

IN THE SUPREME COURT OF OHIO

ELIZABETH BURNETT, )  
 ) CASE NO. 07-0954  
 )  
 ) Plaintiff/Appellee, )  
 )  
 ) On Appeal from the Trumbull County  
 vs. ) Court of Appeals, Eleventh District,  
 ) Case No. 2006-T-0085  
 )  
 ) MOTORISTS MUTUAL INSURANCE )  
 ) COMPANIES, et al., )  
 )  
 ) Defendant/Appellant )

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**ELIZABETH BURNETT'S MEMORANDUM IN RESPONSE TO  
MEMORANDUM IN SUPPORT OF JURISDICTION BY MOTORIST MUTUAL**

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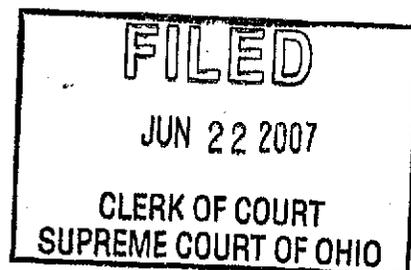


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EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST

Defendant-Appellee's Motion to Certify Conflict to the Supreme Court of Ohio should be denied. The issue for certification is of such limited public interest, that certification of this issue is unwarranted.

The issue attempting to be certified deals with the Constitutionality of former Revised Code § 3937.18(J)(1) and § 3937.18(K)(2), or more commonly referred to as the intra-family exclusion. These provisions permitted insurance companies to deny coverage to injured parties who were resident family members of the tortfeasor. This Court's opinion correctly held that this arbitrary classification was a violation of the Ohio and United States Equal Protection Clause.

The Ohio Legislature, having seen the inequitable results that § 3937.18(J)(1) and § 3937.18(K)(2) provided, repealed the intra-family exclusion. These sections were only in effect from September 3, 1997 through September 21, 2001. Because these provisions were in effect for only a brief period, certification would not be warranted as few, if any, cases are currently in litigation deal with these provisions, or have survived to this date.

With the final effective date of the statute being September 21, 2001, any potential lawsuits would have to have been filed by September 2003, excluding minors' claims. It is unlikely that any decision on this matter would have any effect, as few cases would still in litigation contain this issue.

## STATEMENT OF THE CASE AND FACTS

On February 14, 2000, Elizabeth Burnett was a passenger in a vehicle driven by her husband, Albert Burnett. The vehicle was involved in an accident on State Route 7, in Brookfield Township, Trumbull County, Ohio, in which her husband, Albert Burnett, was negligent. Elizabeth Burnett sustained serious injuries resulting from the accident.

Motorists Mutual Insurance Company insured the vehicle driven by Albert Burnett, to which Albert Burnett was a named insured. Albert Burnett paid separate premiums for liability coverage of \$100,000/300,000 and uninsured motorist coverage of \$100,000/300,000 for the vehicle which he was driving.

Elizabeth Burnett filed both a liability and uninsured motorist claim with Motorist Mutual Insurance Company for her injuries. Motorists Mutual Insurance Company denied Elizabeth Burnett's claim under both the liability coverage and uninsured motorist coverage due to the intra-family exclusion contained in each applicable coverage.

On March 1, 2001, Plaintiff-Appellant Elizabeth Burnett filed a Complaint against several Defendants including Albert Burnett and Defendant-Appellee Motorists Mutual Insurance Company for Breach of Contract, Other Torts and Declaratory Relief to Hold Statute Unconstitutional. Defendant Motorists filed an Answer/Counterclaim and Cross-Claim on May 4, 2001. Defendant Burnett filed an Answer and Cross-claim on May 31, 2001.

Subsequently, all parties filed Motions for Summary Judgment. On July 14, 2003, the trial court granted Plaintiff's Motion for Summary Judgment. The trial court determined that Plaintiff was entitled to uninsured motorists benefits under the insurance policy issued by Defendant Motorists on the basis that Revised Code Sections

3937.19(J)(1) and 3937.18(K)(2) were ambiguous and irreconcilable thus resulting in an insurance policy provision based on Revised Code Section 3937.18(K)(2) unenforceable. On August 1, 2003, Defendant Motorists filed its' Notice of Appeal.

On August 22, 2005, the Court of Appeals reversed the trial court's decision and remanded the case to the trial court. The Court of Appeals decision stated that the trial court relied heavily on *Morris v. United Ohio Ins. Co.*, 4<sup>th</sup> Dist. No. 02CA2653, 2003-Ohio-1708, in making its' determination which had since been overruled by *Kyle v. Buckeye Union Ins. Co.*, 108 Ohio St.3d 170, in which the Supreme Court of Ohio determined that the two statutes in dispute in the present case were not conflicting, but complimentary. The Appellate Court remanded the case to the trial court so that it could make a determination of issues presented to the trial court but not addressed, i.e. public policy and constitutionality, due to the trial court's finding of liability on other grounds.

Summary Judgment was again filed by the parties on the issue of the constitutionality of former Ohio Revised Code 3937.18(J) and (K)(2). The trial court granted Summary Judgment to Motorists Mutual without opinion. The trial courts judgment entry stated only that summary judgment was appropriate as no genuine issue of material fact existed. Elizabeth Burnett then filed a timely notice of appeal.

Elizabeth Burnett's Appeal claimed several assignments of error, one of which alleged that former R.C. § 3937.18(J) and (K)(2) violated the Equal Protection Clause of both the United States and Ohio Constitutions as the statute impermissibly classified individuals based on familial relations.

The Eleventh District Court of Appeals agreed that the statutes violated the Equal Protection Clause. It held that R.C. § 3937.18(K)(2) "create[s] an arbitrary and illogical

distinction that is not furthering a legitimate interest and has no rational basis.” (Appendix, Ex. A, ¶ 23)<sup>1</sup> This decision is consistent with the Supreme Court’s decision in *Kyle v. Buckeye Union Insurance*, 103 Ohio St.3d 170, 2004-Ohio-4885. The holding in *Kyle* only says that former R.C. § 3937.18(J)(1) and (K)(2) are consistent. The issue of equal protection and other constitutional arguments were not addressed by the Ohio Supreme Court.

#### ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: Proposition of Law No. 1: The “intra-family” exclusion authorized and permitted by former R.C. § 3937.18(K)(2) does violate the Equal Protection Clauses of the Ohio and United States Constitutions

Section 2, Article I of the Ohio Constitution provides that:

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.

The “Equal Protection Clauses of the Ohio and United States Constitutions are ‘functionally equivalent’.” *Morris v. United Ohio Ins. Co.* (2005), 160 Ohio App.3d 663, 667, citing *Desenco, Inc. v. Akron* (1999) 84 Ohio St.3d 535, 543-544. Thus, essentially the same standard for determining whether a statute violates equal protection is administered under state and federal law. *Id.*

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<sup>1</sup> Exhibit A is attached to Appellants Memorandum in Support of Jurisdiction

"A statutory classification violates the Equal Protection Clause of the Ohio Constitution if it treats similarly situated people differently based upon an illogical and arbitrary basis." *State v. Brown* (1996), 117 Ohio App.3d 6, 10, citing *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 15, 425. Classifications are not forbidden under the Equal Protection Clause, rather, the Equal Protection Clause prevents the state 'from treating differently people who are in all relevant respects alike.'" *Morris*, 160 Ohio App.3d at 667, citing *Park Corp. v. Brook Park* (2004), 102 Ohio St.3d 166, 169.

The Ohio Guest Statute, as described above, also had an Equal Protection challenge waged against it, to which the statute was determine to be unconstitutional on Equal Protection grounds, in addition to the Due Process grounds. *Primes v. Tyler* (1975), 43 Ohio St.2d at 204-205. The court reasoned that the Guest Statute violated the Equal Protection Clause of the Ohio Constitution, "in that it denie[d] equal protection and benefit of the law to the people of this state by its grant of a special privilege and immunity to negligent drivers who injure nonpaying passengers. *Id.* The court stated that the "prevention of spurious claims is not suitably furthered by the...differential treatment afforded to guests and passengers." *Id.* at 201.

In this case, R.C. 3937.18 (K)(2) had the same governmental purpose as the Guest Statute which was struck down as unconstitutional, being the prevention of collusive lawsuits. *Morris v. United Ohio Ins. Co.* (2005), 160 Ohio App.3d at 665. These statutes, as with the Guest Statute, clearly and impermissibly draw an illogical and arbitrary distinction between injured parties, such that injured parties related to the tortfeasor within the same household are foreclosed from recovery while injured parties

who are not related to the tortfeasor, or related to the tortfeasor but not living in the same household, can pursue recovery for their injuries.

The classifications made by R.C. 3937.18 (K)(2) are illogical and arbitrary and should be unenforceable as a violation of the Equal Protection Clause. For instance, two individuals riding in the same vehicle are both injured by an accident caused by the driver, their right to recovery is based on their status as a relative or nonrelative residing in the household or relative or non relative who does not live with the insured. By this logic an individual should not be a passenger in a vehicle driven by a relative for the risk of being injured without a right to liability coverage or uninsured motorists coverage for the time frame of 1997 to 2000, while R.C. 3937.18(K)(2) was in effect. God forbid that a member of this honorable court negligently injured their spouse or resident children in a one car collision or crossed the center line.

Specifically with regard to Revised Code 3937.18(K)(2), a recent case discussed the language employed therein, specifically with regard to what is meant to be classified for equal protection purposes. *Morris v. United Ohio Ins. Co.* (2005), 160 Ohio App.3d 663. Revised Code 3937.18(K)(2) states that an uninsured motor vehicle and underinsured motor vehicle does not include 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.

In *Morris*, the court addressed an Equal Protection challenge against Revised Code 3937.18(K)(2). 160 Ohio App.3d 663. The court stated that the statute did not violate Equal Protection in that under the statute "it doesn't matter who the tortfeasor is", but that the focus of the statute is the vehicle. *Id.* at 667. The court stated that there was

no classification made, thus there was no discrimination that would offend the federal or state Equal Protection Clauses.” *Id.*

The Court arrived at an illogical conclusion when it announced that Ohio Revised Code 3937.18(K)(2)'s focus was the vehicle being driven, not the individual driving the vehicle. As stated above and recognized in the *Morris* case, the purpose of the statute is to prevent collusive lawsuits and fraud. *Morris v. United Ohio Ins. Co.* (2005), 160 Ohio App.3d at 665. Therefore, the focus of the statute would logically and can only be the individuals involved and the possibility of them perpetrating a fraud on the insurance companies. Any other interpretation is nothing more than subterfuge.

The language employed by both statutes is meant to be a catchall so as to include all family members that, while not cohabitating with the insured party, were still permitted to borrow the insured party's vehicle. One need only look at the practical effect of the statutes; the injured parties affected by the rule is, almost exclusively, relatives of the tortfeasor. See *Kyle*, 103 Ohio St.3d 170, *State Farm Auto Ins. Co. v. Alexander* (1992), 62 Ohio St.3d 397. It is clear that the legislature intended to exclude family members from liability and uninsured motorist coverage and specifically included a catchall phrase by using the “named insured” language. (“The mere recitation of a benign \* \* \* (statutory) purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.” *Primes v. Tyler* (1975), 43 Ohio St.2d 195, 198.).

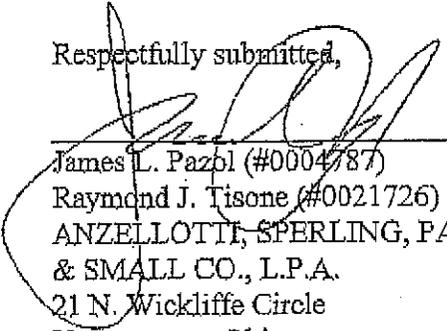
Revised Code Sections 3937.18(J) and (K)(2) deny equal protection of the law to the citizens of the State of Ohio by denying injured parties the equal protection of the law of the state based on the relation of the injured party to the insured. Therefore, based on

the above stated reasons, both sections of the Ohio Revised Code should be struck down as unconstitutional and violative of the Equal Protection Clause of Ohio and the United States Constitution.

CONCLUSION

For the foregoing reasons, the issue being presented to this Court does not raise to the level of a substantial constitutional question. Appellee Elizabeth Burnett respectfully requests this court to deny jurisdiction in this case.

Respectfully submitted,

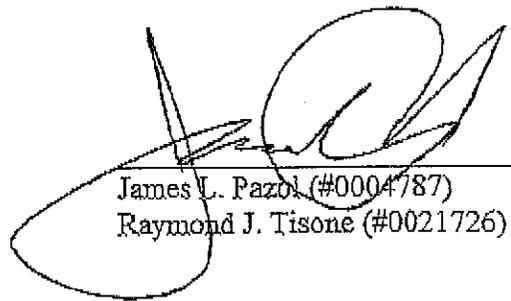


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PROOF OF SERVICE

I certify that a copy of the foregoing Memorandum In Response to Memorandum in Support of Jurisdiction by Motorists Mutual was sent by ordinary U.S. mail to the following this 22 Day of June, 2007.

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