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## STATEMENT OF FACTS

There are a handful of assertions set forth in the Brief of Appellee that require correction or clarification.

- At page 1 of the Brief of Appellee, the Commissioner writes: “The issues presented in this case have already been decided in *General Motors Corporation v. Wilkens* (2004), 102 Ohio St.3d 33.” That statement is largely incorrect.

*General Motors Corporation v. Wilkens* did not consider the purchase for resale argument set forth in Proposition of Law 3 of the Brief of Appellant.

Moreover, the amendment to the definition of “consumer” now found in R.C. 5739.01(D)(5) and the exception to the definition of “retail sale” found in R.C. 5739.01(E)(15), since recodified as an exemption from tax and now found in R.C. 5739.02(B)(42)(m), did not become effective until September 29, 1997. That being the case, *General Motors Corporation v. Wilkens* did not consider the arguments advanced in Proposition of Laws 2 and 5 of the Brief of Appellant that are based on such provisions.

- At page 5 of the Brief of Appellee, the Commissioner first writes: “[C]ar purchasers are never made aware of DCC’s Customer Satisfaction Assurance Program and the possibility of getting goodwill repairs.” Similar statements are found on pages 26 and 27, where the Commissioner incorrectly asserts that General Motors’ owner’s manual advises car owners of its goodwill repair policy, but DCC’s does not.

With regard to the first statement, there is no basis for the Commissioner’s assertion that car purchasers are never made aware of DCC’s Customer Satisfaction Assurance Program. The fact that the Assessments are based on over \$59 million in goodwill repairs (more than \$795,000

per month) makes it plain that DCC's customers are very much aware of the company's goodwill policy – and significantly benefit from it.

With regard to the latter statement, the content of the Customer Satisfaction Procedure section of GM's warranty manual is, not surprisingly, very similar to the content of the How to Deal With Warranty Problems section of DCC's warranty manual. Without specifically referring to goodwill repairs, each advises a car owner who he or she should contact if not satisfied that the repair of his or her car is being handled correctly or equitably.

- At page 5 of the Brief of Appellee, the Commissioner first writes: "The owner of [a] vehicle does not pay for a goodwill repair." While the owner of a vehicle doesn't pay for a goodwill repair at the time the repair is performed, a portion of the purchase price of each vehicle sold by DCC is for the cost of goodwill repairs that will be performed in the future. The Board acknowledged this fact in its Decision and Order. (Supp. 13). In similar circumstances, the Supreme Court of Michigan held that those who purchase vehicles from General Motors pay the cost of goodwill repairs at the time the vehicle is purchased. *General Motors Corporation v. Dept. of Treasury* (2002), 466 Mich. 231, 644 N.W.2d 734. Thus, vehicle owners do pay for goodwill repairs, and have already been subject to Ohio's sales tax on such payments.

- At various places in the Brief of Appellee the Commissioner confuses special policy repairs, as that term is used in *General Motors Corporation v. Wilkens*, with goodwill repairs. As explained in the briefs filed with the Court in *General Motors Corporation v. Wilkens*:

Special policy repairs are repairs of defective conditions occurring in vehicles manufactured by GM that are attributable to defective parts and/or workmanship. Dealers are advised of the conditions covered by this portion of GM's warranty program through the release of special policy bulletins. The bulletins identify vehicles and components covered, mileage and time limitations, as well as claims and customer

notification information. Owners of vehicles covered by a special policy bulletin are advised of the bulletin by mail. The bulletins are also maintained by dealers in a binder and are readily available for customer review in the service reception area.

Also as explained in the briefs filed with the Court in *General Motors Corporation v.*

*Wilkins:*

Goodwill repairs are typically authorized when it appears that a condition is the result of a defect in material or workmanship as opposed to aging, physical damage, lack of proper maintenance or owner abuse.

Goodwill repairs and special policy repairs are similar in concept. The distinction between the two is that goodwill repairs are authorized on an *ad hoc* basis, whereas special policy repairs are authorized for every vehicle falling within a specified class whenever an identified condition presents itself. \*\*\* If the same defect began to present itself frequently, what was originally authorized as a goodwill repair could eventually be converted into a special policy repair with the issuance of a special policy bulletin.

## ARGUMENT

### *Introductory Statement*

In the Brief of Appellant, DCC advances 5 propositions of law. Each presents an argument, some in the alternative, intended to persuade the Court that the Board's Decision and Order should be reversed, in whole or in part. The Brief of Appellee responds to each proposition of law. For the most part, the Commissioner simply advances a different interpretation of the controlling provisions of law. In these circumstances, rather than repeat arguments already made in the Brief of Appellant, DCC will limit its reply to specific points relating to:

DCC's reliance on R.C. 5739.01(D)(5) -- the definition of "consumer" on and after September 29, 1997;

DCC's reliance on R.C. 5739.01(E)(15) – the exception/exemption available on and after September 29, 1997 to persons who sell repair services for purchases of property permanently transferred to the consumer of the repair service; and

DCC's reliance on R.C. 5739.01(E)(1) – the purchase for resale exception.

### **DCC's Reliance on R.C. 5739.01(D)(5)**

**DCC is not a "consumer" of any tangible personal property or taxable service provided by its dealers when performing goodwill repairs.**

In Proposition of Law 2 of the Brief of Appellant, DCC established that only a "consumer" can be held liable for Ohio's sales or use tax. DCC then argued that under the definition of "consumer" as it read prior to September 29, 1997 it was not the consumer of any tangible personal property or taxable service provided by its dealers when performing goodwill repairs. DCC went on to note that, effective September 29, 1997 the law changed – i.e., the following language was added to R.C. § 5739.01(D):

(5) A person who makes sales of any of the services listed in division (B)(3) of this section is the consumer of any tangible personal property used in performing the service. The purchase of that property is not subject to the resale exception under division (E)(1) of this section.

Thus, since September 29, 1997, the General Assembly has mandated that for sales tax purposes persons who sell repair services be considered the consumer of any tangible personal property used when performing the repair service. In the matter at hand, that would be DCC's dealers, not DCC. Accordingly, the Assessments, to the extent they are based on the cost of parts used to perform repairs on and after September 29, 1997, are unlawful.

*Reply to Commissioner*

With regard to DCC's reliance on R.C. § 5739.01(D)(5), the Commissioner argues first that the referenced subdivision is irrelevant because it is a sales tax provision. (Brief of Appellee at page 21.) Two pages later the Commissioner acknowledges that, pursuant to R.C. § 5741.02(C)(2), if a transaction would not be subject to Ohio's sales tax if transacted in Ohio, it is not subject to Ohio's use tax. Thus, the relevance of R.C. § 5739.01(D)(5) to this case -- If a transaction is a sale that by virtue of R.C. § 5739.01(D)(5) is not subject to sales tax as to a given person because that person is not the consumer of the property being sold, R.C. § 5741.02(C)(2) leads to the conclusion that the transaction can not be subject to use tax as to that same person.

With regard to DCC's substantive argument that under R.C. § 5739.01(D)(5) its dealers are the consumers of any tangible personal property used in performing the goodwill repair services in question, the Commissioner argues that the referenced subdivision covers only "tools, equipment, and supplies used or consumed in 'performing the service'." (Brief of Appellee at page 22.)

A side by side comparison of the language of R.C. § 5739.01(D)(5) and the Commissioner’s interpretation of such language demonstrates that the Commissioner’s interpretation impermissibly restricts the plain language of the General Assembly.

R.C. § 5739.01(D)(5)	Commissioner’s Interpretation
<p><u>any tangible personal property</u> used in performing the [R.C. § 5739.01(B)(3)] service</p>	<p><u>tools, equipment, and supplies</u> used or consumed in performing the R.C. § 5739.01(B)(3) service</p>

If the General Assembly had intended to limit R.C. § 5739.01(D)(5) in the manner suggested by the Commissioner, they could have done so. They did not. Inasmuch as their language is clear and unambiguous, it must be applied as written.

As the Court stated in *Storer Communications, Inc. v. Limbach* (1988), 37 Ohio St.3d 193:

In *Sears v. Weimer* (1944), 143 Ohio St. 312, 28 O.O. 270, 55 N.E.2d 413, we stated the first rule of statutory construction in paragraph five of the syllabus:

“Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.”

We amplified this rule in *State, ex rel. Foster, v. Evatt* (1944), 144 Ohio St. 65, 29 O.O. 4, 56 N.E.2d 265, at paragraphs seven and eight of the syllabus:

“7. Courts have no legislative authority and should not make their office of expounding statutes a cloak for Supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (*Singluff v. Weaver*, 66 Ohio St. 621, approved and followed.)

“8. There is no authority under any rule of statutory construction to add to, enlarge, Supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.”

Statutes clear in their terms need no interpretation; they simply need application. If the inquiry into language of a statute “reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied according.” *Provident Bank v. Wood* (1973), 36 Ohio St. 2d 101, 105-106, 65 O.O.2d 296, 298, 304 N.E.2d 378, 381 citing *Sears v. Weimer, supra. Id.* at 194.<sup>1</sup>

Under the plain language of R.C. § 5739.01(D)(5), a person who makes a sale of a repair service is the consumer of **any** tangible personal property used in performing the service.

### *Summary*

In the matter at hand, the Commissioner has assessed DCC as the consumer of parts purchased from its dealers that were used by the dealers in the performance of goodwill repairs. But under R.C. § 5738.01(D)(5), on and after September 29, 1997, DCC was not the consumer of such parts. Its dealers were. They used the parts to perform the repair services that underlie the Assessments. Thus, the assessment of tax against DCC on the cost of parts used to perform goodwill repairs on and after September 29, 1997 was improper.

### **DCC’s Reliance on R.C. 5739.01(E)(15)**

**If DCC is considered to be the consumer of any tangible personal property provided by a dealer when performing goodwill repairs, DCC's purchase of such property is exempt from tax to the extent the property is permanently transferred to the consumer of the repair service as an integral part of the performance of the service.**

Relying on R.C. § 5739.01(D)(5), DCC has argued that for repairs occurring on or after September 29, 1997 it is not the consumer of any tangible personal property used by its dealers when performing goodwill repairs.

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<sup>1</sup> See also *Philips Industries, Inc. v. Limbach* (1986), 37 Ohio St.3d 100.

If, however, the Court were to conclude that DCC is the consumer of such parts, the provisions of R.C. § 5739.01(E)(15) – which was enacted at the same time as R.C. § 5739.01(D)(5) -- come into play. R.C. § 5739.01(E)(15) excepts from the definition of retail sale, and, therefore, from tax, those sales in which the purpose of the consumer is:

To use tangible personal property to perform a service listed in division (B)(3) of section 5739.01 of the Revised Code, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service.

### *Reply to Commissioner*

The Commissioner again argues that this provision covers only tools, equipment and supplies. (Brief of Appellee at page 40.) As was the case with R.C. § 5739.01(D)(5), this restrictive interpretation is at odds with the plain language of the statute. An obvious indication that this is the case is that tools and equipment are never transferred to the consumer of the referenced services. That being the case, the General Assembly must have had a more expansive universe of tangible personal property in mind when enacting R.C. § 5739.01(E)(15). The language of R.C. § 5739.01(D)(5) refers to any tangible personal property. Nothing in R.C. § 5739.01(E)(15) suggests that the reference therein to tangible personal property was intended to be any less encompassing.

With regard to the examples offered on page 41 of the Brief of Appellee, DCC has no quarrel with the Commissioner's analysis -- except for noting that the several references to R.C. § 5739.01(E)(9) appear to be in error. That said, the examples don't in any way support the restrictive interpretation of R.C. § 5739.01(E)(15) for which the Commissioner argues. The simple fact is that if DCC is considered the consumer of any tangible personal property used when performing goodwill repairs, under the plain and unambiguous language of R.C. §

5739.01(E)(15) its purchase of such property is excepted from the definition of retail sale to the extent the property is permanently transferred to the owner of the vehicle being repaired as an integral part of the performance of the repair service.

Applying the language of R.C. § 5739.01(E)(15), if DCC purchases an alternator (of which it is considered to be the consumer) that is permanently transferred to a vehicle owner as part of the performance of a repair service, DCC's purchase is excepted from the definition of retail sale under R.C. § 5739.01(E)(15) if the transfer is integral to the performance of the service. And it is obvious that if a vehicle won't run without a new alternator, the transfer of the alternator is an integral part of the repair service.

The Commissioner may not like the result that flows when the language of R.C. § 5739.01(E)(15) is given effect, but the clear import of the language enacted by the General Assembly must be given effect.

#### *Summary*

If, despite the provisions of R.C. § 5739.01(D)(5), DCC is considered to be the consumer of any tangible personal property (not just tools, equipment and supplies) used by a dealer when performing goodwill repairs, DCC's purchase of such property is exempt from tax to the extent the property is permanently transferred to the consumer of the repair service as an integral part of the performance of the service.

**DCC's Reliance on R.C. 5739.01(E)(1)**

**If DCC is considered the consumer of any tangible personal property or taxable service provided by a dealer when performing goodwill repairs, such property or service was resold by DCC to the owners of the vehicles repaired by the dealers.**

In Proposition of Law 3 to the Brief of Appellant, DCC argued that if it is considered to be the consumer of any parts or labor used by its dealers when performing goodwill repairs, DCC should be considered as having resold the parts and labor to the owners of the vehicles repaired by its dealers.<sup>2</sup> In these circumstances, the transactions between DCC and its dealers would be excepted from the definition of "retail sale" under R.C. § 5739.01(E)(1) and, therefore, are not subject to Ohio sales or use tax. The referenced section reads:

“Retail sale” and “sales at retail” include all sales except those in which the purpose of the consumer is:

(1) To resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person \*\*\*.

The Board rejected DCC’s argument for a single reason – the Board concluded that DCC didn’t resell the repair services in question “in the same form” as received by DCC. DCC responded to the Board’s determination at pages 28-33 of the Brief of Appellant.

*Reply to Commissioner*

At pages 28 and 29 of the Brief of Appellee, the Commissioner sets forth his defense of the Board’s determination. The Commissioner attempts to divine and distinguish the benefit received by DCC (the labor of its dealers according to the Board; customer satisfaction according to the Commissioner) and a vehicle owner (a repaired vehicle according to both the Board and

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<sup>2</sup> This contention is not applicable to property purchased after September 29, 1997. See R.C. § 5739.01(D)(5), as amended by Am. Sub. H.B. 215, 1997 Ohio Laws 909, effective September 29, 1997.

the Commissioner) in any given repair transaction. Completely ignored in the Commissioner's analysis is *Cousino Constr. Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, which teaches us to ask a very simple question: "Does the purchaser (here, DCC) change the goods or services it has purchased in any way?"<sup>3</sup>

With regard to this question, unlike the rather unique cases involving employment services cited by the Commissioner, when a dealer repairs a vehicle the cost of which is borne by DCC under its goodwill repair program, specific defects in a specific vehicle are repaired; nothing more, nothing less. DCC passes along to the vehicle's owner the dealer's labor or the repaired vehicle, call it what you will, exactly as it was provided by the dealer -- without any alteration, modification or enhancement whatsoever (i.e., in the form in which it was received by DCC).

*Commissioner's Alternate Argument – No Consideration*

DCC builds into the price of each of the vehicles it manufactures an amount sufficient to cover the cost of goodwill repairs. In effect, DCC is paid in advance for the cost of these repairs. The Board acknowledged this fact. See Decision and Order at pages 13 and 14. (Appendix 20-21.) Nevertheless, the Commissioner argues that DCC can't be considered as having resold the

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<sup>3</sup> As the Court wrote in *Cousino Constr. Co. v. Wilkins*:

"R.C. 5739.01(E) excludes from the definition of '[r]etail sale' (and therefore excludes from the R.C. 5739.02 sales tax on retail sales) any sale 'in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person.' In other words, when the purchaser's intent in buying goods or services is to resell them to yet another purchaser without changing the goods or services in any way, the original purchase is not considered a 'retail sale' and is therefore not subject to the sales tax on retail sales. (And under R.C. 5741.02(C)(2), any sale not subject to sales tax is likewise not subject to the use tax.)" (Emphasis added)

parts and labor associated with goodwill repairs because DCC has no legal obligation to perform such repairs. More specifically, the Commissioner contends that DCC's customers did not provide any consideration for such repairs. (Brief of Appellee at pages 24-26.)

Again, DCC includes as part of the price charged for its vehicles an amount sufficient to cover the anticipated cost of goodwill repairs – knowing full well that such repairs would be sought and provided in the future. DCC's customers paid (and were taxed on) that additional amount. In these circumstances, consideration was paid for the goodwill repairs at the time the vehicles were purchased. This conclusion is supported by the decision rendered in *General Motors Corporation v. Dept. of Treasury* (2002), 466 Mich. 231, 644 N.W.2d 734, in which Michigan's Supreme Court held in analogous circumstances:

The cost of the goodwill adjustment policy is included in the retail price of GM vehicles as something that is purchased by customers". (Supp. 33, 35.)

Despite previously writing that *General Motors Corporation v. Wilkens*, 108 Ohio St.3d 90, 2006-Ohio-162, which addressed General Motors' goodwill policy, is "identical to this case in all significant respects" (Brief of Appellee at page 12), the Commissioner dismisses DCC's reliance on *General Motors Corporation v. Dept. of Treasury* because General Motors' goodwill policy is different than DCC's. (Brief of Appellee at page 27.) This lack of consistency on the part of the Commissioner would be less troubling if it were accurate. It is not.

First, the Commissioner writes that, unlike DCC's goodwill policy, General Motors' goodwill policy is a "promise to hear and address customer complaints even after the written warranty expires." (Brief of Appellee at page 27.) Actually, the quoted language is the Michigan Supreme Court's characterization of General Motors' policy and is based on language very similar to language found in DCC's warranty's manual. (Compare Exhibit 10d at page 52,

which advises a car owner who he or she should contact if not satisfied that the repair of his or her car is being handled correctly or equitably, with the Customer Satisfaction section of General Motors warranty manual.)

The Commissioner also incorrectly writes that “the DCC Dealer Warranty Manual states that ‘post-warranty adjustments are not legal obligations due vehicle owners under the terms of our warranty’.” (Brief of Appellee at page 27.) No such statement appears in the DCC Dealer Warranty Manual. It does appear in the company’s Dealer Policy Warranty Policy and Procedures Manual, which is distributed to dealers, but not customers. More significant, General Motors includes a similar provision in its Service Policies and Procedures Manual, indicating that goodwill repairs are discretionary on the part of the company.

The bottom line is that neither General Motors nor DCC considers itself to have a legal obligation to perform goodwill repairs. Each, however, has a well recognized and longstanding policy of performing such repairs. In these circumstances, Michigan’s Supreme Court determined that one purchasing a vehicle is paying part of the purchase price for parts and labor that may be provided in the future should the vehicle then be repaired free of charge under the manufacturer’s goodwill policy/program. Other states have done the same. See, for example, Wisconsin Reg. Tax 11.27(7), which excepts the cost of goodwill repairs from tax.

A retailer who provides free parts or services or both to a customer under an implied warranty in order to maintain good customer relations, although not required to do so under a sales agreement, maintenance agreement, express warranty, or insurance plan may purchase the parts without Wisconsin sales or use tax as property for resale.

This Court is asked to follow the lead of Michigan’s Supreme Court, and those other states that consider purchases of parts used to perform goodwill repairs as having been purchased

for resale (the consideration provided at the time the vehicle was purchased as part of the price of the vehicle) and, therefore, not subject to sales tax.

*Administrative Releases*

As noted in the Brief of Appellant, even the Commissioner has recognized the existence of consideration supporting a purchase for resale claim in circumstances analogous to a goodwill repair. After the 1991 enactment of Am. Sub H.B. 298, which for the first time characterized the issuance of a warranty, maintenance or service contract as a sale for Ohio sales tax purposes, the Commissioner issued an information release (Exhibit 21/Supp. 59-60) that reads in part:

**B) THE SALE OF WARRANTIES, MAINTENANCE OR SERVICE CONTRACTS, OR SIMILAR AGREEMENTS, WHERE THE VENDOR AGREES TO REPAIR OR MAINTAIN TANGIBLE PERSONAL PROPERTY, IS SUBJECT TO THE SALES OR USE TAX.**

**\*\*\*\*\* SPECIAL NOTES \*\*\*\*\***

The sale of a warranty, maintenance or service contract, or similar agreement is considered to be made at the vendor's location and is subject to the tax rate in effect in the vendor's county. All such sales must be reported under a regular county vendor's license which is obtained through the County Auditor's Office in the county where the sales are made. There is a \$25 application fee and a \$10 annual renewal fee.

Taxable warranties, contracts or agreements would also include so-called "third party" agreements wherein the vendor agrees to pay for the repairs or maintenance which will actually be done by a "third party." This does not include bona fide insurance policies that protect against loss or damage.

Since the transaction outlined in paragraphs A and B are now considered sales, the vendor could be eligible for exemption from sales or use tax on purchases of tangible personal property or selected services. The exemption would be based on the "resale" or "used directly in making a retail sale" exemption. If an exemption applies, the purchaser must provide the supplier with a properly completed exemption certificate.

In January 1992, the Commissioner issued a second information release (Exhibit 22/Supp. 61-62) that reads in part:

D) AS THE PROVIDER OF THE REPAIR, MAINTENANCE OR SERVICE, DO I HAVE ANY CLAIMS FOR EXEMPTION?

Yes

You can claim exemption on the purchase of parts used in fulfilling the warranty based on the claim “purchased for resale.”

If you subcontract the repair service to another, you can claim exemption on the purchase of a repair service (parts and/or labor) based on the “purchased for resale” exemption.

The first information release (Exhibit 21) acknowledges that one who sells a warranty, maintenance or service contract can claim a purchase for resale exception for purchases of items used to perform the contract. The Commissioner’s response is that the release says only that the resale exception could be available, not that it is available. Notwithstanding this hair-splitting, the release acknowledges that in some set of circumstances the resale argument is viable – meaning payment for the contract constitutes consideration for parts and labor provided if and when services are provided under the contract.

The second information release (Exhibit 22) says that if you provide a warranty, repair or maintenance service you “can claim exemption on the purchase of parts used in fulfilling the warranty based on the claim ‘purchase for resale.’” Here, the Commissioner says only that the release doesn’t apply to warrantors. And why is that? The release applies to persons who provide warranty, repair or maintenance services. But, according to the Commissioner, that can’t be the person who sells the contract and is directly responsible for seeing that it is fulfilled; it can only be a subcontractor hired by the warrantor. No reason is offered to support this

counter-intuitive conclusion. None exists. Indeed, the release anticipates that some warranty vendors will perform the warranty repairs and some may subcontract out the work.

### *Legislative History*

In the Brief of Appellee, the Commissioner refers to Legislative Service Commission summaries of various enactments. Not having presented the summaries as evidence during the Board's hearing (or even including them in the Appendix or Supplement to its Brief), the Commissioner cannot rely on them now.

Particularly relevant to the Commissioner's reliance on Legislative Service Commission summaries is the decision rendered in *State v. Conyers*, Case No. L-97-1327 (Ohio 6th App. Dist., July 17, 1998), wherein the Court said in footnote 1 that it would not consider statements contained in a summary prepared by the Ohio Legislative Reference Service Commission attached as appendixes to the parties' briefs because they were never made part of the record. Significantly, the Court noted that Ohio has no official legislative history. Thus, the summaries do not set forth facts generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

With regard to the point the Commissioner is attempting to make by referencing the Legislative Service Commission summaries – i.e., that only one exception or exemption can apply to any given transaction – that is not the case. Even a cursory reading of Chapter 5739 of the Revised Code reveals that a number of exceptions or exemptions are based on the use made of an item, while several others are based on who is using the item. And its not at all unusual for the exceptions or exemptions to overlap. (E.g., A casual sale of machinery directly used in a manufacturing operation is tax free under R.C. 5739.02(B)(8), but the sale would be tax free under R.C. 5739.02(B)(43)(g) as well.)

With specific reference to the purchase for resale exception as it relates to warranty related transactions, it was not until July 1, 1993, six months after the General Assembly repealed R.C. § 5739.01(E)(9) -- which had excepted from tax the purchase of things used or consumed to fulfill a contractual obligation incurred by a vendor of a warranty, maintenance or service contract -- that R.C. 5739.01(D)(4) was enacted. The latter subdivision, for the first time, prohibited a consumer from claiming the purchase for resale exemption on purchases of parts or labor used to fulfill a warranty obligation.<sup>4</sup>

Less than one year later, the General Assembly repealed R.C. 5739.01(D)(4) as part of Am. Sub. H.B. 715, 1994 Ohio Laws 7046. Once again, nothing in the Code prohibited a consumer from claiming the purchase for resale exemption on purchases of parts or labor used to fulfill a warranty obligation.

Roughly three years later, the General Assembly enacted R.C. 5739.01(D)(5) as part Am. Sub. H.B. 215, 1997 Ohio Laws 909. This subdivision prohibits the seller of a repair service from claiming the purchase for resale exemption on purchases of parts used to perform the service.

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<sup>4</sup> There is no basis for the Commissioner's claim that R.C. 5739.01(D)(4), enacted as part of Am. Sub. H.B. No. 152, is a clarification of prior law. As the Court said in *Lynch v. Gallia County Board of Commissioners* (1997), 79 Ohio St.3d 251, 254, "When confronted with amendments to a statute, an interpreting court must presume that the amendments were made to change the effect and operation of the law." See also *State v. Spiegel* (1914), 91 Ohio St. 13, 22, ("The presumption is that when the legislature adopts an amendment it intends to make some change in the statute amended \*\*\*."). Accordingly, unless a bill amending a statute contains a clear indication that the General Assembly intended retrospective application, the amendment may only apply to cases or transactions arising subsequent to its effective date. See *Pettit v. Buhrts*, Case No. 95APE06-765 (Ohio 10th App. Dist., April 18, 1996); see also *Reckart v. Nationwide Mutual Fire Ins. Co.*, Case No. 95APE08 -1085 (Ohio 10th App. Dist., Feb. 1, 1996). In this case, there is no indication that the General Assembly intended Am. Sub. H.B. 152 to apply retroactively.

As is apparent from the foregoing, during the 1990's the General Assembly struggled with the sales tax treatment to be accorded purchases of parts and/or labor used to perform warranty repairs. Part of the calculus involved whether the purchase for resale exception ought to be available to one purchasing parts or labor used to perform such repairs. At times the General Assembly concluded that the exception should not be available, and enacted legislation to that effect. At other times, there was no such restriction. Either way, the enactments of legislation specifically preventing a purchaser from relying on the exception are an indication that, but for such legislation, the exception would be available.

#### *Summary*

For transactions occurring before September 29, 1997, if DCC is considered the consumer of any tangible personal property or taxable service provided by a dealer when performing goodwill repairs, such property or service was resold by DCC to the owners of the vehicles repaired by the dealers. For that reason, DCC's purchases are not subject to tax.

#### **CONCLUSION**

For the reasons set forth in the Brief of Appellant and in this Reply Brief of Appellant, the Court is urged to rule that:

1. DCC did not acquire title to or possession of any tangible personal property that may have been provided in the transactions underlying the Assessments. Nor was a license to use or consume tangible personal property granted to DCC in these transactions. Consequently, the transactions on which the Assessments are based do not constitute sales for Ohio sales tax purposes and DCC can not be held liable for sales or use tax on such transactions pursuant to R.C. §§ 5739.01(B) and 5741.02(C)(2).

2. DCC did not use any tangible personal property or realize any benefit associated with any service that may have been provided in the transactions underlying the Assessments.

Consequently, DCC can not be held liable for use tax on the amounts paid for such property or service pursuant to R.C. § 5741.02(A)

3. The amounts paid by DCC are for parts and labor used or consumed to perform goodwill repairs to motor vehicles owned by others. DCC is not the consumer of such parts and labor as the term "consumer" is defined in R.C. §§ 5739.01(D) or 5741.01(F). Consequently, DCC can not be held liable for use tax on the amounts paid for such parts and labor pursuant to R.C. §§ 5741.02(B) and (C)(2).

4. If DCC is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, and if DCC's use of the parts and labor was in fulfillment of an obligation incurred under either (1) a warranty that comes with every motor vehicle manufactured by DCC or (2) a warranty, maintenance or service contract, or similar agreement by which DCC agreed to repair or maintain a motor vehicle, the transactions between DCC and its dealers are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(13) and, therefore, are not subject to Ohio sales or use tax pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

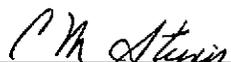
5. If DCC is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, DCC resold the parts and labor to the owners of the vehicles repaired by its dealers in the same form in which the parts and labor were received by DCC. In these circumstances, the transactions between DCC and its dealers are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(1) and, therefore, are not subject to Ohio sales or use tax pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

6. Because the amount charged for a new motor vehicle includes the anticipated cost of repairs to be performed in the future under DCC's warranty program, and further because sales or use tax was paid on the full amount charged for a new vehicle at the time the new vehicle was purchased, imposition of tax on the amount paid by DCC for repairs performed to vehicles covered by the company's warranty program unlawfully subjects the cost of the repairs to double taxation. In these circumstances, the transactions between DCC and its dealers are not subject to Ohio use tax pursuant to R.C. §§ 5741.02(C)(1).

7. If DCC is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, DCC either (1) incorporated the parts and labor into a vehicle produced for sale or (2) used the parts and labor primarily in a manufacturing operation to produce a vehicle for sale. In these circumstances, the transactions between DCC and its dealers are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(2) and (9) and, therefore, are not subject to Ohio sales or use tax pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

8. If DCC is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, DCC's purchases of the personal property used to perform such repairs are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(15) to the extent they occurred on or after September 29, 1997 and the property was permanently transferred to the consumer of the repair service as an integral part of such service. In these circumstances, DCC is not subject to Ohio sales or use tax on its purchases pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

Respectfully submitted

  
\_\_\_\_\_  
Charles M. Steines

**IN THE SUPREME COURT OF OHIO**

DaimlerChrysler Corporation,	)	Appeal from Ohio Board of Tax Appeals
	)	
Appellant,	)	BTA Case No: 2004-T-187
	)	BTA Case No: 2004-T-188
v.	)	
	)	
William W. Wilkins,	)	Supreme Court Case 06-1731
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

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**Appendix to Reply Brief of Appellant**

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3 of 3 DOCUMENTS

**Melissa R. Pettit et al., Plaintiffs-Appellees, v. Barbara J. Buhrts et al.,  
Defendants-Appellees, (Lightning Rod Mutual Insurance Company,  
Defendant-Appellant.)**

No. 95APE06-765

**COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN  
COUNTY**

*1996 Ohio App. LEXIS 1554***April 18, 1996, Rendered**

**NOTICE:** [\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING  
RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:** APPEAL from the Franklin County Court of Common Pleas.

**DISPOSITION:** Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant insurer challenged a judgment from the Franklin County Court of Common Pleas (Ohio). Plaintiffs, a husband and wife, sued defendant driver after the driver's vehicle struck the wife's car, causing her to sustain personal injuries. The trial court granted plaintiffs' motion for summary judgment and denied the insurer's motion for summary judgment regarding underinsured motorist coverage.

**OVERVIEW:** Plaintiffs brought a claim against their own insurer for a declaratory judgment relating to the availability of underinsured motorist insurance coverage. The driver who caused the accident had liability insurance with another insurance company. The other insurance company paid \$ 50,000 to plaintiffs, the liability limits of its policy. The parties stipulated that plaintiff suffered compensatory damages in excess of \$ 75,000. The trial court found that plaintiffs were entitled to collect up to the full limits of their underinsurance policy to the extent that their damages exceeded the amount that the driver's other insurance company had already paid them. The trial court also found that the husband's loss of consortium was separate and independent from his wife's bodily injury claim and was governed by the separate per person limits. On appeal, the court held that the trial court correctly granted plaintiffs' motion for summary judgment and denied the insurer's motion for summary judgment. The court agreed with the trial court that amendments to *Ohio Rev. Code Ann. § 3937.18*. did not contain a clear indication that the Ohio General Assembly intended it to be applied retroactively.

**OUTCOME:** The court found that the trial court correctly granted plaintiffs' motion for summary judgment and denied the insurer's motion for summary judgment on the grounds that the prior caselaw controlled the disposition of the case. Therefore, the court overruled the insurer's two assignments of error and affirmed the judgment from the trial court.

**COUNSEL:** Plymale & Associates, and Ronald E. Plymale, for appellees Melissa R. Pettit and Bryan Pettit.

Hamilton, Kramer, Myers & Cheek, and George A. Lyons, for appellee Barbara J. Buhrts.

Lane, Alton & Horst, and Cynthia L. Sands, for appellee Great-West Life & Annuity Insurance Co.

Wiles, Doucher, Van Buren & Boyle Co., L.P.A. and W. Charles Curley, for appellant.

**JUDGES:** DESHLER, J. CLOSE, J., concurs. HOLMES, J., dissents. HOLMES, J., retired, of the Supreme Court of Ohio, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

**OPINION BY:** DESHLER

**OPINION:** (REGULAR CALENDAR)

OPINION

DESHLER, J.

This case arises out of an automobile accident that occurred in Ross County, Ohio, on November 19, 1993. Plaintiffs filed suit in the Franklin County Court of Common Pleas against the tortfeasor Barbara J. Buhrts. Subsequently, an amended complaint naming additional defendants was filed. The only claim pertinent to this appeal was the one filed in the amended complaint [\*2] against defendant Lightning Rod Insurance Company for declaratory judgment relating to the availability of underinsured motorist insurance coverage. The parties stipulated as to the pertinent facts which, in essence, are as follows:

On November 19, 1993, plaintiff Melissa Pettit was operating an automobile on State Route 35 in Ross County, Ohio. Defendant Barbara Buhrts, driving her car in the opposite direction, went left-of-center and struck Pettit's car. As a result of that accident, Pettit sustained personal injuries.

At the time of the accident, Buhrts had liability insurance with State Farm with limits of \$ 50,000. Pettit had uninsured/underinsured motorist coverage with defendant Lightning Rod Mutual Insurance Company ("LRM") with limits of \$ 25,000 per person and \$ 50,000 per accident. The pertinent provisions of the LRM policy read as follows:

**"INSURING AGREEMENT**

"We will pay damages which an **insured** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of **bodily injury** sustained by an **insured** and caused by an accident.  
\*\*\* We will pay under this coverage only after the limits of [\*3] liability under any applicable **bodily injury** liability bonds or policies have been exhausted by payment of judgments or settlements.

" \*\*\*

"**Uninsured motor vehicle** means a land motor vehicle or **trailer** of any type:

"2. To which a **bodily injury** liability bond or policy applies at the time of the accident, but its limit for **bodily injury** liability is less than the limit of liability for **Uninsured Motorist Coverage**.

" \*\*\*

**"LIMIT OF LIABILITY**

"The limit of liability shown in the Declarations for 'each person' for **Uninsured Motorists Coverage** is our maximum limit of liability for all damages for **bodily injury** sustained by any one person in any one accident. Subject to this limit for 'each person', the limit of liability shown in the Declarations for 'each accident' for **Uninsured Motorist Coverage** is our maximum limit of liability for all damages for **bodily injury** resulting from any one accident. This is the most we will pay regardless of the number of:

"1. Insureds;

"2. Claims made;

" \*\*\*

"Any [\*4] amounts otherwise payable for damages under **Uninsured Motorist Coverage** shall be reduced by all sums paid because of the **bodily injury** by or on behalf of persons or organizations who may be legally responsible. \*\*\* " (Emphasis *sic*.)

As the liability carrier for the negligent tortfeasor, State Farm paid to Pettit the sum of \$ 50,000, the liability limits of its policy. In connection with the injuries she sustained in this accident, the parties stipulated that Pettit had suffered compensatory damages in excess of \$ 75,000.

At the trial level, the parties filed cross-motions for summary judgment and the trial court, after reviewing all the stipulated facts and applicable law, found that the cross-motions for summary judgment contained two separate legal issues: (1) Are plaintiffs precluded from recovery of uninsured/underinsured motorist coverage under the policy issued from LRM to plaintiff Bryan Pettit where the tortfeasor's policy limits equal the limits of plaintiffs' uninsured/underinsured policy? (2) Are plaintiffs precluded from "stacking" the consortium claim of plaintiff Bryan Pettit as a separate bodily injury claim under the uninsured/underinsured provisions [\*5] of the policy.

In regard to the first issue, the trial court found that the holding of the Ohio Supreme Court in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St. 3d 500, 620 N.E.2d 809, was dispositive. The court stated that:

"According to *Savoie*, individuals covered by an underinsured policy who suffer from injuries caused by an automobile accident are entitled to collect up to the full limits of their underinsurance policy to the extent that their damages exceed the amounts which the tort-feasor's insurer has already paid them. In this case, Plaintiff Melissa Pettit's damages exceed the amount she obtained from the tortfeasor's insurance carrier. Therefore, under *Savoie*, she is entitled to collect up to the policy limit. \*\*\* "

As to the second issue, the trial court found that the plaintiffs are entitled to a judgment finding that plaintiff Bryan Pettit's loss of consortium is separate and independent from plaintiff Melissa Pettit's bodily injury claim and is governed by the separate per person limits.

Defendant LRM appeals, setting forth two assignments of error:

"1. The trial court erred in granting Plaintiff Melissa Pettit's motion for summary [\*6] judgment.

"2. The trial court erred in denying Defendant Lightning Rod Mutual Insurance Company's motion for summary judgment."

Defendant's two assignments of error will be addressed together as both raise the issue of whether the enactment of Am.Sub.S.B. 20 in 1994 amending *R.C. 3937.18* was intended by the legislature to correct the Supreme Court's decision in *Savoie* and should, therefore, be applied retroactively to the facts of this case, which occurred prior to the amendment n1 . The trial court refused to apply Am.Sub.S.B. 20 retroactively relying upon holdings enunciated by other branches of the Franklin County Court of Common Pleas.

n1 Defendant has not separately challenged the trial court's holding that plaintiff's may "stack" Bryan Pettit's loss of consortium claim as a separate bodily injury claim.

Determining whether a statute is to be applied retroactively is a two-step inquiry. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 522 N.E.2d 489. The first [\*7] step, as established by *R.C. 1.48*, involves determining whether the General Assembly intended the statute to have retroactive application. 36 Ohio St. 3d at 105-107. The second step involves determining whether retroactive application of the statute would violate Section 28, Article II of the Ohio Constitution. 36 Ohio St. 3d at 106. However, the constitutional inquiry does not arise unless it is first determined that the legislature intended the statute to be applied retroactively. *Id.*

*R.C. 1.48* provides that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." Thus, unless a statute contains a clear indication that the legislature intended it to apply retroactively, the statute may only apply to cases which arise subsequent to its enactment. *Kiser v. Coleman* (1986), 28 Ohio St. 3d 259, 262, 503 N.E.2d 753.

Having carefully reviewed Am.Sub.S.B. 20, it is apparent that its language does not contain a clear indication that the General Assembly intended it to be applied retroactively. In fact, the provision contains no mention whatsoever of application prior to its effective date. Consequently, Am.Sub.S.B. 20 is prospective only [\*8] in its application. Accord *Cartwright v. Maryland Ins. Group* (1995), 101 Ohio App. 3d 439, 655 N.E.2d 827; *Legge v. Nationwide Mutual Insurance Co.* (Sept. 29, 1995), 1995 Ohio App. LEXIS 4315, Franklin App. No. 95APE04-396, unreported (1995 Opinions 4223), fn. 1; *United Auto Serv. Assn. v. Mack* (May 17, 1995), 1995 Ohio App. LEXIS 2046, Clark App. No. 94-CA-32, unreported; *Hobler v. Motorists Mut. Ins. Co.* (Aug. 9, 1995), 1995 Ohio App. LEXIS 3290, Auglaize App. No. 2-95-10, unreported.

Based on the foregoing discussion, the trial court correctly granted plaintiffs' motion for summary judgment and denied defendant's motion for summary judgment on the grounds that *Savoie* controls the disposition of the present case. Defendant's two assignments of error are overruled.

Having overruled both of defendant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CLOSE, J., concurs.



HOLMES, J., dissents.

**DISSENT BY: HOLMES**

**DISSENT: HOLMES, J., dissenting:**

In that I differ from the majority as to the controlling law to be applied to the issue of the retroactivity of Am.Sub.S.B. 20, I must respectfully dissent. It is [\*9] true that generally in the analysis of the retroactivity of a legislative act, the two-step process, as set forth in *Van Fossen v. Babcock & Wilcox Co. (1988)*, 36 Ohio St. 3d 100, 522 N.E.2d 489, is applied. Such an analysis was the basis of the majority opinion herein, and it was determined that the General Assembly had not clearly indicated that the legislative act was to be applied retroactively, therefore, the second step as to the determination whether it was substantive and violative of Section 28, Article II, Ohio Constitution, was not necessary.

As stated, the application of the analysis of *Van Fossen* would generally be valid in the consideration of the issue of retroactivity of a legislative act; however, this case presents the unusual exception to that rule. Here, rather than dealing with a legislative act which changes the existing law, we are dealing with a legislative act which corrects a judicial interpretation of the law, and restates in such act what had been the existing legislative intent that had been specifically pronounced as the law of Ohio by a prior General Assembly.

In cases preceding 1980, the majority of the Ohio Supreme Court had held that provisions [\*10] barring the stacking of uninsured and underinsured coverages violated public policy and were thus unenforceable. *Grange Mut. Cas. Co. v. Volkmann (1978)*, 54 Ohio St. 2d 58, 374 N.E.2d 1258; *Curran v. State Auto Mut. Ins. Co. (1971)*, 25 Ohio St. 2d 33, 266 N.E.2d 566. In 1980, the 114th General Assembly enacted R.C. 3937.18(G) which provided, in pertinent part:

"Any automobile liability or motor vehicle liability policy of insurance \*\*\* may include terms and conditions that preclude stacking of [uninsured and underinsured] coverages."

The Ohio Supreme Court unanimously interpreted this statute to be a legislative countermand of *Volkmann* and *Curran*. Accordingly, in *Karabin v. State Auto. Mut. Ins. Co. (1984)*, 10 Ohio St. 3d 163, 462 N.E.2d 403, in *Dues v. Hodge (1988)*, 36 Ohio St. 3d 46, 521 N.E.2d 789, and in *Hower v. Motorists Mut. Ins. Co. (1992)*, 65 Ohio St. 3d 442, 605 N.E.2d 15, the Supreme Court held that such clauses were enforceable when clear, conspicuous and unambiguous.

Then, in 1993, the majority of the Supreme Court shifted gears in *Savoie v. Grange Mut. Ins. Co. (1993)*, 67 Ohio St. 3d 500, 620 N.E.2d 809, and declared [\*11] that any clauses in insurance policies that precluded inter-family stacking of coverage in separate policies were legally unenforceable. Chief Justice Moyer in dissent, Justice Wright concurring, quite correctly stated that: "The action of the majority defies not only logic and sound jurisprudence but also, more importantly, the General Assembly." 67 Ohio St. 3d at 512. Further, the Chief Justice stated that: "In addition to the disrespect that the majority shows for *stare decisis*, its rulings violate an even more fundamental tenet of our system of government -- that of separation of powers." *Id.* at 513. "The legislature is the primary judge of the needs of public welfare, and the court will not nullify the decision of the legislature except in the case of a clear violation of a state or federal constitutional provision. *Williams v. Scudder (1921)*, 102 Ohio St. 305, 131 N.E. 481, paragraphs three and four of the syllabus." *Savoie* at 515.

"When the General Assembly enacts a valid, constitutional law that reverses or alters law that this court has announced, this court is bound to follow that law. To do otherwise violates the fundamental principle of separation of powers." [\*12] 67 Ohio St. 3d at 512.

Following the Supreme Court's majority opinion in *Savoie*, the 120th General Assembly enacted Am.Sub.S.B. 20.

The act specifically states at Section 7:

"It is the intent of the General Assembly in amending division (A)(2) of *section 3937.18 of the Revised Code* to supersede the effect of the holding of the Ohio Supreme Court in the October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co. (1993), 67 Ohio St. 3d 500, 620 N.E.2d 809*, relative to the application of underinsured motorist coverage in those situations involving accidents where the tortfeasor's bodily injury liability limits are greater than or equal to the limits of the underinsured motorist coverage."

Other sections of the act are also specific that Am.Sub.S.B. 20 was being enacted not only to express the intent of the 120th General Assembly, but to supersede the effect of the holding in *Savoie* and to reexpress and confirm the legislative intent of the 114th General Assembly in enacting Am.H.B. 489 containing *R.C. 3937.18(G)*. Section 9 of Am.Sub.S.B. 20 accordingly states:

"It is the intent of the General Assembly in amending division (G) of *section 3937.18 of the* [\*13] *Revised Code* to supersede the effect of the holding of the Ohio Supreme Court in its October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co. (1993), 67 Ohio St. 3d 500, 620 N.E.2d 809*, relative to the stacking of insurance coverages, and to declare and confirm that the purpose and intent of the 114th General Assembly in enacting division (G) of section 3937.18 in Am. H.B. 489 was, and the intent of the General Assembly in amending *section 3937.18 of the Revised Code* in this act is, to permit any motor vehicle insurance policy that includes uninsured motorist coverage and underinsured motorist coverage to include terms and conditions to preclude any and all stacking of such coverages, including interfamily and intrafamily stacking."

Other sections of the act are equally expressive of the legislative intent of Am.Sub.S.B. 20. n2

n2 "Section 8. It is the intent of the General Assembly in amending division (A)(2) of *section 3937.18 of the Revised Code* to declare and confirm that the purpose and intent of the 114th General Assembly in enacting division (A)(2) of section 3937.18 in Am. H.B. 489 was, and the intent of the General Assembly in amending *section 3937.18 of the Revised Code* in this act is, to provide an offset against the limits of the underinsured motorist coverage of those amounts available for payment from the tortfeasor's bodily injury liability coverage.

" \*\*\*

"Section 10. It is the intent of the General Assembly in enacting division (H) of *section 3937.18 of the Revised Code* to supersede the effect of the holding of the Ohio Supreme Court in its October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co. (1993), 67 Ohio St. 3d 500, 620 N.E.2d 809*, that declared unenforceable a policy limit that provided that all claims for damages resulting from bodily injury, including death, sustained by any one person in any one automobile accident would be consolidated under the limit of the policy applicable to bodily injury, including death, sustained by one person and to declare such policy provisions enforceable."

[\*14]

The Ohio General Assembly has made it clear that it was not codifying a new law in Ohio in enacting Am.Sub.S.B. 20, but on the contrary, was providing an act which restated the legislative intent that had been enacted within *R.C. 3937.18* in the 118th General Assembly. By explicitly superseding the interpretation of *R.C. 3937.18* in *Savoie*, the General Assembly had clarified what it intended the law to be in the first instance. This is clearly within the province of

the legislative body.

The specific issue of whether or not "corrective" or "superseding" legislative law must be considered retroactive has never been specifically decided by the Supreme Court of Ohio. However, in this regard, it was pointed out by Chief Justice Moyer in the dissent in *Savoie* that the Ohio Supreme Court had previously asserted in *Leis v. Cleveland Ry. Co.* (1920), 101 Ohio St. 162, 128 N.E. 73, that: "'The law [common law] itself, as a rule of conduct may be changed at the will \*\*\* of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed.'" (Citation omitted.) *Id.* at 165.

Many [\*15] other states have specifically addressed this issue. For instance, the Supreme Court of Connecticut has stated in *State v. Magnano* (1987), 204 Conn. 259, 528 A.2d 760:

" \*\*\* Like legislatures, judges are fallible. The legislature has the power to make evident to us that it never intended to provide a litigant with the rights that we previously had interpreted a statute to confer. \*\*\* " *Id.* at 772.

The principle that legislative "clarifications" of prior legislation should be applied retroactively has been recognized by a number of American courts. In *GTE Sprint Communications Corp. v. State Bd. of Equalization* (1991), 2 Cal.Rpt.2d 441, the court stated:

" \*\*\* Where a statute or amendment clarifies existing law, such action is not considered a change because it merely restates the law as it was at the time, and retroactivity is not involved. \*\*\* " *Id.* at 444-445.

Also, acting on what it believed to be faulty judicial interpretation of a statute, the Michigan Legislature amended the statute in question. Even though the amending legislation was not made expressly retroactive, the Michigan Court of Appeals upheld that result, and stated: [\*16]

"Clearly, the Legislature intended that 1987 P.A. 39 have retroactive effect. \*\*\* In [a prior decision], this Court declared that 'a later statement of legislative intent by the Legislature is binding on this Court.' Although the Legislature cannot, through amendment, change the settled meaning of a statute, it can amend a statute to make plain what the legislative intent had been all along from the time of the statute's enactment, if varying interpretations of the statute have created uncertainty. In those circumstances, the amendment has a retroactive effect. \*\*\* This principle of statutory construction \*\*\* applies where no settled interpretation of the statute has been established and where the amendment was adopted soon after the controversy as to its interpretation arose -- such as here. That timing indicates the amendment was a legislative interpretation of the original act rather than a substantial change of it. \*\*\* " *Trinova Corp. v. Dept. of Treasury* (Mich.App. 1988), 166 Mich. App. 656, 421 N.W.2d 258, 262.

The Minnesota Supreme Court reached a similar result with identical reasoning in *Dabrowski v. Dabrowski* (Minn.App.1991), 477 N.W.2d 761, 765: [\*17]

"'Generally, a law is not construed to be retroactive unless that is clearly the intent of the legislature.' \*\*\* However, where the legislature clarifies a statute, the statute may be read retroactively. \*\*\* In addition, where the legislature's prompt reaction to a court's statutory construction shows disagreement with the court's construction rather than a change in legislative policy, 'it is not a question of retroactivity, but

more merely akin to a clarification.'\*\*\* "

See, also, *In re Eastport Assoc. v. City of Los Angeles* (C.A.9, 1991), 935 F.2d 1071, 1080: "When an amendment clarifies rather than changes existing law, it may be inferred that the amendment applies retroactively"; *Daley v. Zebra Zone Lounge, Inc.* (Ill.App.1992), 236 Ill. App. 3d 511, 603 N.E.2d 785, 177 Ill. Dec. 715: "A subsequent amendment to a statute may reveal the legislature's intent in enacting a statute, especially where the amendment was enacted soon after controversy developed over the original version. [Therefore,] retroactive application is especially appropriate where the amendment does not change the law but merely serves to clarify a statute."; *Coulter v. Newmont Gold [\*18] Co.* (D.Nev. 1992), 799 F. Supp. 1071, 1074: "Where 'Congress enacts [a] statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture,' the statute must be applied retroactively."

Clearly, the intent of the General Assembly in enacting Am.Sub.S.B. 20 was to specifically state that the result in *Savoie* was not what it ever intended the law to be. This is especially evidenced by the legislatively-selected language that the intention of the act was to "supersede" rather than just overrule *Savoie*. This language makes it clear that the majority opinion in *Savoie* never was the law in this state.

Based upon all of the foregoing, the legislative correction of the majority holding in *Savoie*, and the clarification of the intent of *R.C. 3937.18* in Am.Sub.S.B. 20 should be applied to the facts of this case.

HOLMES, J., retired, of the Supreme Court of Ohio, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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**Harlan Reckart, Sr. et al., Plaintiffs-Appellees, v. Nationwide Mutual Fire Insurance Co., Defendant-Appellant, State Farm Insurance Co. et al., Defendants-Appellees.**

**No. 95APE08-1085**

**COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY**

*1996 Ohio App. LEXIS 303*

**February 1, 1996, Rendered**

**NOTICE:** [\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:** APPEAL from the Franklin County Court of Common Pleas.

**DISPOSITION:** Judgment affirmed.

**COUNSEL:** Nurenberg, Plevin, Heller & McCarthy Co., L.P.A., William S. Jacobson and Joel Levin, for plaintiffs-appellees.

Crabbe, Brown, Jones, Potts & Schmidt, Michael R. Henry and Kristen H. Smith, for defendant-appellant.

**JUDGES:** BOWMAN, P.J. BRYANT and CLOSE, JJ., concur.

**OPINION BY:** BOWMAN

**OPINION:** (REGULAR CALENDAR)

DECISION

BOWMAN, P.J.

On February 22, 1995, Karen and Ronald Reckart were killed in an automobile accident caused by the negligence of Donald Chapman. It was stipulated Chapman carried insurance coverage in the amount of \$ 12,500 per person and \$ 25,000 per occurrence. A declaratory judgment action was filed by the parents, brothers and sisters of Karen and Ronald, requesting a declaration that they were entitled to recover damages based on the uninsured motorist provision in their various policies of insurance. n1 Nationwide Mutual Fire Insurance Company ("Nationwide") and Allstate Insurance Company denied coverage based on language in their policies that defined a relative as one who [\*2] regularly resided in the insured's household and was related to the insured by blood, or who lived temporarily outside the household. It was undisputed that Karen did not live with her brother Robert S. Corkish, Jr., or her sister Carol S. Kaspar.

n1 Harlan and Loretta Reckart, Ronald's parents, Robert and Claudia Corkish, Karen's parents, Robert

Corkish, Jr., Karen's brother, and Carol Kaspar, Karen's sister, filed claims against Nationwide. Timothy Reckart, Ronald's brother, filed a claim against State Farm Insurance Company which was settled and dismissed with prejudice. Vikki Ellis, Karen's sister, filed a claim against Allstate Insurance Company.

The trial court entered judgment against Nationwide and Allstate and Nationwide appeals the judgment as to Robert Corkish, Jr., and Carol Kaspar, setting forth the following assignment of error:

"THE TRIAL COURT ERRED IN HOLDING THAT A NON-RESIDENT RELATIVE SIBLING IS LEGALLY ENTITLED TO RECOVER AND UNDERINSURANCE COVERAGE IS MANDATED BY R.C. § 3937.18 [\*3] WHEN A SISTER IS INJURED BY AN UNDERINSURED MOTORIST."

Pursuant to *Civ.R. 56*, summary judgment is proper if there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. It is a procedural device designed to terminate litigation at an early stage where a resolution of factual disputes is unnecessary. However, it must be awarded with caution, resolving all doubts and construing the evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion. See *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 433 N.E.2d 615; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46. A motion for summary judgment is only appropriate where, after construing the evidence most strongly in favor of the party opposing the motion, reasonable minds could only conclude that the movant is entitled to judgment. *Whiteleather v. Yosowitz* (1983), 10 Ohio App.3d 272, 461 N.E.2d 1331.

The burden of establishing that material facts are not in dispute and that no genuine issue of material fact exists is [\*4] on the party moving for summary judgment. When a motion for summary judgment is made and supported as provided for in *Civ.R. 56*, an adverse party may not rest upon the allegations or denials of his pleadings, but must produce evidence on issues for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095.

The trial court found Corkish and Kaspar, as brother and sister of Karen Reckart, were her relatives and next of kin and, therefore, legally entitled to recover damages pursuant to Ohio's wrongful death statute, *R.C. 2125.02*. In determining that the restrictive language in Nationwide's insurance policy could not bar Corkish and Kaspar from recovery, the trial court based its decision on *Sexton v. State Farm Mutl. Automobile Ins. Co.* (1982), 69 Ohio St.2d 431, 433 N.E.2d 555, which held at the syllabus:

"1. *R.C. 3937.18* provides protection for insured persons for damages for bodily injury and death, *inter alia*, which they are legally entitled to recover from owners or operators of uninsured motor vehicles.

"2. An insured father is entitled to recover those damages, which [\*5] he was legally obligated to pay, under his uninsured motorist coverage for the wrongful death of a minor child, even if the child was not an insured according to the terms of the policy."

The language in Nationwide's policy, like the policy language in *Sexton*, attempted to exclude coverage for damages resulting from injury or death of relatives who did not reside in the insured's household. The Ohio Supreme Court found such policy language was contrary to the purposes of the Ohio uninsured/underinsured motorist statute, *R.C. 3937.18(A)*, and was, therefore, unenforceable.

The arguments raised by appellant have been considered and rejected by this court on several occasions. Appellant

attempts to distinguish *Sexton* on the basis that *Sexton* was the father of a minor decedent with financial responsibility for her, although she did not reside in his household, whereas, in this instance, Karen Reckart was an adult who did not reside with either her brother or her sister. *R.C. 2125.02* has been amended since the decision in *Sexton*, however, to allow for all injuries and losses, and pecuniary loss is not necessary for recovery of damages for those within the statute's coverage. [\*6]

In *Rose v. Grange Ins. (Jan. 13, 1994), Franklin App. No. 93 AP-1134, 1994 Ohio App. LEXIS 65*, unreported (1994 Opinions 45), based on facts identical to the facts of this case, this court followed *Savoie v. Grange Mut. Ins. Co. (1993), 67 Ohio St.3d 500, 620 N.E.2d 809*, and concluded a brother could recover under the uninsured motorist provisions in his insurance policy, although the decedent did not reside with him, was not named in the policy and was not injured in a motor vehicle covered by the policy. See, also, *Wells v. State Farm Mut. Auto. Ins. Co. (Aug. 16, 1994), Franklin App. No. 94 APE01-115, 1994 Ohio App. LEXIS 3659*, unreported (1994 Opinions 3688).

In *Ramage v. Central Ohio Emergency Serv., Inc. (1992), 64 Ohio St.3d 97, 592 N.E.2d 828*, the Ohio Supreme Court rejected appellant's argument that other next of kin who are not presumed to have suffered damages may not recover damages where there is a surviving spouse, parent or child. In paragraph two of the syllabus, the court in *Ramage* held:

"Pursuant to the Ohio wrongful death statute, *R.C. 2125.02*, other next of kin, although not presumed to have sustained damages, may recover damages for [\*7] mental anguish and loss of society upon proper proof thereof, even though there is a surviving parent, spouse, or minor children."

Appellant also argues that amendments to *R.C. 3937.18(A)*, which became effective October 20, 1994, precludes appellees from recovery. Appellant admits that this amendment, which became known as the *Savoie* amendment, was not in effect either at the time of Karen's death or when this action was filed. In the amendment to *R.C. 3937.18*, the General Assembly stated its intent was to supersede the Ohio Supreme Court's holding in *Savoie* as to the meaning of per person limits, claim stacking and the use of underinsurance coverage as excess insurance coverage. Appellant argues that the purpose of the legislation was only for clarification and as it does not alter the rights of litigants, it may be applied retroactively. We reject appellant's argument.

In the first instance, there is no clear indication in the statute that it was intended to be retroactive as required by *R.C. 1.48. Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100, 522 N.E.2d 489*. As the Second District Court of Appeals stated, in *United Servs. Auto. Assn. v. Mack* [\*8] (May 17, 1995), Clark App. No. 94- CA-32, 1995 Ohio App. LEXIS 2046, unreported:

" \*\*\* We find, however, that unlike some statutes or amendments enacted by the General Assembly, there is no language in the amended statute or the uncodified sections of the statute that would make the *Savoie* amendment applicable to actions pending in the court on the statute's effective date. We note that the General Assembly used the verbs 'supersede' and 'declare and confirm' to describe its purpose in amending *R.C. 3937.18*. We will not stretch the meaning of these verbs beyond their accepted and ordinary usage. Moreover, since the General Assembly has, in the past, used express language to apply new or amended statutes to pending actions, we will not infer its intent to do so without language expressing or clearly implying that intent. Without express language from the General Assembly that the *Savoie* amendment is to apply retroactively to pending actions, we lack the threshold [\* 10] requirement to examine the constitutional question under Section 28, Article II of the Ohio Constitution. Thus, we conclude that the *Savoie* amendment is not retroactive."

Second, we find that the amendment [\*9] to *R.C. 3937.18* does more than clarify the meaning of the statute. The

amendment substantially alters the statutory right of individuals such as those in appellees' position to recover damages based on the interpretation of *R.C. 2125.02* and *3937.18(A)* by the Ohio Supreme Court in *Savoie*. Inasmuch as application of the amendment to *R.C. 3937.18* would eliminate the right of Corkish and Kaspar to recover, it is not intended just for clarification and cannot be applied retroactively to a pending action.

For the foregoing reasons, appellant's assignment of error is not well-taken and is overruled, and the judgment of the trial court is affirmed.

*Judgment affirmed.*

BRYANT and CLOSE, JJ., concur.

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**State of Ohio, Appellee v. David Conyers, Appellant**

**Court of Appeals No. L-97-1327**

**COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, LUCAS COUNTY**

*1998 Ohio App. LEXIS 3274*

**July 17, 1998, Decided**

**PRIOR HISTORY:** [\*1] Trial Court No. CR 97-1904.

**DISPOSITION:** JUDGMENT REVERSED.

**COUNSEL:** Julia R. Bates, prosecuting attorney, and Eric Baum and Brenda J. Majdalani, for appellee.

Jeffrey Gamso, for appellant.

**JUDGES:** Peter M. Handwork, P.J. George M. Glasser, J., Richard W. Knepper, J. CONCUR.

**OPINION BY:** PETER M. HANDWORK

**OPINION: OPINION AND JUDGMENT ENTRY**

HANDWORK, P.J. This appeal is brought by appellant, David Conyers, to challenge the ruling of the Lucas County Court of Common Pleas that appellant is guilty of escape, a violation of *R.C. 2921.34(A)* and (C)(2)(a), and the three year prison sentence imposed by the trial court as punishment. Appellant has presented four assignments of error that are:

"First Assignment of Error

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING APPELLANT, A PAROLEE IN A HALFWAY HOUSE, GUILTY OF ESCAPE UNDER *R.C. 2921.34* WHERE *R.C. 2967.15(C)(1)* AND (2) PROVIDE THAT SUCH A PAROLEE SHALL BE TREATED AS A PAROLE VIOLATOR WHO CANNOT BE PROSECUTED FOR ESCAPE.

"Second Assignment of Error

II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING APPELLANT GUILTY OF ESCAPE UNDER *R.C. 2921.34* WHERE NO STATUTE DEFINES THE ELEMENT OF 'BREAKING DETENTION' NEEDED TO SUPPORT [\*2] A CONVICTION FOR ESCAPE.

"Third Assignment of Error

III. BECAUSE APPELLANT WAS PAROLED BEFORE THE OCTOBER 4, 1996 EFFECTIVE DATE OF H.B. 154,

WHICH MODIFIED *R.C. 2921.01(E)* TO INCLUDE PAROLEES WITHIN THE DEFINITION OF DETENTION, CONVICTING APPELLANT OF ESCAPE PURSUANT TO THAT MODIFICATION IS AN IMPERMISSIBLE EX POST FACTO AND RETROACTIVE APPLICATION OF A STATUTE, IN VIOLATION OF THE UNITED STATES CONSTITUTION, ART. I, SEC. 9, AND THE OHIO CONSTITUTION, ART. II, SEC. 28.

"Fourth Assignment of Error

IV. THE TRIAL COURT ERRED BY CONVICTING APPELLANT OF ESCAPE WHERE HE RAISED THE AFFIRMATIVE DEFENSE THAT HIS DETENTION WAS IRREGULAR WHEN HE WAS PLACED IN A HALFWAY HOUSE A SECOND TIME WITHOUT PROPER PROCEDURES."

Before we address any of the assignments of error, we first consider: (1) a motion to file a supplemental brief with additional authority filed by appellee, the state of Ohio; (2) a memo in opposition to that motion and in the alternative a motion to file a sur-reply brief filed by appellant; (3) a motion for leave to file supplemental authority filed by appellee; and (4) a memorandum in response with a motion to strike filed by appellant. We find that justice is best [\*3] served by permitting appellee to file the supplemental brief and by permitting appellant to file the sur-reply brief. Accordingly, appellee's motion to file a supplemental brief is granted, and appellant's motion to file a sur-reply brief is granted.

We order that both the supplemental brief and the sur-reply brief are filed instanter. We also find that justice is best served by permitting appellee to file supplemental authority, so appellee's motion for leave to file supplemental authority is granted. Appellant's motion to strike any reference in appellee's motion to a judge who did not sign the decision offered as supplemental authority is denied, as the references made by appellee have no bearing on this court's consideration of the reasoning used in the decision in question.

The facts in this case are quite straight forward. Appellant was released from prison on parole on April 12, 1996. He was paroled to a halfway house operated by the Volunteers of America ("VOA") in Toledo, Ohio. Parolees who are residents of the halfway house must have a signed pass from their parole officer to leave the facility. The doors at the entrance are locked, and workers from VOA sign visitors and [\*4] residents in and out at the front desk just inside the entrance.

In October 1996, appellant was allowed to move from the halfway house. He was residing with his godmother and was still on parole.

In January 1997, parole authorities required appellant to return to the halfway house as a resident because of an alleged parole violation. When he moved back into the halfway house, his parole officer reviewed the facility rules with him. Included in the rules was a warning that if he left the facility without permission, he could be charged with escape.

On April 20, 1997, appellant was given a pass to leave the facility for a specified amount of time. He returned to the halfway house fifteen minutes late. A worker at the intake window of the halfway house told appellant he was required to take a breath alcohol test because he was late. Appellant refused to take the breath test, and left the halfway house. He did not return to the halfway house.

On May 9, 1997, appellant was indicted. He was charged with escape, a violation of *R.C. 2921.34*. As we previously noted, following a bench trial appellant was convicted of committing the crime of escape and was sentenced to three years in prison. [\*5] Appellant is now challenging that conviction and sentence.

In support of his first assignment of error, appellant argues that as a parolee, he could not be charged with the crime of escape. He points to a conflict between statutes enacted to govern parolees in Ohio and statutes enacted to punish persons in detention who possess a deadly weapon while under detention or who escape. He states that after this court applies the rules of statutory construction, the only conclusion this court can reach is that as a parolee he could not be charged with escape in this case.



Appellee responds that there is no conflict between the statutes in question. Appellee also argues that even if this court finds that a conflict does exist between the statutory provisions, after applying the rules of statutory construction this court will conclude that appellant was properly charged with and convicted of the crime of escape.

Appellant and appellee agree that until recently the provisions in the relevant statutes excluded parolees from the groups of persons who could be charged with escape. Appellant and appellee also agree that recent changes have been made in the relevant statutes. Appellant contends [\*6] that even after the changes were made, a parolee cannot be charged with escape. Appellee argues that the changes were made so that a parolee can be charged with escape. We therefore begin our consideration of this issue by reviewing the changes that have been made in the relevant statutes.

*R. C. 2921.34 (A)(1)* provides:

"(A)(1) No person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention, or purposely fail to return to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement."

Key elements to the crime of escape include a person who is under detention and the breaking of that detention. To learn who qualifies as a person under detention, one must refer to the provisions of *R. C. 2921.01(E)*.

The provisions of *R. C. 2921.01(E)* were changed by the legislature while appellant was on parole. When appellant was first released from prison on parole, the provisions of *R. C. 2921.01(E)* included the following statement:

"Detention does not include supervision of probation or parole, or constraint incidental [\*7] to release on bail."  
*R. C. 2921.01(E)* eff. 8-23-95.

While appellant was still on parole, and before he was sent back to VOA, the legislature changed the provisions of *R. C. 2921.01(E)*. The provisions of *R. C. 2921.01(E)* were changed on October 4, 1996 to provide, in pertinent part:

"'Detention' means \*\*\* supervision by an employee of the department of rehabilitation and correction of a person on any type of release from a state correctional institution." *R. C. 2921.01(E)*.

The statement found in the older version of the statute that excluded persons under supervision for probation or parole from the definition of detention was omitted. The changes were made when the legislature enacted a new law to prohibit persons under detention from possessing weapons. n1

n1 Both appellant and appellee have referred to statements contained in a summary prepared by the Ohio Legislative Service Commission regarding the reasons for changing the definition of detention. We note, however, that Ohio has no official legislative history. *State v. Dickinson* (1971), 28 Ohio St. 2d 65, 67, 275 N.E.2d 599. Since the materials referred to by the parties and attached as appendixes to their briefs were never made a part of the record, we will not consider them. See *United Auto Workers Local Union 1112 v. Philomena* (March 10, 1998), 1998 Ohio App. LEXIS 929, Franklin App. No. 97APE01-69 and 97 APE01-100, unreported. Rather, we will construe the legislative intent through the time-honored method used in Ohio, considering "the entire act and the surrounding circumstances attending its enactment." *State, ex rel. Mitman v. Bd. of County Commissioners of Greene County* (1916), 94 Ohio St. 296, 308, 113 N.E. 831.

[\*8]

Appellant concedes that the changed provisions of *R. C. 2921.01(E)* now include in the definition of "detention", persons who are released from prison but who are still under the supervision of a parole officer. Accordingly, it follows that if a parolee breaks detention, the key elements of escape are fulfilled.

However, as appellant points out, the analysis of the issues in this case does not end with a review of the change in the definition of "detention" found in *R.C. 2921.01(E)* and its effect on who is encompassed under the elements of the crime of escape found in *R.C. 2921.34*. Instead, we must consider whether the change in the definition of "detention" and the ensuing broadening of persons subject to a charge of escape was in conflict with other statutory provisions, in effect when appellant left VOA without permission, that governed persons on parole.

The version of *R.C. 2967.15* that was in effect when appellant left VOA without permission read, in pertinent part:

"A furlonghee or any releasee other than a person who is released on parole or pardon is considered to be in custody while on furlough or other release, and, if he absconds from supervision, he may be prosecuted [\*9] for the offense of escape." *R.C. 2967.15(C)(2)* eff. 6/30/95 (emphasis added).

Appellee contends that the above quoted provision was not in conflict with the provisions found in *R.C. 2921.34* and *R.C. 2921.01*. Appellee argues that the above quoted provision does not expressly prohibit the state from filing escape charges against a parolee who absconds from supervision. We disagree.

This court does not have to resort to rules of construction to decipher the meaning of the language found in the version of *R.C. 2967.15(C)(2)* that applies to this case. The plain meaning of the language shows that the legislature prohibited the state from filing escape charges against a parolee who absconded from supervision. The legislature created the prohibition by specifically excluding persons on parole who absconded from supervision from the categories of persons who could be charged with escape. Accordingly, we agree with appellant's contention that a conflict did exist between the provisions of *R.C. 2921.34* and *R.C. 2921.01* and the provisions of *R.C. 2967.15(C)(2)* that were in effect when appellant left the VOA and was charged, convicted and sentenced for the crime of escape.

Appellant argues [\*10] that to resolve the conflict between the statutes in question, this court should apply *R.C. 1.51*. *R.C. 1.51* provides:

"If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail."

Appellee argues that the correct rule of statutory construction for resolving the situation in this case is found in *R.C. 1.52*. *R.C. 1.52* provides, in pertinent part:

"(A) If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."

Appellee argues that the specific provisions in this case, found in *R.C. 2967.15*, that excluded parolees from being charged with escape when they absconded from supervision, were enacted before the general provisions, found in *R.C. 2921.34* and *R.C. 2921.01*, that amended the definition of detention and included parolees in the group of detainees who could be charged [\*11] with escape. Appellee states that since the specific provisions were enacted first, they are no longer effective and they are replaced by the more recent general provisions. Appellee contends that when Ohio courts have considered *R.C. 1.51* and *R.C. 1.52* together, they have consistently ruled "that the specific statute will control over a general statute only if it was enacted after the general provision."

We have carefully reviewed the cases appellee cites in support of its proposition. While the cases do contain statements that a more recently enacted specific statute will

"control" or "take precedence" over a general statute that was enacted first, see *Davis v. State Personnel Bd. of Review* (1980), 64 Ohio St. 2d 102, 105, 413 N.E.2d 816; and *State, ex rel. Brown v. Rockside Reclamation, Inc.* (1976), 47

*Ohio St. 2d 76, 83, 351 N.E.2d 448*, the facts in those cases showed that the more specific statutes in question in those cases were the later enacted statutes. The cases cited by appellee did not require the courts in question to consider whether an earlier enacted specific statute would ever control over a later enacted general statute. We agree with appellant, therefore, that the cases [\*12] cited by appellee do not create any binding precedent for the situation we now consider in this case.

As appellant points out, the provisions of *R.C. 1.51* start with the general rule that a special provision "prevails as an exception to the general provision". *R.C. 1.51*. The provisions then go on to explain the exception to the general rule. A general provision will prevail over a special provision if: (1) the general provision is the most recently enacted; and (2) the manifest intent of the legislature is that the general provision prevail over the special provision. When we read the provisions of *R.C. 1.51* in conjunction with the provisions of *R.C. 1.52*, therefore, we conclude that a later enacted general provision will only prevail over an earlier enacted special provision if certain requirements are met. Namely, did the legislature exhibit a manifest intent that the most recently enacted general provision should prevail over a previously enacted special provision. See *Balent v. Natl. Revenue Corp. (1994), 93 Ohio App. 3d 419, 424, 638 N.E.2d 1064*.

In this case, we cannot find that the legislature exhibited a manifest intent that the more recently enacted general provisions relating to [\*13] escape, found in *R.C. 2921.34* and *R.C. 2921.01*, should prevail over the earlier enacted special provisions found in *R.C. 2967.15(C)(2)*, that excluded a parolee from the persons who could be charged with escape. Indeed, since appellant was tried, convicted and sentenced in this case, the legislature enacted an amended version of *R.C. 2967.15*. The newly enacted version of *R.C. 2967.15* provides, in pertinent part:

"A person who is under transitional control or who is under any form of authorized release under the supervision of the adult parole authority is considered to be in custody while under the transitional control or on release, and, if the person absconds from supervision, the person may be prosecuted for the offense of escape." *R.C. 2967.15(C)(2) eff. 3-17-98*.

The recent amendment of *R.C. 2967.15* shows that the legislature did not initially have a manifest intent that parolees who absconded from supervision could be charged with escape. The legislature has since decided to enact a special provision that does exhibit that intent, but at the time appellant was charged, tried, convicted and sentenced, the law in this state did not reflect any manifest intent that the general [\*14] provisions found in *R.C. 2921.34* and *R.C. 2921.01* should prevail over the earlier enacted special provisions of *R.C. 2967.15*. Accordingly, appellant is correct when he contends that he could not be found guilty of escape as a matter of law. Appellant's first assignment of error is well-taken.

Due to our disposition of the first assignment of error, appellant's remaining assignments of error are rendered moot. The judgment of the Lucas County Court of Common Pleas is reversed, and this case is remanded for further proceedings consistent with this opinion. Appellee is ordered to pay the court costs of this appeal.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, *6th Dist.Loc.App.R. 4*, amended 1/1/98.

Peter M. Handwork, P.J.

JUDGE

George M. Glasser, J.

Richard W. Knepper, J.

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Brief of Appellant (with the Appendix separately bound) was served on counsel for the Tax Commissioner, this 16th day of March, 2007 by inserting a copy in an envelope addressed to Cheryl Pokorny, Assistant Attorney General, 30 East Broad Street, Columbus, Ohio 43215, and depositing the envelope in the United States mail for delivery.



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Charles M. Steines