

IN THE SUPREME COURT OF OHIO

JACK R. ADVENT, Exec.,

Appellant,

v.

ALLSTATE INSURANCE COMPANY, et  
al.,

Appellees.

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:  
: On Appeal from the Franklin County  
:  
: Court of Appeals, Tenth Appellate  
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: District  
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: Supreme Court Case No. 06-2271  
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: Court of Appeals Case No. 06AP-103  
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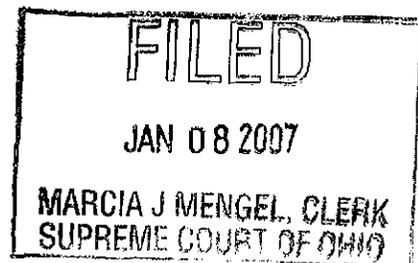
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MEMORANDUM IN OPPOSITION TO JURISDICTION  
OF APPELLEE ALLSTATE INSURANCE COMPANY

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

This case is not a case of public or great general concern because the issues that arise in this case have been eliminated by subsequent changes in the law. Given the time that has passed since the legislature made those changes, few cases will be impacted by the Court's decision in this case.

Appellant has attempted to elevate the importance of this case by claiming that the lower court's decision effectively eviscerated *Wolfe v. Wolfe* (2000), 88 Ohio St.3d 246. However, Appellant's argument fails to recognize that the lower court's decision was consistent with nearly every other court that has considered the viability of *Wolfe* since the amendments of SB 267. The legislature redefined the *Wolfe* two-year guarantee period in passing SB 267.

The lower court simply applied the law to the unique set of facts in this case. The decision is unlikely to have great impact on pending cases or cases to be filed in the future because the issues in this case arose because the two-year *Wolfe* guarantee period began between the effective dates of SB 267 and SB 97 and the motor vehicle accident occurred after the effective date of SB 97. The effective date of SB 267 was September 21, 2000. The effective date of SB 97 was October 31, 2001. With just thirteen months between these effective dates, the number of policy holders similarly situated would be relatively small. Moreover, given the length of time since SB 97 became effective, the number of cases still pending that involve similarly situated policy would be even smaller. The Court's discretionary review is warranted in a case with such limited impact.

Contrary to Appellant's assertions, the decision in this case does not open the door for insurers to unilaterally remove coverage bargained for by consumers in the middle of a guarantee period. The law continues to protect consumers from cancellation of their policies and guarantees renewal with the same coverages the insured bargained for during the two-year guarantee period. See, R.C. §3937.31(A). Appellant did not bargain for the coverage he sought in this case. If coverage had arisen at all it would have been through a legal fiction. The legislature eliminated that legal fiction with the passage of SB 97. The lower court simply concluded that this change in the law was one that the insurers were permitted to incorporate into existing policies. Appellant continued to get exactly as much coverage as he purchased. Appellant's attempt to paint a picture of the demise of insurance law as we know it is again a vast overstatement of the importance of this case.

#### **STATEMENT OF THE CASE**

The parties are largely in agreement as to the facts of this case. The accident occurred on September 29, 2002. At the time, Appellant Jack Advent and his wife Valijean Advent, who died in the accident, were insured by Allstate Insurance Company. Mr. and Mrs. Advent first purchased automobile insurance coverage from Allstate on March 12, 1989. The policy was renewed every six months thereafter, up to and including the policy period beginning September 12, 2002 to March 12, 2003.

On October 1, 2001, S.B. 97 became effective, eliminating the requirement of a written offer and rejection or reduction of UM/UIM coverage. See, R.C. §3937.18 as amended by S.B. 97. At each renewal date after the law changed, Appellant's policy included a notice to insureds that the written requests for a change in the amount of

UM/UIM coverage were no longer necessary and asking insureds to review their coverage to verify that it was correct. In his deposition, Mr. Advent did not dispute that he received these notices and admitted that, at all times before the accident, he was aware that his UM/UIM coverage limits were lower than his liability coverage limits. (See, Advent Depo. at 25, 27-31, excerpts also attached as Appendix Exh. A.)

Despite this knowledge, Appellant filed suit in the Franklin County Court of Common Pleas claiming he was entitled to UM/UIM coverage equal to his liability coverage by operation of law. Defendant Allstate filed a motion for summary judgment that was granted by the Trial Court. Appellant appealed that decision to the 10<sup>th</sup> District Court of Appeals. The appellate court affirmed the trial court's decision.

After receiving the decision of the court of appeals, Appellant sought a certification that the appellate decision was in conflict with the decision of the 8<sup>th</sup> District Court of Appeals in *Arn v. McLean*, 2004 Ohio 654. The court of appeals certified the conflict and Appellants filed notice of the certification with this Court on December 29, 2006.

While the motion for certification was pending with the court of appeals, Appellant also filed a discretionary appeal with this Court and a Memorandum in Support of Jurisdiction. Appellee files this response to the Memorandum in Support of Jurisdiction for the Court's consideration pursuant to S Ct.R. IV, §4(C).

### **ARGUMENT**

Response to Appellant's Propositions of Law Nos. 1 and 2: R.C. §3937.18 as amended by SB 267 is applicable in this case. Pursuant to that version of R.C. §3937.18, Appellee appropriately incorporated the changes in the law that resulted from SB 97 upon the renewal of the policy.

The parties agree that, at the very least, the amendments of S.B. 267 apply in this case. The disagreement lies in whether R.C. §3937.31(E) allows the subsequent changes in the law created by S.B. 97 to be incorporated into existing policies. The answer is apparent from the plain language of the revised statute:

Nothing in this section prohibits an insurer from incorporating into a policy any changes that are permitted or required by this section or other sections of the Revised Code at the beginning of any policy period within a two year period set forth in Division A of this section.

R.C. §3937.31(E), added by S.B. 267. The notes that accompany R.C. §3937.31 further clarify the General Assembly's intent:

It is the intent of the General Assembly in amending R.C. §3937.31 to make it clear that an insurer may modify the terms and conditions of an automobile insurance policy to incorporate changes that are permitted or required by that section and other sections of the Revised Code at the beginning of any policy period within the two year period set forth in Division A of that section.

See, R.C. §3937.31, at notes. The General Assembly did not limit the changes that could be incorporated within the 2-year guarantee period and did not exclude changes to UM/UIM coverage. The General Assembly allowed any changes that are permitted or required under the Revised Code.

Despite the General Assembly's broad language, Appellant asked the Court of Appeals and now asks this Court to create an exception or exclusion to R.C. §3937.31(E). Appellant seeks to exclude the changes from SB 97 that eliminated the requirement of an offer of UM/UIM coverage and a valid written rejection. However, Appellant presented no evidence to the Court of Appeals and presents no evidence to this Court that the General Assembly intended to make such an exception.

In fact the evidence suggests that the General Assembly did not intend to make such an exception. The legislature explicitly noted that the intent of the amendment was to overturn *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St.3d 565 and *Linko v. Indemnity Ins. Co. of North America* (2000), 90 Ohio St.3d 445. See, R.C. 3937.18 at notes (E). Had the legislature intended for these changes to be excluded from R.C. §3937.31(E), it could have created that exception explicitly.

Not only does it appear from the language of the amendments and legislature's notes that R.C. §3937.31(E) was to be applied broadly, but the majority of the lower courts that have considered the issue have come to the same conclusion. In *Arn v. McLean*, 2005 Ohio 654, the 2<sup>nd</sup> District Court of Appeals concluded that it was "the very explicit intent of the legislature" to allow insures to modify policies during the two-year period of guaranteed coverage. Therefore, the court concluded that SB 97 could be incorporated. See, *id.* Also in *St. Clair v. Hassebrock*, 2006 Ohio 6159, the 1<sup>st</sup> District Court of Appeals concluded that the SB 267 Amendments made a clearer distinction between the 2-year guarantee period set forth in R.C. §3937.31(A) and a policy period, allowing incorporation of changes in the law at the beginning of each policy period within the guarantee period. See, *id.* at \*6. The *Hassebrock* court also concluded that SB 97 could be incorporated in the middle of a guarantee period. In this case, the 10<sup>th</sup> District Court of Appeals reached the same conclusion.

At least one justice from this Court has already expressed agreement with this interpretation of the SB 267 amendments. In *Young v. Cincinnati Insurance* (2005), 105 Ohio St.3d 1252, Justice Stratton dissented from the Court's decision to dismiss the appeal because he sought to address a similar issue. In *Young*, the issue was whether

the changes created by SB 267 could be incorporated into a policy with a guarantee period that began before the effective date of SB 267. Justice Stratton concluded that “application of amended R.C. §3937.31 to this policy would effectuate the General Assembly’s articulated public policy.” See, *id.* at 1252. The same public policy should apply here.

The only court that has come to a different conclusion is the 8<sup>th</sup> District Court of Appeals in *Storer v. Sharp*, 2006 Ohio 1577. However, the *Storer* court reached this conclusion by rejecting R.C. §3937.31(E) as amended by SB 267. In its decision, the court acknowledged the defendant’s argument that R.C. §3937.31(E) allowed the incorporation of SB 97 into existing parties but relied on one of its own previous decision to summarily reject the statutory language. A court cannot simply reject the laws passed by the General Assembly because it fails to agree with them. The 8<sup>th</sup> District Court of Appeals exceeded its authority by refusing to apply R.C. §3937.31(E). The intent of the legislature is clear. An insurer may incorporate changes in the law within the 2-year guarantee period.

The legislature’s intent in passing SB 267 was clear. The legislature intended to allow insurers to incorporated changes in the law into existing policies. Just thirteen months after passing that amendment, the legislature changed the law with SB 97. Had the legislature intended for SB 97 to be an exception, it could have created an exception.

By incorporating SB 97 into Appellant’s existing policy, Appellee did not change the coverage that Appellant purchased. Appellant testified that he knew his UM/UIM coverage limits were lower than his liability limits before the effective date of SB 97 and

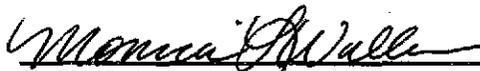
knew nothing of the legal fiction that SB 97 eliminated. The lower court's decision does not mark a sweeping change to Ohio insurance law nor does it result in injustice to this Appellant. The lower court effectuated the intent of the Ohio legislature and honored the agreement reached between this insurer and insured. Therefore, the decision should not be disturbed on appeal.

### **CONCLUSION**

For the reasons stated above, this case does not involve a matter of public and great general interest, nor a substantial constitutional question. Therefore, Appellee Allstate Insurance Company respectfully urges this court to deny Appellant's Memorandum in Support of Jurisdiction in this matter.

Respectfully submitted,

**LANE, ALTON & HORST, LLC**



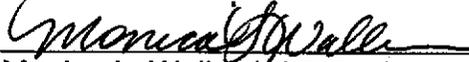
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served on the following via ordinary U.S. mail this the 8<sup>th</sup> day of January, 2007:

John M. Gonzales, Esq.  
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Attorney for Plaintiff

  
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Monica L. Waller (0070941)