381.

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

TERESA L. ANGEL	:	CASE NO. 05P000146
Plaintiff(s),	:	JUDGE DAVID L. FUHRY
-vs-	:	**JUDGMENT ENTRY**
ERIC J. REED, et. al.	:	
Defendant(s).	:	

This matter comes on for consideration on defendant's, Allstate Insurance Company's, Motion for Summary Judgment, opposed by plaintiff.

THE COURT FINDS the Motion should be granted. Plaintiff received the benefit of the full two years in which to bring her action.

The plaintiff's reliance on Kraly v. Vannewkirk (1994), 69 Ohio St. 3d 627 is inappropriate. The tort feasor there was insured at the time of the accident. In this case, defendant Reed was not.

WHEREFORE, the Motion for Summary Judgment is granted and judgment is hereby granted for defendant Allstate Insurance Company and against plaintiff Teresa L. Angel.

THE COURT FURTHER FINDS that plaintiff has no service as to defendant Reed. Plaintiff shall proceed to obtain service forthwith so that this case can proceed.

THE COURT FURTHER FINDS that this is a final appealable order and that there is no just reason for delay.

IT IS SO ORDERED.

8/26/05
DAVID L. FUHRY, JUDGE

cc: M. S. Delahunty, III, Esq.
E. J. Reed (2)
P. I. Sah, Esq.

cd

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6 of 6 DOCUMENTS

Melanie S. Miller, et al., Appellants/Cross-Appellees v. American Family Insurance Company, et al., Appellees/Cross-Appellants.

Court of Appeals No. OT-02-011

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, OTTAWA COUNTY

2002 Ohio 7309; 2002 Ohio App. LEXIS 7200

December 30, 2002, Decided

PRIOR HISTORY: [**1] Trial Court No. 00-CVC-181.

DISPOSITION: AFFIRMED.

COUNSEL: David C. Peebles, for appellants.

Stephen C. Roach, for appellees.

OPINION BY: KNEPPER

OPINION

DECISION AND JUDGMENT ENTRY

KNEPPER, J.

[*P1] This is an appeal and cross-appeal from a judgment of the Ottawa County Court of Common Pleas which granted summary judgment to defendant-appellee/cross-appellant, The Cincinnati Insurance Company ("CIC"), in an action seeking uninsured motorist coverage benefits. Through that judgment, the court dismissed the complaint of plaintiffs-appellants/cross-appellees, Melanie S. Miller, Calin Miller and Daniel A. Miller, and the cross-claim of defendant American Family Insurance Company against CIC.

[*P2] On June 22, 1999, Melanie Miller was involved in an automobile accident while driving a vehicle owned by her husband Daniel Miller. Melanie was using the vehicle for personal errands and her minor daughter Calin Miller was in the vehicle as a passenger. The accident was caused by Jose Guterrez, who failed to yield the right of way at a stop sign. Mr. Guterrez was an uninsured driver.

[*P3] At the time of the accident, the Millers maintained a policy of automobile insurance issued by American Family [**2] which included uninsured motorist coverage. In addition, Daniel Miller was employed by Obars Machine and Tool Company ("Obars"). Obars was a named insured under a policy of insurance issued by CIC, with a policy period of July 10, 1998 to July 10, 2001. That policy included business auto and uninsured/underinsured motorist ("UM/UIM") coverages (the "auto policy"). Obars was also a named insured under a commercial umbrella policy issued by CIC with a policy period of July 10, 1997 to July 10, 2000 (the "umbrella policy").

[*P4] On August 18, 2000, the Millers filed a complaint against Guterrez, American Family, and John Doe and/or John Doe, Inc., identified as "Plaintiffs' insurer and successor companies or entities thereto. Identities and addresses unknown." Subsequently, on June 25, 2001, the Millers filed their first amended complaint, adding CIC as a party defendant. In their claim against CIC, the Millers sought UM/UIM benefits under the policy of insurance issued to Obars. The Millers filed a second amended complaint on November 16, 2001, adding Monroe Guaranty Insurance Company ("Monroe") as a party defendant. Monroe had issued a policy of insurance to Melanie Miller's [**3] employer, Grates Silvertop Restaurant, and the Millers sought UM/UIM benefits under that policy. [1]

1 The claim against Monroe is not at issue in this appeal.

[*P5] In their answer to the Millers' second amended complaint, CIC raised the affirmative defense that the Millers were not entitled to UM/UIM benefits under the CIC auto policy because they violated the contractual limitations period and gave late notice of the June 22, 1999 accident and of their claim for benefits. In addition to filing an answer to the second amended complaint, American Family filed a cross-claim against CIC and Monroe. The cross-claim sought an order declaring

that in the event the Millers were entitled to UM/UIM coverage from American Family, that coverage is excess and/or pro rata to the coverage provided by the CIC and Monroe policies.

[*P6] On February 6, 2002, CIC filed its motion for summary judgment. CIC raised four issues in that motion: (1) that the Millers were not insured under the UM/UIM provisions of the CIC [**4] auto policy; (2) that the Millers' UM/UIM claims were barred by the other vehicle exclusion; (3) that the Millers violated the contractual two year time limitation within which they were required to file their lawsuit against CIC; and (4) that the Millers were not insured under the commercial umbrella policy. In their memorandum in opposition to CIC's summary judgment motion, the Millers sought an order finding that they were "insureds" under both the auto and umbrella policies of insurance issued by CIC to Obars and were therefore entitled to UM/UIM coverage under both policies.

[*P7] American Family filed its own summary judgment motion and a memorandum in opposition to CIC's summary judgment motion. Consistent with its cross-claim, American Family requested that the court hold as a matter of law that the CIC and Monroe policies be found to provide primary insurance for the Millers' UM/UIM claims. Alternatively, American Family requested that the court order the insurance companies to provide UM/UIM coverage to the Millers on a pro rata basis.

[*P8] In a decision and order dated March 19, 2002, the trial court granted CIC's motion for summary judgment on both plaintiffs' [**5] complaint and American Family's cross-claim. The trial court examined the CIC policy and determined that the Millers were insureds under the policy. However, the court concluded that because, at the time of the accident, Melanie Miller was driving an automobile that was not specifically identified in the policy, the "other owned vehicle" exclusion of the policy operated to prevent coverage. Although the court did not expressly address CIC's argument that the Millers' claims were barred by the limitations period set forth in the policy, by reaching the issue of the application of the "other owned vehicle" exclusion, the court necessarily determined that the Millers had timely filed suit against CIC. Subsequently, the trial court filed a judgment entry granting CIC's motion for summary judgment, dismissing the Millers' second amended complaint against CIC and dismissing American Family's cross-claim against CIC. The court also found, pursuant to *Civ.R. 54(B)*, that there was no just reason for delay. Accordingly, despite the fact that other claims are still pending in the trial court, the Millers filed the present appeal to challenge the trial court's ruling.

[*P9] In their brief [**6] before us, the Millers raise the following assignment of error:

[*P10] "The trial court erred by granting appellee Cincinnati Insurance Company's motion for summary judgment and finding that appellant, while an insured, was excluded from coverage under Cincinnati's insurance policy."

[*P11] In addition, CIC filed a cross-appeal, which raises an additional assignment of error:

[*P12] "The trial court erred by not granting summary judgment in favor of defendant/appellee/cross-appellant The Cincinnati Insurance Company based on plaintiffs/appellants not being an insured under the insurance policies issued by the Cincinnati Insurance Company."

[*P13] Because the assignments of error are interrelated and both challenge the trial court's summary judgment ruling, they will be addressed together. In reviewing a trial court's ruling on a motion for summary judgment, this court examines the case de novo. *Conley-Slowinski v. Superior Spinning & Stamping Co. (1998), 128 Ohio App.3d 360, 363, 714 N.E.2d 991.* To prevail on a motion for summary judgment, the movant must demonstrate that there remains no genuine issue of material fact and, when construing the [**7] evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Civ.R. 56(C).*

[*P14] The arguments raised by the parties require that we address the following issues: (1) Do the Millers qualify as insureds under the CIC auto policy? (2) If the Millers are insured under the policy, is the contractual limitations period in the auto policy valid? and (3) If the contractual limitations period is invalid, does the "other owned vehicle" exclusion prevent the Millers from coverage under the auto policy?

[*P15] The "Ohio Uninsured Motorists Coverage-Bodily Injury" provision of the CIC auto policy at issue provides that CIC "will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or operator of *** an 'uninsured motor vehicle.'" It then identifies "who is an insured" as follows:

[*P16] "1. You.

[*P17] "2. If you are an individual, any 'family member.'

[*P18] "3. Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' The covered 'auto' must be out of service because of its breakdown, repair, [**8] servicing, loss or destruction.

[*P19] "4. Anyone for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured.'"

[*P20] Furthermore, the "Named Insured" under the policy is identified, through a General Change Endorsement effective March 25, 1999, as Obars Machine and Tool Company and Marcia K. Obarski, Trustee of the Marcia K. Obarski Trust. Similarly, a General Change Endorsement effective July 10, 1998, added Greg and Marci Obarski as additional insureds under the policy.

[*P21] The trial court concluded that because the policy referred to a corporation as "you," the policy was ambiguous and therefore necessarily included coverage for the corporation's employees. In reaching this conclusion, the court expressly found that the naming of specific individuals in the policy did not cure the ambiguity created when the term "you" refers to a corporation as a named insured. CIC now asserts that because, on the date of the accident, the named insureds under the auto policy were identified as Obars and Marcia K. Obarski, Trustee of the Marcia K. Obarski Trust, and because the policy listed Greg Obarski and Marci Obarski as additional [**9] insureds, the term "you" in the policy was not ambiguous and did not include the Millers.

[*P22] We first note that it is well-established that in order to determine whether the terms in a contract are ambiguous, a court must generally give words and phrases their plain, ordinary or common meaning. *Gomolka v. State Auto. Mut. Ins. Co. (1982), 70 Ohio St.2d 166, 167-168, 436 N.E.2d 1347.* If a contract is clear and unambiguous, its interpretation is a matter of law and there is no issue of fact. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm (1995), 73 Ohio St.3d 107, 108, 1995 Ohio 214, 652 N.E.2d 684.* "'Where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured.'" *Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St.3d 660, 664, 1999 Ohio 292, 710 N.E.2d 1116* quoting *King v. Nationwide Ins. Co. (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380*, syllabus.

[*P23] CIC's argument requires us to once again examine the decision of the Supreme Court of Ohio in *Scott-Pontzer.* In *Scott-Pontzer* [**10] , the decedent, Christopher Pontzer, was killed in an automobile collision which was the result of the negligence of an underinsured motorist. At the time of the collision, Pontzer was driving his wife's automobile and was not acting within the scope of his employment with Superior Dairy. Superior Dairy was the named insured under a policy of commercial automobile liability insurance, which included UIM coverage, and was the named insured under an insurance policy of umbrella/excess coverage, which did not include UIM coverage.

[*P24] On review, the Supreme Court of Ohio held in pertinent part that, absent limiting provisions, employer commercial UM/UIM coverage extends to all of a named insured corporation's employees. The court reached this conclusion by recognizing that under the commercial auto policy at issue, the identity of the "insureds" was ambiguous because the term "you" referred solely to Superior Dairy. Because a corporation can act only through live persons, the court reasoned that it would be "nonsensical" to limit coverage to the corporate entity. *85 Ohio St. 3d at 664.* The same applies for corporate umbrella/excess policies which contain any element of automobile liability [**11] coverage, even if such policies do not mention UM/UIM coverage. Subsequently, in *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am. (1999), 86 Ohio St.3d 557, 1999 Ohio 124, 715 N.E.2d 1142*, the Supreme Court of Ohio applied *Scott-Pontzer* to family members of employees.

[*P25] CIC now asserts that the ambiguity recognized in *Scott-Pontzer* is not at issue in this case because the auto policy refers to individuals as well as the corporate insured. Because the Millers were not named as insureds under the policy, CIC maintains that they do not qualify for UM/UIM coverage under the policy. We disagree.

[*P26] In *Kasson v. Goodman, 6th Dist. No. L-01-1432, 2002 Ohio 3022*, we addressed this very issue with regard to a similar CIC policy and concluded that the addition of two individual insureds on the declarations page did not remove the ambiguity created when a corporation is identified as a named insured and use of the word "you" refers to a corporation. In reaching this conclusion, we relied on the Fifth District Court of Appeals decision in *Burkhart v. CNA Ins. Co.*, Stark App. No. 2001 CA00265, *2002 Ohio 903.* In *Burkhart*, the court determined that the plaintiff, [**12] an employee of Western Branch Diesel, Inc. who was operating his own automobile when it was negligently struck by another motorist, was an insured despite the fact that the declarations page listed named individuals as well as corporate entities. Applying *Scott-Pontzer*, the court reasoned: "Although specific individuals are named insureds under the Continental policies, such fact does not cure the ambiguity created when 'you' refers to Western Branch Diesel, Inc., as the named insured. The rational [sic] announced by the Ohio Supreme Court in *Scott-Pontzer* is applicable to the instant matter. If the policies only afforded coverage to the specific individuals named, the inclusion of Western Branch as a named insured would be superfluous."

[*P27] CIC urges us to overrule or modify our holding in *Kasson*. We decline to do so and find that the Millers do qualify as insureds under the auto policy. We do note, however, that the Supreme Court of Ohio has accepted for review an appeal in the *Burkhart* case. See *Burkhart v. CNA Ins. Co. (2002), 96 Ohio St.3d 1438, 2002 Ohio 3344, 770 N.E.2d 1048*. Accordingly, CIC's assignment of error is not well-taken.

[*P28] [**13] Finding that the Millers are insureds under the auto policy, we next must consider whether the contractual limitations period under that policy was valid. Although the trial court did not expressly address this issue, in order to reach the issue of the applicability of the "other owned vehicle" exclusion to the Millers' case, the court by necessity had to conclude that the limitations period in the policy was invalid or that the appellants' complaint was properly amended.

[*P29] Paragraph (E)(4) of the Uninsured Motorist Coverage-Bodily Injury provision of the auto policy at issue reads in relevant part: "No lawsuit or action whatsoever or any proceeding in arbitration shall be brought against us for the recovery of any claim under the provisions of the Uninsured Motorist Coverage of this policy unless the 'insured' has satisfied all of the things that 'insured' is required to do under the terms and conditions of this policy and unless the lawsuit or arbitration is commenced within two years from the date of the 'accident.'"

[*P30] CIC argues now, as it argued in the court below, that if the Millers are determined to be insureds, their claims for UM coverage are barred [**14] because they failed to file suit against CIC within two years of the date of the accident.

[*P31] The legal basis for recovery under the uninsured motorist provisions of an insurance policy is contract, not tort. *Kraly v. Vannewkirk (1994), 69 Ohio St.3d 627, 632, 635 N.E.2d 323*, citing *Motorists Mut. Ins. Co. v. Tomanski (1971), 27 Ohio St. 2d 222-223, 56 Ohio Op. 2d 133, 271 N.E.2d 924*. The general statute of limitations for actions sounding in contract is fifteen years. *R.C. 2305.06*. The Supreme Court of Ohio, however, has held that "an insurance policy may limit the time for an action on the contract to less than fifteen years if a reasonable time for suit is provided." *Lane v. Grange Mut. Cos. (1989), 45 Ohio St.3d 63, 64, 543 N.E.2d 488*. Such a limitation must be clear and unambiguous to the policyholder. Id. Where a limitation set forth in an insurance policy is unclear and ambiguous, it will fail to shorten the statute of limitations provided by law. *Id. at 65*.

[*P32] In *Kraly, supra*, and *Miller v. Progressive Cas. Ins. Co. (1994), 69 Ohio St.3d 619, 1994 Ohio 160, 635 N.E.2d 317*, [**15] the Supreme Court of Ohio addressed issues related to contractual limitations periods set forth in UM/UIM provisions of insurance contracts. The policy in *Miller* required the insured to commence arbitration or a lawsuit against the insurer to recover uninsured or underinsured motorist benefits within twelve months of the date of the accident. The court concluded that such a limitation was unreasonable and void as against public policy. In reaching that decision, however, the court noted: "We do not suggest that time-limitation provisions of the type at issue in this case are altogether prohibited. Consistent with our analysis, a *two-year* period, such as that provided for bodily injury actions in *R.C. 2305.10*, would be a reasonable and appropriate period of time for an insured who has suffered bodily injuries to commence an action or proceeding for payment of benefits under the uninsured or underinsured motorist provisions of an insurance policy." *Id. at 624-625*. In *Kraly*, decided on the same day as *Miller*, the UM/UIM coverage provisions of the policy at issue required that the insureds file any action against the insurer for UM/UIM [**16] benefits within two years from the date of the accident. Under the unique facts of that case, however, the tortfeasor did not become uninsured until three and one-half months before the expiration of the two year contractual limitations period, when the tortfeasor's liability carrier became insolvent. Given these facts, the court held "*** that the 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. Where the liability insurer of a tortfeasor has been declared insolvent, a right of action of an insured injured by the tortfeasor against his insurer under the uninsured motorist provision of his automobile insurance contract accrues on the date that the insured receives notice of the insolvency. Accordingly, 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 the right of action for such coverage is *per se* unreasonable and violative of the [**17] public policy of the state of Ohio as embodied in *R.C. 3937.18*." *69 Ohio St. 3d at 635*.

[*P33] Interpreting *Miller* and *Kraly*, other appellate districts in this state have upheld two year contractual limitations periods for bringing claims for uninsured motorist benefits. In *Marsh v. State Auto. Mut. Ins. Co. (1997), 123 Ohio App.3d 356, 704 N.E.2d 280*, the plaintiff was involved in an automobile accident with an uninsured driver. The plaintiff filed suit against the tortfeasor approximately two years after the accident but did not learn that the tortfeasor was uninsured until several months after filing suit. After learning that the tortfeasor was uninsured, the plaintiff informed her insurance carrier that she intended to file a claim for uninsured motorist benefits. The uninsured motorist provisions of

plaintiff's insurance policy, however, provided that "with respect to such coverage, no legal action or arbitration proceeding may be brought against us unless the action or proceeding is begun within two years of the date of the accident." The trial court granted the plaintiff's motion for summary judgment and held that the [**18] policy's two-year limitation did not begin to run until the insured "discovered" that the tortfeasor was uninsured. The court of appeals reversed, refusing to apply a discovery rule to the typical traffic accident situation. The court explained: "In the usual situation the insured has ample time to discover the insured status of the tortfeasor within the two-year contractual period. Indeed the insured will usually learn on the date of the accident or shortly thereafter whether the tortfeasor was insured under an automobile liability policy. It is unlawful to operate a motor vehicle in this state unless proof of financial responsibility is maintained. See *R.C. 4509.101*. Proof of financial responsibility is ordinarily provided by use of financial responsibility identification cards, which every insurer writing motor vehicle insurance in Ohio is required to provide to every policyholder. See *R.C. 4509.103*. Discovering the insurance status of a tortfeasor is quite unlike discovering medical or legal malpractice. In the latter situation the Ohio Supreme Court has been willing to toll the short statute of limitations period for bringing [**19] such actions while the malpractice remains undiscovered. *Frysinger v. Leech (1987), 32 Ohio St.3d 38, 512 N.E.2d 337." 123 Ohio App. 3d at 361*. See, also, *Mitchell v. State Auto. Mut. Ins. Co.* , Franklin App. No. *00 AP-1431, 2001 Ohio 3963*.

[*P34] In light of these cases, it is clear that a two-year contractual limitations period that begins to run when a cause of action for uninsured motorist benefits accrues is reasonable. In the present case, the tortfeasor was uninsured on the date of the accident. Although the tortfeasor indicated to the trooper on the scene of the accident that he was insured, the validity of that insurance could have been readily determined. Accordingly, under the circumstances of this case, the day of the accident, June 22, 1999, is the day on which the contractual limitations period began to run. Appellants did not file their amended complaint adding CIC as a party defendant until June 25, 2001, and therefore did not timely assert their claim for uninsured motorist benefits.

[*P35] Our inquiry, however, is not at an end, for we must determine if appellants' amended complaint related back to the original complaint, thereby making it timely.

[**20] [*P36] The timeliness of the claims against CIC are governed by *Civ.Rs. 3(A)* and *15(C)* and *(D)*, which are to be read in conjunction with one another when attempting to determine "if a previously unknown, now known, defendant has been properly served so as to avoid the time bar of an applicable statute of limitations ***." *Amerine v. Haughton Elevator Co. (1989), 42 Ohio St.3d 57, 537 N.E.2d 208*, syllabus. *Civ.R. 3(A)* provides that "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant *** or upon a defendant identified by a fictitious name whose name is later corrected pursuant to *Civ.R. 15(D)*." *Civ.R. 15(D)* sets forth the requirements for properly amending a complaint to add the name of a defendant, previously sued under a fictitious name such as "John Doe," when that defendant's true identity becomes known to a plaintiff. *Amerine, supra at 59*. Among the requirements are: the plaintiff must amend the complaint upon discovery of the defendant's true name; the summons must contain the words "name unknown;" and the defendant must be personally served. *Civ. R. 15(D)*. [**21] An amended pleading will then relate back to the date of the original pleading when "the claim *** asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading ***." *Civ.R. 15(C)*. See *Patrolman "X" v. Toledo (1999), 132 Ohio App.3d 374, 404-405, 725 N.E.2d 291*. The Supreme Court of Ohio has strictly construed this amendment procedure. *Amerine, supra*.

[*P37] In the present case, the original complaint listed "John Doe and/or John Doe, Inc., Plaintiffs' insurer and successor companies or entities thereto. Identities and addresses unknown" as a party defendants. In the amended complaint of June 25, 2001, the plaintiffs then named CIC as a party defendant. That amended complaint, however, was served on CIC by certified mail. In *Amerine, supra*, the Supreme Court of Ohio expressly found that certified mail service does not comply with the requirements of *Civ.R. 15(D)*. Similarly, the summons issued to CIC on the amended complaint does not contain the words "name unknown." Again, the Supreme Court of Ohio has strictly construed the requirements [**22] of *Civ.R. 15(D)* in requiring these specific words. *Amerine, supra*.

[*P38] Accordingly, we must conclude that the amended complaint filed against CIC on June 25, 2001, did not relate back to the original complaint and, as such, was not timely filed.

[*P39] Finding that the contractual limitations period in the UM provisions of the CIC business auto policy was valid, that appellants' first amended complaint was not timely filed and that the complaint was not timely amended, we need not consider whether the "other owned vehicle" exclusion in the subject policy applied in this case. The trial court, therefore, did not err in granting CIC summary judgment against appellants, albeit for a different reason, and appellants' assignment of error is not well-taken.

[*P40] On consideration whereof, the court finds that substantial justice has been done the parties complaining and the judgment of the Ottawa County Court of Common Pleas is affirmed. The parties are ordered to pay their own court costs of these appeals.

JUDGMENT AFFIRMED.

Miller v. American Family Insurance Company, OT-02-011

A certified copy of this entry shall constitute the mandate pursuant [**23] to *App.R. 27.* See, also, *6th Dist.Loc.App.R. 4*, amended 1/1/98.

Peter M. Handwork, J.

James R. Sherck, J.

Richard W. Knepper, J.

CONCUR.

LEXSEE 2003 OHIO 4186

Robbin S. Davis, and Robert L. Davis, Plaintiffs-Appellants, v. Allstate Insurance Company, Defendant-Appellee.

No. 02AP-1322

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2003 Ohio 4186*; *2003 Ohio App. LEXIS 3705

August 7, 2003, Rendered

PRIOR HISTORY: [**1] (C.P.C. No. 00CVC05-4777). APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed.

COUNSEL: Lamkin, Van Eman, Trimble, Beals & Dougherty, and Tim Van Eman, for appellants.

Lane, Alton & Horst LLC, Rick E. Marsh and Kim M. Schellhaas, for appellee.

JUDGES: BOWMAN, J. DESHLER, J., concurs. KLATT, J., concurring separately. DESHLER, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OPINION BY: BOWMAN

OPINION

(REGULAR CALENDAR)

DECISION

BOWMAN, J.

[*P1] Appellants, Robbin S. Davis and Robert L. Davis, appeal from a judgment of the Franklin County Court of Common Pleas which granted summary judgment in favor of appellee, Allstate Insurance Company, in this action seeking uninsured motorist benefits.

[*P2] At all times relevant to this appeal, appellants had an automobile insurance policy with Allstate providing uninsured motorist coverage. In the insurance contract, Allstate agreed to "pay those damages which an insured person or an additional insured person * * * is legally entitled to recover from the owner or operator of an uninsured auto * * * because of bodily injury sustained [**2] by an insured person or an additional insured person." The policy defined an "uninsured auto" as "a motor vehicle which has no bodily injury liability bond or insurance policy in effect at the time of the accident." Under the heading "Legal Actions," the policy stated:

> Any 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.
>
> If, at any time before we pay for the loss, an insured person or additional insured person * * * institutes a suit against anyone believed responsible for the accident, we must be given a copy of the summons and complaint or other process. If a suit is brought without our written consent, we aren't bound by any resulting judgment.

[*P3] On May 30, 1996, appellants were injured in an auto accident caused by Michael J. Jordan. At the time of the accident, Jordan indicated he had an automobile insurance policy with Allstate. In August 1996, Allstate apparently informed appellants that Jordan was not insured by Allstate, but that Allstate would investigate further and notify appellants if it discovered the identity of [**3] Jordan's insurer. The parties do not dispute that Allstate determined Jordan was uninsured in January 1997, but did not inform appellants of this fact.

[*P4] On May 28, 1998, appellants filed suit against Jordan for damages sustained in the accident, amending the complaint to include Allstate as a defendant on May 29, 1998; however, appellants never served process on Allstate. The whereabouts of Jordan remained elusive, and appellants finally obtained service of process upon him by publication in March 1999. On September 28, 1999, appellants moved for a default judgment against Jordan and Allstate, and Allstate was served

process on the motion. The trial court granted the default judgment, and the matter was referred to a magistrate for a damages hearing in December 1999. In February 2000, the court adopted the magistrate's decision and a final entry was journalized in April 2000. Although not reflected in the record of the instant case, the trial court apparently held the default judgment was not binding on Allstate.

[*P5] Appellants filed an action against Allstate on May 30, 2000, this time promptly obtaining service of process. In February 2002, Allstate moved for summary [**4] judgment, which the trial court granted on October 29, 2002. It is from this summary judgment decision that appellants now raise the following errors: [1]

> 1 The record in the case before us only contains pleadings relating to appellants' claim filed in May 2000. The trial court's decision granting summary judgment, as well as the appellate briefs of both parties, reference pleadings from the prior lawsuit, and, since the dates and contents of these pleadings are not in dispute, our references to them shall be as if that record had been filed in this appeal.

I. The lower court committed reversible error in granting summary judgment in favor of Defendant Allstate Insurance Company, because Defendant was not entitled to judgment as a matter of law and the case presented genuine issues of material fact which demand jury resolution.

II. The lower court committed reversible error by denying Plaintiffs' motion for Summary Judgment because the facts, even when construed most strongly in favor of Defendant, clearly establish [**5] that Defendant did not have reasonable justification for denying Plaintiff's claim under the policy at issue.

III. The lower court committed reversible error in finding that the lawsuit filed by Plaintiffs against the Defendant did not comply with the two-year contractual limitations period contained in the policy.

[*P6] Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs. (1997), 123 Ohio App.3d 158, 162, 703 N.E.2d 841* . "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp. (1997), 122 Ohio App.3d 100, 103, 701 N.E.2d 383* . *Civ.R. 56(C)* provides that summary judgment may be granted when the moving party demonstrates that: (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 party against whom the motion for summary judgment is made. *State ex rel. Grady v. State Emp. Relations Bd. (1997), 78 Ohio St.3d 181, 183, 1997 Ohio 221, 677 N.E.2d 343.* [**6]

[*P7] When a motion for summary judgment has been supported by proper evidence, a non-moving party may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in *Civ.R. 56*, must set forth specific facts showing that there is a genuine triable issue. *Civ.R. 56(E)*; *Jackson v. Alert Fire & Safety Equip., Inc. (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027* . To establish the existence of a genuine issue of material fact, the non-moving party must do more than simply resist the allegations in the motion. Rather, that party must affirmatively set forth facts which entitle him to relief. *Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St.3d 108, 111, 570 N.E.2d 1095* . If the non-moving party "does not so respond, summary judgment, if appropriate, shall be entered against the party." *Civ.R. 56(E)*.

[*P8] Appellants' assignments of error are related and will be discussed together. A threshold issue involves appellants' assertion that the filing of their initial lawsuit in May 1998 complied with policy language requiring them to have "brought" their legal action against Allstate within two years, [**7] since nothing in the policy suggests that appellants had to have obtained service of process on Allstate. The trial court rejected this assertion on the basis that the concept of "bringing" an action is the equivalent of "commencing" an action, described in *Civ.R. 3* as occurring when the plaintiff "[files] a complaint with the court, if service is obtained within one year from such filing upon a named defendant." The parties do not dispute that appellants failed to obtain service upon Allstate within one year from filing their amended complaint in May 1998. The trial court determined that filing alone is insufficient to comply with the limitations period in the policy.

[*P9] The language in the Allstate policy stating that "any legal action against Allstate must be brought within two years of the date of the accident," is modeled after statutes of limitations for bodily injury or death actions and is an effort to shorten the standard 15-year limitation for actions on contracts. See *Lane v. Grange Mut. Cos. (1989), 45 Ohio St.3d 63, 64, 543 N.E.2d 488* . In *Lane*, the court declared ambiguous a policy term which required legal action to be brought "within the [**8] time period allowed by the applicable statute of limitations for bodily injury or death actions," since so many unstated factors affected when the time for bringing suit began to run or could have been tolled. The clearer limitations period, utilized in the contract at issue in this case, specifies that legal action will be brought

within two years of the accident, which corresponds to the two-year limit contained in the statute of limitations for bodily injury claims codified at *R.C. 2305.10*.

[*P10] Because the policy is modeled upon the statute of limitations, any issue as to the meaning of the phrase "must be brought" may be resolved by looking to statutory language defining when and how an action is initiated for purposes of the statutes of limitations. *R.C. 2305.17* provides: "An action is commenced within the meaning of sections *2305.03* to *2305.22* * * * by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year." *R.C. 2305.10* provides: "An action for [**9] bodily injury or injuring personal property shall be brought within two years after the cause thereof arose." *R.C. 2305.10* uses a form of the verb "to bring" while *R.C. 2305.17* uses a form of the verb "to commence." Read in tandem, the two statutes indicate that the legislature used the two verbs interchangeably, and that the initiation of legal action (whether it be "brought" or "commenced") necessarily includes obtaining service of process. Thus, we agree with the trial court that the policy's statement that any legal action "must be brought" within two years of the accident unambiguously required appellants to have obtained service of process within one year of having filed their action against Allstate.

[*P11] Appellants also claim that, even if their May 1998 complaint fails, their May 2000 complaint was timely because their cause of action did not accrue until it was established that Jordan was an uninsured motorist, which they assert was in September 1998, when they obtained a default judgment against him. In support, appellants point to the fact that Jordan did not reveal he was uninsured at the time of the accident, [**10] and that Allstate knew, as early as January 1997, that Jordan was uninsured and did not share this information with appellants. According to appellants, because determining the uninsured status of the tortfeasor is a condition precedent to claiming coverage, the time for filing did not begin until that status was established, and the failure to obtain service on the first lawsuit was not fatal to their claim.

[*P12] The trial court rejected this argument on the basis that strict construction of the contract required the action to have been filed within two years of the accident, and that, according to the contract, the cause of action accrued at the time of the accident. In so holding, the court distinguished cases indicating that an accrual can occur later than the date of the accident on the grounds that those cases dealt with underinsured motorist clauses, which by definition require a judicial determination that the tortfeasor's insurance was insufficient, or because the cases were otherwise inapposite.

[*P13] In general, two-year limitations periods contained in automobile insurance policies are not against public policy. *Miller v. Progressive Cas. Ins. Co. (1994), 69 Ohio St.3d 619, 624-625, 1994 Ohio 160, 635 N.E.2d 317.* [**11] Parties to a contract may agree to limit the time for bringing an action to a period less than that provided by relevant statutes of limitation, so long as that period is reasonable. *Kraly v. Vannewkirk (1994), 69 Ohio St.3d 627, 632, 635 N.E.2d 323* , citing *United Commercial Travelers v. Wolfe (1947), 331 U.S. 586, 608, 91 L. Ed. 1687, 67 S. Ct. 1355* . In *Kraly*, the court addressed a factual scenario in which the insureds initially sued the tortfeasor, but discovered during the course of the litigation that the tortfeasor's insurer had been declared insolvent. The insureds then attempted to amend their complaint to include claims against their own insurer, but were unsuccessful because the insurer claimed that the attempted amendment occurred outside the policy's limitation period, which was only one year. In holding that the limitations provision in the contract violated public policy, the court stated, *69 Ohio St. 3d at 633-634*:

> * * * The uninsured motorist coverage section of the policy states at one point that there is no coverage until the issues relating to the liability of the tortfeasor are resolved. It states elsewhere that there is "no right of action [**12] against [it] * * * until all the terms of [the] policy have been met." Obviously encompassed within this language are the events that are a condition precedent to coverage. The condition precedent to uninsured motorist coverage of the insured 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. The insolvency was therefore the triggering event for uninsured motorist coverage. Without such an event, uninsured motorist coverage would not be operative. Accordingly, any demand by appellants upon appellee to provide uninsured motorist coverage prior to the insolvency determination would have been properly rejected by appellee under the terms of the policy. Nevertheless, appellee makes the argument that the limitations period for purposes of its uninsured motorist coverage commenced on the date of the accident even though its exposure to liability could not arise until *after* the insolvency determination. * * *
>
> (Emphasis sic.)

[*P14] The court went on to hold that, because the time remaining to the plaintiffs to commence an uninsured motorist action against [**13] the insurer was "unreasonably brief," the limitation provision in the policy was per se unreasonable and against public policy.

[*P15] Appellants rely upon *Kraly* to assert that, contrary to the language in their policy which signified that the date of accrual of a cause of action was the date of the automobile accident, the actual date their cause against Allstate accrued was when it was definitively established that Jordan was uninsured. They claim that determination of Jordan's insurance status was particularly difficult in this case because Jordan remained an elusive defendant, and because Allstate purposely withheld information establishing that Jordan was uninsured. Thus, they claim that the limitation provision in the contract was unreasonable because it required them to have sued Allstate before it was even established that they had a valid claim against the insurer.

[*P16] Under these facts, appellants' argument is not well-taken. The cases placing emphasis on the date of accrual, rather than a particular triggering event specified in the contract, are all inapposite. For example, this court's holding that the insured's action was timely in *Kuhner v. Erie Ins. Co. (1994), 98 Ohio App.3d 692, 649 N.E.2d 844,* [**14] hinged upon the fact that the insured was attempting to obtain underinsured, not uninsured, motorist coverage. The contract interpreted in *Freeman v. Wayne Mut. Ins. Co.* (Feb. 7, 2000), Madison App. No. CA99-07-018, 2000 Ohio App. LEXIS 406, contained a limitations clause similar to that in the present case, but, unlike our case, also indicated that an action would not accrue until the insurer denied coverage or refused to make a payment. Under the facts in *Freeman,* the two clauses operated to create an unreasonably short limitations period, and, following *Kraly,* the court permitted the insureds to maintain their cause of action against the insurer.

[*P17] More closely related to the facts at bar is *Marsh v. State Auto. Mut. Ins. Co. (1997), 123 Ohio App.3d 356, 704 N.E.2d 280* , in which the insured, after prosecuting a case against the tortfeasor, did not learn of the tortfeasor's uninsured status until after the expiration of the two-year limitations period contained in the policy. When the insured's subsequent claim for uninsured motorist benefits was unsuccessful, she sued the insurer, some four years after the date of the accident. The trial court in that case held that, [**15] despite language in the policy indicating the limitations period began to run on the date of the accident, the actual accrual date was the date that the insured learned that the tortfeasor was uninsured. The Second District Court of Appeals reversed, rejecting a "discovery rule" in favor of placing a duty on the insured to timely determine the uninsured status of a tortfeasor. Thus, under those facts, the appellate court found the insured had not shown the unreasonability of the contract's limitation period:

> In the usual situation the insured has ample time to discover the insured status of the tortfeasor within the two-year contractual period. Indeed the insured will usually learn on the date of the accident or shortly thereafter whether the tortfeasor was insured under an automobile liability policy. * * * Discovering the insurance status of a tortfeasor is quite unlike discovering medical or legal malpractice. In the latter situation the Ohio Supreme Court has been willing to toll the short statute of limitations period for bringing such actions while the malpractice remains undiscovered. * * *

Id. at 361 .

[*P18] In the case at bar, the fact that appellants [**16] amended their initial complaint to add Allstate as a defendant within the two-year limitations period indicates either that appellants suspected Jordan was uninsured, or that appellants were not taking any chances. It was their failure to obtain service of process upon Allstate, and not any confusion about the terms of the contract or the status of the tortfeasor, which led to their failure to comply with the limitations period in the contract. While, like the Ohio Supreme Court, we could imagine a case in which the "willful procrastination on the part of the insurer may invalidate reliance on the limitations period," see *Kraly, at 633, fn. 2* , Allstate's failure to share with appellants any information it had regarding the insurance status of Jordan does not negate the fact that appellants had a duty to determine this status for themselves. [2] Appellants did not "commence" or "bring" their cause of action within two years of the date of the accident, and none of the particular circumstances of their case operated to extend the time in which they were required to sue.

> 2 Appellants have not alleged that Allstate acted in bad faith, and the record does not reveal any evidence that Allstate deliberately attempted to evade service of process, breached a duty to provide appellants with information regarding Jordan's insurance status, or otherwise tried to "run out the clock" on the limitations period.

[**17] [*P19] Because we agree with the trial court that Allstate properly demonstrated there were no genuine issues of material fact so that reasonable minds could only conclude Allstate was entitled to prevail, the court did not err in awarding Allstate judgment as a matter of law. Appellants' first, second and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of Allstate is affirmed.

Judgment affirmed.

DESHLER, J., concurs.

KLATT, J., concurring separately.

DESHLER, J., retired of the Tenth Appellate District, assigned to active duty under authority of *Section 6(C), Article IV, Ohio Constitution*

CONCUR BY: KLATT

CONCUR

KLATT, J., concurring separately.

[*P20] I concur in affirming the trial court's judgment, but for reasons different than those set forth in the majority opinion. I believe the policy provision at issue is clear and unambiguous on its face. I see no reason to interpret the policy language by looking at statutory provisions defining where and how an action is initiated for purposes of the statute of limitations.

[*P21] As noted in the majority's footnote [**18] at the end of P7, this case was filed May 30, 2000. The accident occurred on May 30, 1996. The applicable policy provision states "any legal action against Allstate must be brought within two years of the date of the accident. No one may sue [Allstate] under this coverage unless there is full compliance with all the policy terms." Because this action was not filed within two years of the date of the accident, the trial court properly granted summary judgment in favor of Allstate.

[*P22] Furthermore, because the two-year limitations period at issue here arose by contract, not by statute, *R.C. 2305.19*, the savings statute, has no application. In fact, the applicable statute of limitations would not have barred appellants' claim.

[*P23] Because my reasons for affirming the trial court's judgment differ in some respects from those expressed in the majority opinion, I concur separately.

LEXSTAT O.R.C. 3937.18

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH OCTOBER 17, 2007 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2007 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2007 ***

TITLE 39. INSURANCE
CHAPTER 3937. CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE

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ORC Ann. 3937.18 (2007)

§ 3937.18. Uninsured and underinsured motorist coverage

(A) Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state that insures against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.

Unless otherwise defined in the policy or any endorsement to the policy, "motor vehicle," for purposes of the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, means a self-propelled vehicle designed for use and principally used on public roads, including an automobile, truck, semi-tractor, motorcycle, and bus. "Motor vehicle" also includes a motor home, provided the motor home is not stationary and is not being used as a temporary or permanent residence or office. "Motor vehicle" does not include a trolley, streetcar, trailer, railroad engine, railroad car, motorized bicycle, golf cart, off-road recreational vehicle, snowmobile, fork lift, aircraft, watercraft, construction equipment, farm tractor or other vehicle designed and principally used for agricultural purposes, mobile home, vehicle traveling on treads or rails, or any similar vehicle.

(B) 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:

(1) There exists no bodily injury liability bond or insurance policy covering the owner's or operator's liability to the insured.

(2) The liability insurer denies coverage to the owner or operator, or is or becomes the subject of insolvency proceedings in any state.

(3) The identity of the owner or operator cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of division (B)(3) of this section, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(4) The owner or operator has diplomatic immunity.

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

An "uninsured motorist" does not include the owner or operator of a motor vehicle that is self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

(C) If underinsured motorist coverage is included in a policy of insurance, the underinsured motorist coverage shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the underinsured motorist coverage. Underinsured motorist coverage in this state is not and shall not be excess coverage to other applicable liability coverages, and shall only provide the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured. For purposes of underinsured motorist coverage, an "underinsured motorist" does not include the owner or operator of a motor vehicle that has applicable liability coverage in the policy under which the underinsured motorist coverage is provided.

(D) With respect to the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance, an insured shall be required to prove all elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured or underinsured motor vehicle.

(E) The uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance shall not be subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(F) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(G) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages and that provides a limit of coverage for payment of damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(H) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions requiring that, so long as the insured has not prejudiced the insurer's subrogation rights, each claim or suit for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages be made or brought within three years after the date of the accident causing the bodily injury, sickness, disease, or death, 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.

(I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle cov-

ered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(4) While any employee, officer, director, partner, trustee, member, executor, administrator, or beneficiary of the named insured, or any relative of any such person, is operating or occupying a motor vehicle, unless the employee, officer, director, partner, trustee, member, executor, administrator, beneficiary, or relative is operating or occupying a motor vehicle for which uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided in the policy;

(5) When the person actually suffering the bodily injury, sickness, disease, or death is not an insured under the policy.

(J) In the event of payment to any person under the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, and subject to the terms and conditions of that coverage, the insurer making such payment is entitled, to the extent of the payment, to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of that person against any person or organization legally responsible for the bodily injury or death for which the payment is made, including any amount recoverable from an insurer that is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer that is or becomes the subject of insolvency proceedings, to the extent of those rights against the insurer that the insured assigns to the paying insurer.

(K) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage included in a policy of insurance.

(L) The superintendent of insurance shall study the market availability of, and competition for, uninsured and underinsured motorist coverages in this state and shall, from time to time, prepare status reports containing the superintendent's findings and any recommendations. The first status report shall be prepared not later than two years after the effective date of this amendment. To assist in preparing these status reports, the superintendent may require insurers and rating organizations operating in this state to collect pertinent data and to submit that data to the superintendent.

The superintendent shall submit a copy of each status report to the governor, the speaker of the house of representatives, the president of the senate, and the chairpersons of the committees of the general assembly having primary jurisdiction over issues relating to automobile insurance.

HISTORY:

131 v 965 (Eff 9-15-65); 132 v H 1 (Eff 2-21-67); 133 v H 620 (Eff 10-1-70); 136 v S 25 (Eff 11-26-75); 136 v S 545 (Eff 1-17-77); 138 v H 22 (Eff 6-25-80); 139 v H 489 (Eff 6-23-82); 141 v S 249 (Eff 10-14-86); 142 v H 1 (Eff 1-5-88); 145 v S 20 (Eff 10-20-94); 147 v H 261 (Eff 9-3-97); 148 v S 57 (Eff 11-2-99); 148 v S 267 (Eff 9-21-2000); 149 v S 97. Eff 10-31-2001.