

CASE NO. A07-929

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State of Minnesota
In Supreme Court

SERGEY OGANOV,

Appellant,

VS.

AMERICAN FAMILY INSURANCE GROUP,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

- I. Whether Appellant's uninsured motorist claim accrued, and the statute of limitations began to run, on the date the tortfeasor's liability carrier was declared insolvent rather than on the date of Appellant's motor vehicle accident with an insured driver.

Trial Court's Ruling: The trial court found that Appellant's uninsured motorist claim accrued on the date of the motor vehicle accident rather than the date of the liability carrier's insolvency and, in so doing, dismissed Appellant's claim in its entirety.

Decision of the Court of Appeals: The Court of Appeals held that it was bound to apply the rule of Weeks v. American Family Insurance, 580 N.W.2d 24 (Minn. 1998), *overruled by* Oanes v. Allstate Insurance Company, 617 N.W.2d 401 (Minn. 2000), and found that an uninsured motorist claim accrues and the statute of limitations begins to run on the date of the motor vehicle accident. The Court of Appeals affirmed the trial court's order granting summary judgment for American Family Insurance Company.

Apposite Cases:

- 1) Oanes v. Allstate Insurance Co., 617 N.W.2d 401 (Minn. 2000);
- 2) Miklas v. Parrott, 684 N.W.2d 458 (Minn. 2004);
- 3) Weeks v. American Family Insurance, 580 N.W.2d 24 (Minn. 1998), *overruled by* Oanes v. Allstate Insurance Company, 617 N.W.2d 401 (Minn. 2000).

Apposite Statutes:

None

STATEMENT OF THE CASE

This matter arises upon the August 19, 2008 Order of the Minnesota Supreme Court, granting a Petition for Review of Decision of Court of Appeals brought by Appellant, Sergey Oganov ("Mr. Oganov). Mr. Oganov initially appealed the March 7, 2007 order of the Honorable Charles A. Porter, Jr., granting American Family Insurance Group's ("American Family's") Motion for Summary Judgment and dismissing Mr. Oganov's Uninsured Motorist (UM) claim with prejudice. American Family brought its motion arguing, *inter alia*, that Mr. Oganov's claim is barred by the six-year statute of limitations under Minn.Stat. § 541.05, subd. 1(1). This matter was heard for oral argument before the Minnesota Court of Appeals on March 12, 2008 and, on May 13, 2008, the Court issued an unpublished opinion affirming Judge Porter's order granting summary judgment to Respondent.

STATEMENT OF FACTS

On January 18, 1999, Mr. Oganov sustained injuries to his neck and back when his vehicle was struck by a snowplow owned by Bob Ryan Oldsmobile ("Ryan Oldsmobile") and operated by a Ryan Oldsmobile employee.¹ On that date, Ryan Oldsmobile was insured for automobile liability through a policy issued by Legion Insurance Company ("Legion Insurance").

On October 22, 2001, Mr. Oganov's attorney presented a demand for settlement to Gallagher Basset, claims administrator for Legion Insurance, with

¹ Automobile Accident Loss Report filed with American Family. (A 1-2).

respect to a bodily injury claim versus Ryan Oldsmobile.² On November 2, 2001, Gallagher Basset responded to this settlement demand by denying liability for the injuries.³ On June 3, 2003, Gallagher Basset reiterated its denial and informed Mr. Oganov's counsel that Legion Insurance was placed into "Rehab" by Pennsylvania Courts effective April 1, 2002, with a stay on all negotiations and litigation until June 30, 2003.⁴ The Commonwealth Court of Pennsylvania issued an Order of Liquidation on July 25, 2003, declaring Legion Insurance insolvent and ordering its liquidation.⁵

On July 14, 2004, a Mr. Oganov's counsel served a Summons and Complaint in by hand delivery upon Robert Ryan, Sr., Chief Executive Officer of Bob Ryan Oldsmobile.⁶ Ryan Oldsmobile did not respond to the Complaint.

On November 30, 2004, Mr. Oganov's attorney wrote to Gallagher Basset inquiring as to the status of Legion Insurance.⁷ On December 9, 2004, Gallagher Basset advised Mr. Oganov's counsel that Legion Insurance Company was liquidated.⁸

On the date of the motor vehicle accident, Mr. Oganov carried a policy of automobile insurance through American Family, which included uninsured motorist coverage.⁹ The policy purports to define an "uninsured motor vehicle" as

² October 22, 2001 Correspondence. (A 3-4).

³ November 2, 2001 Correspondence (A 5).

⁴ June 3, 2003 Correspondence. (A 6).

⁵ July 25, 2003 Order of Liquidation (A7-14).

⁶ Summons, Complaint and Affidavit of Service, Oganov v. Bob Ryan Oldsmobile. (A15-19).

⁷ November 30, 2004 Correspondence (A20).

⁸ December 9, 2004 Correspondence (A21).

⁹ American Family Policy #0723 5047 01 65 FPPA MN, and Affidavit of Authentication (A22-40).

one which is “Self-insured or insured by a bodily injury liability bond or policy at the time of the accident but the self-insurer or company denies coverage or is or becomes insolvent within one year after the accident.”¹⁰

On June 23, 2005, Mr. Oganov’s attorney sent a demand letter to American Family Insurance with respect to the uninsured motorist claim arising out of the accident of January 18, 1999.¹¹ American Family responded on July 18, 2005, confirming uninsured motorist benefit limits of \$50,000 per person and stating that American Family was in the process of reviewing the claim.¹² On August 15, 2005, American Family tendered an offer of \$2,400.00 in settlement of Mr. Oganov’s uninsured motorist claim.¹³

Mr. Oganov’s attorney served a Summons and Complaint in the matter of Sergey Oganov v. American Family Insurance Group on August 17, 2006, in which Mr. Oganov claimed uninsured motorist benefits as a result of injuries sustained in the motor vehicle accident of January 18, 1999.¹⁴ On January 19, 2007, American Family moved for summary judgment arguing that there was no “uninsured motor vehicle” within the definition as contained in its policy, and that Mr. Oganov’s claims are time barred.¹⁵ The Motion was heard before the Honorable Charles Porter, Judge of Hennepin County District Court, on February 21, 2007. On March 7, 2007, Judge Porter granted summary judgment in favor of

¹⁰ A28.

¹¹ June 23, 2005 Correspondence. (A41-44).

¹² July 18, 2005 Correspondence. (A45).

¹³ August 15, 2005 Correspondence. (A46).

¹⁴ Summons, Complaint and Affidavit of Compliance, Oganov v. American Family. (A47-56).

¹⁵ Defendant American Family’s Memorandum in Support of Motion for Summary Judgment. (A57-62)

American Family based upon the statute of limitations.¹⁶ Judge Porter did not rule upon American Family's argument regarding the policy definition of "uninsured motor vehicle."¹⁷

Mr. Oganov appealed Judge Porter's order to the Minnesota Court of Appeals, and the matter was heard in oral argument on March 12, 2008. On May 13, 2008, the Court of Appeals issued an unpublished opinion affirming summary judgment and concluding that, per the Supreme Court's rule in Weeks v. American Family Insurance Co., 580 N.W.2d 24 (Minn. 1998) (partially overruled by Oanes v. Allstate Insurance Co., 617 N.W.2d 401 (Minn. 2000), the statute of limitations period for UM claims begins to run on the day of the accident, rather than the date of insolvency of the underlying bodily injury carrier.¹⁸

ARGUMENT

I. Mr. Oganov's uninsured motorist claim accrued, and the statute of limitations began to run, on the date of the liability insurer's insolvency rather than on the date of motor vehicle accident.

Mr. Oganov had no uninsured motorist claim versus American Family until the tortfeasor's liability insurer was declared insolvent on July 25, 2003. A Complaint seeking Uninsured Motorist benefits was served on American Family on August 17, 2006. Mr. Oganov's claim is therefore not barred by the six-year statute of limitations.

¹⁶ Order and Memorandum of the Honorable Charles A Porter, Jr. (A83-88)

¹⁷ A87.

¹⁸ Unpublished Opinion, Sergey Oganov v. American Family Insurance Group, Minnesota Court of Appeals, Case No. A07-929 (A118)

"The construction and applicability of statutes of limitations are questions of law that [appellate courts] review de novo." Noske v. Friedberg, 670 N.W.2d 740, 742 (Minn. 2003) (quotation omitted). An uninsured motorist claim is a contract cause of action, to which the six-year contract statute of limitations applies. Miklas v. Parrott, 684 N.W.2d 458, 460-462 (Minn. 2004). Under Minnesota law, an action shall be commenced within six years "upon a contract or other obligation, express or implied, as to which no other obligation is expressly prescribed." Minn.Stat. § 541.05, subd. 1(1) (2006); Entzion v. Illinois Farmers Insurance Co., 675 N.W.2d 925, 927 (Minn.App. 2004). The six-year statute of limitations for uninsured motorist actions begins to run when the cause of action accrues. Entzion, 675 N.W.2d at 929; Hughes v. Lund, 603 N.W.2d 674, 677-78 (Minn.App.1999). The issue in contention is whether, in an uninsured motorist claim premised on an insolvent liability carrier, the action accrues on the date of the motor vehicle accident, or on the date on which the tortfeasor becomes uninsured by virtue of insolvency. Since Mr. Oganov literally had no cause of action for uninsured motorist benefits on the date of the motor vehicle accident, it is both illogical and unjust to begin the limitations period on that date. The limitations period must begin when he has a viable uninsured motorist claim – the date on which the liability carrier was declared insolvent.

Minnesota Law provides that uninsured motorist coverage is a mandatory component to any automobile policy issued in the state. See Minn. Stat. § 65B.49, subd. 3(a) (1996). Uninsured motorist coverage is further defined as "coverage for

the protection of persons insured under that coverage who are legally entitled to recover damages for bodily injury from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles.” Minn. Stat. § 65B.43, subd.17 (1996). An “[u]ninsured motor vehicle” is in turn defined as “a motor vehicle or motorcycle for which a plan of reparation security meeting the requirements of section 65B.41 to 65B.71 is not in effect.” Minn. Stat. § 65B.43, subd. 16 (1996). The statute gives no temporal limitation or restriction to the phrase “in effect”.

In affirming the trial court’s order granting summary judgment, the Court of Appeals relied specifically upon Weeks v. American Family Insurance Co., 580 N.W.2d 24 (Minn. 1998) (partially overruled by Oanes v. Allstate Insurance Co., 617 N.W.2d 401 (Minn. 2000))¹⁹. In Weeks, the Plaintiff/Respondent was struck and injured by two hit-and-run drivers. 580 N.W.2d at 25. Approximately five years after the accident date, Weeks presented a claim for uninsured motorist benefits to her insurer, American Family Insurance, which responded with a denial. Id. Nearly eight years after the accident date, Weeks commenced litigation versus American Family. Id. The trial court granted American Family’s motion for summary judgment, but the Court of Appeals reversed, holding that Weeks’ suit was timely because her cause of action accrued on the date that American Family rejected her claim. Id. The Supreme Court reversed in turn,

¹⁹ “If this court were to accept appellant’s argument , we would be impermissibly overruling the supreme court’s decision in Weeks. See Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc., 715 N.W.2d 458, 483 (Minn. App. 2006) (holding that the court of appeals has no authority to overrule decisions of the supreme court), *review denied* (Minn. Aug. 23, 2006). In this case, we must apply the rule in Weeks that a UM claim accrues and the statute of limitations begins to run on the date of the accident and therefore appellant’s UM claim is time-barred.” Unpublished Opinion, Sergey Oganov v. American Family Insurance Group, Minnesota Court of Appeals, Case No. A07-929, page 6 (A123)

concluding that “the cause of action for UM benefits accrues on the date of the accident.” In so doing, the Weeks court relied heavily on O’Neill v. Illinois Farmers Insurance Co., 381 N.W.2d 439 (Minn. 1986), in which the court found that a cause of action for underinsured motorist (UIM) benefits accrues as of the date of the motor vehicle accident²⁰. Weeks, 580 N.W.2d at 26-27. Both the Weeks and O’Neill decisions discussed and declined to apply a “breach of contract” analysis under which a UM or UIM claim was deemed to accrue, and the statute begin to run, only when a claim was presented to the insurer and denied, with the denial constituting the breach upon which an action in contract was to be based. Weeks, 580 N.W.2d at 26; O’Neill, 381 N.W.2d at 439-440. Both courts expressed reservations that such an analysis would conceivably allow the claimant “to indefinitely postpone the running of the statute of limitations.” Weeks, 580 N.W.2d at 26; O’Neill, 381 N.W.2d at 440. The Weeks Court further emphasized the “tort aspects” of a UIM or UM claim, stressing that: “Because liability rather than the existence of coverage is the underlying substantive issue, the cause of action for either UIM or UM benefits accrues once the accident occurs, and **the claimant then becomes entitled to seek a judicial determination of liability and to recover damages.**” Weeks, 580 N.W.2d at 27 (emphasis added). Ms. Weeks’ claim, as the court noted, was both cognizable and actionable on the date of her motor vehicle accident. Mr. Oganov, by contrast, had no uninsured

²⁰ “[W]e see no reason to abandon the rationale we adopted more than a decade ago in *O’Neill* – a rationale we have followed consistently in subsequent cases. We remain committed to our reasoning in *O’Neill* and choose to leave its holding undisturbed.” 580 N.W.2d at 27.

motorist claim until over four-and-a-half years following the accident, when Legion Insurance was declared insolvent.

The O'Neill rationale was expressly overturned by the Minnesota Supreme Court in the case of Oanes v. Allstate Insurance Company, 617 N.W.2d 401 (Minn. 2000), which found that a claim for underinsured motorist (UIM) coverage accrues, and the statute of limitations begins to run, on the date of settlement with or judgment against the tortfeasor. The Court noted that a UIM claim is not ripe until it has been determined that the tortfeasor is in fact underinsured by settlement or adjudication of the claim against the tortfeasor: “a recovery from the tortfeasor’s liability insurance is a nonarbitrable condition precedent to bringing an underinsured claim. Until there has been a recovery from the tortfeasor’s insurer, the claimants underinsured claim simply has not matured.” 617 N.W.2d at 405, *citing*, Employers Mutual Cos. v. Nordstrom, 495 N.W.2d 855, 857 (Minn. 1993). Since a UIM claim is not cognizable until the underlying tort claim has been settled or adjudicated, beginning the UIM statute of limitations on the date of the accident “creates the possibility that [it] may run on a valid UIM claim before the claimant can determine whether the claim exists. That result is inconsistent with our sense of justice and one we cannot abide.” 617 N.W.2d at 405. “Accordingly,” the Court stated, “we reject the rule that a UIM claim accrues on the date of the accident that causes the injury. We overrule the *O’Neill-Weeks* line of cases to the extent that they articulate such a rule.” *Id.* at 406. O’Neill held that a UIM claim, rather than accruing on the date of the accident or the date on

which the insurer issues a denial, accrues “in the date of settlement with or judgment against the tortfeasor.” *Id.* In articulating this rule, the court referenced the North Carolina case of North Carolina Insurance Guarantee Association v. State Farm Mutual Automobile Insurance Co., 115 N.C.App. 666, 446 S.E.2d 364, 369 (1994), which held that the statute of limitations did not commence on a UM claim until the tortfeasor’s insurance company was declared insolvent and the UM claimant was then “at liberty to sue”. 617 N.W.2d at 406. In a footnote, the court limited its ruling to UIM claims, stating that “the case before us involves only a UIM claim. There are differences between the two types of claims that may have a bearing on the appropriate accrual rule. For example, ‘[t]he condition precedent for bringing an *uninsured* motorist claim is different from the underinsured claim. To bring an arbitration claim for [UM] benefits, the claimant does not have to recover first from the underinsured tortfeasor; **the claimant need only show that the tortfeasor was uninsured.**” *Id.* at 406, n 2, *quoting Nordstrom*, 495 N.W.2d at 857 n. 4 (emphasis added).

The specific question of when an uninsured motorist claim involving an insolvent liability insurer accrues for purposes of the statute of limitations is one of first impression.²¹ In analyzing the issue, several salient points merit consideration. Firstly, the Minnesota Supreme Court has specifically held that

²¹ Although the Weeks court held that “the cause of action for UM benefits accrues on the date of the accident,” 580 N.W.2d at 27, it did so in the context of two phantom vehicles. *Id.* at 25.

UIM claims are governed by the contract rather than the tort based statute of limitations. Miklas v. Parrott, 684 N.W.2d 458, 460-461 (Minn. 2004).²²

Secondly, and as a close corollary, the Court has affirmed the essentially contractual nature of uninsured motorist claims despite the tort-based assessment of fault and damages. In Miklas v. Parrott, 684 N.W.2d 458, 459 (Minn. 2004), the Court held that the six-year contract statute of limitations applied in a claim for uninsured motorist benefits based upon a wrongful death, rather than the three year wrongful death limitation period. The uninsured motorist carrier argued that Miklas must comply with the three year statute since uninsured motorist coverage is intended to give an insured the same remedy that would have been available if the tortfeasor had been insured. Id. at 462. In rejecting this argument, the Court stated that “blind application of the rule that an insurer steps into the shoes of the tortfeasor ‘disregards the very real distinctions between the insured/insurer relationship and the plaintiff/tortfeasor relationship. Most notably, that no contract exists between a plaintiff and his or her tortfeasor compelling payment of damages.’” Id. at 462, *quoting* Safeco Insurance Co. v. Barcom, 773 P.2d 56, 59 (Wash. 1989). “In other words,” the Court stated, “uninsured motorist claims are claims based on contract with the insured’s insurance company.” Miklas, 684 N.W.2d at 462, *citing* Beaudry v. State Farm Mutual Automobile Insurance Co., 518 N.W.2d 11, 13 (Minn. 1994). Though tort law is relevant in that the plaintiff

²² Entzion v. Illinois Farmers Insurance Co., 675 N.W.2d 925, 929 (Minn.App. 2004) held that the six year contract statute of limitations is applicable to claims for discontinued No-Fault benefits.

must demonstrate fault and damages in order to claim benefits, “this court did not state that uninsured motorist claims must satisfy all aspects of tort law. Instead, we simply held that whether an injury is caused by a negligent or intentional act is determined under principles of tort law and the perspective of the tortfeasor.”

Miklas, 684 N.W.2d at 462, *explaining McIntosh v. State Farm Mutual Automobile Insurance Co.*, 488 N.W.2d 476, 479 (Minn. 1992). The Court further relied upon the “remedial purpose of Minnesota’s no-fault insurance statutes” and the lack of clear legislative intent to limit an uninsured motorist action based upon a wrongful death claim to the three-year statute. Miklas at 462. In short, the Court in Miklas found that the contractual nature of an uninsured motorist claim extended the statute of limitations beyond that which would have governed the underlying claim against the uninsured tortfeasor.²³

Thirdly, although courts have rejected the “breach of contract” theory for claim accrual on the grounds that it would create an essentially unlimited time period within which to bring a claim, recent analysis has focused on when the claim is actually cognizable or actionable. In Oanes v. Allstate Insurance, 617 N.W.2d 401, the court held that an underinsured motorist claim accrues “when the condition precedent to raising the UIM claim that we identified in *Nordstrom* [a recovery from the tortfeasor’s liability insurance] has been satisfied, not before.

²³ Even prior to Oanes v. Allstate Insurance Co., 617 N.W.2d 401 (Minn. 2000), the statute of limitations in uninsured motorist actions had been extended beyond six years from the date of accident. In Hughes v. Lund, 603 N.W.2d 674 (Minn. App. 1999), the court held that “where the insured seeks to arbitrate claims under an arbitration clause in the policy, the six-year statute of limitations ‘does not begin to run until there has been both a demand and a refusal to arbitrate.’” 603 N.W.2d at 677, *quoting Spira v. American Standard Insurance Co.*, 361 N.W.2d 454, 457 (Minn. App. 1985).

The statute of limitations will not be triggered until the UIM claim becomes ripe, eliminating the possibility that the limitations period will have run before the claim could be brought.” 617 N.W.2d at 405, 407, *quoting* Employers Mut. Cos. v. Nordstrom, 495 N.W.2d 855, 857 (Minn. 1993). The Oanes court further cited Boyle v. State Farm Mutual Insurance Co., 456 A.2d 156, 162 (Penn. 1983), which held that under the terms of the uninsured motorist coverage endorsement, the insured's right to payment did not vest until: (1) the insured was in a motor vehicle accident, and (2) the insured sustained bodily injury as a result of that accident, and (3) the insured knows of the uninsured status of the other owner or operator. 456 A.2d at 162. The Minnesota Court of Appeals applied similar reasoning to the accrual of a No-Fault claim in Entzion v. Illinois Farmers Insurance Co., 675 N.W.2d 925, 929 (Minn.App. 2004), which held that the six-year statute of limitations for no-fault benefits begins to run when the insurer discontinues the insured's benefits. “A cause of action accrues and the statute of limitations begins to run when the action can withstand a motion to dismiss for failure to state a claim on which relief can be granted.” 675 N.W.2d at 929, *citing* Noske v. Friedberg, 670 N.W.2d 740, 742 (Minn. 2003).

Each of these factors support the logical and ineluctable conclusion that Mr. Oganov's uninsured motorist claim, initiated on August 17, 2006, is not time barred. Between the January 18, 1999 date of accident and the July 25, 2003 date of insolvency, American Family simply had no contractual obligation to provide uninsured motorist benefits to Mr. Oganov since tortfeasor carried liability

coverage though Legion Insurance. The tortfeasor did not in fact become “uninsured” until Legion Insurance was liquidated and declared insolvent²⁴ by Order of the Commonwealth Court of Pennsylvania on July 25, 2003. Mr. Oganov’s uninsured motorist claim could not possibly have accrued before that moment, because until the insolvency there was no “uninsured vehicle” as defined by Minn. Stat. Section 65B.43, subd 16. (1996). Had Mr. Oganov commenced his UM suit before insolvency, his claim could not have withstood a motion to dismiss for failure to state a claim on which relief can be granted. Thus, Mr. Oganov’s cause of action for uninsured motorist benefits did not accrue on the date of the underlying motor vehicle accident, but rather upon the date on which the tortfeasor became uninsured in fact. His claim versus American Family, served on August 17, 2006, is therefore not time barred.

CONCLUSION

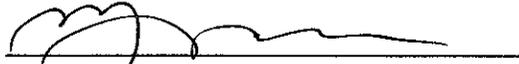
Appellant requests that the Decision of the Court of Appeals, filed on May 13, 2008, be reversed and that the case be remanded for further proceedings.

²⁴ Minn. Stat. § 60C.03, subd. 8, defines as “Insolvent Insurer” for purposes of the Minnesota Insurance Guaranty Association as “an insurer licensed to transact insurance in this state, either at the time the policy was issued, or when the insured event occurred, and against whom a final order of liquidation has been entered after April 30, 1979, with a finding of insolvency by a court of competent jurisdiction in the insurer’s state of domicile.”

Dated: 9/18/2008

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STATE OF MINNESOTA
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SERGEY OGANOV,

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VS.

**CERTIFICATE OF
BRIEF LENGTH**

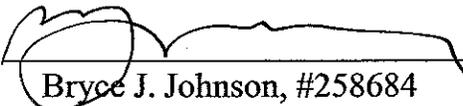
AMERICAN FAMILY INSURANCE GROUP,

RESPONDENT.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a Times New Roman font. The length of this brief is 3,724 words. I certify that the word processing program has been applied to specifically include all text, including headings, footnotes, and quotations. This brief was prepared using Microsoft Office Word 2003.

Dated: 9/18/2008

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