

IN THE SUPREME COURT OF OHIO

ELIZABETH BURNETT,
Plaintiff/Appellee,
v.
MOTORISTS MUTUAL INSURANCE
COMPANIES, et al.,
Defendant/Appellant.

CASE NO. **07-0954**

On Appeal from the Trumbull County Court
of Appeals, Eleventh Appellate District,
Case No. 2006-T-0085

**MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT/APPELLANT
MOTORISTS MUTUAL INSURANCE COMPANY**

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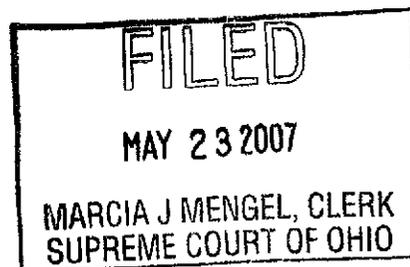


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**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC AND GREAT
GENERAL INTEREST**

This case presents an issue that is of the utmost importance to insurance companies and policyholders regarding uninsured motorist coverage available for damages arising out of motor vehicle accidents when the claim falls under the “intra-family” exclusion contained in personal auto policies as permitted and authorized by former R.C. §3937.18(K)(2). Defendant/Appellant Motorists Mutual Insurance Company (hereinafter “Motorists”) is seeking to institute a claimed appeal of right, pursuant to S.Ct. R II, Section (A)(2), due to the substantial constitutional question involved in the Eleventh Appellate District having determined that former R.C. §3937.18(K)(2), effective from September 3, 1997 through September 21, 2000, is unconstitutional in that it allegedly violates the Equal Protection Clauses of the United States and Ohio Constitutions. In addition, Motorists is seeking to initiate a discretionary appeal, pursuant to S.Ct. R II, Section (A)(3), in that a question of public and great general interest has been raised by the Eleventh Appellate District’s ruling, which effectively eliminates a valid exclusion and expands the scope of uninsured/underinsured motorist coverage provided in innumerable personal auto policies throughout Ohio. Further, the Eleventh Appellate District’s holding in this appeal is in direct conflict with the holding of the Fourth Appellate District on the constitutionality of former R.C. §3937.18(K)(2), thereby creating much confusion and uncertainty among policyholders and insurance companies as to their respective rights and duties under the uninsured/underinsured portions of their personal auto policies. This conflict is the subject of a Motion to Certify Conflict currently pending in the Eleventh District Court of Appeals.

This appeal arises out of a motor vehicle accident which occurred when Plaintiff/Appellee Elizabeth Burnett was traveling as a passenger in a motor vehicle owned and operated by her husband, Albert R. Burnett (hereinafter "Mr. Burnett"), and which was caused by Mr. Burnett's negligence. At the time of the accident, Mr. Burnett was a named insured under a policy of insurance issued by Motorists, and Motorists subsequently denied the claim of the Plaintiff/Appellee for uninsured motorist coverage for damages arising out of the motor vehicle accident due to the "intra-family" exclusion contained in the uninsured/underinsured coverage portion of the policy. The "intra-family" exclusion was statutorily authorized by former R.C. §3937.18(K)(2). However, on appeal, the Eleventh Appellate District determined that former R.C. §3937.18(K)(2) is unconstitutional as it allegedly violates the Equal Protection Clauses of the Ohio and United States Constitutions.

The issue sought to be reviewed is whether former R.C. §3937.18(K)(2) is unconstitutional in that it allegedly violates the Equal Protection Clauses of the Ohio and United States Constitutions by creating an arbitrary and illogical classification based on household status that has a disparate and unfair effect, is not furthered by a legitimate interest, and has no rational basis. The invalidation by the Eleventh Appellate District of former R.C. §3937.18(K)(2), which was enacted by the Ohio General Assembly as part of H.B. 261 and subsequently upheld by the Ohio Supreme Court and the Fourth Appellate District, creates a substantial constitutional question. Further, it is a matter of great general interest to the public at large and the insurance industry for this Court to determine this critical issue regarding the applicability of "intra-family" exclusions for purposes of uninsured/underinsured motorist coverage under Ohio law.

The Eleventh Appellate District's holding in this appeal involves a substantial constitutional question in that the determination that former R.C. §3937.18(K)(2), as enacted by

the Ohio General Assembly, is invalid was based upon an analysis of the statute under the Equal Protection Clauses of the Ohio and United States Constitutions. Former R.C. §3937.18(K)(2) was upheld by the Ohio Supreme Court in *Kyle v. Buckeye Union Ins. Co.* (2004), 103 Ohio St.3d 170, 2004-Ohio-4885, 814 N.E.2d 1195, under a statutory interpretation analysis, and again by the Fourth Appellate District in *Morris v. United Ohio Ins. Co.* (2005), 160 Ohio App.3d 663, 2005-Ohio-2025, 828 N.E.2d 663, following an Equal Protection challenge identical to the challenge in this matter. Despite this precedential authority and the presumption in favor of constitutionality attendant with every regularly enacted statute of Ohio, the Eleventh Appellate District has ruled that former R.C. §3937.18(K)(2) is constitutionally invalid as it violates the Equal Protection Clauses of the United States and Ohio Constitutions. In so doing, the Eleventh Appellate District has raised a substantial constitutional question regarding the validity of the “intra-family” exclusion contained in innumerable personal auto policies throughout Ohio and the status of uninsured/underinsured motorist coverage in this state, in addition to creating a conflict with the Fourth Appellate District’s holding in *Morris*.

It is a matter of great general interest to the public at large and the insurance industry for this Court to determine this critical issue regarding the constitutionality of former R.C. §3937.18(K)(2) in that it provides the express statutory authority for the “intra-family” exclusions contained in countless personal auto policies in effect for the relevant time period. In these policies, such as the policy at issue in this case, the insurance companies specifically excluded uninsured and underinsured motorists coverage to their insureds for vehicles which were owned by, furnished to, or available for the regular use of a named insured or family members, due to the authority provided by the H.B. 261 amendment to former R.C. §3937.18(K)(2). In finding former R.C. §3937.18(K)(2) unconstitutional, the Eleventh District

Court of Appeals has created a situation where insurance companies have become obligated to provide coverage to their insureds for claims which were unambiguously excluded from coverage under their respective policies by express agreement of the parties. The implications of this decision will affect innumerable personal auto policies throughout the State of Ohio, thereby leading to confusion among insureds and insurers regarding their respective rights and duties under their policies, as well as the retroactive alteration of the agreed upon terms of thousands of policies by operation of law. This confusion will undoubtedly result in needless litigation in an effort to determine the respective rights and duties of insureds and insurance companies under these policies and to answer this question of public and great general interest.

This Court should provide guidance to the lower courts in resolving the current conflict between the Eleventh Appellate District and the Fourth Appellate District and establishing predictability to this area of law by resolving the substantial constitutional question created by the Eleventh Appellate District's holding in this appeal and clarifying this issue of public and great general interest.

STATEMENT OF THE CASE AND FACTS

This litigation arises out of a motor vehicle accident which occurred on February 13, 2000, on State Route 7 in Brookfield Township, Trumbull County, Ohio. At the time of the accident, Plaintiff/Appellee Elizabeth Burnett was a passenger in a motor vehicle owned and operated by her husband, Mr. Burnett. It is undisputed that the negligence of Mr. Burnett directly and proximately caused the subject motor vehicle accident. The Plaintiff/Appellee alleges bodily injuries and medical expenses as a result of the accident. At the time of the accident, Mr. Burnett was a named insured under a policy of insurance in effect with Motorists,

designated as Policy No. 1035-05-183639-03. The original effective date of this policy was March 18, 1981, but it had been most recently renewed on March 18, 1999.

At the time of the subject accident, the Plaintiff/Appellee and Mr. Burnett were married and residing together at 7231 Crawford Road in Williamsfield, Ohio. Thus, the Plaintiff/Appellee was a "family member" of Mr. Burnett and a resident of his household, as those terms are defined by the subject Motorists insurance policy. Furthermore, the motor vehicle being operated by Mr. Burnett, a 1995 Ford Taurus, was owned by Mr. Burnett, available for the regular use of Mr. Burnett, and listed as an insured vehicle under Mr. Burnett's Motorists policy. Subsequent to the accident, Motorists denied liability coverage to Mr. Burnett for those claims asserted by Plaintiff/Appellee arising out of the motor vehicle accident due to the family member exclusion contained in the liability portion of the subject Motorists policy. Further, Motorists denied the claim of the Plaintiff/Appellee for uninsured motorist coverage for damages arising out of the motor vehicle accident due to the "intra-family" exclusion contained in the uninsured/underinsured coverage portion of the policy. Plaintiff/Appellee is not asserting that Mr. Burnett is entitled to coverage for her claims under the liability portion of his Motorists policy. However, Plaintiff/Appellee is claiming that she is entitled to uninsured motorist benefits under the subject Motorists policy in that the "intra-family" exclusion is allegedly invalid because former R.C. §3937.18(K)(2), which provides the statutory authority for the "intra-family" exclusion, is unconstitutional.

On March 1, 2001, Plaintiff/Appellee filed a Complaint against Motorists asserting an uninsured motorist claim for injuries allegedly sustained in the subject motor vehicle accident. The Trial Court initially determined that Plaintiff/Appellee was entitled to uninsured motorists benefits under the Motorists policy issued to Mr. Burnett, for the purported reason that R.C.

§3937.18(J)(1) and §3937.18(K)(2) were ambiguous and irreconcilable, thus making the “intra-family” exclusion unenforceable. On appeal by Motorists, the Eleventh District Court of Appeals reversed the Trial Court’s decision on the basis of the Ohio Supreme Court’s holding in *Kyle v. Buckeye Union Ins. Co.*, supra, wherein the Ohio Supreme Court held that the above statutes were not in conflict and that the “intra-family” exclusion was valid and enforceable. On remand, the Trial Court was instructed to determine the public policy and constitutional issues raised by Plaintiff/Appellee which had not yet been considered or addressed. On June 22, 2006, the Trial Court issued a Judgment Entry denying Plaintiff/Appellee’s Motion for Summary Judgment, rejecting her public policy and constitutional arguments, and entering Final Judgment in favor of Motorists.

Plaintiff/Appellee filed a Notice of Appeal of the Trial Court’s decision on July 13, 2006. On appeal, Plaintiff/Appellee argued that the “intra-family” exclusion authorized and permitted by former R.C. §3937.18(K)(2) was against public policy and unconstitutional for allegedly violating the Contracts Clause, Due Process Clause, and Equal Protection Clause of the Ohio and United States Constitutions. In its Opinion of April 9, 2007, the Eleventh District Court of Appeals expressly stated its disagreement with the Supreme Court’s holding in *Kyle*, but acknowledged that it was nonetheless bound to follow the holding in *Kyle* as to statutory interpretation. (Appendix, Ex. A, ¶17). However, because the Supreme Court did not address the constitutionality of former R.C. §3937.18(K)(2) in *Kyle*, the Eleventh Appellate District decided to consider Plaintiff/Appellee’s constitutional arguments. (Appendix, Ex. A., ¶17).

Following a consideration of Plaintiff/Appellee’s challenges, the Eleventh Appellate District held that R.C. §3937.18(K)(2) violated the Due Process Clauses of the Ohio and United States Constitutions in that it creates an arbitrary and illogical distinction, that it does not further

a legitimate interest and has no rational basis. (Appendix, Ex. A, ¶30). In other words, the Eleventh District Court of Appeals concluded that former R.C. §3937.18(K)(2) was unconstitutional because it impermissibly classified individuals based upon familial relations, so that injured persons related to the tortfeasor were precluded from recovery while unrelated injured persons or even non-resident relatives could pursue recovery under the policy. (Appendix, Ex. A, ¶23). Motorists has prosecuted this appeal to the Ohio Supreme Court since the holding by the Eleventh District Court of Appeals conflicts with a prior holding by the Fourth District Court of Appeals on the exact issue, and the holding further violates the spirit of this Court's holding in *Kyle*.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: The “intra-family” exclusion authorized and permitted by former R.C. §3937.18(K)(2) does not violate the Equal Protection Clauses of the Ohio and United States Constitutions as a matter of law.

The issue sought to be reviewed is whether former R.C. §3937.18(K)(2) is unconstitutional in that it allegedly violates the Equal Protection Clauses of the Ohio and United States Constitutions by creating an arbitrary and illogical classification based on household status that has a disparate and unfair effect, is not furthered by a legitimate interest, and has no rational basis. The Motorists policy in effect for Mr. Burnett at the time of the subject motor vehicle accident contained an unambiguous exclusion to uninsured/underinsured motorist coverage, which was expressly authorized by and in direct compliance with former R.C. §3937.18(K)(2). In its Opinion of April 9, 2007, the Eleventh Appellate District held that former R.C. §3937.18(K)(2) is unconstitutional and that Mr. Burnett's policy affords coverage because the vehicle was listed under the policy and premiums were paid for the vehicle. (Appendix, Ex. A, ¶30). This holding invalidates a statute regularly enacted by the Ohio General Assembly and

which was upheld by the Ohio Supreme Court in *Kyle* and the Fourth Appellate District in *Morris*.

The Eleventh Appellate District held in this appeal that former R.C. §3937.18(K)(2) is unconstitutional in that it violated the Equal Protection Clauses of the Ohio and United States Constitutions. (Appendix, Ex. A, ¶30). Article I, Section 2, of the Ohio Constitution, provides as follows:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Pursuant to the Fourteenth Amendment to the United States Constitution, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Simply stated, the Equal Protection Clauses require that individuals be treated in a manner similar to others in like circumstances.

On September 3, 1997, the General Assembly of Ohio enacted former R.C. §3937.18 (K)(2), which stated, in pertinent part, as follows:

(K) As used in this section, “uninsured motor vehicle” and “underinsured motor vehicle” do not include any of the following motor vehicles:

* * *

(2) A motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a name insured.

The Plaintiff/Appellee is challenging R.C. §3937.18 (K)(2) in that she believes it violates the Equal Protection Clauses of the Ohio and United States Constitutions by creating an arbitrary

and illogical classification based on household status that has a disparate and unfair effect, is not furthered by a legitimate interest, and has no rational basis. Motorists respectfully disagrees.

There are well-established principles and standards to be followed when considering the constitutionality of a regularly enacted statute under an Equal Protection analysis. A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 147, 57 O.O. 134, 128 N.E.2d 59. Further, as a general rule, “legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” *Harsco Corp. v. Tracy* (1999), 86 Ohio St.3d 189, 192, 1999-Ohio-155, 712 N.E.2d 1249, citing *McGowan v. Maryland* (1961), 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399. In most cases, courts give a large degree of deference to legislatures when reviewing a statute on an equal protection basis. *Park Corp. v. Brook Park* (2004), 102 Ohio St.3d 166, 167, 2004-Ohio-2237, 807 N.E.2d 913. A classification warrants some kind of heightened review only when it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic; otherwise, “the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.” *Nordlinger v. Hahn* (1992), 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1. The Ohio Supreme Court will not invalidate a plan of classification adopted by the assembly unless clearly arbitrary and unreasonable. *State ex rel. Lourin v. Industrial Commission* (1941), 138 Ohio St. 618, 619, 21 O.O. 490, 37 N.E.2d 595. In this case, it is respectfully submitted that the Eleventh Appellate District has violated these well-established principles and standards by invalidating a statute regularly enacted by the Ohio Legislature.

In *Morris v. United Ohio Ins. Co.*, supra, the Fourth District Court of Appeals was also asked to decide an equal protection challenge to former R.C. §3937.18(K)(2). In that case, the Appellant argued that R.C. §3937.18(K)(2) violated the Equal Protection Clauses of the Ohio and United States Constitutions because it discriminated against claimants who are related to the tortfeasor and that no rational basis existed to justify this distinction. The Fourth Appellate District rejected the Appellant's argument and stated that "R.C. §3937.18(K)(2) is concerned with the tortfeasor's vehicle, not the tortfeasor's identity. (*Id.* at ¶3). Thus, R.C. §3937.18(K)(2) does not discriminate against claimants who are related to the tortfeasor." (*Id.*) Due to the Appellant's failure to identify a proper class, her equal protection challenge was rejected. (*Id.*)

In considering R.C. §3937.18(K)(2), the *Morris* Court stated as follows:

Under R.C. §3937.18(K)(2), it doesn't matter who the tortfeasor is. The focus of R.C. §3937.18(K)(2) is the vehicle the tortfeasor was driving at the time of the accident. If the tortfeasor was driving a vehicle owned by, furnished to, or available for the regular use of a named insured or his or her family members, then the vehicle will not be considered uninsured or underinsured. See *Kyle*, 103 Ohio St.3d 170, 814 N.E.2d 1195, ¶13. This is true regardless of whether the claimant is related to the tortfeasor.

An example will help illustrate our point. Assume that Mrs. Morris' friend was driving the motor home at the time of the accident. Mrs. Morris' initial attempts to recover the liability benefits aren't successful, so she files a claim for uninsured motorist coverage under her policy with United Ohio. Under these circumstances, R.C. §3937.18(K)(2) will preclude coverage, since the tortfeasor, Mrs. Morris' friend, was driving a vehicle owned by a named insured.

As this example demonstrates, the tortfeasor need not be related to the claimant in order for R.C. §3937.18(K)(2), to apply. It is the tortfeasor's vehicle, not his identity, that determines whether (K)(2) applies. If the tortfeasor is driving a vehicle owned by, furnished to, or available for the regular use of a named insured or his or her family members, then (K)(2) will preclude coverage. If, on the other hand, the tortfeasor is driving a different vehicle (a vehicle that is not owned by a named insured or a family member of a named insured), then (K)(2) will not preclude coverage. Accordingly, (K)(2) differentiates between insureds injured by a tortfeasor driving a vehicle owned by, furnished to, or available for the

regular use of a named insured (or his or her family members) and insureds injured by a tortfeasor driving a different vehicle.

(Id. at ¶15-17). The Fourth Appellate District determined that former §3937.18(K)(2) does not violate the Equal Protection Clause of the Ohio and United States Constitutions because the same individual for whom uninsured/underinsured motorists coverage is precluded when driving one vehicle can be entitled to uninsured/underinsured motorists coverage when driving a different vehicle and, therefore, that no classification of individuals is created by the statute.

The Eleventh Appellate District in the instant matter expressly rejected the reasoning and conclusion of the *Morris* Court that former R.C. §3937.18 (K)(2) does not improperly classify individuals. In its Opinion of April 9, 2007, the Eleventh Appellate District held as follows:

We hold that the former version of R.C. 3937.18(K)(2) effective at the time of this policy was unconstitutional because it created an arbitrary and illogical classification based on household status that has a disparate and unfair effect, is not furthered by a legitimate interest, and has no rational basis. We reverse, finding that appellee's policy affords coverage in this case because the vehicle involved in the collision was listed under the policy as required by (J) and premiums were paid for this coverage.

(Appendix, Ex. A, ¶30). Further, the Court stated that “to say the focus of (K)(2) is solely on the vehicle,” as the Fourth Appellate District concluded, “is to put aside the fundamental fact that vehicles do not drive themselves.” (Appendix, Ex. A, ¶25). The Eleventh Appellate District's holding directly conflicts with that of the Fourth Appellate District in *Morris* on an identical Equal Protection challenge. In fact, the Eleventh Appellate District readily acknowledged in its Opinion that its holding is in conflict with the holding in *Morris* by specifically rejecting the Fourth Appellate District's rationale. (Appendix, Ex. A, ¶24). The conflict between the Eleventh Appellate District's holding in this appeal and the holding of the Fourth Appellate District in *Morris* has created confusion and uncertainty on this very important issue of law.

In the instant matter, as illustrated by the Fourth Appellate District, there is no impermissible classification created by former R.C. §3937.18(K)(2) such that an Equal Protection violation could have occurred. Where there is no classification, there is no discrimination that would offend the federal or state Equal Protection Clauses. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 290, 1992-Ohio-133, 595 N.E.2d 862. Under former R.C. §3937.18(K)(2), Plaintiff/Appellee could have been entitled to uninsured/underinsured motorist coverage when traveling as a passenger of her husband in any vehicle not owned or available for the regular use of a named insured or resident family member. It is only when traveling in a vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured that former R.C. §3937.18(K)(2) is applicable and results in a preclusion of uninsured/underinsured motorist coverage. As a result, R.C. §3937.18(K)(2) is, in fact, dependent upon the vehicle and not the individual tortfeasor and no classification sufficient to warrant an Equal Protection analysis is created by the statute.

In *Kyle v. Buckeye Union Insurance Co.*, supra, the Ohio Supreme Court was asked to decide whether former R.C. §3937.18(J)(1) and §3937.18(K)(2), effective September 3, 1997, through October 31, 2001, and September 21, 2000, respectively, were in conflict and, if so, whether such statutes could be reconciled. In deciding that the subsections were not in conflict, the Ohio Supreme Court determined that former subsection (J)(1) permitted the exclusion of uninsured/underinsured coverage when the injured insured was occupying a vehicle owned by an insured but not covered under the liability portion of the policy, which is known as the “other-owned vehicle exclusion.” Former R.C. §3937.18(J)(1) stated as follows:

- (J) The coverage offered under Division (A) of this section or selected in accordance with Division (C) of this section may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under any of the following circumstances:

- (1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made

* * *

Because former R.C. §3937.18(J)(1) and §3937.18(K)(2) do not regulate the same thing, the Ohio Supreme Court determined in *Kyle* that they could function in the alternative or together. (*Id.* at ¶17). Further, the Ohio Supreme Court determined that subsection (J)(1) protected the balance of interests between the insured and the insurance company because the identification of all owned vehicles would result in coverage for the insured while the insurance company received premiums for all risks being covered under the policy. (*Id.* at ¶12).

In its Opinion of April 9, 2007, **the Eleventh Appellate District expressly disagreed with the Ohio Supreme Court's holding in *Kyle* that former R.C. §3937.18(J)(1) and (K)(2) do not conflict and, in fact, stated that it found the dissent in *Kyle* to be more persuasive.**

(Appendix, Ex. A, ¶17). In this appeal, the Eleventh Appellate District effectively sidestepped the authority of the Supreme Court and violated the spirit of the *Kyle* holding by finding former R.C. §3937.18(K)(2) unconstitutional, despite acknowledging that it was bound to follow the Ohio Supreme Court's holding in *Kyle* as to statutory interpretation. (Appendix, Ex. A, ¶17). Because both the statutory interpretation and constitutionality of former R.C. §3937.18(K)(2) had seemingly been resolved through the holdings of the Supreme Court in *Kyle* and the Fourth Appellate District in *Morris*, respectively, the Eleventh Appellate District's holding in this Appeal has raised a substantial constitutional question and created a matter of great and public interest due to the confusion and uncertainty regarding uninsured and underinsured motorist coverage law in Ohio.

The Motorists policy in effect for Mr. Burnett at the time of the subject motor vehicle accident contained an unambiguous “intra-family” exclusion to uninsured/underinsured motorist coverage, which was expressly authorized by former R.C. §3937.18(K)(2). The Eleventh Appellate District, in considering the interaction between former R.C. §3937.18(J)(1) and (K)(2), determined that there was a legitimate interest and rational basis for the requirement of subsection (J)(1) that all covered vehicles be specifically listed in the policy, in that it allows insurance companies to assess their risk and set premiums accordingly. (Appendix, Ex. A, ¶26). However, the Court found that subsection (K)(2) creates an arbitrary and illogical distinction by taking “away uninsured/underinsured coverage based on the identity of the driver, not the identity of the vehicle.” (Id.). As a point of emphasis, the Court stated that “the insured believes that part of the premium is being paid for exactly this type of coverage.” (Id.). However, the Motorists policy in effect for Mr. Burnett at the time of the subject accident specifically excludes from uninsured motor vehicle coverage any vehicle “owned by or furnished or available for the regular use” of an insured or any family member, in direct compliance with former R.C. §3937.18(K)(2). Further, Motorists and Mr. Burnett expressly agreed that those vehicles covered under the subject policy would not be uninsured vehicles when driven by an insured or family member. Nonetheless, the Eleventh Appellate District has determined through its decision in this matter that Motorists, and every other insurance company whose policies contain the language authorized by R.C. §3937.18(K)(2), must provide this coverage to their insureds.

Former R.C. §3937.18(K)(2), as with every other regularly enacted statute, was enacted by the General Assembly with every presumption in favor of its constitutionality. The “intra-family” exclusion contained in Mr. Burnett’s Motorists policy is in direct compliance with former R.C. §3937.18(K)(2) and precludes coverage for the Plaintiff/Appellee under both the

terms of the policy and former R.C. §3937.18(K)(2). Despite the Ohio Supreme Court's holding in *Kyle* and in direct conflict with the Fourth Appellate District's holding in *Morris*, the Eleventh Appellate District has erroneously found R.C. §3937.18(K)(2) to be in violation of the Equal Protection Clauses of the United States and Ohio Constitutions. In accord with this Court's holding in *Kyle* and the holding of the Fourth District Court of Appeals in *Morris*, Motorists respectfully asserts that former R.C. §3937.18(K)(2) is valid and enforceable and not in violation of the Equal Protection Clauses of the Ohio or United States Constitutions.

CONCLUSION

For the reasons discussed above, this case involves a substantial constitutional question and matters of public and great general interest. Further, there is a conflict between the holdings of the Fourth Appellate District and Eleventh Appellate District on the matter sought to be reviewed by this Court. Defendant/Appellant Motorists Mutual Insurance Company respectfully requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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PROOF OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendant/Appellant, Motorists Mutual Insurance Company, was sent by ordinary U.S. mail to the following, this 23rd day of May, 2007:

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APPENDIX

Exhibit

Opinion of the Trumbull County Court of Appeals (April 9, 2007).....A

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS

APR 09 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

ELIZABETH BURNETT, : OPINION
Plaintiff-Appellant, :
- vs - : CASE NO. 2006-T-0085
MOTORISTS MUTUAL INSURANCE :
COMPANIES, et al., :
Defendant-Appellee. :

Civil Appeal from the Court of Common Pleas, Case No. 01 CV 414.

Judgment: Reversed and remanded.

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MARY JANE TRAPP, J.

{¶1} This appeal arises from the June 14, 2006 summary judgment of the Trumbull County Court of Common Pleas finding in favor of appellee, Motorists Mutual Insurance Companies, on the public policy and constitutional issues presented in the former 1997 version of the Uninsured Motorist Statute, R.C. §3937.18(J)(1) and (K)(2). Because we find R.C. §3937.18(J) and (K)(2) violate the equal protection clauses of the Ohio and United States Constitutions, we reverse.



{¶2} On March 1, 2001, appellant, Elizabeth Burnett, filed a complaint against appellee, alleging an uninsured motorist's claim for injuries sustained in a motor vehicle accident in which she was a passenger in an automobile driven by her husband, Albert Burnett. Appellant's claim had been denied by appellee due to the "intra-family" exclusions set forth in the liability and uninsured motorists coverages in the policy between appellee and Mr. Burnett. The trial court initially determined that appellant was entitled to the uninsured motorists benefits after finding that R.C. §3937.18(J)(1) and (K)(2) were ambiguous and irreconcilable. Thus, the "intra-family exclusion" was unenforceable and the uninsured motorist provision could apply.

{¶3} On appeal by appellee, this court reversed the trial court's decision on the basis of the Ohio Supreme Court's holding in *Kyle v. Buckeye Union Ins. Co.*, 103 Ohio St.3d 170, 2004-Ohio-4885, which held that sections (J)(1) and (K)(2) were not conflicting and ambiguous, but rather unambiguous and complementary. Thus, appellant was denied coverage under the intra-family exclusion. On remand, the trial court was instructed to address the public policy and constitutional issues that had not yet been considered or addressed. On June 22, 2006, the trial court granted summary judgment for appellee and dismissed appellant's arguments, which are now before the court.

{¶4} Appellant filed a timely motion of appeal and has set forth the following assignment of error:

{¶5} "The trial court erred to the prejudice of Plaintiff-Appellant when it granted defendant-appellee's motion for summary judgment."

{¶6} **Standard of Review**

{¶7} We review a grant of summary judgment de novo. *Lubrizol Co. v. Lichtenberg & Sons Constr., Inc.*, 11th Dist., No. 2004-L-179, 2005-Ohio-7050, at ¶26, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Thus, we review the trial court's judgment independently and without deference to its determination. *Lubrizol* at ¶26.

{¶8} "Summary judgment is proper when: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come but to one conclusion, and viewing such evidence most strongly in favor the party against whom the motion is made, that conclusion is adverse to that party." *Id.* at ¶27, citing *Dresher v. Burt* (1996), 75 Ohio St.2d 280, 293. Thus, if "the moving party has satisfied this initial burden, the nonmoving party has a reciprocal burden under Civ.R. 56(E) to set forth facts showing there is a genuine issue for trial." *Id.* at ¶29.

{¶9} **The Intrafamily Exclusion**

{¶10} Former R.C. §§3937.18(J)(1) and (K)(2) now at issue read:

{¶11} "(J) The coverages offered under Division (A) of this section or selected in accordance with Division (C) of this section may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under any of the following circumstances ***.

{¶12} "(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made ***.

{¶13} "(K) As used in this section, 'uninsured motor vehicle' and 'underinsured motor vehicle' do not include any of the following motor vehicles: ***.

{¶14} "(2) A motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured".

{¶15} Kyle's Statutory Interpretation

{¶16} The Supreme Court of Ohio explained in *Kyle* that these paragraphs "do not regulate the same thing. Where paragraph (J) states circumstances in which an insured can be denied uninsured/underinsured motorists insurance ("UM/UIM") protection, paragraph (K) articulates when a tortfeasor will not be considered uninsured or underinsured. These provisions may function in the alternative or together." *Kyle* at ¶17.

{¶17} While we respectfully disagree with the majority's determination in *Kyle* that these two code sections do not conflict and find Justice Sweeney's and Justice Pfeifer's dissents more persuasive, we are bound to follow the holding in *Kyle* as to statutory interpretation; however, the constitutionality of these sections was not addressed by the Supreme Court in *Kyle*, supra.

{¶18} We examine the constitutional challenges and find appellant's assignment equal protection challenge to have merit. Accordingly, we reverse the judgment of the trial court.

{¶19} Equal Protection Challenge

{¶20} Appellant argues that the intrafamily exclusion found in former R.C. §§ 3937.18(J) and (K)(2) violates the equal protection clauses of the U.S. and Ohio Constitutions by impermissibly classifying individuals based on familial relations.

{¶21} The Equal Protection Clauses of the Ohio and United States Constitutions are "functionally equivalent." *Desenco, Inc. v. Akron* (1999), 84 Ohio St.3d 535, 543-544. Thus, the standard for whether a statute violates equal protection is essentially the same under state and federal law. *Morris v. United Ohio Ins. Co.*, 160 Ohio App.3d 663, 2005-Ohio-2025, at ¶12, citing *Park Corp v. Brook Park*, 102 Ohio St.3d 166, 169, 2004-Ohio-2237, citing *State v. Thompkins*, (1996) 75 Ohio St.3d 558, 561.

{¶22} Essentially, "[t]he Equal Protection Clause prevents the state from treating people differently under its laws on an arbitrary basis." *Morris* at ¶13, citing *State v. Williams* (2000), 88 Ohio St.3d 513, 521, citing *Harper v. Virginia State Bd. of Elections* (1996), 383 U.S. 663 (Harlan, J., dissenting). "Unless a suspect class or a fundamental right is involved, a legislative distinction must bear a rational relationship to a legitimate state interest to comply with the Equal Protection Clause." *Nicoson v. Hacker*, (2001), 11th Dist. No. 200-L-213, 2000-Ohio-8718, at 9, citing *Clements v. Fashing* (1982), 457 U.S. 957, 963.

{¶23} The Fourth Appellate District confronted and rejected this very equal protection challenge in *Morris v. United Ohio Ins. Co.*, supra. However, we find that R.C. §3937.18(K)(2) does create an arbitrary and illogical distinction that is not furthering a legitimate interest and has no rational basis. Thus R.C. 3937.18(K)(2) is unconstitutional because it impermissibly classifies individuals based upon a familial relation, so that injured persons related to the tortfeasor are precluded from recovery while injured persons not related or even non-resident relatives can pursue recovery under the policy.

{¶24} In *Morris*, the Fourth Appellate District held that the focus of (K)(2) was on the vehicle, not on the individual. Specifically, the court stated: "R.C. 3937.18(K)(2) is concerned with the tortfeasor's vehicle, not the tortfeasor's identity. Thus, R.C. 3937.18(K)(2) does not discriminate against claimants who are related to the tortfeasor." *Id.* at ¶3. To follow this logic means that no classifications are created under (K)(2); and thus, no equal protection challenge can be brought. We reject this rationale.

{¶25} To say the focus of (K)(2) is solely on the vehicle is to put aside the fundamental fact that vehicles do not drive themselves. The classification of vehicles under (K)(2) is creating an illogical and arbitrary classification of individuals who are injured but may not recover solely because they are related to and live in the household of the insured. The effect of this provision in conjunction with provision (J) does create an arbitrary classification and violates the equal protection clauses of the Ohio and United States Constitution.

{¶26} We do find there to be a legitimate interest and rational basis for defining and limiting the scope of coverage under provision (J) to specifically listed vehicle so that the insurance company can assess their risk and set premiums accordingly. Provision (J) provides for coverage if a vehicle is specifically identified. It ensures that premiums are paid to cover risks for only specifically identified vehicles. This requires the insured to list the vehicle in order to have UM/UIM coverage on that vehicle. However, provision (K)(2) takes away this coverage based on the identity of the driver, not the identity of the vehicle. This creates an arbitrary and illogical distinction. Indeed, the insured believes that part of the premium is being paid for exactly this type of coverage.

{¶27} Mr. Burnett specifically listed the vehicle involved in the collision in the policy, and thus, was in accordance with provision (J). Mr. Burnett paid a premium for UM/UIM coverage that applied to this vehicle. However, UM/UIM coverage is being denied solely because the person injured in the specifically listed vehicle that he was driving is a resident family member. This exclusion is clearly based upon the classification of the person and not on the status of the vehicle as the *Morris* court would have us believe. The policy is not covering what the consumer expects it to cover and what by its terms promises to cover based on an arbitrary distinction of familial status, in effect creating an illusory promise of coverage. No legitimate interest is furthered by this exclusionary effect.

{¶28} No legitimate governmental interest can said to be furthered by excluding only injured household members from recovery. The reality is that this anomalous statute has created a situation where those injured between September 3, 1997 through September 21, 2000, are being denied coverage solely due to their status as a household member.

{¶29} As Justice Pfiefer noted in the dissenting opinion of *Kyle*, "Fortunately, the General Assembly has amended the statute that, under this court's holding, allows such an anomalous situation to occur. *** For over three years, every child buckled in a mandatory child-safety restraint and protected by the latest safety designs of our automobile manufacturers was left at critical risk by a gap in basic insurance coverage that this court today finds valid." *Kyle* at ¶35.

{¶30} We hold that the former version of R.C. 3937.18(K)(2), effective at the time of this policy¹ was unconstitutional because it created an arbitrary and illogical classification based on household status that has a disparate and unfair effect, is not furthered by a legitimate interest, and has no rational basis. We reverse, finding that appellee's policy affords coverage in this case because the vehicle involved in the collision was listed under the policy as required by (J) and premiums were paid for this coverage.

{¶31} The judgment of the trial court is reversed, and this case is remanded for proceedings consistent with this opinion.

WILLIAM M. O'NEILL, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.

1. R.C. §3937.18 has since been amended: See S.B. 56, passed in 1999, S.B. 267, passed in 2000, and finally S.B. 97, passed in 2001, which specifically changed R.C. §3937.18(K)(2), to now read: "Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage included in a policy of insurance."

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ELIZABETH BURNETT,

Plaintiff-Appellant,

- vs -

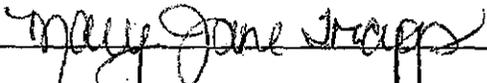
MOTORISTS MUTUAL INSURANCE
COMPANIES, et al.,

Defendant-Appellee.

JUDGMENT ENTRY

CASE NO. 2006-T-0085

For the reasons stated in the opinion of this court, appellant's assignment of error has merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is reversed, and this matter is remanded for proceedings consistent with this opinion.



JUDGE MARY JANE TRAPP

WILLIAM M. O'NEILL, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.

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COURT OF APPEALS

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