

COLORADO COURT OF APPEALS

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Court of Appeals No.: 08CA0781  
Boulder County District Court No. 06CV346  
Honorable D.D. Mallard, Judge

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Darrell Toutant,

Plaintiff-Appellant,

v.

Nationwide Mutual Insurance Company,

Defendant-Appellee.

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JUDGMENT REVERSED AND CASE  
REMANDED WITH DIRECTIONS

Division V

Opinion by: JUDGE BOORAS  
Graham and Kapelke\*, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**

Announced: April 23, 2009

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Wheeler, Trigg, Kennedy, LLP, Terence M. Ridley, Michael D. Alper, John M. Vaught, Denver, Colorado, for Defendant-Appellee

\*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2008.

Plaintiff, Darrell Toutant, individually and on behalf of all others similarly situated, appeals the summary judgment in favor of Nationwide Mutual Insurance Company (Nationwide) on all of his claims. We reverse and remand.

### I. Background

Toutant purchased automobile insurance, including liability and uninsured/underinsured motorist (UM/UIM) coverage from Nationwide on two vehicles from 1997 to 2003. Only the UM/UIM coverage is at issue here.

Toutant's declaration page for his Nationwide policy contains a separate category for UM/UIM coverage and lists a total premium of \$40.40. The policy excludes UM/UIM coverage for "bodily injury suffered while occupying a motor vehicle owned by you or a relative, but not Insured for Auto Liability under this policy" (OBNI exclusion).

Nationwide uses a two-tiered premium structure for UM/UIM coverage in its policies. For policies listing a single vehicle, it charges one premium rate for UM/UIM coverage. For policies listing multiple vehicles, such as Toutant's policy, it charges a different and higher premium rate.

In addition, Nationwide sells UM/UIM coverage on an all-or-nothing basis; thus, Toutant had the option to purchase UM/UIM coverage on all of his vehicles insured with Nationwide or to decline UM/UIM coverage entirely.

This litigation was originally filed in 2003 as a class action with twenty-seven plaintiffs against twenty-five insurance companies. In 2006, the action was subsequently severed into smaller cases, each naming an individual insurance company.

Toutant asserted claims for fraudulent concealment; negligent misrepresentation by omission; bad faith; violation of the Colorado Consumer Protection Act; and declaratory judgment.

In its summary judgment order, the trial court incorporated summary judgment orders it issued in three of the other severed cases, which concluded that (1) multi-vehicle policy insurance companies were not required to permit their insureds to accept or reject UM/UIM coverage separately for each vehicle insured for liability; (2) insurance companies have a duty to disclose sufficient accurate information about their UM/UIM coverage but that “duty does not extend to advising insureds about competitor business practices and alternative coverage options that may be found in the

insurance marketplace”; and (3) insurance companies do not have a duty to advise insureds of the implications of *DeHerrera v. Sentry Insurance Co.*, 30 P.3d 167 (Colo. 2001), regarding the purchase of UM/UIM coverage.

## II. Standard of Review

We review the grant of summary judgment de novo. *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 570 (Colo. 2008).

Summary judgment is appropriate only if the pleadings and supporting documents demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c). The moving party has the burden to establish that no such issue exists, and the court must consider the facts in the light most favorable to the nonmoving party. *Civil Serv. Comm’n v. Pinder*, 812 P.2d 645, 679 (Colo. 1991). “However, once the moving party makes a convincing showing that there are no genuine issues of material fact, the opposing party must demonstrate with relevant and specific facts that a real controversy exists.” *Sender v. Powell*, 902 P.2d 947, 950 (Colo. App. 1995). “In a summary judgment context, a material fact is a fact that will affect the outcome of the case.” *Id.*

### III. Toutant's Policy

Initially, we do not discern a disputed factual issue whether Nationwide's declaration page could be misleading as to whether it charges for UM/UIM coverage on a per vehicle basis. Unlike in *Briggs v. American National Property & Casualty Co.*, \_\_\_ P.3d \_\_\_, \_\_\_ (Colo. App. No. 07CA2217, Mar. 5, 2009), and *Wagner v. Travelers Property Casualty Co.*, \_\_\_ P.3d \_\_\_ (Colo. App. No. 07CA2112, Nov. 13, 2008), Toutant's policy does not list a separate UM/UIM premium for each of his two vehicles.

### IV. OBNI Exclusion

We are, however, persuaded that the OBNI exclusion in Toutant's policy creates a disputed factual issue, and for the reasons set forth below summary judgment was improper.

In *DeHerrera*, our supreme court concluded:

[T]he language of the UM/UIM statute and the purpose of that statute require that UM/UIM insurance apply to an insured person when injured by a financially irresponsible motorist, irrespective of the vehicle the injured insured occupies at the time of injury.

30 P.3d at 176.

In *Jaimes v. State Farm Mutual Automobile Insurance Co.*, 53 P.3d 743 (Colo. App. 2002), a division of this court addressed the

effect of *DeHerrera* on an OBNI exclusion, and concluded that because *DeHerrera* required an insurer to provide UM/UIM benefits to an insured regardless of the vehicle the insured was driving when injured, OBNI exclusions are void as against public policy.

Because the facts of this case and the legal issues raised are substantially like those addressed in *Briggs* and we are persuaded by the reasoning in *Briggs*, we incorporate the analysis and conclusions of that opinion here as follows:

- Neither section 10-4-609, C.R.S. 2008, nor *DeHerrera* prohibits Nationwide from issuing multi-vehicle, all-or-nothing UM/UIM coverage. *Briggs*, \_\_\_ P.3d at \_\_\_ (concluding that section 10-4-609 does not require that UM/UIM coverage be offered on a per vehicle basis).

- By continuing to include an OBNI exclusion in its policies, Nationwide failed to satisfy its disclosure obligations under section 10-4-609. *Id.* at \_\_\_.

Nationwide's continued use of the OBNI exclusion after *DeHerrera* creates a genuine issue of material fact whether Toutant could reasonably have misunderstood that he was required to purchase a multi-vehicle policy and pay the higher premium for

UM/UIM coverage in order for his second vehicle to be covered under the policy.

As in *Briggs*, Toutant “might have made different purchasing decisions had the invalid OBNI exclusion not been included in his policy.” *Id.* at \_\_\_\_\_. For example, if Toutant had wanted to insure his second “vehicle with a different insurer and still be fully insured, he would have thought he needed to purchase UM/UIM coverage from the other insurer, even though, unbeknownst to him, he already had UM/UIM coverage” under his Nationwide policy. *Id.* at \_\_\_\_\_.

Accordingly, the summary judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

JUDGE GRAHAM and JUDGE KAPELKE concur.

# Court of Appeals

STATE OF COLORADO  
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JANICE B. DAVIDSON  
CHIEF JUDGE

February 2, 2009

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41 (b), the mandate of the Court of Appeals may issue forty-six days after entry of the judgment. In workers' compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment.

Filing a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT:

Janice B. Davidson  
Chief Judge  
Colorado Court of Appeals