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Insurance Law: Ohio's Underinsured Motorist Coverage: A New Loophole

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INSURANCE LAW: OHIO'S UNDERINSURED MOTORIST COVERAGE: A NEW LOOPHOLE—*Hill v. Allstate Insurance Company*, 50 Ohio St. 3d 243, 553 N.E.2d 658 (1990).

I. INTRODUCTION

On April 25, 1990, the Ohio Supreme Court created a loophole in underinsured motor vehicle coverage when it decided *Hill v. Allstate Insurance Company*.[1] Generally, underinsured motorist coverage in Ohio allows a victim to recover from his/her own insurance company based on the negligence of a tortfeasor whose liability limits are less than the victim's underinsured motorist coverage limits.[2] In *Hill*, the Ohio Supreme Court held that underinsured motorist coverage recovery is not available to an insured when the tortfeasor's liability limits are identical to the insured's underinsured motorist limits, even when the insured's recovery has been reduced by multiple claimants.[3]

In a sharply divided court, the majority in *Hill* maintained that the clear and unambiguous language of the controlling statute dictated the result.[4] The dissent argued that this result conflicts with stated public policy[5] which is to place the insured victim in the position he/she would have been if injured by an uninsured motorist.

The dissent contended that there will be many instances where an insured would be in a superior position if injured by an uninsured motorist rather than by an underinsured motorist.[6] The dissent further ar-

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1. 50 Ohio St. 3d 243, 553 N.E.2d 658 (1990).

2. Comment, *Redefining Underinsured Motorist Coverage in Ohio*, 44 OHIO ST. L.J. 771, 785 (1983).

3. *Hill*, 50 Ohio St. 3d at 245, 553 N.E.2d at 661. This decision disregards the amount actually compensated, even if reduced by multiple claimants, and only focuses on policy limits.

4. *Id.* at 245, 553 N.E.2d at 661. The underinsured motorist statute reads:

> [U]nderinsured motorist coverage, which shall be in an amount equivalent of coverage 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 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.

OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989) (emphasis added). The main disagreement between the majority and dissent in *Hill* rests on the words "available for payment" and "at the time of the accident." *See infra* text accompanying notes 95-107.

5. *Hill*, 50 Ohio St. 3d at 250, 553 N.E.2d at 665. This same language outlining public policy is also stated by the majority in support of its position. *Id.* at 246, 553 N.E.2d at 661.

6. *Id.* at 249, 553 N.E.2d at 664 n.8. It is important to note the difference between uninsured motorist coverage and underinsured motorist coverage. Uninsured motorist coverage deals

gued that the majority's opinion overrules the *Wood v. Shepard*[7] holding. Under *Wood*, each wrongful death action derived from an underinsured motorist fatality will be considered a separate and distinct injury suffered by the person bringing the claim.[8] Therefore, if there are multiple wrongful death claims, the recovery will be subject not to the per person limits of a policy but to the per accident limits.[9] The majority countered that the question of wrongful death claims had not been reached as a threshold matter because the tortfeasor was not underinsured.[10]

This casenote discusses four aspects of the decision in *Hill*. The first aspect is the tension between the majority's interpretation of the underinsured motorist coverage statute and the public policy considerations supporting the statute.[11] The second aspect is the loophole in coverage created by the holding in *Hill* and whether the legislature anticipated this result.[12] The third aspect is the question of whether *Hill* effectively overrules *Wood*.[13] Finally, this casenote examines the impact of the *Hill* decision.[14] This casenote concludes that the Ohio Supreme Court's decision in *Hill* created an unnecessary loophole in underinsured motorist coverage when multiple claimants are involved.

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with the case where the tortfeasor has failed to purchase liability insurance or carries such insurance but the limits are less than those statutorily required. 3 I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 35.01 (2d ed. 1991 rev.). Underinsured motorist coverage deals with the case where the tortfeasor has complied with the statutorily required liability limits but the victim either carries higher underinsured motorist coverage limits than the tortfeasor's liability limits or the victim's damages exceed the tortfeasor's liability limits. MATTHEW BENDER & CO., NO-FAULT AND UNINSURED MOTORIST AUTOMOBILE INSURANCE § 30.40[1] (1985 & Supp. 1990).

7. 38 Ohio St. 3d 86, 526 N.E.2d 1089 (1988). The court held "that each wrongful death beneficiary has a separate claim, compensable up to the subject insurance policy's per occurrence underinsured motorist coverage limits, even though the policy limited recovery for all damages for injury or death of one person to a *single* limit of liability." *Hill*, 50 Ohio St. 3d at 248, 553 N.E.2d at 663 (citing the syllabus); *Wood*, 38 Ohio St. 3d at 86, 526 N.E.2d at 1089.

8. *Wood*, 38 Ohio St. 3d at 88, 526 N.E.2d at 1091. The wrongful death statute provides in relevant part: "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." OHIO REV. CODE ANN. § 2125.02(A)(1) (Anderson 1990). The holding in *Wood* therefore states that all of the insureds' wrongful death claims are not subject to the per person limit of the policy. *Wood*, 38 Ohio St. 3d at 91, 526 N.E.2d at 1094.

9. *Id.*

10. *Hill*, 50 Ohio St. 3d at 247, 553 N.E.2d at 662.

11. *See infra* text accompanying notes 86-147.

12. *See infra* text accompanying notes 149-156.

13. *See infra* text accompanying notes 158-182.

14. *See infra* text accompanying notes 183-192.

II. FACTS & HOLDING

On January 19, 1985, Haywood Shaw, a passenger in a car, died in an automobile accident.[15] Donald Roberts, another passenger, and Ervin Heugatter, the owner and operator of the vehicle,[16] were also killed in the same accident.[17] Heugatter caused the accident by negligently colliding with a train.[18]

Heugatter was insured by the Western Reserve Mutual Casualty Company under a policy with liability limits of $50,000 per person injured and $100,000 per accident.[19] Heugatter's insurance company paid Shaw's estate $50,000.[20] The remaining $50,000 went to Robert's estate, exhausting Heugatter's policy.[21]

Surviving Shaw was his father, son, and daughter, Linda Hill.[22] At the time of his death, Shaw was insured by Allstate Insurance Company (hereinafter Allstate). Shaw's policy provided him with underinsured motorist coverage limits of $50,000 per person and $100,000 per accident.[23]

Linda Hill filed an underinsured motorist claim with Allstate for $50,000 based on a wrongful death action.[24] Allstate denied payment because Heugatter's liability limits were equal to Shaw's underinsured motorist limits.[25] Hill sought a declaratory judgment in the court of common pleas.[26] Allstate moved for and was granted a judgment on the pleadings.[27] Hill appealed and the trial court's ruling was affirmed.[28] Both lower courts reasoned that Heugatter was not underinsured, pursuant to Ohio Revised Code section 3937.18,[29] because Heugatter's liability limits were equal to and not less than Shaw's underinsured motorist coverage limits.[30] According to the lower courts' interpretations of the statute,[31] the tortfeasor's liability limits must be less than the victim's underinsured motorist coverage limits in order for the victim to

15. *Hill*, 50 Ohio St. 3d at 243, 553 N.E.2d at 659.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* Both carried split limits of $50,000 per person and $100,000 per accident.
26. *Id.* at 243-44, 553 N.E.2d at 659.
27. *Id.* at 244, 553 N.E.2d at 659.
28. *Id.*
29. *Id.*; OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).
30. *Hill*, 50 Ohio St. 3d at 244, 553 N.E.2d at 659-60.
31. The court was referring to OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).

recover from his/her underinsured motorist coverage.[32] This interpretation is regardless of the actual amount recovered by the victim from the tortfeasor's insurer.[33] The record was then certified for review and affirmed on the same basis by the Ohio Supreme Court.[34]

III. BACKGROUND

A. Uninsured/Underinsured Motorist Coverage Generally[35]

Underinsured motorist coverage developed in response to an insurance gap that existed when states required only uninsured motorist coverage.[36] Uninsured motorist coverage was designed to provide a means of recovery to victims[37] injured by a tortfeasor who had either failed to purchase liability insurance or carried liability insurance with limits less than those statutorily required.[38] Uninsured motorist coverage also was designed to place the insured victim in the same position he/she would have been in had the negligent party carried liability insurance limits at least equal to the minimum limits required by law.[39] The gap in coverage occurred when a victim was injured by a negligent tortfeasor who carried the minimum liability limits. The victim's recovery would be limited to the tortfeasor's liability limits. Thus, the victim might only recover $12,500 if injured by an insured motorist. If, on the other hand, the same victim is injured by an uninsured motorist, he/she might recover much more, depending on his/her uninsured motorist coverage limits.

For example, if the tortfeasor carried $12,500 per person and $25,000 per accident in liability coverage and the victim carried

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32. *Hill*, 50 Ohio St. 3d at 244, 553 N.E.2d at 659-60.

33. *Id.*

34. *Id.* at 244, 553 N.E.2d at 660.

35. For an excellent discussion of underinsured motorist coverage, see generally, Huelsmann & Knoebel, *Underinsured Motorists: An Evolving Insurance Concern*, 17 N. KENT. L. REV. 417 (1990). For a similar discussion regarding Ohio specifically, see generally, Comment, *supra* note 2, at 771.

36. Huelsmann & Knoebel, *supra* note 35, at 418.

37. Uninsured motorist coverage (as well as underinsured motorist coverage) is not a form of liability coverage. Instead, it provides first party coverage much like an accident or indemnity policy. That is, the insured victim makes a claim against his/her own insurance company instead of the tortfeasor's insurance company. 12a M. RHODES, COUCH ON INSURANCE § 45:624 (2d ed. 1981). Whether the insurance contract provides the coverage that was bargained for in the exchange is the direct issue. Public policy requires that underinsured motorist coverage should place the insured in the same position he/she would have been in had the insured been injured by an uninsured motorist. *Hill*, 50 Ohio St. 3d at 246, 553 N.E.2d at 661.

38. SCHERMER, *supra* note 6, § 35.01. The present minimum requirements for automobile liability insurance in Ohio are $12,500 per person and $25,000 per accident. OHIO REV. CODE ANN. § 4509.20(A) (Anderson 1990).

39. SCHERMER, *supra* note 6, § 35.01; *see* 2 A. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 2.1 (2d ed. 1990).

$100,000 per person and $250,000 per accident in uninsured motorist coverage, the victim would be able to recover only the $12,500 because the tortfeasor's coverage met the statutorily required minimums. The victim would have no uninsured motorist claim. Had the tortfeasor been uninsured, however, the victim would be able to recover up to $100,000 under the per person limits of his/her own uninsured motorist coverage, assuming his/her damages were that extensive.[40] This result would occur because the tortfeasor failed to carry the statutorily required liability insurance. Therefore, prior to the introduction of underinsured motorist coverage, the victim was, in many instances, better off being injured by a uninsured tortfeasor.

Thus, uninsured motorist coverage proved inadequate in two respects. First, when minimum coverage laws failed to keep pace with actual damages, the minimum limits were often insufficient to compensate the injured victim.[41] Uninsured motorist coverage was not triggered when the tortfeasor carried the minimum statutorily required liability insurance, even though these minimums failed to adequately compensate the victim due to rising medical and economic costs.[42] Second, inadequate coverage also occurred when there were multiple claimants. In this situation, the tortfeasor purchased coverage that met or exceeded the statutorily required minimum, but the actual damage award was below the required minimum because the available coverage was split among a number of victims.[43]

In response to these inadequacies, state legislators passed underinsured motorist coverage laws.[44] Generally, there are two forms of underinsured motorist coverage.[45] One form focuses on liability limits while the other form focuses on the victim's damages.[46] In the first form, a tortfeasor is deemed underinsured when his/her liability limits are less than the victim's uninsured motorist coverage limits.[47] The second form defines the tortfeasor as underinsured when his/her policy limits are inadequate to compensate the victim fully.[48]

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40. If the victim had been killed, those considered insured under his/her policy would be able to bring separate wrongful death claims. *Wood*, 38 Ohio St. 3d at 91, 526 N.E.2d at 1094. In this case, the recovery would not be limited to $100,000 but to $250,000, the per accident limit of the decedent's uninsured motorist coverage, assuming there was more than one wrongful death claim.

41. WIDISS, *supra* note 39, § 31.2.

42. MATTHEW BENDER & CO., *supra* note 6, § 30.40[2][c].

43. *Id. § 30.40[4].*

44. Comment, *supra* note 2, at 773.

45. Comment, *Unraveling the Underinsured Motorist Web: Ohio's Underinsured Motorist Coverage*, 20 AKRON L. REV. 749, 752-56 (1987).

46. SCHERMER, *supra* note 6, § 35.02.

47. *Id.*

48. *Id.*

These two forms of underinsured motorist coverage reflect different theories regarding the purpose of underinsured motorist coverage. Focusing on liability limits reflects the goal of placing the victim "in the same position he would have occupied had the tortfeasor's liability limits been the same as the insured's uninsured motorist limits."[49] Focusing on damages, on the other hand, is "to afford the [victim] a means of recovering all damages suffered as a result of his injuries."[50]

B. Ohio's Underinsured Motorist Coverage

Ohio's first attempt at underinsured motorist coverage[51] was a mixture of these two forms. The statute's wording was unclear as to whether liability limits or actual damages were to be the limiting factor.[52] The language of the statute contained the phrase "insufficient to pay the loss" suggesting that the victim's damages would be the factor determining whether the tortfeasor was underinsured.[53] The statute also contained the phrase "up to the insured's uninsured motorist coverage limits"[54] suggesting a comparison between the tortfeasor's liability limits and the victim's underinsured motorist coverage limits to determine if the tortfeasor was underinsured.[55] Because of the uncertainty of which of the two forms of underinsured motorist coverage the legislators intended, the statute was repealed two years later.[56]

The uninsured motorist statute was then amended to include underinsured motorist coverage.[57] In the amended version, the phrase "insufficient to pay the loss" was removed along with other changes in the wording. The removal of this phrase indicates that the comparison is between the tortfeasor's effective liability limits[58] and the victim's un-

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49. MATTHEW BENDER & CO., *supra* note 6, § 30.40[2].

50. *Id.*

51. OHIO REV. CODE ANN. § 3937.181 (Anderson 1989) (effective in 1980; repealed 1982). The statute provided in relevant part: "Underinsured motorist coverage means coverage . . . protecting an insured against loss . . . where the limits of coverage available for payment to the insured . . . are insufficient to pay the loss up to the insured's uninsured motorist coverage limits." *Id.*

52. Comment, *supra* note 2, at 777.

53. *Id.*

54. Underinsured motorist coverage is sold in conjunction with uninsured motorist coverage. Therefore, the limits are identical. When a statute refers to uninsured motorist coverage limits and this note refers to underinsured motorist coverage limits, the terms are interchangeable. This applies only in reference to limits and not to any other aspect of the two different types of coverage. *See supra* note 6.

55. *Id.*

56. Comment, *supra* note 2, at 776; OHIO REV. CODE ANN. § 3937.181 (Anderson 1989)(repealed 1982).

57. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).

58. The phrase "effective liability limits" is used because this note argues that, in situations involving multiple claimants, the comparison is between the amount actually paid to the victim

derinsured motorist coverage limits to determine if the tortfeasor is underinsured.[59]

C. Ohio Case Law

Prior to the passage of Ohio's first underinsured motorist statute, the Ohio Supreme Court ruled in *Shelby Mutual Insurance Company v. Smith*[60] that a tortfeasor carrying the statutorily required minimum liability limits was not uninsured when the victim's recovery had been reduced below the statutorily required liability coverage by multiple claimants.[61] Although *Shelby* preceded underinsured motorist coverage in Ohio, the decision is suggestive of the Ohio Supreme Court's approach to cases involving automobile liability insurance and multiple claimants. That is, if the tortfeasor has met the statutory requirements, he/she will not be considered uninsured regardless of what was actually paid to the claimants under the tortfeasor's policy. Similarly, if the tortfeasor has liability limits equal to the victim's uninsured motorist coverage, the tortfeasor will not be considered underinsured regardless of the amount actually paid. At the time of *Shelby*, "courts were reluctant to define a vehicle as uninsured where its liability limits were reduced by multiple claims."[62] However, since the adoption of underinsured motorist coverage, the trend has been to allow recovery in multiple claimant cases.[63]

Subsequent to the amendment of Ohio's uninsured motorist statute,[64] a number of appellate courts faced the question of whether to classify a tortfeasor as underinsured when multiple claimants had reduced the amount actually recovered below the victim's underinsured motorist coverage limits. In *Brown v. Erie Insurance Company*,[65] the Ohio Court of Appeals for Cuyahoga County held that a tortfeasor is underinsured where the victim's recovery has been reduced below the victim's underinsured motorist coverage limits by multiple claimants.[66] The court reasoned that "the original motivation behind the enactment of R.C. 3937.181(C) was to assure that persons injured by an underin-

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and the victim's underinsured motorist coverage limits. *See infra* text accompanying notes 112-120. In the situation where only one victim is injured, the comparison is between the tortfeasor's liability limits and the victim's underinsured motorist coverage limits because the limits will equal the amount actually paid.

59. Comment, *supra* note 2, at 785; *see supra* note 3 (provides the text of the present underinsured motorist statute in full).

60. 45 Ohio St. 2d 66, 341 N.E.2d 597 (1976).

61. *Id.* at 69, 341 N.E.2d at 599.

62. MATTHEW BENDER & CO., *supra* note 6, § 30.40[4].

63. *Id.*

64. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).

65. 35 Ohio App. 3d 11, 519 N.E.2d 408 (1986).

66. *Id.* at 12, 519 N.E.2d at 410.

sured motorist would receive at least the same amount of total compensation that they would have received if they had been injured by an uninsured motorist."[67] The court found that this was a general policy statement regarding underinsured motorist coverage that also represented the legislative intent of the amended version.[68] Therefore, the court held that the amount actually paid must be equivalent to the amount the victim could have received had he/she been injured by an uninsured tortfeasor. Similarly, the Ohio Court of Appeals for Lucas County, in *Knudson v. Grange Mutual Companies*,[69] used identical reasoning to that used by the court in *Brown*. The *Knudson* court also held that underinsured motorist coverage was applicable when multiple claimants reduced recovery below the victim's underinsured motorist coverage limits.[70]

In *Ohio Casualty Insurance Company v. Yoby*,[71] the Ohio Court of Appeals for Cuyahoga County, however, the court held that underinsured motorist coverage applies only where a tortfeasor's liability limits are less than the victim's underinsured motorist coverage limits.[72] The distinguishing factor in *Yoby* was that, although Dawn Yoby's recovery had been reduced by multiple claimants, she still recovered in excess of her underinsured motorist limits.[73] She recovered $27,500 from the tortfeasor's insurer but only carried $25,000 in underinsured motorist coverage.[74] The difference between *Yoby* and the *Brown* and *Knudson* cases is that the court's broad holding in *Yoby* would still disallow recovery from the victim's underinsured motorist coverage as long as the limits in the policies were equal.[75] Had the plaintiff in *Yoby* recovered less than her underinsured motorist coverage limits, her underinsured motorist claim would have been disallowed.

Therefore, it became apparent that there was a split among the appellate courts. The Ohio Supreme Court resolved the conflict with its decision in *Hill*, but at the same time created a loophole in underin-

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67. *Id.* (quoting James v. Michigan Mut. Ins. Co., 18 Ohio St. 3d 386, 389, 481 N.E.2d 272, 274-275 (1985)).

68. *Id.* The court was correct in holding that this public policy also applies to the present statute. It has also been cited by the Ohio Supreme Court as a correct statement of present public policy. *Hill*, 50 Ohio St. 3d at 246, 553 N.E.2d at 661.

69. 31 Ohio App. 3d 20, 507 N.E.2d 1155 (1986).

70. *Id.* at 23, 507 N.E.2d at 1157.

71. 23 Ohio App. 3d 51, 491 N.E.2d 360 (1985).

72. *Id.* at 55, 491 N.E.2d at 364.

73. *Id.* at 52, 491 N.E.2d at 361.

74. *Id.*

75. *Id.* at 55, 491 N.E.2d at 364.

sured motorist coverage. This loophole is found in only one other jurisdiction.[76]

D. *Underinsured Motorist Coverage in Other Jurisdictions*

Twenty-four states have statutes that are facially similar to Ohio's statute.[77] These statutes compare the tortfeasor's liability limit with the insured's underinsured motorist coverage. Since none of these statutes have language identical to Ohio's, a proper comparison is difficult.

Most courts in jurisdictions with statutes similar to Ohio's have been willing to view multiple claimants as reducing the tortfeasor's liability limits and triggering the insured's underinsured motorist coverage.[78] In Texas[79] and West Virginia,[80] the statutes contain express provisions regarding multiple claimant situations. In other states, the courts have held that in multiple claimant situations the comparison should be between the effective coverage[81] of the tortfeasor's liability limits and the victim's underinsured motorist coverage limits.[82]

One other jurisdiction has held that a reduction in recovery due to multiple claimants will not allow the victim to make an underinsured motorist claim.[83] In New York, it has been held that the victim is entitled to underinsured motorist benefits only where the tortfeasor's liability limits were less than those limits contained in the victim's underin-

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76. *See infra* text accompanying notes 82-83; N.Y. INS. LAW § 3420(f)(2) (McKinney 1985).

77. Huelsmann & Knoebel, *supra* note 35, at 427 n.41 (provides a list of the underinsured motorist statutes placing the victim in a position of recovery equivalent to his/her uninsured motorist coverage).

78. *Id.* at 429.

79. TEX. INS. CODE ANN. § 5.06-1(2)(b) (Vernon 1981). An underinsured motor vehicle includes one where liability limits "have been reduced by payment of claims arising from the same accident to, an amount less than the . . . underinsured coverage." *Id.*

80. W. VA. CODE § 33-6-31(b) (Supp. 1991). An underinsured motor vehicle is defined as one where liability limits "[have] been reduced by payments to others insured in the accident to limits less than limits the insured carried for underinsured motorist's coverage." *Id.*

81. *See supra* note 58.

82. *See, e.g.*, St. Arnaud v. Allstate Ins. Co., 501 F. Supp. 192 (S.D. Miss. 1980) (applied Mississippi law); Jones v. Travelers Indem. Co. of R.I., 368 So. 2d 1289 (Fla. 1979); Butler v. MFA Ins. Co., 356 So. 2d 1129 (La. Ct. App. 1978); Ballanger v. Toenjes, 362 N.W.2d 2 (Minn. Ct. App. 1985).

83. The New York legislators made a very clear choice to disallow underinsured motorist coverage in multiple claimant situations. The New York statute reads in relevant part:

> Supplementary uninsured motorists insurance shall provide coverage, in any state or Canadian province, if the limits of liability under all bodily injury liability bonds and insurance policies of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by such policy.

N.Y. INS. LAW § 3420(f)(2) (McKinney 1985); compare with Ohio's underinsured motorist statute which contains the phrase "available for payment to the insured" when comparing the limits of the tortfeasor and victim. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989); *see also infra* text accompanying notes 112-119.

sured motorist coverage.[84] This was despite the fact that multiple claimants had reduced the actual recovery below the victim's underinsured motorist limits. Thus, Ohio is one of two states that does not allow recovery up to the underinsured motorist coverage limits when multiple claimants have reduced the victim's recovery below his/her underinsured motorist coverage limits.

For example, in Ohio and New York, if a victim has underinsured motorist coverage limits of $50,000 and a tortfeasor has identical liability limits of $50,000, the victim will be unable to pursue an underinsured motorist claim. This policy is reasonable if the victim is the only one injured because he/she will recover up to the amount of his/her underinsured motorist coverage ($50,000).

The following examples illustrate the effect that arbitrary circumstances, such as the number of people injured in the accident and the liability limits of the tortfeasor, can have on the victim's ability to recover. If the victim is one of five people injured and each receives $10,000 from the tortfeasor's limits of $50,000, the tortfeasor's coverage will be exhausted. The victim, carrying $50,000 in underinsured motorist limits, will be unable to make an underinsured motorist claim even though he/she carried $40,000 more in underinsured motorist coverage than was actually recovered ($10,000). Further, if the victim carried underinsured limits of $100,000, he/she would have a viable underinsured motorist claim because his/her underinsured motorist coverage limits exceeded the tortfeasor's liability limits ($100,000 compared to $50,000). In this situation, the victim would be able to recover an additional $90,000 from his/her own insurer,[85] over and above the $10,000 already received.[86] Thus, arbitrary circumstances, such as the number of people injured in the accident and the liability limits of the tortfeasor, significantly affect the victim's recovery.

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84. Manfredo v. Centennial Ins. Co., 124 A.D.2d 979, 508 N.Y.S.2d 811 (App. Div. 1986).

85. It is important to note that once underinsured motorist coverage is triggered, the recovery is for the difference between the amount actually recovered and the limits of the underinsured motorist coverage. The recovery is not limited to the difference between the tortfeasor's liability limits and the victim's underinsured motorist coverage limits. This is regardless of whether there were multiple claimants or only a single victim. In the example given, this leads to the anomalous result that the victim who carries $100,000 in underinsured motorist coverage recovering not only the $50,000 in additional coverage he/she carries over the tortfeasor's liability limits, but also the $40,000 that the other victims were not allowed to recover because they carried underinsured motorist coverage equal to the tortfeasor's liability limits. The two solutions to this anomaly are to disallow recovery of the $40,000 for all of the victims or allow all of them to recover the $40,000. The equitable solution is to allow all of the victims to recover the $40,000 and avoid basing recovery on arbitrary circumstances.

86. This example assumes that the damages of the victim exceed $100,000. For another example of this inequity see *Hill*, 50 Ohio St. 3d at 249, 553 N.E.2d at 664 n.8.

IV. ANALYSIS

The main problem with the *Hill* decision is that the majority's application of underinsured motorist coverage fails to close the gap in coverage that the statute was intended to fill.[87] Additional problems with the *Hill* decision include its failure to effectuate public policy,[88] dependence on arbitrary circumstances,[89] and improper interpretation of Ohio's underinsured motorist coverage statute.[90]

Had Shaw died due to the negligence of an uninsured motorist, his family would have recovered $100,000 rather than the $50,000 they actually received.[91] The $100,000 recovery is based on the *Wood* holding which ruled that derivative claims of a wrongful death action are not subject to the per person limit but rather to the per accident limit.[92] Traditionally, if only one person is injured in an accident, the recovery is limited to the per person limit of a policy. Nevertheless, Ohio's wrongful death statutes presume separate injury to those who survive the victim and are considered insured under his/her policy.[93] All other injuries in Ohio, if suffered by one person, are subject to the per person limits of an insurance policy.

An illustration would be the case where the victim is severely injured rather than killed. If the victim is injured and has underinsured motorist coverage with split limits of $50,000 per person and $100,000 per accident, then the recovery will be limited to $50,000. If the victim is killed, however, then each person who is considered insured under the policy would have a separate and distinct wrongful death claim, even though only one person suffers bodily injury. The recovery in this case would be limited by the per accident limit which is $100,000, assuming there is more than one wrongful death claim.[94] Therefore, in *Hill*, Shaw's underinsured motorist coverage did not indemnify him or his family members, who are considered insured under the policy, to the extent they would have been indemnified had he been injured by an uninsured motorist.[95]

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87. *See supra* notes 35-50 and accompanying text.

88. *See infra* note 111.

89. *See supra* text accompanying notes 84-85.

90. *See infra* text accompanying notes 95-147.

91. *Hill*, 50 Ohio St. 3d at 250, 553 N.E.2d at 664 (Resnick, J., dissenting).

92. *Wood*, 38 Ohio St. 3d at 91, 526 N.E.2d at 1094.

93. *Id.*

94. If only one person is bringing a wrongful death claim, then there is only one person presumed injured. Therefore, this single wrongful death claim will be subject to the per person limit of the policy.

95. *Hill*, 50 Ohio St. 3d at 250, 553 N.E.2d at 664 (Resnick, J., dissenting). It is clear that Shaw's beneficiaries would have received $100,000 had he been killed by an uninsured motorist because their only recovery would have been from Allstate based on the wrongful death claims

A. *Public Policy v. Strict Interpretation*

The main source of disagreement between the majority and dissent in *Hill* rests on the language of the underinsured motorist statute in light of the stated public policy. Both agree that public policy dictates that the victim must be placed in the same position in which he/she would have been had he/she been injured by an uninsured motorist.[96] The majority and dissent disagree, however, on the application of this policy to the statute.

The relevant portion of the underinsured motorist statute reads: "Underinsured motorist coverage . . . shall provide protection for an insured . . . where the limits of coverage available for payment to the insured . . . are less than the limits for the insured's uninsured motorist coverage at the time of the accident."[97] The majority argued that the words "available for payment"[98] in conjunction with "at the time of the accident"[99] left them no room to expand the scope of available coverage.[100] The majority stated: "Simply put, the underinsured motorist statute requires an insurer to provide coverage to its insured when the tortfeasor's coverage is *less* than the limits of the insured's uninsured motorist coverage at the time of the accident."[101] All that is required, according to the majority, is a simple policy comparison. When the coverage of the policies are equal, the tortfeasor is not underinsured. Since the majority found this language clear and unambiguous, they refused to expand the coverage.[102] To read the statute otherwise, the majority argued, would ignore the phrase "at the time of the accident."[103]

The dissent argued that the public policy of placing a victim in the same position he/she would have been in had he/she been injured by an uninsured motorist can only be achieved by examining the words "available for payment"[104] and awarding recovery based on those words.[105] Thus, what is "available for payment"[106] should be compared to the victim's underinsured motorist limits to determine if the

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that are subject to the per accident limit of the policy ($100,000).

96. Both the majority and dissent agree this is the correct statement of public policy. *Id.* at 246, 553 N.E.2d at 661; *Id.* at 250, 553 N.E.2d at 665 (Resnick, J., dissenting).

97. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).

98. *Id.*

99. *Id.*

100. *Hill*, 50 Ohio St. 3d at 245, 553 N.E.2d at 661.

101. *Id.* at 244, 553 N.E.2d at 660.

102. *Id.* at 247, 553 N.E.2d at 662; 8c J. APPELMAN, INSURANCE LAW AND PRACTICE § 5067.65 (1981) (argues that courts should not expand coverage when policy limitations are clear).

103. *Hill*, 50 Ohio St. 3d at 245, 553 N.E.2d at 661 n.3.

104. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).

105. *Hill*, 50 Ohio St. 3d at 249, 553 N.E.2d at 664 (Resnick, J., dissenting).

106. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).

tortfeasor is underinsured. This analysis would place the victim of an underinsured tortfeasor in the same position of recovery had he/she been injured by an uninsured motorist.

Although the dissent's result comports with public policy, it never addressed the words "at the time of the accident."[107] Either these words are surplusage, which is contradictory to the canon of statutory interpretation that all words and phrases are included for a purpose,[108] or public policy overrides their import. As the dissent never addresses this problem, it is not clear which alternative is being applied.

There were alternative arguments available to the dissent. For example, it could have argued that the words, "at the time of accident,"[109] are repugnant to the purpose of the statute and therefore should be ignored.[110] If the phrase, "at the time of the accident,"[111] is interpreted as controlling, it will continually limit recovery in cases where there are multiple claimants and public policy will not be achieved.[112]

Also, the dissent could have argued that these words were intended only to modify the immediately preceding phrase. That is, "at the time of the accident"[113] is simply a reference point to establish the "insured's uninsured motorist coverage"[114] limits. The actual comparison of coverage is made later, once it can be established what portion of the tortfeasor's liability coverage is "available for payment."[115] This argument makes the most sense. Applying the phrase "at the time of the accident"[116] to the phrase "available for payment"[117] is internally inconsistent because it cannot be known "at the time of the accident"[118] what will be ultimately "available for payment."[119] Until the damages are ascertained at a later date and the claims of the other claimants

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107. *Id.*

108. CRAIES ON STATUTE LAW 104-5 (7th ed. 1971).

109. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).

110. The problem is determining what the clear legislative purpose was. *See infra* notes 149-156 and accompanying text.

111. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).

112. Public policy will not be achieved because, if the victim is injured by an uninsured motorist, the victim will not have to split his/her award recovered from his/her own insurer. If the victim is injured by a tortfeasor who carries liability insurance equal to the victim's underinsured motorist coverage, the victim will have to split the recovery from the tortfeasor's insurer with the other victims. In this case, the victim will have no claim against his/her own insurer, and thus, recover less than what he/she would have if he/she had been the only person injured.

113. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

have been settled, all that can be done is to guess what will be "available for payment"[120] to the victim. The phrase, "at the time of the accident,"[121] can only refer to the victim's underinsured motorist coverage limits. This interpretation of the statute is in line with the public policy consideration of placing a victim in the same position in which he/she would have been had he/she been injured by an uninsured motorist. It accomplishes this by forcing a comparison between the amount actually paid by the tortfeasor's insurer to the victim and the victim's underinsured motorist coverage limits.

This interpretation is not without its difficulties. The problems with this interpretation are: (1) the punctuation does not suggest such a limitation; and (2) the phrase immediately preceding "available for payment"[122] speaks in terms of "limits of coverage"[123] suggesting the comparison is between the limits rather than the amount actually paid. First, regardless of punctuation, the phrase, "at the time of the accident,"[124] makes no sense modifying the phrase "available for payment"[125] because the two clauses are inconsistent and logically incompatible.[126] Second, the phrase, "limits of coverage available for payment,"[127] is immediately followed by the phrase "to the insured."[128] In the case of the multiple claimants, the tortfeasor's liability limits are not "available for payment to the insured."[129] What is "available for payment to the insured"[130] will be uncertain until the claims of the other injured parties have been resolved.

A possible counter to these arguments could be accomplished by referring to the original underinsured motorist statute. The repealed statute read in relevant part: "Underinsured motorist coverage means coverage . . . protecting an insured against loss . . . where the limits of coverage available for payment to the insured . . . are insufficient to pay the loss up to the insured's uninsured motorist coverage limits."[131] It could be argued that the legislature chose to retain the phrase, "limits of coverage available for payment to the insured,"[132] while eliminat-

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.; see supra* text accompanying notes 112-119.
127. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).
128. *Id.*
129. *Id.*
130. *Id.*
131. OHIO REV. CODE ANN. § 3937.181 (Anderson 1989) (repealed 1982).
132. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).

ing "insufficient to pay the loss."[133] In effect, the phrase "insufficient to pay the loss"[134] meant that when the recovery from the tortfeasor was reduced for some reason, the victim should still be allowed to make an underinsured motorist claim. Thus, without these qualifying words, the remaining phrase, "limits of coverage available for payment to the insured,"[135] requires only a policy comparison regardless of what was actually paid to the victim.

There are three problems with this argument. First, the original statute was never read in such a manner. The two phrases were read to imply different types of underinsured motorist coverage.[136] "[I]nsufficient to pay the loss"[137] referred to the victim's actual damages and suggested that, if recovery of the tortfeasor's liability limits would not make full restitution to the victim, then the victim would have a valid underinsured motorist claim.[138] Rather than modifying one another, the phrases contradicted each other because they suggested different theories of underinsured motorist coverage.[139] It was because of this confusion that the statute was repealed two years after its enactment.[140]

Second, even assuming that the phrases work in conjunction, the majority must reconcile its interpretation with public policy.[141] In multiple claimant situations, the victim of an underinsured motorist would be better off if he/she had been injured by an uninsured motorist.[142] This is contrary to public policy requiring the victim to be in the same position whether injured by an uninsured or underinsured tortfeasor.

Finally, reading "the limits of coverage available for payment to the insured"[143] as the majority does, is internally inconsistent. There is simply no way to determine what is "available for payment to the insured"[144] because the "limits of coverage"[145] are not fully "available for payment to the insured"[146] in a multiple claimant situation.[147]

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133. OHIO REV. CODE ANN. § 3937.181 (Anderson 1989) (repealed 1982).
134. *Id.*
135. *Id.*
136. *See supra* text accompanying notes 51-56.
137. OHIO REV. CODE ANN. § 3937.181 (Anderson 1989) (repealed 1982).
138. *See supra* text accompanying notes 51-56.
139. *Id.*
140. *Id.*
141. The majority must do so because it states that its interpretation is in line with public policy. *Hill*, 50 Ohio St. 3d at 246, 553 N.E.2d at 661; *see supra* note 111.
142. *Hill*, 50 Ohio St. 3d at 249, 553 N.E.2d at 664 n.8.
143. OHIO REV. CODE ANN. § 3937.18(A)(2) (Anderson 1989).
144. *Id.*
145. *Id.*
146. *Id.*
147. *See supra* text accompanying notes 112-119.

Therefore, it seems the majority has incorrectly interpreted the plain meaning of the words of the statute. As a result, the majority believed that it would be acting beyond its judicial role were the court to expand the coverage available under the statute.[148] The outcome is unfortunate because a close and careful reading could have avoided future loss to innocent victims.

B. Did the Ohio General Assembly Anticipate this Loophole?

One effect of amending uninsured motorist statutes to include underinsured motorist coverage is that courts will generally regard the same public interests as supporting both.[149] The amended version of the uninsured motorist statute "seems to indicate a legislative intent to guarantee compensation only up to the limits of the injured insured's own uninsured motorist coverage limits."[150] Thus, assuring recovery to the extent of uninsured motorist coverage while disallowing greater recovery was a motivating factor behind amending underinsured motorist coverage in Ohio.[151]

If the intent was to limit coverage, then the question arises as to what extent the coverage was to be limited. The Ohio Supreme Court stated in *James v. Michigan Mutual Insurance Company*[152] that "the original motivation behind the enactment of R.C. 3937.181(C) was to assure that persons injured by an underinsured motorist would receive at least the same amount of total compensation that they would have received if they had been injured by an uninsured motorist."[153] This same policy statement is cited by both the majority and dissent in *Hill*.[154] Therefore, while *James* could be distinguished because it was interpreting the intent of the repealed statute, the same intent has been attributed to the amended version.[155] This is logical considering underinsured motorist coverage is now part of the uninsured motorist statute.[156]

The question then becomes: Did the legislature anticipate this loophole in coverage? The reasonable answer is that it did not or it

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148. *Hill*, 50 Ohio St. 3d at 246-47, 553 N.E.2d at 662 (court will not fashion an excess provision by judicial fiat).

149. WIDISS, *supra* note 39, § 32.2; *see also Ware v. Nationwide Ins. Co.*, 33 Ohio App. 3d 74, 75, 514 N.E.2d 440, 441 (1986).

150. Hentemann, *Underinsured Motorist Coverage: A New Coverage With New Problems*, 56 OHIO ST. B. A. REP. 122, 129 (1983).

151. *See generally* Comment, *supra* note 2, at 788-791.

152. 18 Ohio St. 3d 386, 481 N.E.2d 272 (1985).

153. *Id.* at 389, 481 N.E.2d at 275.

154. *Hill*, 50 Ohio St. 3d at 246, 553 N.E.2d at 661; *Id.* at 250, 553 N.E.2d at 665 (Resnick, J., dissenting).

155. *Id.*

156. *Id.*

would have included a clause that expressly excluded multiple claimants situations from underinsured motorist coverage.[157] Otherwise, the public policy would be to place a victim in the position he/she would have occupied had he/she been injured by an uninsured motorist *except when there are multiple claimants*. Since the public policy supporting the original statute did not contain this exception, it should not be included now by judicial interpretation.

C. *Has* Wood v. Shepard *Been Overruled?*

The *Hill* court addressed the assertion that this case should be controlled by *Wood v. Shepard*.[158] In *Wood*, it was held that each wrongful death beneficiary has a separate claim, compensable up to the subject insurance policy's per occurrence underinsured motorist coverage limits, even though the policy limited recovery for all damages for injury or death of one person to a single limit of liability.[159] According to this reasoning, Shaw's beneficiaries should have received $100,000 based on the per accident limit of the underinsured motorist coverage, rather than the $50,000 received from Heugatter's insurer.[160]

The *Hill* court distinguished *Wood*, arguing that, as a threshold matter, the liability limits of the tortfeasor's policy were equal to Shaw's underinsured motorist coverage. Thus the court never reached the question of underinsured motorist coverage.[161] The threshold matter of whether underinsured motorist coverage is triggered must be reached before the argument of multiple wrongful death claims arising under the coverage can be addressed.[162] This analysis is correct as long as the tortfeasor is not considered underinsured because of the wrongful death claims.[163] Had the majority correctly interpreted the statute and found Heugatter to be underinsured, Shaw's family would have recovered an additional $50,000 from Allstate.

The problem is that the majority in *Hill* muddles the issue by continuing its analysis of *Wood* in an attempt to rectify its decision with public policy.[164] Thus, the majority states that an insurer may limit all

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157. *See supra* note 82.

158. 38 Ohio St. 3d 86, 526 N.E.2d 1089 (1988).

159. *Id.* at 86, 526 N.E.2d at 1089 (citing the syllabus).

160. *See supra* text accompanying notes 90-94.

161. *Hill*, 50 Ohio St. 3d at 247, 553 N.E.2d at 662.

162. *Id.*

163. The wrongful death claims work in conjunction with the underinsured motorist statute. The wrongful death claims are the reason Heugatter should have been deemed underinsured. If only Shaw had been injured, the proper recovery would have been $50,000. Since Ohio presumes separate injuries for those persons bringing wrongful death claims, the recovery should have been $100,000.

claims, even those arising out of wrongful death, to the per person limit of a policy by using the proper language.[165] The court, relying on *Tomlinson v. Skolnik*[166] which limited a loss of consortium claim to the per person limit of a policy,[167] argues that Allstate may contract around *Wood*.[168] The argument in *Tomlinson* suggests that an insurer could limit recovery to the per person limit of a policy as long as the terms are clear and easily understandable no matter what type of injury was involved.[169]

Using the reasoning from *Tomlinson*, the *Hill* court stated that "damages arising out of a single bodily injury" will be limited to the per person limit.[170] This analysis directly contradicts the majority's assertion that *Wood* has been distinguished because *Wood* held that wrongful death claims are not subject to the per person limit of a policy.[171] The two arguments are mutually exclusive. Either *Wood* has been limited in its application or it has been distinguished and is not applicable to *Hill*. The majority would like to be able to reconcile its decision with public policy,[172] but as it endeavors to do so, it runs into contradictory arguments.

Finally, the majority argues that the wrongful death claims should have been brought against Heugatter's insurer.[173] Had the wrongful death claims been brought against Heugatter's insurer, this still would not resolve the question of whether Heugatter was underinsured. Realistically, this argument is just a restatement of the first argument asserting that, as a threshold matter, the question of underinsured motorist coverage was not reached.[174] By suggesting that the claim should have been brought against Heugatter's insurer, the majority is suggesting that there is not a valid underinsured motorist claim. That is, underinsured motorist claims are brought against the victim's insurer, not the tortfeasor's insurer. Bringing the claims against Heugatter's insurer, however, does not address the question of whether an underinsured motorist claim can be brought against Allstate, nor does it solve

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165. *Hill*, 50 Ohio St. 3d at 246, 553 N.E.2d at 661-62.

166. 44 Ohio St. 3d 11, 540 N.E.2d 716 (1989) (case involved a loss of consortium claim). *But see*, Cincinnati Ins. Co. v. Phillips, 52 Ohio St. 3d 162, 556 N.E.2d 1150 (1990). This case reaffirms *Wood* and states that "the wrongful death statutes not be abridged in any manner whatsoever." *Id.* at 163, 556 N.E.2d at 1152.

167. *Tomlinson*, 44 Ohio St. 3d at 13, 540 N.E.2d at 718-19.

168. *Id.*

169. *Id.*

170. *Hill*, 50 Ohio St. 3d at 246, 553 N.E.2d at 662.

171. *Id.* at 244-45, 553 N.E.2d at 660.

172. *Id.*; *see supra* note 140.

173. *Hill*, 50 Ohio St. 3d at 247, 553 N.E.2d at 662.

174. *Id.* The argument states that "there was no underinsurance available to these beneficiaries under the unambiguous terms of the Allstate policy and R.C. 3937.18(A)(2)." *Id.*

the question of why *Wood* is inapplicable in this case. Therefore, by arguing that the claims should have been brought against Heugatter, the court is implying that there is no claim of underinsured motorist coverage available.

The dissent argued that *Wood* was controlling because of its holding that multiple wrongful death claims are subject only to the per accident limits of underinsured motorist coverage.[175] Further, the dissent argued that the proper comparison is between the amount of the tortfeasor's liability limits available for payment and the victim's underinsured motorist coverage limits.[176] Thus, since there were separate claims for wrongful death and only $50,000 was available for payment, Heugatter was underinsured because Shaw carried underinsured motorist coverage with per accident limits of $100,000.[177]

The majority also agreed with the public policy underlying underinsured motorist coverage; that may explain its over-extensive treatment of *Wood*.[178] The majority's analysis suggests that *Wood* has been limited in its applicability. Indeed, it most likely was limited for a short time.

Subsequent to *Hill*, the Ohio Supreme Court decided *Cincinnati Insurance Company v. Phillips*.[179] In this case, David Thompson was killed in an automobile accident caused by Rosa Phillips.[180] David Thompson was survived by his wife and daughter. The court of appeals ruled that all claims, even for wrongful death, were subject to the per person limits of the underinsured motorist coverage.[181] The Ohio Supreme Court reversed, stating that its "decision in *Wood v. Shepard* . . . demands that the wrongful death statutes . . . not be abridged in any manner whatsoever."[182] Further, the court distinguished *Tomlinson*, holding that wrongful death claims are different from loss of consortium claims, and therefore, wrongful death claims are not subject to the per person limits of underinsured motorist coverage.[183] Thus, even if *Wood* were limited by *Hill*, it has regained its standing as controlling law in Ohio.

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175. *Id.* at 248-49, 553 N.E.2d at 663-64 (Resnick, J., dissenting).

176. *Id.* at 249, 553 N.E.2d at 664 (Resnick, J., dissenting). The dissent also argued that, if the public policy underlying underinsured motorist coverage is to place the insured in the position he/she would have been had he/she been injured by an uninsured motorist, then the comparison must be between the amount available for payment and the limits of the underinsured motorist coverage. *Id.* at 249-50, 553 N.E.2d at 664 (Resnick, J., dissenting).

177. *Id.* at 250, 553 N.E.2d at 664 (Resnick J., dissenting); *see supra* note 162.

178. *Id.* at 246-47, 553 N.E.2d at 662.

179. 52 Ohio St. 3d 162, 556 N.E.2d 1150 (1990).

180. *Id.* at 162, 556 N.E.2d at 1150-51.

181. *Id.* at 162-63, 556 N.E.2d at 1151.

182. *Id.* at 163, 556 N.E.2d at 1151-52 (citations omitted).

183. *Id.* at 164, 556 N.E.2d at 1152-53.

D. *Impact of Hill*

The issue of whether a tortfeasor will be deemed an underinsured motorist when recovery has been reduced by multiple claimants has been addressed since *Hill* in *Transamerica Insurance Company v. Nolan*.[184] In this case, a car accident occurred killing five people and injuring four others.[185] The tortfeasor was insured with policy limits of $100,000 per person and $300,000 per accident.[186] Linda and Dennis Wallace were the divorced parents of Anthony Wallace who was killed in the accident.[187] Linda and Dennis Wallace each received $26,000 from the tortfeasor's insurer as their share of the payment for the wrongful death of their son.[188] Linda and Dennis each had insurance policies with separate companies which had underinsured limits of $100,000 per person and $300,000 per accident.[189] The Wallaces each sued their respective insurers for the remaining $74,000.[190]

The trial court held for the Wallaces.[191] The court of appeals reversed the trial court, holding that *Hill* is "dispositive of the dispute between these parties."[192] The appellate court found this result distasteful, stating: "While we do not pretend to like this result, we are nevertheless resigned to it by the current status of the law."[193] Instead of recovering $200,000 for the loss of their child, the Wallace's received only $52,000 because of a loophole.

Even $200,000 seems inadequate to compensate for the loss of a child, but liability and indemnity insurance is not directly about placing value on human life. The direct issue is whether the insurance contract provides the coverage that was bargained for in the exchange. According to public policy, underinsured motorist coverage is supposed to place the insured in the same position he/she would have been had he/she been injured by an uninsured motorist.

Nolan establishes that when multiple claimants are present, the underinsured motorist coverage contract does not provide the coverage that was bargained for because of a loophole created by the decision in

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184. No. 89-12-077, No. 89-12-079 (12th App. Dist., Ohio., Sept. 4, 1990) (LEXIS, States Library, Ohio File).
185. *Id.* at *2.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at *3 (the trial court's decision was rendered prior to the *Hill* decision).
192. *Id.* at *4-5.
193. *Id.* at *8.

Hill. Even where a victim recovers only a fraction of the amount "available for payment" from the tortfeasor's insurer, the victim's underinsured motorist coverage will not alleviate the inequity.

V. CONCLUSION

The decision in *Hill* created a loophole in underinsured motorist coverage when multiple claimants are involved. The decision reflects a reading of the underinsured motorist statute which fails to reach a fair or just result. The decision is directly contradictory to the public policy supporting the statute: to place victims in a position of recovery equivalent to their uninsured motorist coverage. Instead, it allows arbitrary circumstances, such as the number of people injured in the accident and the liability limits of the tortfeasor, to significantly reduce the recovery of an innocent victim.

Hill tampered with a previous interpretation of Ohio's wrongful death statutes in attempting to rectify its decision with public policy. A subsequent decision, however, has apparently corrected this tampering and reflects a reinstatement of *Wood* and its interpretation of Ohio's wrongful death statutes as controlling law. It remains to be seen, however, whether *Hill* has permanently overruled *Wood* when wrongful death claims, underinsured motorist coverage, and multiple claimants are involved in a case.

The Ohio Supreme Court could have interpreted the statute in a way which would have avoided this unfair and unjust result, but it incorrectly construed the statute and refused to expand the coverage. Had the court correctly interpreted the statute, the court would have discovered that the course it took limited the coverage. Had the court taken the correct course, there would have been nothing to expand. As a result, the court created a loophole in underinsured motorist coverage. The statute, correctly interpreted, adequately takes care of situations involving multiple claimants.

Timothy Young