IN THE SUPREME COURT OF OHIO

ELIZABETH BURNETT, Plaintiff/Appellee, v. MOTORISTS MUTUAL INSURANCE COMPANIES, et al., Defendant/Appellant.	))))))))))	CASE NO. 07-1176 Appeal from the Trumbull County Court of Appeals, Eleventh Appellate District, Case No. 2006-T-0085

NOTICE OF CERTIFIED CONFLICT

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FILED
JUN 29 2007
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Certified Conflict

Defendant/Appellant Motorists Mutual Insurance Company hereby gives notice to the Supreme Court of Ohio that the Trumbull County Court of Appeals, Eleventh Appellate District, has certified a conflict in Court of Appeals Case No. 2006-T-0085, which was filed June 20, 2007. A copy of said Judgment Entry certifying a conflict is attached hereto as Exhibit "A". This case is being appealed based upon a certified conflict, pursuant to Sup. Ct. R. II, Section 1(A)(4), between the Trumbull County Court of Appeals, Eleventh Appellate District, in the instant matter and the Ross County Court of Appeals, Fourth Appellate District, in *Morris v. United Ohio Insurance Company*, 160 Ohio App.3d 663, 2005-Ohio-2025. Copies of the Opinions from these conflicting cases are attached hereto as Exhibits "B" and "C", respectively.

Defendant/Appellant Motorists Mutual Insurance Company filed a Notice of Appeal and Memorandum in Support of Jurisdiction on May 23, 2007 in the instant matter in the Supreme Court of Ohio, Case No. 07-0954.

Respectfully submitted,

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PROOF OF SERVICE

I certify that a copy of the foregoing Notice of Certified Conflict was sent by ordinary U.S. mail to the following, this 28th day of June, 2007:

James L. Pazol, Esq.
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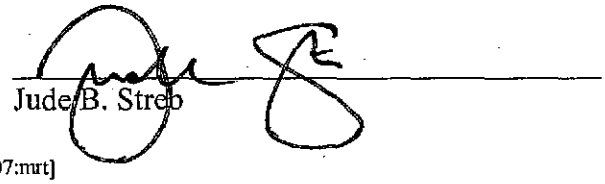
Counsel for Plaintiff/Appellee Elizabeth Burnett



Jude B. Streb

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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

FILED
COURT OF APPEALS
JUN 20 2007
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

On April 18, 2007, appellee, Motorists Mutual Insurance Company, filed a motion, pursuant to App.R. 25 to certify this case to the Supreme Court of Ohio on the basis of a conflict. Appellee asserts that this court's decision in *Burnett v. Motorists Mutual Ins. Cos.,* 11th Dist. No. 2006-T-0085, 2007-Ohio-1639, is in conflict with the decision of the Fourth District in *Morris v. United Ohio Ins. Co.*, 160 Ohio App.3d 663, 2005-Ohio-2025.

Appellee asserts that in the foregoing case, the Fourth District determined that the former 1997 version of the Uninsured Motorist Statute, R.C. 3937.18(K)(2), when read in conjunction with the intra-family exclusion found in R.C. 3937.18(J)(1), does not violate the Equal Protection Clauses of the United States and Ohio Constitutions. Specifically, the Fourth District held that R.C. 3937.18(K)(2) is "concerned with the tortfeasor's vehicle, not the tortfeasor's identity." Id. at ¶3. Thus, the court concluded that the appellant failed to identify a proper class for analysis and rejected her equal protection claim.

EXHIBIT" A "

Former R.C. 3937.18(J)(1) and (K)(2) now at issue read:

"(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 ***.

"(1) While the insured is operating or occupying a motor vehicle 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 ***.

"(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 named insured."

In *Burnett*, supra, at ¶25, this court stated that: "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."

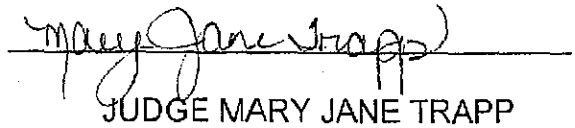
Thus, we held: "***that the former version of R.C. 3937.18(K)(2), effective at the time of this policy was unconstitutional because it created an arbitrary and

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." Id. at ¶30.

Based upon the foregoing conflict, we certify the following issue for review by the Supreme Court of Ohio:

"Whether former R.C. 3937.18(K)(2) when read in conjunction with R.C. 3937.18(J)(1) violates the Equal Protection Clauses of the Ohio and United States Constitutions since it creates an arbitrary and illogical classification based on household status that has a disparate and unfair effect since it precludes coverage for injured individuals who may not recover solely because they are related to and live in the household of the insured?"

Appellee's motion to certify a conflict is granted.



JUDGE MARY JANE TRAPP

WILLIAM M. O'NEILL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.

FILED
COURT OF APPEALS
JUN 20 2007
TRUMBULL COUNTY, OH
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TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

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.

James L. Pazol and *Raymond J. Tisone*, Anzellotti, Sperling, Pazol & Small Co., L.P.A., 21 North Wickliffe Circle, Youngstown, OH 44515 (For Plaintiff-Appellant).

Merle D. Evans, III, Day Ketterer Ltd., Millennium Centre, #300, 200 Market Avenue North, Canton, OH 44701-4213 (For Defendant-Appellee).

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.

EXHIBIT "B"

{¶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} **<u>The Intrafamily Exclusion</u>**

{¶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 policy[1] 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.

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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.

Mary Jane Trapp

JUDGE MARY JANE TRAPP

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

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

FILED
COURT OF APPEALS
APR 09 2007
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

Morris v. United Ohio Ins. Co.
Ohio App. 4 Dist.,2005.

Court of Appeals of Ohio,Fourth District, Ross County.
MORRIS, Appellant,
v.
UNITED OHIO INSURANCE COMPANY, Appellee.
No. 02CA2653.

Decided April 22, 2005.

Background: Motor home passenger brought action against automobile insurer to recover uninsured motorist (UM) benefits on ground that policy excluded coverage for driver's liability. The Common Pleas Court, Ross County, entered summary judgment in favor of insurer. Passenger appealed. The Court of Appeals, Harsha, J., reversed and remanded. Appeal was taken. The Supreme Court, 103 Ohio St.3d 462, 2004-Ohio-5706, 816 N.E.2d 1060, reversed and remanded.

Holding: On remand, the Court of Appeals, Harsha, J., held that former statutory definition of uninsured and underinsured motor vehicles to exclude 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 did not violate equal protection.

Affirmed.
West Headnotes
[1] Constitutional Law 92 ⚷3006

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)2 Relationship to Similar Provisions
92k3006 k. Federal/State Cognates. Most Cited Cases
(Formerly 92k209)
The state and federal equal protection clauses are functionally equivalent. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 2.

[2] Constitutional Law 92 ⚷3006

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)2 Relationship to Similar Provisions
92k3006 k. Federal/State Cognates. Most Cited Cases
(Formerly 92k209)
The standard for determining whether a statute violates equal protection is essentially the same under state and federal law. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 2.

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EXHIBIT "C"

[3] Constitutional Law 92 ⚷3054

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3054 k. Arbitrary, Capricious, or Unreasonable Action in General. Most Cited Cases
(Formerly 92k211(1))
The equal protection clause prevents the state from treating people differently under its laws on an arbitrary basis. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 2.

[4] Constitutional Law 92 ⚷3041

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3041 k. Similarly Situated Persons; Like Circumstances. Most Cited Cases
(Formerly 92k211(1))
The equal protection clause does not forbid classifications; rather, it prevents the state from treating differently people who are in all relevant respects alike. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 2.

[5] Constitutional Law 92 ⚷3694

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)12 Trade or Business
92k3681 Licenses and Regulation
92k3694 k. Insurance. Most Cited Cases
(Formerly 92k240(2))

Insurance 217 ⚷2786

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(D) Uninsured or Underinsured Motorist Coverage
217k2785 Uninsured Motorists or Vehicles
217k2786 k. In General. Most Cited Cases
Former statute which defines uninsured and underinsured motor vehicles to exclude 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 did not discriminate against claimants who were related to the tortfeasor and did not violate state or federal equal protection clause; the statute differentiated 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

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tortfeasor driving a different vehicle. R.C. § 3937.18(K)(2) (2000).

Gonzales & Rowland, L.L.P., and John M. Gonzales, Westerville, for appellant.
Freund, Freeze & Arnold and Kevin C. Connell, Dayton, for appellee.
HARSHA, Judge.
{¶ 1} After reversing our decision in *Morris v. United Ohio Ins. Co.,* Ross App. No. 02CA2653, 2003-Ohio-1708, 2003 WL 1756416, the Supreme Court of Ohio remanded the matter for consideration of an issue we did not reach. Accordingly, we now address Wanda Morris's constitutional challenge to former R.C. 3937.18(K)(2),[FN1] which stated that the terms "uninsured motor vehicle" and "underinsured motor vehicle" do 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."

FN1. This decision deals with former R.C. 3937.18 as amended by Am.H.B. No. 261, effective September 3, 1997, through September 21, 2000.

{¶ 2} Mrs. Morris argues that R.C. 3937.18(K)(2) violates the Equal Protection Clauses of the Ohio and United States Constitutions because it discriminates against claimants who are related to the tortfeasor. Moreover, she argues that no rational basis exists to justify this distinction.

{¶ 3} However, we disagree with Mrs. Morris's description of the classification created by R.C. 3937.18(K)(2). 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. Rather, it 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. ***665** Since appellant has failed to identify a proper class for analysis, we reject her equal protection claim summarily. Accordingly, we affirm the trial court's judgment.

{¶ 4} In February 2000, Richard Morris was driving a motor home when he rear-ended a semi. His wife, Wanda Morris, was a passenger in the motor home and suffered various injuries as a result of the accident. At the time of the accident, the Morrises had an automobile liability policy with United Ohio Insurance Company. The policy identified Richard and Wanda Morris as the "named insureds" and listed the motor home as a "covered vehicle" in a separate binder for liability and uninsured motorist coverages.

****655** {¶ 5} The liability coverage portion of United Ohio's policy provided:
A. We do not provide Liability Coverage for any insured:
1. For bodily injury or death to you or any family member.

In addition, the uninsured/underinsured motorist coverage portion of the policy provided:C. Uninsured motor vehicle means a land motor vehicle or trailer of any type:
* * *
4. To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insurance company:
a. denies coverage * * *.

However, the uninsured/underinsured motorist portion also provided:E. With regard to definition C., uninsured motor vehicle does not include any vehicle or equipment:

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1. Owned by or furnished or available for the regular use of you or any family member.

{¶ 6} Mrs. Morris initially attempted to recover under the liability coverage portion of her husband's policy. However, United Ohio denied coverage based on the Section A.1. exclusion cited above. Apparently, both parties agree that United Ohio properly denied this claim.

{¶ 7} Mrs. Morris subsequently filed a claim for uninsured motorist coverage, but United Ohio denied this claim as well. United Ohio concluded that the motor home could not be an uninsured motor vehicle since the definition in Section E.1., which was authorized by R.C. 3937.18(K)(2), provided that an uninsured motor vehicle did not include a vehicle "owned by or furnished or available for the regular use of you or any family member." Because the Morrises owned the motor home that caused the accident, United Ohio concluded that the motor home was not, by definition, an uninsured motor vehicle.

***666** {¶ 8} In March 2001, Mrs. Morris filed a complaint in the Ross County Court of Common Pleas alleging that United Ohio had wrongfully denied her uninsured motorist claim. She also sought a declaratory judgment that R.C. 3937.18(K)(2) was unconstitutional.[FN2] After United Ohio filed its answer, both parties filed motions for summary judgment. On summary judgment, Mrs. Morris argued (1) that R.C. 3937.18(J)(1) and (K)(2) were irreconcilable and, therefore, R.C. 3937.18(K)(2) should not be given effect and (2) that R.C. 3937.18(K)(2) violated that Equal Protection Clauses of the Ohio and United States Constitutions. The trial court rejected these arguments and granted summary judgment to United Ohio. The court concluded that R.C. 3937.18(J)(1) and (K)(2) could be reconciled and thus, the statutorily authorized definition of uninsured motor vehicle contained in the policy was valid. Additionally, the court concluded that former R.C. 3937.18(K)(2) did not violate the Equal Protection Clause since the classification it created was reasonably related to the accomplishment of a legitimate governmental interest, i.e., the prevention of collusive lawsuits. For additional factual and procedural background, see *Morris v. United Ohio Ins. Co.,* Ross App. No. 02CA2653, 2003-Ohio-1708, where we reversed the trial court's judgment.

FN2. Mrs. Morris notified the Ohio Attorney General of her constitutional challenge to former R.C. 3937.18(K)(2) as required by R.C. 2721.12.

{¶ 9} In September 2004, the Supreme Court of Ohio issued its decision in *Kyle v. Buckeye Union Ins. Co.,* 103 Ohio St.3d 170, 2004-Ohio-4885, 814 N.E.2d 1195, and ****656** held that R.C. 3937.18(J)(1) and (K)(2) address different topics and thus do not conflict. Based on its decision in *Kyle,* the Supreme Court of Ohio reversed our decision in *Morris,* Ross App. No. 02CA2653, 2003-Ohio-1708, and remanded the matter for consideration of Mrs. Morris's remaining assignment of error. Thus, we now consider the following assignment of error:
The trial court erred by not declaring former R.C. 3937.18(K)(2) unconstitutional.

{¶ 10} In reviewing a summary judgment, the lower court and appellate court utilize the same standard, i.e., we review the judgment independently and without deference to the trial court's determination. *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8, 536 N.E.2d 411. Summary judgment is appropriate when the movant has established the following: (1) that there is no genuine issue as to any material fact, (2) that the moving party is entitled to judgment as a matter of law, and (3) that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence against it construed most strongly in

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its favor. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881, citing *Harless v. Willis Day Warehousing* ***667** *Co.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46. See, also, Civ.R. 56(C).

{¶ 11} In her assignment of error, Mrs. Morris argues that R.C. 3937.18(K)(2) violates the Equal Protection Clauses of the Ohio and United States Constitutions. She claims that subsection (K)(2) unconstitutionally differentiates between claimants who are related to the tortfeasor and all other claimants. Moreover, she argues that no rational basis exist to justify this distinction.

[1][2] {¶ 12} 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, 706 N.E.2d 323. Consequently, the standard for determining whether a statute violates equal protection is essentially the same under state and federal law. *Park Corp. v. Brook Park,* 102 Ohio St.3d 166, 169, 2004-Ohio-2237, 807 N.E.2d 913, citing *State v. Thompkins* (1996), 75 Ohio St.3d 558, 561, 664 N.E.2d 926.

[3][4] {¶ 13} "The Equal Protection Clause prevents the state from treating people differently under its laws on an arbitrary basis." *State v. Williams* (2000), 88 Ohio St.3d 513, 530, 728 N.E.2d 342, citing *Harper v. Virginia State Bd. of Elections* (1966), 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (Harlan, J., dissenting). The Equal Protection Clause does not forbid classifications. Rather, it prevents the state " 'from treating differently people who are in all relevant respects alike.' " *Park Corp.,* 102 Ohio St.3d at 169, 807 N.E.2d 913, quoting *Nordlinger v. Hahn* (1992), 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1.

[5] {¶ 14} R.C. 3937.18 sets forth the requirements concerning uninsured and underinsured motorist coverage. Former R.C. 3937.18(K)(2) stated: "As used in this section, 'uninsured motor vehicle' and 'underinsured motor vehicle' do 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." Mrs. Morris claims that this statutory subsection discriminates against claimants who are related to the tortfeasor. We disagree.

{¶ 15} 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 ****657** 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.

{¶ 16} An example will help illustrate our point. Assume that Mrs. Morris's friend was driving the motor home at the time of the accident. Mrs. Morris's initial attempts to recover liability benefits are unsuccessful, so she files a claim for uninsured motorist coverage under her policy with United Ohio. Under these ***668** circumstances, R.C. 3937.18(K)(2) will preclude coverage since the tortfeasor, Mrs. Morris's friend, was driving a vehicle owned by a named insured.

{¶ 17} 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 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

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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.

{¶ 18} As the Supreme Court of Ohio has recognized on multiple occasions, where there is no classification, there is no discrimination that would offend the federal or state Equal Protection Clauses. See *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 290, 595 N.E.2d 862. In the absence of a sufficient legal classification, an equal protection analysis is not required. Id. In light of the fact that the appellant has failed to identify the appropriate class, we need not construct one for her in order to proceed with the analysis. This assignment of error has no merit.

{¶ 19} Based upon the Supreme Court's holding in *Kyle* and its reversal of our prior decision in this matter, we affirm the judgment of the trial court.

Judgment affirmed.

ABELE, P.J., and CLINE, J., concur.
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