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Unknown Effects of Wood v. Shepard on Uninsured and Underinsured Motorist Coverage in Ohio

Gary D. Plunkett

UNKNOWN EFFECTS OF *WOOD v. SHEPARD* ON UNINSURED AND UNDERINSURED MOTORIST COVERAGE IN OHIO*

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I. INTRODUCTION

"One of the most significant developments of the twentieth century"[1] was the advent of the mass-produced automobile.[2] Among its many consequences was a profound increase in the mobility of society.[3] With this increased mobility came the increased risk of injury or death on our highways. Our highways were overwhelmed with unsafe drivers, many of whom were uninsured. This financial irresponsibility on the part of drivers was attacked by various state legislatures.[4] The legislatures en-

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[1] R. JERRY, UNDERSTANDING INSURANCE LAW 641 (1987). Indeed, the most important event in the history of insurance law was the advent of the mass-produced automobile.

[2] *Id.*; 1 A. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE pt. 3, at 3 (2d ed. 1987).

[3] R. JERRY, *supra* note 1, at 641; 1 A. WIDISS, *supra* note 2, at 3.

[4] R. JERRY, *supra* note 1, at 641-58; 1 A. WIDISS, *supra* note 2, at 3-19; Schwartz, *A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans*, 48 OHIO ST. L. J. 419, 421-22 (1987); Ciano, *Underinsured Motorist Coverage, Company Insolvency, and the Ohio Insurance Guaranty Association Act*, 21 CLEV. ST. L. REV. 65, 65-67 (1972); Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 NW. U.L. REV. 497, 497-500 (1967); Comment, *Ohio's Uninsured Motorist Coverage — Should the Legislature Re-examine the Statute?*, 15 CAP. U.L. REV. 325, 326 (1986); Comment, *The Effect of Other Insurance Clauses in Cases of Concurrent Coverage of Uninsured Motorist Insurance*, 37 U. CIN. L. REV. 582, 582-83 (1968); Comment, *Uninsured Motorist Coverage*, 12 CLEV. ST. L. REV. 66, 66-67 (1963); Comment, *Redefining Underinsured Motorist Coverage in Ohio*, 44 OHIO ST. L. REV. 771, 771-72 (1983).

acted compulsory insurance laws, financial responsibility laws, and laws creating unsatisfied judgment funds.[5] In an effort to forestall the enactment of further legislation, the insurance industry began to market uninsured motorist (UM) coverage in the mid-1950's.[6] Soon thereafter, the legislatures enacted statutes requiring mandatory UM coverage.[7] Because of the inadequacies of UM coverage, however, underinsured motorist coverage (UDM) developed in response.[8] The basic objective of uninsured and underinsured motorist (UUM) coverage was to provide compensation that would otherwise be unavailable to the victims of financially irresponsible motorists.

The Ohio Supreme Court in *Wood v. Shepard*[9] had occasion to interpret Ohio's wrongful death statute[10] in conjunction with Ohio's UUM statute.[11]

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[5] R. JERRY, *supra* note 1, at 641-58; 1 A. WIDISS, *supra* note 2, at 3-19; Schwartz, *supra* note 4, at 421-22; Ciano, *supra* note 4, at 65-67; Widiss, *supra* note 4, at 497-500; Comment, *Ohio's Uninsured Motorist Coverage*, *supra* note 4, at 326; Comment, *Concurrent Coverage of Uninsured Motorist Insurance*, *supra* note 4, at 66-67; Comment, *Redefining Underinsured Motorist Coverage*, *supra* note 4, at 771-72.

[6] 1 A. WIDISS, *supra* note 2, pt. 1, at 12; R. JERRY, *supra* note 1, at 644; Plevin, *Set-off Under Uninsured Motorist's Coverage*, 20 CLEV. ST. L. REV. 10 (1971); Comment, *Arbitration, Statute of Limitations, and Uninsured Motorist Endorsements*, CLEV. ST. L. REV. 528 (1970).

[7] 1 A. WIDISS, *supra* note 2, pt. 1, at 13-14.

[8] 2 A. WIDISS, *supra* note 2, pt. 3, at 6.

[9] 38 Ohio. St. 3d 86, 526 N.E.2d 1089 (1988).

[10] OHIO REV. CODE ANN. § 2125.01-03 (Page 1983). OHIO REV. CODE ANN. § 2125.01 provides:

> When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued . . . shall be liable to an action for damages, notwithstanding the death of the person injured.

OHIO REV. CODE ANN. § 2125.02(A)(1) provides:

> An action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent.

[11] OHIO REV. CODE ANN. § 3937.18 (Page 1982). This section states:

> (A) No automobile liability or motor vehicle liability policy of insurance insuring 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 shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following are provided:
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> (1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury or death under provisions approved by the superintendent of insurance for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom:

The supreme court held that the wrongful death of an insured creates separate claims that are not subject to a single person limit of liability in the deceased insured's UUM coverage.[12] *Wood* is a nebulous decision.

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(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability; or motor vehicle liability coverage and shall provide protection for an insured against loss for bodily injury, sickness, or disease, including death, 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 insured's uninsured motorist coverage at the time of the accident. The limits of liability for an insurer providing underinsured motorist coverage shall be the limits of such coverage, less those amounts actually recovered under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

(C) The named insured may only reject or accept both coverages offered under division (A) of this section. The named insured may require the issuance of such coverages for bodily injury or death in accordance with a schedule of optional lesser amounts approved by the superintendent, that shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. Unless the named insured requests such coverages in writing, such coverages need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverages in connection with a policy previously issued to him by the same insurer. If the named insured has selected uninsured motorist coverage in connection with a policy previously issued to him by the same insurer, such coverages offered under division (A) of this section need not be provided in excess of the limits of the liability previously issued for uninsured motorist coverage, unless the named insured requests in writing higher limits of liability for such coverages.

(D) For the purpose of this section, a motor vehicle is uninsured if the liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction.

(E) In the event of payment to any person under the coverages required by this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which 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 which is or becomes the subject of insolvency proceedings, to the extent of his rights against such insurer which such insured assigns to the paying insurer.

(F) The coverages required by this section shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverage offered under division (A) of this section may include terms and conditions that preclude stacking of such coverages.

(H) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage provided in compliance with this section.

[12] 38 Ohio St. 3d 86, 88, 526 N.E.2d 1089, 1091 (1988).

It overcompensates the deceased insured's surviving family members and turns the deceased insured's UUM coverage into a bottomless well from which the surviving family members may draw compensation. The full effect of *Wood* is yet unknown. What is known, however, is that the state of the law after *Wood* is a mess. This article discusses the propriety of *Wood*.

II. FACTS AND HOLDING

On September 8, 1984, James Wood, his wife Gina, and their two minor children, Jessica and Carrie, were traveling west in their truck on State Route 49.[13] At the same time, Craig Shepard was traveling north in his car on Gordon-Landis Road.[14] Failing to obey a stop sign at the intersection of State Route 49 and Gordon-Landis Road, Shepard collided his car into the Woods' truck.[15] Gina Wood died from resulting injuries.[16] Injured in the accident were James, Jessica, and Carrie Wood.[17]

Shepard had an automobile insurance policy with State Farm Mutual Automobile Insurance Company.[18] This policy provided liability coverage with limits of $50,000 per person and $100,000 per accident.[19] James and Gina Wood had an automobile insurance policy with The Professional Insurance Company that provided UUM coverage with liability limits of $100,000 per person and $300,000 per accident.[20] Jessica and Carrie Wood were covered under this policy.[21]

Thereafter, James Wood, individually and in his capacities as administrator of Gina Wood's estate and guardian of Jessica and Carrie Wood, brought an action against Shepard and Professionals.[22] James Wood sought damages from Shepard for the wrongful death of Gina Wood.[23] The Woods settled with Shepard. James Wood also sought a declaratory judgment construing the Professionals policy regarding the underinsured motorist coverage provision.[24] James Wood sought a declaration that each of the Woods be entitled to assert separate claims against the UDM coverage because of their status as beneficiaries of the action for Gina Wood's wrongful death.[25]

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Wood v. Shepard, 38 Ohio St.3d 86, 88, 526 N.E.2d 1089, 1091 (1988).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Wood v. Shepard, 38 Ohio St.3d 86, 88, 526 N.E.2d 1089, 1091 (1988).
[21] *See, e.g., id.*
[22] *Id.*
[23] *Id.*
[24] Wood v. Shepard, 38 Ohio St.3d 86, 88, 526 N.E.2d 1089, 1091 (1988).
[25] *Id.* at 86-87, 526 N.E.2d at 1090.

The trial court held that Ohio's wrongful death statute created only a single cause of action, thus precluding the Woods from asserting separate wrongful death claims under the UDM coverage.[26] The Montgomery County Court of Appeals affirmed.[27] But, because of a conflict at the appellate level on whether Ohio's wrongful death statute created separate claims, the court of appeals certified the record to the Ohio Supreme Court.[28]

The Ohio Supreme Court, in a four-to-three decision, disagreed with the trial court and the court of appeals. The supreme court held that "[e]ach person entitled to recover damages . . . for wrongful death, and who is an insured under an underinsured motorist provision in an insurance policy, has a separate claim and such separate claims may not be made subject to the single person limit of liability in the underinsured motorist provision."[29]

The supreme court reasoned that the language of the wrongful death statute supports that the statute creates separate claims.[30] The court noticed that certain survivors of the decedent are rebuttably presumed to have suffered damages.[31] The court, therefore, reasoned that because each survivor is presumed to have suffered damages, each must have a separate claim.[32] The court recognized, moreover, that the Ohio Uninsured and Underinsured Motorist statute required insurers to provide insureds with recovery for wrongful death caused by uninsured or underinsured motorists.[33] The court found that the UUM statute did not authorize insurers to limit claims for wrongful death to single person limits of liability.[34]

James, Jessica, and Carrie Wood were all insureds under the Professionals policy.[35] Thus, the Ohio Supreme Court held that Professionals could not limit the Woods' claims for wrongful death to the single person limit of liability in the underinsured motorist coverage provision. As a result, each claim had a maximum coverage of $100,000 up to a total limitation of $300,000.[36]

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[26] *Id.* at 87, 526 N.E.2d at 1090.

[27] *Id.*

[28] Wood v. Shepard, 38 Ohio St. 3d 86, 87, 526 N.E.2d 1089, 1090 (1988). The conflicting appellate court cases were *Gordon v. Nationwide Mut. Ins. Co.*, No. 86-CA-2 (Delaware App. June 5, 1986) (LEXIS, States Library, Ohio file) (holding that separate causes of action for wrongful death are not subject to an insurer's single person limit of liability) and *Dick v. Allstate Ins. Co.*, 34 Ohio App.3d 28 (Hamilton Co. 1986), *rev'd*, 40 Ohio St. 3d 80 (1988) (holding that separate causes of action for wrongful death are subject to an insurer's single person limit of liability). After *Wood* was decided, the Ohio Supreme Court in *Dick v. Allstate Ins. Co.*, 40 Ohio St. 3d 80 (1988), reversed the Court of Appeals for Hamilton County.

[29] Wood v. Shepard, 38 Ohio St. 3d 86, 91, 526 N.E.2d 1090, 1094 (1988).

[30] *Id.* at 90, 526 N.E.2d at 1092.

[31] *Id.*

[32] *Id.*

[33] Wood v. Shepard, 38 Ohio St. 3d 86, 90, 526 N.E.2d 1089, 1092 (1988).

[34] *Id.*

[35] *Id.* at 91, 526 N.E.2d at 1093.

[36] *Id.* at 90-91, 526 N.E.2d at 1093-94.

III. BACKGROUND

A. Wrongful Death in Ohio

Civil recovery for wrongful death has greatly developed since Lord Ellenborough in *Baker v. Bolton*[37] declared that "the death of a human being could not be complained of as an injury."[38] At common law, an action for wrongful death did not exist.[39] Statutes created the right to sue for the death of a human being. Consequently, a wrongful death action is widely regarded as a "creature of statute."[40]

Before 1851, there was no cause of action for wrongful death in Ohio.[41] In 1851, however, the Ohio General Assembly enacted its first wrongful death statute.[42] It was modeled after England's Fatal Accidents Act of 1846, commonly known as Lord Campbell's Act.[43] Similar to most jurisdictions, the proper plaintiff in an Ohio wrongful death action is the

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[37] 1 Camp. 493, 170 Eng. Rep. 1033 (Nisi Prius 1808).

[38] *Id. See also* Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916).

[39] J. McCormac, Wrongful Death in Ohio 1 (1982).

[40] *See id.*

[41] Sabol v. Pekoc, 148 Ohio St. 545, 549, 76 N.E.2d 84, 87 (1947); J. MCCORMAC, *supra* note 39, at 1. *See* Ross, *Recovery of Punitive Damages in Ohio Wrongful Death Actions: A Preferred Approach*, 6 U. DAYTON L. REV. 175, 178 (1981); Comment, *Ohio's New Wrongful Death Statute: An Expanded Scope of Recoverable Damages*, 53 U. CIN. L. REV. 1083, 1088 (1984) [hereinafter *Wrongful Death*].

[42] Ohio's first wrongful death statute reads as follows:

> Sec. 1. *Damages recoverable for causing death.* Be it enacted, etc., That whenever the death of a person shall be caused by wrongful act, neglect or default; and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof; then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.
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> Sec. 2. *Action brought by personal representative.* Every such action shall be brought by and in the name of the personal representative of such deceased persons; and the amount recovered in every such action, shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal estates, left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just, not exceeding five thousand dollars, with reference to the pecuniary injury resulting from such death to the wife and next of kin to such deceased person; Provided, that every such action shall be commenced within two years after the death of such deceased person.

REVISED STATUTES OF OHIO, 2 CURWEN 1673, 49 LAWS 117, ch. 1105 (1851).

[43] J. MCCORMAC, *supra* note 39, at 1; W. PROSSER & W. KEETON, HANDBOOK OF THE LAW OF TORTS, § 127, at 945 (5th ed. 1984).

personal representative of the decedent.[44] Only the personal representative may bring a wrongful death action.[45] The action is maintained for the exclusive benefit of the decedent's surviving spouse, children, parents, and other next of kin.[46] "[A] prerequisite of recovery for wrongful death is that there be in existence a beneficiary for whom the exclusive right is to be maintained."[47] If there are no beneficiaries, there is no right to maintain a wrongful death action.[48] Historically, the underlying policy of a wrongful death action is that the decedent's surviving family members should be compensated for the loss of support that would have been received but for the decedent's death.[49] Thus, in some jurisdictions, recovery for wrongful death is limited to pecuniary loss resulting from the decedent's death.[50] Recent amendments to Ohio's wrongful death statute have expanded the scope of recoverable damages well beyond pecuniary loss.[51]

Interpreting wrongful death statutes has been a formidable task for the courts. A well-known maxim of statutory construction is that statutes in derogation of the common law are to be strictly construed.[52] Wrongful death statutes are in derogation of the common law because, at common law, wrongful death was not actionable.[53] Nonetheless, three views regarding the interpretation of wrongful death statutes have emerged.[54]

Some authorities hold that death statutes, being in derogation of the common law, are to be strictly construed.[55] Other authorities, viewing death statutes as remedial, hold that a liberal construction is appropriate.[56] Finally, a third view contends that death statutes are to be strictly

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[44] OHIO REV. CODE ANN. § 2125.02 (Page 1987).
[45] *Id.*
[46] *Id.*; J. MCCORMAC, *supra* note 39, at 11.
[47] J. MCCORMAC, *supra* note 39, at 11.
[48] *See id.*
[49] W. PROSSER & W. KEETON, *supra* note 43, § 127, at 949.
[50] *Id.*
[51] 1. Comment, *Wrongful Death*, *supra* note 41, at 1099. The compensatory damages that may be awarded in an Ohio wrongful death action are as follows:

(1) Loss of support from the reasonably expected earning capacity of the decedent:
(2) Loss of services of the decedent:
(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, an education, suffered by the surviving spouse, minor children, parents, or next of kin:
(4) Loss of prospective inheritance to the decedent's heirs at law at the time of his death:
(5) The mental anguish incurred by the surviving spouse, minor children, parents, or next of kin.

OHIO REV. CODE ANN. § 2125.02(B) (Page 1987).
[52] STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING 129 (2d ed. 1984).
[53] Sabol v. Pekoc, 148 Ohio St. 545, 551-52, 76 N.E.2d 84, 95 (1947).
[54] *See* 22A AM. JUR. 2D *Death* § 13 (1988); 30 O. JUR. 3D *Death* § 36-39 (1981).
[55] 22A AM. JUR. 2D *Death* § 13 (1988).
[56] *Id.*

construed when one determines the persons or classes of persons who are entitled to recover, but liberally construed when one applies the statute to those persons or classes.[57]

Long ago, the Ohio Supreme Court in *Pittsburgh, Cincinnati and St. Louis R.R. v. Hine*[58] stated that Ohio's wrongful death statute created new rights in derogation of the common law and, therefore, must be strictly construed.[59] Here the supreme court acknowledged that Ohio's death statute was not remedial.[60] Then in *Mahoning Valley R.R. v. Van Alstine*,[61] the Ohio Supreme Court appeared to depart from *Hine*. The court in *Van Alstine* recognized that Ohio's death statute should be strictly construed, but that the policy and purpose of the statute should not be ignored either.[62] Years later in *Sabol v. Pekoc*,[63] the supreme court again stated that Ohio's wrongful death statute, being in derogation of the common law, "must be applied strictly in accord with all its essential terms."[64] As an example, the *Sabol* court noted:

> [I]f the beneficiaries and not the representative were to bring an action for wrongful death, such an action would not lie because the beneficiaries have no common-law right by statute. Unless a petition for wrongful death is filed strictly according to the essential terms of the wrongful-death act, such petition does not state a good cause of action because the act is the sole source of the right upon which the petition is based.[65]

But when a dispute arose concerning the substitution of the decedent's personal representative after the lapse of the limitations period, the supreme court in *Kyes v. Pennsylvania R.R.*[66] specified that the death statute was procedural and remedial and should be liberally construed.[67] The court in *Kyes* held the substitution was not error, because the personal representative in a wrongful death action is a mere nominal party.[68]

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[57] *Id.*
[58] 25 Ohio St. 629 (1874).
[59] *Id.* at 634.
[60] *Id.*
[61] 77 Ohio St. 395, 83 N.E. 601 (1908).
[62] *Id.* at 411, 83 N.E. at 88.
[63] 148 Ohio St. 545, 76 N.E.2d 84 (1947).
[64] *Id.* at 552, 76 N.E.2d at 88.
[65] *Id.*
[66] 158 Ohio St. 362, 109 N.E.2d 503 (1952).
[67] *Id.* at 365, 109 N.E.2d at 505.
[68] *Id.* A well-known author on wrongful death has explained inconsistencies in interpreting Ohio's death act:

> There are numerous principles of statutory construction that may be argued in any given case, some of which may support one interpretation and others which may support an opposite construction. Previously, one provision of the Wrongful Death Act has been applied strictly based upon the recognized rule that a statute in derogation of common law must be so applied, while, in another case, the Wrongful Death Act was referred to as procedural and remedial in its nature and to be construed liberally. Although on the surface there appears to be an inconsistency in these two

B. UUM Coverage in Ohio

Ohio's uninsured and underinsured motorist statute provides for the mandatory offering of uninsured and underinsured motorist coverage for bodily injury.[69] The purpose of UUM coverage for bodily injury is to compensate the injured insured as he would have been had the tortfeasor possessed liability insurance or adequate liability insurance.[70] UUM coverage is a form of first-party insurance.[71] It shifts the loss from the tortfeasor to the injured party's insurer. The insured protects himself against the financial irresponsibility of the tortfeasor by purchasing UUM coverage for bodily injury. UUM coverage for bodily injury is truly of a personal nature.[72]

The UUM statute also provides for the mandatory offering of UUM coverage for wrongful death.[73] But the purpose of UUM coverage for wrongful death is to compensate the surviving family members of the deceased insured, not the deceased insured himself.[74] For it is the surviving family members who would have been compensated had the tortfeasor possessed liability insurance.[75] To be compensated pursuant to his UUM coverage, the insured must be legally entitled to recover damages from the tortfeasor.[76] The tortfeasor must be at fault.[77] Regardless of fault, however, a deceased insured is not legally entitled to recover damages for his own wrongful death.[78] He is dead. Nor can the estate of a deceased

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holdings, the inconsistency is not irreconcilable. The provision of the wrongful death statute which was strictly construed applied to the right itself, whereas the provision which was construed liberally concerned the procedural requirement that the plaintiff be the personal representative and whether that term was broad enough to include an ancillary administratrix. Thus, the issue of whether to apply strict or liberal construction to R.C. Chapter 2125 probably is, at least in part, dependent upon what aspect of the Wrongful Death Act is being considered. Even if the rule of strict construction is to be applied, the policy and purpose of the statute cannot be ignored in determining the intent of the general assembly.

J. MCCORMAC, *supra* note 39, at 5.

[69] OHIO REV. CODE ANN. § 3937.18 (Anderson 1988).

[70] R. JERRY, *supra* note 1, at 651; K. ABRAHAM, DISTRIBUTING RISK 144 (1986).

[71] Widiss, *Uninsured Motorist Coverage: Observations on Litigating Over When a Claimant is "Legally Entitled to Recover"*, 68 IOWA L. REV. 397, 398-99 (1983).

[72] *Id.*

[73] OHIO REV. CODE ANN. § 3937.18 (Anderson 1988).

[74] *Id.* Of course the surviving family members are to be compensated as they would have been had the tortfeasor possessed liability insurance.

[75] *Id.*

[76] OHIO REV. CODE ANN. § 3937.18 (Anderson 1988); Widiss, *supra* note 71, at 408-09.

[77] Widiss, *supra* note 71, at 408-09.

[78] OHIO REV. CODE ANN. § 2125.02(A)(1) (Anderson 1988). The Ohio Supreme Court in Sumwalt v. Allstate Ins. Co., 12 Ohio St. 3d 294, 466 N.E.2d 544 (1984), stated: "The phrase 'legally entitled to recover from the owner or operator of an uninsured auto,' contained in the uninsured motorist provision of an automobile insurance policy, means that the insured must be able to prove the elements of her claim necessary to recover damages." *Id.* at 295, 466 N.E.2d at 544. Because a deceased insured is dead, he cannot prove the elements of any claim.

insured recover damages for his wrongful death.[79] In Ohio, unlike some states,[80] a wrongful death action is not maintained for the benefit of the decedent or his estate.[81] Rather, the action is maintained for the benefit of the decedent's surviving family members.[82] And only the decendent's surviving family members may recover for the decedent's wrongful death.[83] In short, an insured cannot recover under his UUM coverage for his own wrongful death. Thus, by purchasing UUM coverage for wrongful death, the insured protects his surviving family members from the financial irresponsibility of the tortfeasor.

The only time an insured can recover for wrongful death under his own UUM coverage is when the insured is recovering damages for the wrongful death of another who has been killed by an uninsured or underinsured motorist.[84] The person who has been wrongfully killed, however, does not have to be an insured under the UUM coverage.[85] *Sexton v. State Farm Mutual Automotive Insurance Co.*[86] illustrates this point.

In *Sexton*, Gareld Sexton's daughter, Laurie, died as a result of an automobile accident caused by an uninsured motorist.[87] Laurie was not an insured under her father's policy with State Farm and she did not live with him.[88] The State Farm policy provided uninsured motorist coverage.[89] Subsequently, Gareld Sexton submitted a claim under his UM coverage to recover his damages that resulted from the negligence of the uninsured motorist.[90] Because Laurie was not an insured, and the father was not personally injured, State Farm denied coverage.[91] The Ohio Supreme Court, however, held that Sexton was entitled to recover.[92] The supreme court read Ohio's then existing UUM statute as requiring insurers to provide coverage to insureds who are legally entitled to recover damages because of death caused by an uninsured motorist.[93] Sexton was entitled to recover damages for Laurie's wrongful death and an uninsured motorist had caused it.[94] The court recognized that the UUM statute did

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[79] OHIO REV. CODE ANN. § 2125.02 (Anderson 1988).
[80] 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH 116-26 (2d ed. 1975).
[81] OHIO REV. CODE ANN. § 2125.02 (Anderson 1988).
[82] *Id.*
[83] *Id.*
[84] Sexton v. State Farm Mut. Auto Ins. Co., 69 Ohio St. 2d 431, 433 N.E.2d 555 (1982).
[85] *Id.* at 434-37, 433 N.E.2d at 558-60.
[86] 69 Ohio St. 2d 431, 433 N.E.2d 555 (1982).
[87] *Id.* at 431, 433 N.E.2d at 557.
[88] Sexton v. State Farm Mut. Auto Ins. Co., 69 Ohio St. 2d 431, 433 N.E.2d 555, 557 (1982).
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Sexton v. State Farm Mut. Auto Ins. Co., 69 Ohio St. 2d 431, 435, 433 N.E.2d 555, 559 (1982).
[93] *Id.* at 437, 433 N.E.2d at 560.
[94] *Id.*

not specify that the insured must be personally injured.[95] State Farm's policy, limiting recovery to those insureds personally injured, was thus contrary to the UUM statute.[96] The Ohio Supreme Court stated:

> Thus, we have previously concluded that the purpose of the statute is to protect the insured from losses and provide for recovery of damages, which is consistent with our interpretation of the statute in the instant case. Other statements concerning the injured are not determinative because in the previous cases the insured and injured were the same person. None of these cases considered the circumstances at issue — whether uninsured motorist coverage permits recovery when an insured's damages result from injuries or death of another person.[97]

Justices Holmes, Locher, and Krupansky dissented.[98] Justice Holmes found that the policy did not unreasonably limit Sexton's UM coverage.[99] He believed that the majority was judicially extending coverage to include family members who live in places far distant from the named insured.[100] "The risk area intended to be covered by the policy is the family unit living in the same household."[101]

Uninsured and underinsured motorist coverage, moreover, compensates insureds only[102] and, as already noted, only surviving family members may recover for the wrongful death of the deceased relative.[103] To be compensated pursuant to the decedent's UUM coverage for the decedent's wrongful death, the surviving family members of the decedent must be insureds under the decedent's UUM coverage.[104] Theoretically, then, an insurer cannot provide UUM coverage for the wrongful death of an insured if that insured is the only insured in the policy. In one sense, the UUM statute seems to require that when an insurer offers an insured UUM coverage for wrongful death, the insurer must offer to insure all surviving family members of the insured. But this reading of the UUM

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[95] *Id.* at 434, 433 N.E.2d at 558-59.

[96] Sexton v. State Farm Mut. Auto Ins. Co., 69 Ohio St. 2d 431, 437, 433 N.E.2d 555, 560 (1982).

[97] *Id.* at 436, 433 N.E.2d at 559-60.

[98] *Id.* at 437, 433 N.E.2d at 560.

[99] *Id.* at 438, 433 N.E.2d at 561.

[100] Sexton v. State Farm Mut. Auto Ins. Co., 69 Ohio St. 2d 431, 438, 433 N.E.2d 555, 561 (1982).

[101] *Id.*

[102] OHIO REV. CODE ANN. § 3937.18 (Anderson 1988). UM coverage protects "persons insured thereunder." *Id.* at § 3937.18(A)(1). UDM coverage provides "protection for an insured." *Id.* at § 3937.18(A)(2).

[103] OHIO REV. CODE ANN. § 2125.02 (Anderson 1988).

[104] OHIO REV. CODE ANN. § 3937.18 (Anderson 1988). The Ohio Supreme Court in Wood v. Shepard, 38 Ohio St. 3d 86, 91, 526 N.E.2d 1089, 1093 (1988), stated that "[o]nly an *insured* under the underinsured motorist provision can recover under the policy for injury or wrongful death." This, of course, also applies to UM coverage.

statute seems improbable. It is doubtful that the General Assembly intended to force an insurer to contract with all surviving family members of an insured.[105] No Ohio law expressly requires an insurer to insure all surviving family members of an insured.[106] For the most part, an automobile insurance carrier has absolute discretion in deciding whom it wishes to insure.[107] Given that the decedent's personal representative is the only person who may bring a wrongful death action, a more plausible reading of the UUM statute would require the insurer to insure the deceased insured's personal representative and, upon the decedent's wrongful death, to pay the personal representative all sums which the representative is entitled to recover on behalf of the decedent's surviving family members. Consequently, the insurer could compensate all surviving family members for the decedent's wrongful death without contracting with all survivors directly.

C. Precursors to Wood

Ohio's uninsured and underinsured motorist statute has always seemingly confused Ohio courts. In this regard, the courts may not have been entirely at fault. The UUM statute is not the most artfully drafted statute. The language of the statute is confusing. The Ohio Supreme Court has not, however, ameliorated the confusion. In fact, its decisions have served to increase the confusion. *Wood* is not the first Ohio Supreme Court decision to cause uncertainty about the proper interpretation of the UUM statute. Rather, *Wood* is the latest in a long line of controversial decisions. Three key Ohio Supreme Court decisions are examined.

In *Auto-Owners Mutual Insurance Co. v. Lewis*,[108] the appellant's minor son was injured in an automobile accident with an uninsured motorist.[109] The appellant's son was covered under a policy issued to the appellant by the appellee Auto-Owners Mutual Insurance Company.[110] The policy provided uninsured motorist coverage.[111] The appellant sued the uninsured motorist's estate and asserted a claim for personal injuries on behalf of his son and an individual claim for the loss of his son's services.[112] The

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[105] *Compare with* 38 Ohio St. 3d 86, 94, 526 N.E.2d 1089, 1096 (1988). Justice Holmes stated: "The conclusions of the majority are directly contrary to the clear language of the agreement, and the majority's position advocates that this court reject not only the terms of the policy, but also minimize the ability of the parties to enter into contractual arrangements."

[106] *See generally* OHIO REV. CODE ANN. § 3937.01-99 (Anderson 1988). *See also* OHIO ADMIN. CODE § 3901-1-01-3901-2-15 (1988).

[107] *See supra* note 106 and accompanying text.

[108] 10 Ohio St. 3d 156, 462 N.E.2d 396 (1984).

[109] *Id.* at 156, 462 N.E.2d at 396.

[110] *Id.* at 161, 462 N.E.2d at 400.

[111] *Id.*

[112] Auto-Owners Mut. Ins. Co. v. Lewis, 10 Ohio St. 3d 156, 161, 462 N.E.2d 396, 400 (1984). *See* Grindell v. Huber, 28 Ohio St. 2d 71, 275 N.E.2d 614 (1971) (holding that when a minor child is injured by a tortfeasor a derivative action is created in favor of the minor child's parents); Whitehead v. General Telephone Co., 20 Ohio St. 2d 108, 254 N.E.2d 10 (1969) (same).

appellee disputed the extent of coverage and brought a declaratory judgment action.[113] At the declaratory judgment action, the trial court found that the maximum amount of UM coverage applied separately to each claim.[114] In effect, the trial court allowed appellant to double the amount of UM coverage.[115] The court of appeals reversed.[116]

The Ohio Supreme Court agreed with the trial court.[117] The supreme court, finding support in *Sexton*, held that "where separate and independent causes of action arise from injuries caused by an uninsured motorist and such injuries are covered by the uninsured motorist provision of an automobile insurance policy, the policy limits applicable to uninsured motorist coverage will be available to each cause of action."[118]

In *Auto-Owners*, the supreme court erroneously relied on *Sexton*. *Sexton* concerned wrongful death; *Auto-Owners* did not. This basic distinction was never acknowledged. The supreme court in *Auto-Owners* feared that the appellant could receive less coverage than he paid for, if the UM coverage was not available to each of the appellant's claims.[119] The result, however, was that the appellant received more coverage than he ever could have imagined.[120] The reasoning in *Auto-Owners* was simply inadequate and unpersuasive.

Almost two years later in 1986, the Ohio Supreme Court decided *In re Estate of Reeck*,[121] a case of first impression. The issue presented was "whether a settlement recovered pursuant to the uninsured motorist provision of an insurance policy is to be considered the proceeds of an insurance contract payable to the deceased insured's estate or as damages distributable under the Wrongful Death Act."[122] In *Reeck*, Donald L. Reeck was killed by an uninsured motorist.[123] Reeck was survived by his wife, Mrs. Reeck, and by his daughter, Mrs. Hill.[124] At the time of his death, Reeck had an insurance policy providing UM coverage.[125] Mrs. Hill was an insured under her father's policy.[126] Mrs. Reeck, the executrix of Reeck's estate, settled the insurance claim under Reeck's UM coverage.[127]

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[113] *Auto-Owners*, at 157, 462 N.E.2d at 398.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] Auto-Owners Mut. Ins. Co. v. Lewis, 10 Ohio St. 3d 156, 160, 462 N.E.2d 396, 400 (1984).
[118] *Id.* at 156, 462 N.E.2d at 397.
[119] *Id.* at 161, 462 N.E.2d at 401.
[120] *Id.*
[121] 21 Ohio St. 3d 126, 488 N.E.2d 195 (1986).
[122] *Id.* at 127-28, 488 N.E.2d at 197.
[123] *Id.* at 126, 488 N.E.2d at 196.
[124] *Id.*
[125] *In re* Estate of Reeck, 21 Ohio St. 3d 126, 127, 488 N.E.2d 195, 196 (1986).
[126] *Id.* at 129.
[127] *Id.* at 126, 488 N.E.2d at 195.

The trial court allowed all settlement proceeds to be distributed by the terms of Reeck's will, not by Ohio's wrongful death statute.[128] Because the proceeds were to be distributed pursuant to the decedent's will, and Mrs. Hill was not mentioned in the will, she was precluded from sharing in the proceeds. The court of appeals affirmed.[129]

The Ohio Supreme Court reversed the court of appeals and the trial court.[130] The supreme court held that the settlement proceeds were to be distributed among those entitled to recover for the decedent's wrongful death.[131] By so holding, the court found that Mrs. Hill could share in the proceeds.[132]

Four years after *Auto-Owners*, in *Dues v. Hodge*,[133] the Ohio Supreme Court overruled its holding in *Auto-Owners*.[134] In *Dues*, Jay Dues, a minor, was injured by an uninsured motorist.[135] The parents of Jay, on his behalf and on their own behalf, and Jay's brother, Randy, sued the uninsured motorist.[136] The Dueses further sought a declaratory judgment against their insurer, State Farm Mutual Insurance Company, to determine the amount of uninsured motorist coverage available at the time of the accident.[137] Jay was not insured, but his parents and brother were.[138] State Farm had three automobile insurance policies in effect that had been issued to Robert Dues.[139] Each policy contained UM coverage, and each policy contained liability limits of $100,000 for all damages due to bodily injury to one person and $300,000 for all damages due to bodily injury to all parties.[140] State Farm also had in effect an automobile policy issued to Jay's brother, Randy Dues.[141] This policy contained UM coverage limited to $25,000 for all damages due to bodily injury to one person and $50,000 for all damages due to bodily injury to all parties.[142] The case was bifurcated and the declaratory judgment action was submitted to a referee.[143]

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[128] *Id.* at 126-27.
[129] *In re* Estate of Reeck, 21 Ohio St. 3d 126, 127, 488 N.E.2d 195, 196 (1986).
[130] *Id.* at 129, 488 N.E.2d at 198.
[131] *Id.*
[132] *Id.*
[133] 36 Ohio St. 3d 46, 521 N.E.2d 789 (1988).
[134] *Id.* at 49, 521 N.E.2d at 793.
[135] *Id.* at 46, 521 N.E.2d at 790.
[136] *Id.*
[137] Dues v. Hodge, 36 Ohio St. 3d 46, 47, 521 N.E.2d 789, 790 (1988).
[138] *Id.* at 46, 521 N.E.2d at 791.
[139] *Id.*
[140] *Id.*
[141] Dues v. Hodge, 36 Ohio St. 3d 46, 47, 521 N.E.2d 789, 791 (1988).
[142] *Id.* at 46-47, 521 N.E.2d at 791.
[143] *Id.* at 47, 521 N.E.2d at 791.

The Dueses attempted to "stack" the UM coverages in each policy.[144] They claimed they were entitled to a recovery of $100,000 for Jay Dues under the UM provision of each policy issued to Robert Dues.[145] The Dueses claimed each parent had derivative actions based on Jay's injuries and that each parent was entitled to recover $100,000 under each policy issued to Robert Dues.[146] They further sought an additional $50,000 under Randy Dues' policy.[147]

The referee determined that the policies contained valid anti-stacking provisions.[148] Thus, the Dueses were entitled only to $100,000 of total coverage for the direct and derivative actions.[149] The trial court agreed with the referee about the validity of the anti-stacking provisions.[150] The trial court found that Jay Dues was entitled only to $100,000 of coverage, but found that Jay's parents were entitled to an additional $100,000 of coverage because of their derivative actions.[151] The Dueses were thus entitled to a maximum of $200,000 of UM coverage. [152]

The court of appeals upheld the anti-stacking rulings.[153] The court of appeals, however, found available an action for liability by Jay, a derivative action by the parents, and a derivative action by the brother.[154] The court of appeals found that the Dueses were entitled to $100,000 of UM coverage for each separate action under four insurance policies.[155]

The Ohio Supreme Court affirmed in part and reversed in part.[156] The first issue before the court was whether the anti-stacking provisions were valid.[157] The court ruled that they were and found that the referee was correct in forbidding the stacking of UM coverage.[158] The second issue presented was whether the language in the insurance contract allowed

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[144] *Id.*

Stacking is a term that refers to obtaining for a single loss insurance proceeds from duplicate coverages. If an insured is allowed to stack coverages, the insured is allowed to recover for damages received a sum up to the stated limit of each policy that provides coverage. Under the principle of indemnity, an insured is allowed to recover from insurance no more than his loss. However, the policy limits of available insurance coverages often are less than the injuries suffered by an insured or a victim of the insured's conduct. If more policies can be reached for coverage, it is more likely that the victim will receive compensation for his injuries.

R. JERRY, *supra* note 1, at 678.

[145] Dues v. Hodge, 36 Ohio St. 3d 46, 47, 521 N.E.2d 789, 791 (1988).

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] Dues v. Hodge, 36 Ohio St. 3d 46, 47, 521 N.E.2d 789, 791 (1988).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] Dues v. Hodge, 36 Ohio St. 3d 46, 47, 521 N.E.2d 789, 791 (1988).

[154] *Id.*

[155] *Id.*

[156] *Id.* at 49, 521 N.E.2d at 793.

[157] Dues v. Hodge, 36 Ohio St. 3d 46, 47, 521 N.E.2d 789, 791 (1988).

[158] *Id.* at 47-48, 521 N.E.2d at 791-92.

separate UM coverage for derivative actions.[159] The policy made clear that State Farm provided a maximum of $100,000 UM coverage for each accident involving bodily injury to one person.[160] The court reasoned that a derivative action stems from a single accident.[161] "Indeed, the derivative action would not exist but for the primary action."[162] The State Farm policies limited coverage to $100,000 for all actions arising from a single accident involving bodily injury to one person.[163]

The Ohio Supreme Court acknowledged that *Auto-Owners* was erroneously based on *Sexton*.[164] The court overruled paragraph two of the *Auto-Owners* syllabus and held that "[a]n insurance policy provision that limits recovery for all causes of action arising out of bodily injury to one person to a single limit of liability is a valid restriction of uninsured motorist coverage."[165]

The *Wood* court did not overrule *Dues*, but distinguished it.[166] According to *Wood*, "[t]he distinction is that *Dues* concerned bodily injury while this case concerns wrongful death, for which each survivor is statutorily afforded a separate claim for damages."[167] Therefore, each beneficiary of an insured decedent will have a separate claim under the UUM coverage — immune from an insurer's single person limit of liability.[168] Conversely, an insurer's attempt to limit derivative claims in bodily injury actions will prevail.[169]

Justice Holmes, concurring in part and dissenting in part, reasoned that a wrongful death action creates only one cause of action.[170] He vig-

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[159] *Id.* at 48, 521 N.E.2d at 792.

[160] *Id.*

[161] Dues v. Hodge, 36 Ohio St. 3d 46, 48, 521 N.E.2d 789, 792 (1988).

[162] *Id.*

[163] *Id.*

[164] *Id.* at 49, 521 N.E.2d at 793.

[165] Dues v. Hodge, 36 Ohio St. 3d 46, 49, 521 N.E.2d 789, 793 (1988).

[166] Wood v. Shepard, 38 Ohio St. 3d 86, 91, 526 N.E.2d 1089, 1093-94 (1988).

[167] *Id.* at 91, 526 N.E.2d at 1093.

[168] *Id.* at 91, 526 N.E.2d at 1094.

[169] Dues v. Hodge, 36 Ohio St. 3d 46, 49, 521 N.E.2d 789, 793 (1988).

[170] *Wood*, 38 Ohio St. 3d at 95, 526 N.E.2d at 1097 (Holmes, J., concurring and dissenting in part). Justice Holmes' proposed syllabus reads:

> 1. Where a wrongful death is asserted and an action is brought pursuant to Ohio's wrongful death statute, R.C. 2125.02, although a surviving spouse, the children, the parents, and the next of kin of the decedent may be entitled to receive damages as proportioned among them by the jury, or the court, *there is only one cause of action* for the recovery of these damages flowing from the death of the decedent.
>
> 2. An automobile insurance policy provision that limits recovery under the policy, for all damages due to bodily injury, including death from such injuries of one person to a single limit of liability, is a valid restriction of uninsured and underinsured motorist coverage and does not violate R.C. 3937.18.
>
> 3. Accordingly, in a claim for wrongful death under a policy of automobile insurance providing underinsured motorist coverage, the per-person limitation of liability applies to all damages sought by the personal representative of the decedent, regardless of the number of statutory beneficiaries who are also covered persons under the policy.

Id. at 92, 526 N.E.2d at 1094 (emphasis in original).

orously dissented with the majority's interpretation of *Dues*.[171] Justice Holmes refused to read *Dues* as applying only to causes of action for bodily injury.[172] To hold otherwise, stated Justice Holmes, is "not . . . based upon any reasonable interpretation of the verbiage of that opinion."[173] Moreover, he felt that the majority's position thwarted the ability of insurers to contract freely.[174] Justice Holmes concluded that the majority's position was in direct opposition to the majority view of other states on the issue.[175]

D. Decisions From Other Jurisdictions

Of the few instances in which other courts have considered the wrongful death issue presented in *Wood*, these courts have summarily rejected an insured's attempt to assert separate claims under an insurance policy limiting liability to a single person.[176] The Florida case of *Mackoul v. Fidelity & Casualty Co. of New York*[177] is a good example.

In *Mackoul*, the appellant was the father and personal representative of a child who died as a result of injuries sustained in an automobile accident.[178] The appellant's insurance policy contained uninsured and underinsured motorist coverage with liability limits of $100,000 for bodily injuries sustained by any one person up to an aggregate amount of $300,000 for all damages arising out of any one accident.[179] The appellant argued that under the wrongful death statute a separate cause of action was created in favor of the child's father, mother, and estate.[180] Furthermore, the appellant contended that each cause of action could be asserted under the policy.[181]

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[171] *Id.* at 95, 526 N.E.2d at 1097.

[172] *Id.*

[173] Wood v. Shepard, 38 Ohio St. 3d 86, 95 526 N.E.2d 1089, 1097 (1988).

[174] *Id.* at 94, 526 N.E.2d at 1096.

[175] *Id.*

[176] *See generally* State Farm Mut. Auto. Ins. Co. v. Eubanks, 785 F.2d 1346 (5th Cir. 1986); Safeco Ins. Co. of America v. Simmons, 642 F. Supp. 305 (N.D. Cal. 1986); Mackoul v. Fidelity and Casualty Co. of New York, 402 So. 2d 1259 (Fla. App. 1981); State Farm Mut. Auto. Ins. Co. v. Acosta, 479 So. 2d 1089 (Miss. 1985); Arnold v. Mountain West Farm Bureau Mut. Ins. Co., 707 P.2d 161 (Wy. 1985); New Hampshire Ins. Co. v. Bisson, 122 N.H. 747, 449 A.2d 1226 (1982); Thompson v. Grange Ins. Co., 34 Wash. App. 151, 660 P.2d 307 (1983); Vega v. State Farm Mut. Auto. Ins. Co., 401 So. 2d 368 (La. App. 1981); Zoda v. Mutual of Enumclaw Ins. Co., 34 Wash. App. 98, 684 P.2d 91 (1984).

[177] 402 So. 2d 1259 (Fla. App. 1981).

[178] *Id.* at 1259.

[179] *Id.*

[180] *Id.*

[181] Mackoul v. Fidelity & Cas. Co. of New York, 402 So.2d 1259, 1260 (Fla. App. 1981).

Without rejecting that separate claims may arise from a wrongful death action, the court in *Mackoul* held that the policy clearly limited the amount of recoverable damages by all parties for the bodily injury to one person to $100,000.[182] The court analyzed neither wrongful death nor UUM coverage.[183] In addition, the court drew no distinction between bodily injury sustained by an insured and the wrongful death of an insured.[184] Other than citing to remotely analogous cases, the *Mackoul* court relied on the clear language in the policy.[185]

One District Court of Appeals of Florida in *Florida Insurance Guaranty Association v. Cope*,[186] relying on *Mackoul*, held that the survivors of a wrongful death action cannot assert separate claims under an uninsured motorist provision limiting liability to losses sustained by any one person.[187] As did the *Mackoul* court, the *Cope* court did not reject that separate claims arise from a wrongful death action.[188] Nonetheless, for the Florida Court of Appeals, the *Mackoul* precedent was adequate justification to reject the survivors' attempt to assert separate claims.[189]

The United States District Court for the Northern District of Mississippi in *State Farm Mutual Automobile Insurance Co. v. Eubanks*[190] held that each beneficiary entitled to recover under Mississippi's wrongful death act could not assert separate claims under insurance policies limiting liability coverage to bodily injuries sustained by one person.[191] Unlike *Mackoul*, the court in *Eubanks* provided a reasonable rationale for its holding: "To hold differently would result in the amount of liability under a policy depending in large part on the number of statutory beneficiaries an insured might have. An insured with a large family would have more coverage than an insured with an identical policy but a small family."[192]

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling.[193] The court of appeals, however, based its decision not on the district court's rationale but on *State Farm Mutual Automobile Insurance Co. v. Acosta*,[194] a case that did not concern wrongful death beneficiaries asserting separate claims under an insurance policy.[195]

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[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] Mackoul v. Fidelity & Cas. Co. of New York, 402 So.2d 1259, 1260 (Fla. App. 1981).
[186] 405 So. 2d 292 (Fla. App. 1981).
[187] *Id.* at 294.
[188] *Id.*
[189] *Id.*
[190] 620 F. Supp. 17 (D. Miss. 1985), *aff'd*, 785 F.2d 1346 (5th Cir. 1986).
[191] *Id.*
[192] *Id.*
[193] State Farm Mut. Auto. Ins. Co. v. Eubanks, 785 F.2d 1346 (5th Cir. 1986).
[194] 479 So. 2d 1089 (Miss. 1985).
[195] *Id.*

IV. ANALYSIS

A. Separate Wrongful Death Claims

Wood v. Shepard[196] begins from the premise that a wrongful death action creates separate claims.[197] The Ohio Supreme Court in *Wood* reasoned that this "conclusion . . . emanates from the language of the statute itself."[198] In *Wood*, the court focused on particular statutory language stating that the surviving spouse, children, and parents of the decedent are rebuttably presumed to have suffered damages.[199] To the court, if one suffers damages, one must have a claim.[200] The supreme court in *Wood*, however, did not limit its decision to those family members rebuttably presumed to have suffered damages.[201] The rebuttable presumption of the wrongful death statute does not apply to the decedent's other next of kin.[202] The supreme court in *Wood* did not exclude other next of kin from the scope of its decision.[203] Thus, the court's focus on the death statute's rebuttable presumption is of no significance.

The Ohio Supreme Court, moreover, never explained what it meant by "separate claims."[204] Does the term "claim" mean "action"? May each surviving family member now proceed with his own wrongful death action separate from other family members?[205] If so, the courts of Ohio will be burdened with numerous, individual wrongful death actions filed by each surviving family member.

The death statute mandates that "*[a]n action* for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving [family members] of the decedent."[206] The statute contemplates one action, brought by the decedent's personal representative for the benefit of the decedent's surviving family members. The statute efficiently combines the "claims" of the decedent's family members into a single action. Of course, each family member of a wrong-

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[196] 38 Ohio St. 3d 86, 526 N.E.2d 1089 (1988).
[197] *Id.* at 88, 526 N.E.2d at 1091.
[198] *Id.* at 90, 526 N.E.2d at 1092.
[199] *Id.*
[200] Wood v. Shepard, 38 Ohio St. 3d 86, 90, 526 N.E.2d 1089, 1092 (1988).
[201] *Id.* at 90-92, 526 N.E.2d at 1092-94.
[202] J. MCCORMAC, *supra* note 39, at 14.
[203] *See supra* note 202.
[204] Wood v. Shepard, 38 Ohio St. 3d 86, 88, 526 N.E.2d 1089, 1092 (1988).
[205] One author has written:
> [Wood] should not be extended beyond the space intended by the Supreme court. The court noted that the action must be brought in the name of the personal representative of the decedent; the court did not purport to allow a beneficiary to proceed with his own action rather than as one of the beneficiaries in a single action brought in the name of the personal representative of the decedent.

J. MCCORMAC, *supra* note 39, at 2 (Supp. 1989).
[206] OHIO REV. CODE ANN. § 2125.02 (Anderson 1988) (emphasis added).

fully killed decedent will ultimately receive the damages that the decedent's personal representative recovers for them. And in a loose sense, each surviving family member could be said to have a separate claim for damages. It does not follow, however, that an insurer cannot subject those claims to a single person limit of liability in its uninsured and underinsured motorist coverage. A single person limit of liability treats a wrongful death action as does the wrongful death statute itself: Each surviving family member is combined into a legal unit; the death action retains its singular nature. Under a single person limitation, though, each survivor still receives his individual portion of the wrongful death proceeds.

The supreme court in *Wood* was construing a statute, the UUM statute. There is no mention in that statute that insurance companies cannot subject surviving family members' claims to a single person limit of liability. Likewise, there is no mention in the wrongful death statute that insurance companies cannot subject surviving family members' claims to a single person limit of liability.

A single person limit of liability is just one method of defining the maximum coverage in an insurance policy. Other methods exist, but the single person limitation is the most efficient. In sum, the Ohio Supreme Court in deciding *Wood* misinterpreted the function of a single person limit of liability and left the scope of its decision unknown.

B. Contrary to the Purpose of UUM Coverage

Wood is contrary to the purpose of uninsured and underinsured motorist coverage for wrongful death. In the context of wrongful death, the purpose of UUM coverage is to compensate the deceased insured's surviving family members as they would have been had the tortfeasor possessed liability insurance.[207] If a tortfeasor possesses liability insurance, the single person limit of liability in his policy would combine and limit the claims of all surviving family members.[208]

Under *Wood*, the insurer and insured are confronted with an anomalous situation. If an insured is severely injured by a negligent uninsured motorist, the injured insured's insurer pays in accordance with the terms of the single person limit of liability in the insured's policy. If that insured dies several days later, however, the decedent's insurer pays not in accordance with the terms of the decedent's policy but in accordance with how many surviving family members that insured left behind. *Wood* leaves an insurer's liability limits to chance.

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[207] *See supra* notes 74-83 & accompanying text.

[208] This statement assumes that Hill v. Allstate Insurance Co., 50 Ohio St. 3d 243, N.E.2d (1990) and Burris v. Grange Mut. Cos., 46 Ohio St. 3d 84, 545 N.E.2d 83 (1989) are still good law in Ohio.

C. Bypassing Wood

The Ohio Supreme Court in *Wood* held that the claims of each survivor in a wrongful death action may not be combined and limited to the single person limit of liability in the deceased insured's UUM coverage.[209] The supreme court reasoned that the UUM statute does not grant authority to limit claims for wrongful death to a single person limitation.[210] The insurance policy in *Wood* contained a single person limit of liability of $100,000.[211] But the supreme court held that the claims of James, Jessica, and Carrie Wood were each entitled to a maximum coverage of $100,000 up to a total limitation of $300,000 for the wrongful death of Gina Wood, as opposed to all three claims being combined and limited to a maximum coverage of $100,000.[212]

Assume that the holding in *Wood* is correct. A wrongful death action does create separate claims, not subject to an insurer's single person limit of liability in its UUM coverage. Nonetheless, an insurance company could, in effect, bypass this holding by simply writing separate limits of liability for the claims of each survivor in a wrongful death action. Each claim would remain separate and distinct. The insurance company would not be *combining* and *limiting* the claims of each survivor to a single person limit of liability. In *Wood*, for example, the insurance company could have separately limited the claims of each surviving family member to $12,500 per person up to a total limitation of $25,000 per incident.[213] Thus, James, Jessica, and Carrie Wood could have received no more than $25,000 for the wrongful death of Gina Wood. No Ohio law forbids this.[214] In short, *Wood* may have been nothing more than form over substance.

It was contended in *Wood* "that the wrongful death statute . . . could be used, under *Wood*, to permit recovery by persons who are not in any way contractually in privity with an underinsured carrier."[215] The Ohio Supreme Court rejected this contention. The supreme court explained that "[o]nly an insured under the underinsured motorist provision can

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[209] Wood v. Shepard, 38 Ohio St. 3d 86, 88, 526 N.E.2d 1089, 1091 (1988).

[210] *Id.* at 90, 526 N.E.2d at 1092-93.

[211] *Id.* at 86, 526 N.E.2d at 1089. This common policy clause reads as follows:

LIMIT OF LIABILITY

The Limit of Liability shown in the declarations for this coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the number of:

1. Covered persons;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

Id. at 88 n.2, 526 N.E.2d 1091 n.2.

[212] *Id.* at 90-91, 526 N.E.2d at 1093-94.

[213] OHIO REV. CODE ANN. § 4509.20(A) (Anderson 1988); *see* Inman v. Natl. Union Fire Ins. Co., 49 Ohio App. 3d 122, 124 (1988).

[214] *See generally* OHIO REV. CODE ANN. § 3937.01-99 (Anderson 1988); OHIO ADMIN. CODE § 3901-1-01-3901-2-15 (1988).

[215] Wood v. Shephard, 38 Ohio St. 3d 86, 91, 526 N.E.2d 1089, 1093 (1988).

recover under the policy for injury or wrongful death."[216] The court thus intimated that an insurer has complete discretion in deciding whom it wishes to make an insured. Could an insurer insure only insureds who have no chance of being wrongful death beneficiaries as to each other? Similarly, in the context of insuring families, could an insurer issue separate policies to each family member, clearly naming only that family member as an insured and excluding all others? In both situations, no insured would be an insured under the wrongfully killed insured's uninsured and underinsured motorist coverage. As a result, no insured could collect under the deceased insured's UUM coverage for the deceased insured's wrongful death.

Another question — though perhaps more plausible — asks whether an insurer could insure only the named insured and his personal representative in his UUM coverage? No one other than the named insured and his personal representative would be insureds under the UUM coverage. Here all surviving family members of the named insured would be indirectly compensated for the named insured's wrongful death through the named insured's personal representative. The surviving family members, however, would have no right to collect directly under the named insured's UUM coverage.

The Ohio Supreme Court's decision in *Wood* does not resolve these important questions. To what extent, if at all, an insurer may exclude an insured's surviving family members remains a mystery.

D. Subsequent Cases

Since *Wood*, the Ohio Supreme Court has decided four cases addressing the scope of *Wood*. The first case was *Cincinnati Insurance Co. v. Phillips*.[217] In *Phillips*, Rosa Phillips was driving a motor vehicle owned by her husband, Harry Phillips, Jr.[218] Mrs. Phillips had her husband's permission to drive the vehicle.[219] Mrs. Phillips negligently collided her vehicle into the vehicle of David M. Thompson.[220] Mr. Thompson's wife, Sharon Kay Thompson, was a passenger in her husband's vehicle.[221] As a result of the collision, Mr. Thompson died and Mrs. Thompson sustained injuries.[222] The Thompson's minor daughter, Shannon was not a passenger in the vehicle.[223]

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[216] *Id.*

[217] 44 Ohio St. 3d 163, 541 N.E.2d 1050, *reh'g granted*, 45 Ohio St. 3d 602, 544 N.E.2d 274 (1989).

[218] *Id.* at 163, 541 N.E.2d at 1050.

[219] *Id.*

[220] *Id.*

[221] Cincinnati Ins. Co. v. Phillips, 44 Ohio St. 3d 163, 163, 541 N.E.2d 1050, 1050-51, *reh'g granted*, 45 Ohio St. 3d 602, 544 N.E.2d 274 (1989).

[222] *Id.* at 163, 541 N.E.2d at 1051.

[223] *Id.*

At the time of the accident, Cincinnati Insurance Company had in effect a policy of liability insurance, insuring the Phillipses.[224] Sharon Kay Thompson, individually and as administratrix of her husband's estate, and Shannon Thompson sued the Phillipses.[225] The first cause of action claimed damages for the wrongful death of David Thompson.[226] The second cause of action claimed damages for the personal injuries of Sharon Kay Thompson.[227] A third cause of action claimed damages for the conscious pain and suffering of David Thompson.[228] And finally, a fourth cause of action claimed damages for Shannon Thompson arising from the knowledge of her father's death.[229]

The Cincinnati Insurance Company filed an action, seeking a declaration of its liability limits within its policy with the Phillipses.[230] The trial court determined that Cincinnati was responsible for the maximum possible liability of $300,000 for the accident.[231] The trial court found that the full $100,000 liability limit for "each person" under the policy applied separately for Mr. Thompson's survivorship claim, Mrs. Thompson's personal injury claim, and the wrongful death action.[232] The court of appeals reversed. The court of appeals held that one set of "each person" limits applied to all damages for bodily injury suffered by Mr. Thompson, including the survivorship and wrongful death actions.[233]

Thus, Cincinnati's maximum liability was limited to $200,000, or $100,000 for each person involved in the accident.[234] Finding its judgment to be in conflict with other appellate decisions, the court of appeals certified the record of the case to the Ohio Supreme Court.[235]

The only issue before the Ohio Supreme Court was whether the policy language provided for separate maximum coverages of $100,000 each for Mr. Thompson's survivorship claim and for the wrongful death action filed by Mrs. Thompson.[236] The supreme court, relying on *Tomlinson v. Skolnik*,[237] held the liability language of the Cincinnati policy applied

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[224] *Id.*

[225] Cincinnati Ins. Co. v. Phillips, 44 Ohio St. 3d 163, 163, 541 N.E.2d 1050, 1051, *reh'g granted*, 45 Ohio St. 3d 602, 544 N.E.2d 274 (1989).

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] Cincinnati Ins. Co. v. Phillips, 44 Ohio St. 3d 163, 163, 541 N.E.2d 1050, 1051, *reh'g granted*, 45 Ohio St. 3d 602, 544 N.E.2d 274 (1989).

[230] *Id.*

[231] *Id.*

[232] *Id.* at 163-64, 541 N.E.2d at 1051.

[233] Cincinnati Ins. Co. v. Phillips, 44 Ohio St. 3d 163, 163, 541 N.E.2d 1050, 1051, *reh'g granted*, 45 Ohio St. 3d 602, 544 N.E.2d 274 (1989).

[234] *Id.* at 164, 541 N.E.2d at 1051.

[235] *Id.*

[236] *Id.* at 164, 541 N.E.2d at 1052.

[237] 44 Ohio St. 3d 11, 540 N.E. 2d 716 (1989). In *Tomlinson*, Ronald Tomlinson was injured in an automobile accident with a vehicle operated by Joe Skolnik. Skolnik was insured by Buckeye Union Insurance Company. The Buckeye policy provided coverage for bodily injury liability in the amount of $25,000 for each person and aggregate bodily injury liability in the amount of $50,000 for each

only to those persons who were *in* the accident. Mr. and Mrs. Thompson were the only two actually in the accident.[238] The Thompsons argued that the each person limitation in the policy should apply individually for the survivorship claim and for the death action.[239] The supreme court disagreed. Although a wrongful death action is distinct from a survivorship action, the limit of liability in the Cincinnati policy is determined by the number of persons injured in any one accident.[240] "Thus, if only two persons sustain bodily injury in any one auto accident, as here, then only two separate claims may be made against the policy, regardless of the number of causes of action or type of damage which arose out of such bodily injury."[241] This single person limit of liability was a valid restriction of automobile liability insurance.

Justice Douglas vigorously dissented, stating that the majority's decision was absurd.[242] According to Justice Douglas, "[t]he majority opinion, in effect, allows the Thompsons' wrongful death claim to be combined, under a single limit of liability, with other injuries suffered."[243] He would extend *Wood* to situations of liability coverage.[244] Citing *Bartlett v. Na-*

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accident. Ronald Tomlinson sued Skolnik. His wife, Nancy Tomlinson, who was not in the accident, joined in the suit with a claim for loss of consortium. Buckeye settled with Ronald Tomlinson, paying him $25,000. Buckeye alleged this amount to be the limit of liability under its policy. Nancy Tomlinson's loss of consortium claim was reserved.

Nancy Tomlinson filed a declaratory judgment action seeking an additional $25,000 over the $25,000 paid to her husband. Nancy Tomlinson alleged that her loss of consortium claim was a separate claim under the policy. The parties agreed that if Nancy Tomlinson's claim was recognized as a separate claim under the policy, she would be entitled to the $25,000. Thus, the issue was whether a claim for loss of consortium constituted a separate claim for bodily injury within the liability coverage of the Buckeye policy. The Ohio Supreme Court held that Nancy Tomlinson's claim for loss of consortium was not a separate claim for bodily injury and that Buckeye's policy limiting recovery for all causes of action arising out of bodily injury to one person to a single limit of liability is a valid restriction of automobile liability insurance.

The Ohio Supreme Court, relying on *Dues*, 36 Ohio St. 3d 47, 521 N.E.2d 789 (1988), reasoned that a loss of consortium claim derives from the spouse's claim for bodily injury. The loss of consortium claim is a derivative action; the spouse's claim for bodily injury is the primary action. Nancy Tomlinson's action would not exist but for her husband's action for bodily injury. No law in Ohio forbids an insurer to restrict derivative actions to a single person limit of liability.

Tomlinson is distinguishable from *Wood*. *Tomlinson* did not concern wrongful death. It concerned a derivative action. And, as stated previously, Ohio does not prevent an insurer from restricted claims deriving from another's bodily injury. Therefore, an insurance policy limiting recovery for all causes of action arising out of or because of bodily injury to one person to a single limit of liability is a valid restriction of uninsured and underinsured motorist coverage. The derivative claimant is left to find coverage under the terms of the tortfeasor's policy.

[238] Cincinnati Ins. Co. v. Phillips, 44 Ohio St. 3d 163, 166, 541 N.E.2d 1050, 1053, *reh'g granted*, 45 Ohio St. 3d 602, 544 N.E.2d 274 (1989).

[239] *Id.*

[240] *Id.* at 165-66, 541 N.E.2d at 1053-54.

[241] *Id.* at 166, 541 N.E.2d at 1053.

[242] Cincinnati Ins. Co. v. Phillips, 44 Ohio St. 3d 163, 167, 541 N.E.2d 1050, 1054, *reh'g granted*, 45 Ohio St. 3d 602, 544 N.E.2d 274 (1989).

[243] *Id.*

[244] *Id.* at 167-68, 541 N.E.2d at 1054-55.

tionwide Mutual Insurance Co.,[245] Justice Douglas stated the purpose of uninsured motorist coverage is to put the injured insured in the same position he would have been in had the tortfeasor possessed liability insurance.[246] The Justice continued:

> The logic of the holding in *Bartlett* is distorted by today's holding, however, because an injured person can assert more claims against her own uninsured and underinsured coverage, pursuant to *Wood, supra*, than she can against the tortfeasor's liability coverage. In short, today's holding reaches the absurd result of an injured party being better off when struck by an uninsured tortfeasor than by a person with liability insurance.[247]

Furthermore, noted Justice Douglas, Ohio courts will be burdened by numerous suits being filed against an injured insured's underinsured motorist coverage.[248] " '[W]hen . . . the actual amount payable to an injured party under the tortfeasor's policy is less than the insured's policy limits, the tortfeasor is an underinsured.' "[249] As a result, an injured insured who is denied the payment of a wrongful death claim by the tortfeasor's liability insurer will file an underinsured claim with his own insurer.[250] The insured, of course, will be entitled to payment under *Wood*.[251]

The second case decided by the Ohio Supreme Court addressing the scope of *Wood* was *Burris v. Grange Mutual Cos.*[252] In *Burris*, Annette Pollack negligently collided her car into a truck driven by Sanford Burris, Sr.[253] Burris was the sole occupant of the truck.[254] As a result of the collision, Burris died.[255] Burris was survived by his son, Sanford Burris, Jr., who was appointed administrator of the estate.[256] Burris was also survived by his mother, Ada Burris, and eight adult siblings.[257] Pollack was insured by Grange Mutual Casualty Company.[258] The Grange policy provided coverage of $100,000 per person and $300,000 per occurrence.[259] Sanford Burris, Jr., negotiated with Grange to settle the wrongful death

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[245] 33 Ohio St. 2d 50, 294 N.E.2d 665 (1973).

[246] Cincinnati Ins. Co. v. Phillips, 44 Ohio St. 3d 163, 168, 541 N.E.2d 1050, 1055, *reh'g granted*, 45 Ohio St. 3d 602, 544 N.E.2d 274 (1989).

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] Cincinnati Ins. Co. v. Phillips, 44 Ohio St. 3d 163, 168, 541 N.E.2d 1050, 1055, *reh'g granted*, 45 Ohio St. 3d 602, 544 N.E.2d 274 (1989).

[251] *Id.*

[252] 46 Ohio St. 3d 84, 545 N.E.2d 83 (1989).

[253] *Id.* at 85, 545 N.E.2d at 85.

[254] *Id.*

[255] *Id.*

[256] Burris v. Grange Mut. Cos., 46 Ohio St. 3d 84, 85, 545 N.E.2d 83, 85 (1989).

[257] *Id.*

[258] *Id.*

[259] *Id.*

claim that he could maintain against Pollack.[260] A tentative settlement of $90,000 was reached and filed with the probate court.[261]

Ada Burris objected to the proposed settlement and moved to have Sanford Burris, Jr., removed as administrator.[262] Ada Burris also filed suit in the common pleas court seeking a declaratory judgement on whether the $100,000 or $300,000 policy limit applied to all claims against Pollack.[263] Sanford Burris, Jr., moved to dismiss the declaratory judgment action.[264] Eventually, the common pleas court dismissed the declaratory judgement action and, at the same time, the probate court authorized Sanford Burris, Jr., to settle the wrongful death claim for $90,000.[265] Ada Burris appealed, but the court of appeals held that only $100,000 of coverage was available.[266]

On appeal to the Ohio Supreme Court, Ada Burris argued that the court should extend *Wood* to situations involving the tortfeasor's liability policy.[267] Ada Burris argued that each beneficiary under the wrongful death statute has a claim that cannot be made subject to the single person limit of liability in Pollack's automobile liability insurance policy.[268] Ada Burris therefore argued that the $300,000 per occurrence limitation applied, not the $100,000 each person limitation.[269] To hold otherwise, according to Ada Burris, would create an anomaly, in that the per person limitation would be invalid regarding UUM coverage but valid under a general liability policy.[270]

The Ohio Supreme Court disagreed and distinguished *Wood*.[271] The supreme court recognized that *Wood* rests on the uninsured and underinsured motorist statute which forbids an insurer to limit UUM coverage to single person limitations.[272] Ada Burris could not point to any statute precluding single person limitations in the general liability insurance policy of a tortfeasor.[273] The court, moreover, reasoned that there was no privity of contract between Ada Burris, the tort claimant, and Grange, the insurer of the tortfeasor.[274] Conversely, in *Wood*, all tort claimants were insured under the same policy.[275] Ada Burris was left to find coverage under the terms of the Grange policy.

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[260] Burris v. Grange Mut. Cos., 46 Ohio St. 3d 84, 85, 545 N.E.2d 83, 85 (1989).
[261] *Id.*
[262] *Id.* at 85-86, 545 N.E.2d at 85.
[263] *Id.* at 86, 545 N.E.2d at 85-86.
[264] Burris v. Grange Mut. Cos., 46 Ohio St. 3d 84, 85, 545 N.E.2d 83, 85-86 (1989).
[265] *Id.*
[266] *Id.*
[267] *Id.* at 87-88, 545 N.E.2d at 87-88.
[268] Burris v. Grange Mut. Cos., 46 Ohio St. 3d 84, 87-88, 545 N.E.2d 83, 87-88 (1989).
[269] *Id.*
[270] *Id.*
[271] *Id.* at 88-89, 545 N.E.2d at 88.
[272] Burris v. Grange Mut. Cos., 46 Ohio St. 3d 84, 88-89, 545 N.E.2d 83, 88 (1989).
[273] *Id.* at 88, 545 N.E.2d at 87-88.
[274] *Id.* at 88, 545 N.E.2d at 88.
[275] *Id.*

In *Burris*, Justice Sweeney dissented.[276] Justice Sweeney would extend *Wood* to situations in which a wrongful death beneficiary attempts to recover under the liability insurance coverage of a tortfeasor.[277] And of course, the beneficiary does not have to be an insured under the tortfeasor's liability policy. According to Justice Sweeney, because the wrongful death statute creates separate claims, an insurer cannot limit the number of claims that may be pursued by wrongful death beneficiaries.[278]

On April 25, 1990, the Ohio Supreme Court decided *Hill v. Allstate Insurance Co.*[279] There the court held that "[u]nless otherwise provided by an insurer, underinsured motorist liability insurance coverage is not available to an insured where the limits of liability contained in the insured's policy are identical to the limits of liability set forth in the tortfeasor's liability insurance coverage."[280] Simply put, the effect of *Hill* is that the beneficiaries of the deceased insured will be in a superior position if the tortfeasor carries no liability insurance. *Hill* flies in the face of *Wood*. Justice Resnick, dissenting in *Hill*, does a fabulous job of pointing out the confusion in the majority's reasoning:

> Consider the following example: Six people are involved in a one-car accident caused by the driver's (tortfeasor's) negligence. Furthermore, assume the tortfeasor and all five passengers died in the accident, and that the tortfeasor's policy provided the same limits as in this case — $50,000/$100,000. The estates of the five passengers would then each assert claims against the tortfeasor's insurance company. Most likely, the tortfeasor's insurance company will pay the per accident limit and hypothetically, award each decedent's estate $20,000. If each decedent's individual insurance limits are identical to the tortfeasor's insurance limits, under the majority's holding the decedents would not be considered underinsured since their policy limits are identical to the tortfeasor's policy limits. Thus, they *all* would be better off if the tortfeasor has no liability insurance at the time of the accident. The inequity of the majority's holding is obvious.
>
> Furthermore, assume that three of the decedents carried underinsured motorist coverage with limits of $100,000 per person and $300,000 per accident, while two of the decedents carried insurance limits identical to the tortfeasor's ($50,000/$100,000). The decedents' estates with the higher policy limits could, consistent with *Wood, supra*, each potentially recover up to the $300,000 per accident limit. However, the estates of the

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[276] Burris v. Grange Mut. Cos., 46 Ohio St. 3d 84, 95, 545 N.E.2d 83, 93 (1989) (Sweeney, J., dissenting).

[277] *Id.* at 95, 545 N.E.2d at 93-94.

[278] *Id.*

[279] 50 Ohio St. 3d 243, 553 N.E.2d 658 (1990).

[280] *Id.* at 243, 553 N.E.2d at 659.

> two decedents with policy limits identical to the tortfeasor's limits would each be limited by the majority's decision today to the recovery of only $20,000 from the tortfeasor's insurance company, a difference of $280,000![281]

Despite the confusion, however, one thing seemed clear: If *Hill* was to stay, then *Wood* was to go.

But on July 3, 1990, it looked as if *Wood* was to stay and *Hill* as well as *Burris* was to go. At this time, the Ohio Supreme Court decided its most confusing case, *Cincinnati Insurance Co. v. Phillips (Phillips II).*[282] The supreme court, through Justice Sweeney, reconsidered its earlier decision in *Phillips I* and reversed.[283] The court held that each person entitled to recover damages for wrongful death has a separate claim and such separate claims may not be made subject to the single person limit of liability in a tortfeasor's policy.[284] Thus, the court extended *Wood* to situations of liability coverage. The court in *Phillips II* stated it makes no sense to reach the absurd result that an injured party is better off when struck by an uninsured motorist than by a motorist who possesses liability insurance.[285] The majority cited neither *Hill* nor *Burris.*

To complicate matters, Justice Brown, concurring in the judgment in *Phillips II,* conceded that the majority attempted to overrule *Hill* but he noted that *Hill* was not overruled because the attempt lacked the agreement of four justices.[286] Justice Holmes dissented and reminded the majority that *Burris* stated an overriding principle. " 'An automobile liability insurance provision that limits coverage for all damages arising out of bodily injury, *including death,* sustained by one person to a single limit of liability is a valid restriction.' "[287] Then, out of the blue, Justice Wright declared that Hill had overruled *Wood* and that the only real significance of *Phillips II* was that it reaffirmed *Hill's* overruling *Wood.*[288]

Consequently, the bench and bar of Ohio have been left in a state of vast confusion. Many questions are unanswered: What is the status of *Hill*? Is *Hill* distinguishable from *Phillips II* because *Hill* concerned UDM coverage? What is the status of *Burris*? Is *Burris* distinguishable from *Phillips II*? What is the future of *Dues*? Will the Supreme Court forbid insurance companies to limit recovery for all causes of action arising out of bodily injury to one person to a single limit of liability?

The unclear reasoning in *Wood* and its progeny impairs the effectiveness of the insurance industry. The industry will find it impossible to outline the scope and effect of these decisions. And by outlining the scope and effect of important decisions, the insurance industry can draft policies correctly, treat insureds properly, and maintain the industry consistently.

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[281] *Id.* at 249 n.8, 553 N.E.2d at 664 n.8 (Resnick, J., dissenting).
[282] 52 Ohio St. 3d 162, 556 N.E.2d 1150 (1990).
[283] *Id.* at 163, 556 N.E.2d at 1151.
[284] *Id.* at 166, 556 N.E.2d at 1154.
[285] *Id.* at 165, 556 N.E.2d at 1153.
[286] *Id.* at 166, 556 N.E.2d at 1154 (Brown, J., concurring in judgment).
[287] *Id.* at 167, 556 N.E.2d at ___ (Holmes, J., dissenting, citing Burris v. Grange Mut. Cos., 46 Ohio St. 3d 84, 545 N.E.2d 83 (1989)).
[288] *Id.* at 167, 556 N.E.2d at 1155 (Wright, J., dissenting).

V. CONCLUSION

The insurance industry has deplored the confusion and uncertainty that have followed in the wake of *Wood v. Shepard.*[289] The analysis of the Ohio Supreme Court in *Wood*, to be sure, rests on shaky ground. The Montgomery County Court of Appeals stated: "We . . . reject the notion that Gina Wood's death somehow gave rise to independent causes of action for wrongful death . . . . To our thinking, such a position is fundamentally irreconcilable with the basic nature of a wrongful death action."[290] But perhaps more important, *Wood* may be irreconcilable with the basic nature of uninsured and underinsured motorist coverage. That the Ohio Supreme Court may have overlooked serious consequences resulting from its decision in *Wood* can provide little comfort to the policyholders, insurance industry, and legal community of Ohio. Indeed, the full effect of *Wood* remains to be seen. The Ohio Supreme Court has left many difficult questions unanswered and each new case raises yet more questions. In the end, however, it may well be that everyone — the bench, the bar, and the litigants — pays for the uncertainty generated by *Wood* in the form of increased litigation and convoluted decisions.

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[289] 38 Ohio St. 3d 86, 526 N.E.2d 1089 (1988).
[290] Wood v. Professionals Ins. Co., unreported, No. 9891 (Ct. App. 1986).