

07 - 1760

IN THE SUPREME COURT OF OHIO

Fred L. Lager, Administrator of the  
Estate of Sara E. Lager, deceased,

Appellee,

vs.

Nationwide Mutual Fire  
Insurance Company,

Appellant.

: Supreme Court Case  
: No. \_\_\_\_\_  
:

: On Appeal from the  
: Lucas County Court of Appeals,  
: Sixth Appellate District  
:

: Court of Appeals  
: Case No. L-07-1022  
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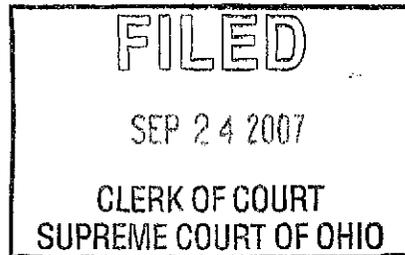
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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY**

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

This is a case of public or great interest because there presently exists a conflict between the various courts of appeals concerning the interpretation of the phrases “because of bodily injury” and “for bodily injury” as found in the uninsured/underinsured portion of the policy of insurance.

This case brings before the Court decisions out of three different appellate districts: *Hall v. Nationwide Mut. Fire Ins. Co.*, No. 05AP-305, Court of Appeals of Ohio, Tenth Appellate District, Franklin County, 2005 Ohio 4572; 2005 Ohio App. LEXIS 4132, September 1, 2005, Rendered, Discretionary appeal not allowed by *Hall v. Nationwide Mut. Fire Ins. Co.*, 2006 Ohio 179, 2006 Ohio LEXIS 88 (Ohio, Jan. 25, 2006); *Lager v. Miller-Gonzalez*, Court of Appeals No. L-07-1022, Court of Appeals of Ohio, Sixth Appellate District, Lucas County, 2007 Ohio 4094; 2007 Ohio App. LEXIS 3713, August 10, 2007, Decided, and *Tuohy v. Taylor*, Case No. 4-06-23, Court of Appeals of Ohio, Third Appellate District, Defiance County, 2007 Ohio 3597; 2007 Ohio App. LEXIS 3305, July 16, 2007, Date of Judgment Entry.

In 2005, the Tenth District Court of Appeals determined that the use of the two different phrases: “for bodily injury” and “because of bodily injury” created an ambiguity in the context of wrongful death claims.

Since the Tenth District’s decision in 2005, the Ohio Supreme Court issued a decision in *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St. 3d 70, 2006 Ohio 1926. It was the majority’s conclusion that the 1997 amendments to R.C. 3937.18(A) made by

Am. Sub. H.B. No. 261, 147 Ohio Laws, Part II, 2372 (“1997 H.B. 261”) H.B. 261, Gen. Assem. (Ohio 1997), permitted insurance coverage to be restricted to losses arising from bodily injuries which are suffered by an insurance policy’s insureds.

The effect of the legislature’s amendments to R.C. 3937.18, and the Supreme Court of Ohio’s decision in *Hedges*, were to allow the insurer to require its insured to personally sustain bodily injury in order to recover UM benefits.

Despite these evolutions in the law, the Sixth District Court of Appeals in *Lager v. Miller-Gonzalez*, *supra*, followed the *Hall* decision without discussing the effect of the changes in the law and summarily concluded the language to be ambiguous.

Conversely, the Third District Court of Appeals in *Tuohy v. Taylor*, *supra*, disagreed with the *Hall* decision and noted that “an ambiguity exists only when a provision in a policy is susceptible of more than one reasonable interpretation.” *Tuohy* at p. 11. The Third District found Judge Lanzinger’s dissent in *Kotlarczyk v. State Farm Mut. Auto. Ins. Co.*, 2004 Ohio 3447 to be persuasive.

I respectfully dissent because I believe that the State Farm policy contains a valid exclusion that precludes uninsured motorist coverage in this case.

[\*P57] The majority acknowledges that R.C. 3937.18(J) is the [\*\*32] pertinent statute that governs this August 18, 1999 accident. As noted in *Baughman v. State Farm Mut. Auto Ins. Co.*, 88 Ohio St. 3d 480, 2000 Ohio 397, 727 N.E.2d 1265, this statute was amended by H.B. 261, effective September 3, 1997, to supersede the Ohio Supreme Court’s holding in *Martin v. Midwestern Group Ins.*, 70 Ohio St. 3d 478, 1994 Ohio 407, 639 N.E.2d 438, which had invalidated “other owned vehicle” exclusions on public policy grounds. The Supreme Court noted that the amendment to the statute “made the ‘other owned vehicle’ exclusions enforceable once more.” *Id.*, at 484.

[\*P58] After recognizing that the State Farm policy did include language of this exclusion, the majority then backtracks and relies on *Moore v. State Auto. Mut. Ins. Co.*, 88 Ohio St.3d 27, 2000 Ohio 264, 723 N.E.2d 97, a case interpreting a former version of R.C. 3937.18(J), to conclude that wrongful death claims must be covered so as to give effect to R.C. 3937.18. The remaining cases, which the majority has cited to argue that the other owned auto exclusion does not apply to wrongful death cases, have also relied upon Moore, a [\*\*33] decision now called into question because of the subsequent legislative action in H.B. 261.

[\*P59] Section III in Carol Kotlarczyk's policy reads in part:

[\*P60] "When Coverage U[uninsured/underinsured motorist coverage] Does Not Apply": THERE IS NO COVERAGE: \* \* \* (2) FOR BODILY INJURY TO AN INSURED: (a) WHILE OPERATING OR OCCUPYING A MOTOR VEHICLE OWNED OR LEASED BY, FURNISHED TO, OR AVAILABLE FOR THE REGULAR USE OF YOU, YOUR SPOUSE, OR ANY RELATIVE IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY.

[\*P61] The stated intent is to limit coverage to vehicles specifically identified to the policy. The "other-owned auto exclusion" is plain.

[\*P62] Michelle Kotlarczyk was an "insured" under appellant's policy because she was a relative who resided with appellant. But she was killed while operating a vehicle that she herself owned (a 1996 Chevy Cavalier). Her Cavalier was excluded from UM/UIM coverage by State Farm's policy that specifically covered a 1992 Ford Escort issued to her mother, Carol Kotlarczyk. We have applied the "other owned vehicle exclusion" before in *Geran v. Westfield Ins. Co.*, Lucas App. No. L-01-1398, 2002 Ohio 1230, [\*\*34] to preclude UM/UIM coverage.

[\*P63] Although the majority opinion emphasizes the issue of stacking and devotes the bulk of its time to that

issue, that discussion becomes moot when coverage under a policy does not exist.

[\*P64] I would find that the trial court did not err in granting summary judgment to appellee and denying summary judgment to appellant. With both assignments of error well-taken, I would affirm the judgment below.

The facts in the case at bar raise the same issue as that discussed in Judge Lanzinger's dissent and the time is ripe to end the discrepancies between the various districts and for guidance in the resolution of this issue from this state's highest court.

### STATEMENT OF THE CASE AND FACTS

#### STATEMENT OF THE CASE

On January 21, 2005, Appellee, Fred L. Lager, as Administrator of the Estate of Sara E. Lager, brought a wrongful death and survivorship suit against Ryan Miller Gonzalez and Nationwide Mutual Fire Insurance Company. The suit sought a declaration of coverage under the policy of insurance issued by Nationwide to Fred and Cathy Lager.

On February 2, 2006, Appellant, Nationwide Mutual Fire Insurance Company, moved for summary judgment on the declaratory judgment action seeking a determination that there was no uninsured/underinsured motorist coverage available to Fred and Cathy Lager for their wrongful death claim due to the "other owned auto" exclusion contained in the policy of insurance.

On February 27, 2006, Appellee filed a response to the Motion for Summary Judgment and also moved for summary judgment in Appellee's favor on the declaratory judgment action.

On April 13, 2006, the trial court denied Appellant's Motion for Summary Judgment and granted Appellee's Motion for Summary Judgment.

On May 5, 2006, Appellant moved for relief from judgment/reconsideration of the decision.

On June 5, 2006, Appellant moved to stay the effect of the summary judgment until Appellant could take the deposition of Ryan Miller Gonzalez.

On August 23, 2006, Appellant filed the deposition of Miller Gonzalez.

On September 26, 2006, the trial court denied Appellant's Civ. R. 60(B)/reconsideration motion.

The above decisions of the trial court became final appealable orders on December 27, 2006.

On January 22, 2007, a Notice of Appeal was filed by Appellant, Nationwide Mutual Fire Insurance Company.

On August 10, 2007, the Sixth District Court of Appeals issued a Decision and Judgment Entry. It is from this decision that Appellant seeks a discretionary appeal.

On September 5, 2007, the Sixth District Court of Appeals issued a Decision and Judgment Entry finding it's decision of August 10, 2007 to be in conflict with a Judgment entered by the Third District Court of Appeals in *Tuohy v Taylor*, 3<sup>rd</sup> Dist. No. 4-06-23. The *Tuohy* decision was issued on July 16, 2007.

On August 30, 2007, a Notice of Appeal was filed from the Sixth District's decision in *Tuohy v. Taylor*, Supreme Court Case No. 2007-1631.

STATEMENT OF FACTS

Sara E. Lager died from injuries sustained in a 2003 collision while a passenger in her own vehicle, a 1992 Chevrolet Camaro. The Camaro was insured by Appellant, Nationwide Mutual Fire Insurance Company. Sara's policy of insurance had uninsured/underinsured motorist coverage in the amount of \$50,000 per person/\$100,000 per occurrence. Sara's parents, Fred and Cathy Lager, were also insured by Appellant, Nationwide Mutual Fire Insurance Company, under a separate policy of insurance. This policy provided uninsured/underinsured motorist coverage in the amount of \$300,000 per person/\$300,000 per occurrence.

Fred and Cathy Lager seek to present a claim for the wrongful death of their daughter, Sara, under their own policy of insurance.

The policy of insurance issued to Fred and Cathy Lager provides in pertinent part:

We will pay compensatory damages, including derivative claims, that you or a relative are legally entitled to recover from the owner or driver of an uninsured motor vehicle under the tort law of the state where the motor vehicle accident occurred, because of bodily injury suffered by you or a relative and resulting from the motor vehicle accident. Damages must result from a motor vehicle accident arising out of the:

1. ownership;
2. maintenance; or
3. use

of the uninsured motor vehicle.

(Page U1 of Defendant's Exhibit CC, a certified copy of the policy.)

However, after this general description of coverage, the policy goes on to provide an exclusion for situations in which any insured is in a vehicle owned by the insured but not insured under this particular policy of insurance.

A. This coverage does not apply to anyone for bodily injury or derivative claims:

3. While any insured operates or occupies a motor vehicle:

- a) owned by;
- b) furnished to; or
- c) available for regular use of:

you or a relative, but not insured for Auto Liability coverage under this policy. Policy does not apply if any insured is hit by any such motor vehicle. (Page U2 and U3 of Defendant's Exhibit CC, a certified copy of the policy.)

It is uncontroverted that the vehicle being operated by Sara Lager was owned by her and not insured for Auto Liability coverage under the policy issued to Fred and Cathy Lager.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I: In a claim for statutory wrongful death damages under a policy of insurance for uninsured/underinsured motorist coverage, an ambiguity is not created when one portion of the policy uses the term "because of bodily injury" and another portion of the policy uses the term "for bodily injury" because there is no rational distinction between the**

**phrases “for bodily injury” and “because of bodily injury”.**

It is uncontroverted that the version of R.C. 3937.18(A), in effect on the date of Sara Lager’s death in 2003, permits an insurer to limit UM/UIM coverage when any insured is occupying a vehicle owned by her or a relative, but not insured for Auto Liability coverage under the policy from which the insured is seeking coverage. In this situation, the decedent, Sara Lager, was killed while she was occupying a vehicle she owned which was not listed on or insured under Fred and Cathy Lager’s policy. Appellee argues that the initial description of coverage, for damages recoverable from a tortfeasor “because of bodily injury” has a different meaning than the term used in the exclusion “for bodily injury” and thus an ambiguity is created.

The genesis of this idea is found in former Supreme Court Justice Brown’s concurring opinion in *Cincinnati Insurance v. Phillips* (1990), 52 Ohio St. 3d 162.

The limit of liability shown in the Declarations for each person for Bodily Injury Liability *is our maximum limit of liability for all damages for bodily injury* sustained by any one person in any one auto accident. \* \* \* (Emphasis added.)

These words should be given their plain meaning. The limit applies only to “damages for bodily injury.” Claims for wrongful death (and loss of consortium) are not claims “for bodily injury” although they may be claims arising out of bodily injury. Thus, the limit does not apply.

First, it must be noted that this comment is not contained in the syllabus of the case and thus does not state the law in the State of Ohio. It is mere dicta. Second, both Justices Wright and Holmes in their dissents, examining the same language, found no

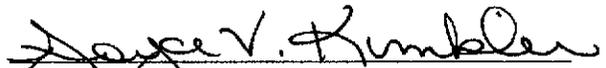
ambiguity. Justices Sweeny, Douglas, Resnick and Moyer are silent on the issue of ambiguity in the language. Finally, in the case at bar, by contractual definition, claims for wrongful death are claims for bodily injury as that term is defined in the contract. Pursuant to the contract of insurance, bodily injury means: physical injury, sickness, disease, or resulting death. The only kind of claim you can get from bodily injury resulting in death is a wrongful death claim. Because the definition included "death resulting therefrom" there is no rational distinction between the phrases "for bodily injury" and "because of bodily injury" Therefore, this comment of Justice Brown which led to *Newsome v. Grange* (1993), Ohio App. LEXIS 1210 and *Hall v. Nationwide Mut. Fire Ins. Co.*, 2006 Ohio 179 and their progeny needs to be re-examined in light of the evolution of the law of the State of Ohio and changes in contract language to determine if it has been given undue significance.

At the present time, there is no rational distinction between the terms "for bodily injury" and "because of bodily injury" as those terms are used in the policy of insurance. The contract of insurance does not contain any ambiguity and the terms of the policy should be given their plain and unambiguous meaning.

CONCLUSION

Wherefore, Appellant, Nationwide Mutual Fire Insurance Company, moves this Court for an ORDER granting Nationwide a discretionary appeal in this matter for the purpose of determining this question of great public interest.

Respectfully submitted,



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ONE OF THE ATTORNEYS FOR  
APPELLANT, NATIONWIDE MUTUAL  
FIRE INSURANCE COMPANY

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction of Appellant, Nationwide Mutual Fire Insurance Company, was sent by ordinary U.S. mail to W. Randall Rock, Attorney for Appellee, Fred L. Lager, Administrator of the Estate of Sara E. Lager, Deceased, 32 N. Main Street, Suite 911, Dayton, Ohio 45402, on this 21st day of September, 2007.

  
JOYCE V. KIMBLER, #0033767

ONE OF THE ATTORNEYS FOR  
APPELLANT, NATIONWIDE MUTUAL  
FIRE INSURANCE COMPANY

AUG 14 2007

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IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Fred L. Lager, Administrator of the  
Estate of Sara E. Lager, deceased

Court of Appeals No. L-07-1022

Appellee

Trial Court No. CI05-1322

v.

Ryan Miller-Gonzalez, et al.

Defendants

and

Nationwide Mutual Fire Insurance Co.

**DECISION AND JUDGMENT ENTRY**

Appellant

Decided: AUG 10 2007

\* \* \* \* \*

W. Randall Rock, for appellee.

Edward T. Mohler, for appellant.

\* \* \* \* \*

SINGER, J.

{¶ 1} Appellant brings this accelerated appeal from a summary judgment awarded to a claimant for underinsured motorist coverage by the Lucas County Court of Common Pleas.

**E-JOURNALIZED**

**AUG 10 2007**

1.

{¶ 2} Sara E. Lager died from injuries she sustained in a 2003 collision while a passenger in her own car. The accident was caused by the negligence of the driver of Sara's car, Ryan Miller-Gonzalez.

{¶ 3} At the time of the accident, Sara Lager was insured by an auto policy issued by Nationwide Property and Casualty Co. with uninsured/underinsured motorist ("UM/UIM") limits of \$50,000 per person/\$100,000 per occurrence. At the same time her parents, Fred and Cathy Lager, were insured by an auto policy issued by appellant, Nationwide Mutual Fire Insurance Co. This policy provided \$300,000 per person/\$300,000 per occurrence UM/UIM coverage for the Lagers or a "relative."

{¶ 4} On January 21, 2005, appellee, Fred L. Lager as administrator of the estate of Sara E. Lager, brought a wrongful death and survivorship suit against Miller-Gonzalez and sought a declaration of UM/UIM coverage under the policies issued by Nationwide Property and Casualty Co. and appellant. Nationwide Property eventually agreed to pay its policy limits as UIM coverage and was dismissed as a defendant.<sup>1</sup>

{¶ 5} On February 2, 2006, appellant moved for summary judgment, arguing that by the terms of its policy issued to Fred and Cathy Lager, UM/UIM coverage for Sara Lager was excluded by an "other owned auto" exclusion because her vehicle was not listed as an insured vehicle on her parent's policy. Moreover, appellant asserted,

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<sup>1</sup>Appellant represents that Miller-Gonzalez was also dismissed from the case, but we find no dismissal in the record. This is nonetheless immaterial as the judgment appealed from contained Civ.R. 54(B) language.

coverage was precluded because she was not a "relative" of her parents as defined in the policy's UM/UIM provisions.

{¶ 6} Appellee responded with a memorandum in opposition and his own cross-motion for summary judgment. In support of his cross-motion, appellee submitted affidavits and other documents tending to show that the 21-year-old Sara at the time of her death was living in Toledo to attend college, but maintained her permanent residence at the Centerville, Ohio home of her parents. Thus, appellee contended, Sara was covered under her parents' policy as a "relative:" which, in the language of the insurance contract, included a blood relation, "\* \* \* if under the age of 25 and unmarried, while living temporarily outside your household."

{¶ 7} On April 13, 2006, the trial court denied appellant's motion for summary judgment and granted appellee's. The court concluded that, on the undisputed facts before the court, Sara Lager was a "relative" entitled to UM/UIM coverage under her parents policy. With respect to the "other owned auto" exclusion that appellant asserted excluded any coverage, following *Hall v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 05AP305, 2005-Ohio-4572, the court found the language of the exclusion ambiguous and construed the policy in favor of coverage.

{¶ 8} On May 5, 2006, appellant moved for relief from judgment/reconsideration of the decision. On June 5, 2006, appellant moved to stay the effect of the summary judgment until appellant could take the deposition of Ryan Miller-Gonzalez.

{¶ 9} On August 23, 2006, appellant filed the deposition of Miller-Gonzalez. In his deposition, Miller-Gonzalez testified that at the time of the accident he was living with Sara Lager, sharing financial responsibilities with her and that the two were making plans to be married. Nevertheless, on September 26, 2006, the trial court denied appellant's Civ.R. 60(B)/reconsideration motion and found moot its motion for a stay. The court later also found moot an appellee motion to strike the Miller-Gonzalez deposition.

{¶ 10} From these judgments, appellant now brings its appeal. In three assignments of error, appellant asserts that the trial court erred in (1) denying its summary judgment motion; (2) granting appellee's motion for summary judgment; and, (3) denying its motion for reconsideration.

{¶ 11} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 12} "\* \* \* (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, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 13} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

I. Coverage/Other Owned Auto Exclusion.

{¶ 14} The policy of insurance issued by appellant to the Lagers contains the following provision in its UM/UIM endorsement:

{¶ 15} "We will pay compensatory damages, including derivative claims, that you or a **relative** are legally entitled to recover from the owner or driver of an **uninsured motor vehicle** under the tort law of the state where the **motor vehicle** accident occurred, because of **bodily injury** suffered by you or a **relative** and resulting from the **motor vehicle** accident. Damages must result from a **motor vehicle** accident arising out of the: 1. ownership; 2. maintenance; or 3. use; of the **uninsured motor vehicle.**" (Emphasis in original.)

{¶ 16} As defined in the policy, an uninsured motor vehicle includes an underinsured motor vehicle. "That is a **motor vehicle** for which bodily injury liability coverage limits or other security or bonds are in effect; however, their total amount available for payment is less than the limits of this coverage." A "'RELATIVE' means a natural person who regularly lives in **your** household and who is related to **you** by blood, marriage or adoption (including a ward or foster child). 'RELATIVE' includes such person, if under the age of 25 and unmarried, while living temporarily outside **your** household."

{¶ 17} From the affidavit of appellee, undisputed at the time the cross-motions for summary judgment became decisional, Sara satisfied the conditions of the policy for coverage as a relative. She was under 25. She was temporarily residing outside her parents' home while attending college. The \$50,000 per person limit under her own Nationwide Property insurance policy was less than the \$300,000 per person limit in her parents' policy with appellant.

{¶ 18} Without conceding the coverage issue, appellant insists that, even assuming there is coverage, recovery must be denied because of the policy's other-owned auto exclusion. Under "Coverage Exclusions," the policy provides:

{¶ 19} "A. This coverage is not applied to anyone for **bodily injury** or derivative claims:

{¶ 20} "\* \* \*

{¶ 21} "3. While any **insured** operates or occupies a motor vehicle:

{¶ 22} "a) owned by:  
{¶ 23} "b) furnished to; or  
{¶ 24} "c) available for the regular use of;  
{¶ 25} "you or a **relative**, but not insured for auto liability coverage under this policy. \* \* \*"

{¶ 26} Appellant maintained that Sara Lager died of bodily injuries sustained in a vehicle owned by her, but not insured under its policy. Consequently, appellant insists, coverage for her was excluded.

{¶ 27} Appellee responded that Sara Lager's parents are legally entitled to recover under Ohio tort law from an underinsured driver for the presumptive damages they sustained as the result of Sara's death. See R.C. 2125.02(A). Such injuries, according to appellee, are "because of" Sara's bodily injury, not "for" Sara's bodily injuries. Appellant's policy coverage clause grants coverage "because of **bodily injury** \* \* \* suffered by **you** or a **relative** \* \* \*." Consequently, appellee argued, coverage exists. Since the parents' claim is for their own loss resulting "because of" Sara's death, not "for" her death, appellee insisted, the exclusion does not apply.

{¶ 28} Following *Hall*, supra, the trial court found ambiguous the "because of" – "for" discrepancies in the policy. Construing the language of the policy in favor of the insured, see *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, syllabus, the court concluded that coverage existed and appellee was entitled to judgment as a matter of law.

{¶ 29} On appeal, appellant contends that the trial court's reliance on *Hall* is misplaced as that decision came from the Tenth District Court of Appeals and is not binding on courts in this jurisdiction.

{¶ 30} While it is true that the decisions of other courts of appeals are not binding on us, they do carry a substantial persuasive authority. *Stapleton v. Holstein* (1998), 131 Ohio App.3d 596, 598. *Hall* examined the exact same policy language applied in circumstances materially the same as those presented here. The *Hall* court found this language ambiguous. *Hall* at ¶ 18, discretionary appeal not accepted, 108 Ohio St.3d 1416, 2006-Ohio-179. We are persuaded that this is the proper interpretation of this insurance contract.

{¶ 31} Accordingly, the trial court properly denied appellant's motion for summary judgment and did not err in granting appellee's motion for summary judgment. Appellant's first and second assignments of error are not well-taken.

## II. Relief from Judgment/Reconsideration

{¶ 32} In its remaining assignment of error, appellant asserts that the trial court erred in denying its motion for relief from judgment or reconsideration.

{¶ 33} In their briefs, neither party addresses the relief from judgment question. This is as well, as Civ.R. 60(B) applies to a "final judgment, order or proceeding." The summary judgment here was interlocutory until Civ.R. 54(B) language was added well after the decision about which appellant complains was entered.

{¶ 34} A motion for reconsideration after a final judgment is not recognized in the Ohio Rules of Civil Procedure. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, paragraph two of the syllabus. Prior to a ruling becoming final, however, a trial court may entertain a motion for reconsideration. *Picciuto v. Lucas Cty. Bd. of Commrs.* (1990), 69 Ohio App.3d 789, 797. Whether to grant a motion for reconsideration rests within the sound discretion of the court and will not be disturbed absent an abuse of discretion. *Id.* An abuse of discretion is more than a mistake of law or an error of judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Harman v. Baldwin*, 107 Ohio St.3d 232, 235, 2005-Ohio-6264, ¶ 16.

{¶ 35} Appellant insists that we carefully examine the September 26, 2006 entry denying its reconsideration motion. Appellant suggests that, because the entry did not even mention the Miller-Gonzalez deposition, the court failed to consider this evidence. What appellant fails to provide is authority that would necessitate the court considering such a late filing, months after the cross-motions for summary judgment became decisional.

{¶ 36} The trial court issued its judgment on the cross-motions for summary judgment on April 12, 2006. On May 5, 2006, appellant moved for reconsideration, premising its motion on what it asserted were cases undermining the court's reasoning in granting summary judgment. On August 23, 2006, appellant filed the Miller-Gonzalez deposition with a document captioned, "Notice of Filing by Nationwide Mutual Fire Insurance Company." It is in this pleading only that appellant argues that the Miller-

Gonzales deposition demonstrates that Sara Lager was not a "relative" within the meaning of the policy.

{¶ 37} After a case has been set for pretrial or trial, a motion for summary judgment may be made only with leave of the court. Civ.R. 56(B). Civ.R. 56(C) directs, in part, "\* \* \* Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, *timely filed* in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *No evidence or stipulation may be considered except as stated in this rule.*" (Emphasis added.) Civ.R. 56(E) provides that, "[t]he court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. \* \* \*." The trial court has discretion as to whether accept or reject consideration of late filed affidavits or depositions. *Smitley v. Smith* (Mar. 8, 1988), 4th Dist. No. 455.

{¶ 38} The deposition appellant insists should have been considered was filed well out of rule and we find no indication in the record to suggest that appellant sought the court's permission for such untimely filing. Consequently, we cannot say that the court abused its discretion in failing to consider the deposition or denying appellant's motion for reconsideration. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 39} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant

to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

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

Mark L. Pietrykowski, P.J.

*Mark L. Pietrykowski*  
JUDGE

Arlene Singer, J.

*Arlene Singer*  
JUDGE

William J. Skow, J.  
CONCUR.

*William J. Skow*  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

FILED  
LUCAS COUNTY

2006 APR 13 A 8:35

COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURTS

→ Received  
4-27-06  
A.V.M.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Fred L. Lager, etc.,

Plaintiff,

-vs-

Ryan J. Miller-Gonzalez, et al.,

Defendant.

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Case No.: CI 05-1322

Honorable Denise Ann Dartt

OPINION AND JOURNAL ENTRY

I. FACTS

Sara E. Lager was the owner of a 1992 Chevrolet Camaro which was insured by Defendant Nationwide Property and Casualty Company ("Nationwide"). On January 26, 2003, the Camaro was being driven by Sara's boyfriend, Defendant Ryan J. Miller-Gonzalez, and Sara was a passenger when the vehicle was involved in an automobile accident. Sara died as a result of the accident.

Sara's parents, Fred L. and Cathy R. Lager, were also owners of a policy of motor vehicle insurance issued by Nationwide, Policy No 91 34 C 362444 ("the Policy"). Fred L. Lager, administrator of the Estate of Sara E. Lager, filed the instant action against Nationwide, among others, claiming that Fred and Cathy Lager are entitled to uninsured/underinsured motor vehicle ("UM/UIM") coverage under the Policy as wrongful death beneficiaries for the injuries and damages they sustained as a direct and proximate result of

the wrongful death of their daughter Sara.

This cause is before the Court upon cross motions for summary judgment. Plaintiff contends that Sara was a "relative" as defined in the policy and thus a covered person under the UM/UIM provision. Nationwide counters that, even if Sara was a covered person, the parents are excluded from compensation under the policy's "other owned" auto exclusion.

## II. SUMMARY JUDGMENT STANDARD

The Supreme Court of Ohio has set forth a tripartite test that must be met before a motion for summary judgment can be granted: that there is no genuine issue as to any material fact; that movant is entitled to judgment as a matter of law; and that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66, 375 N.E.2d 46.

A party who claims to be entitled to summary judgment on the grounds that a nonmovant cannot prove its case bears the initial burden of: 1) specifically identifying the basis of its motion, and 2) identifying those portions of the record that demonstrate the absence of a genuine issue of material fact regarding an essential element of the nonmovant's case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The movant satisfies this burden by calling attention to some competent summary judgment evidence, of the type listed in Civ.R. 56(C), affirmatively demonstrating that the nonmovant has no evidence to support his or her claims. *Id* Once the movant has satisfied this initial burden, the burden shifts to the nonmovant to set forth specific facts, in the manner prescribed by Civ. R. 56(E), indicating that a genuine issue of material fact exists for trial. *Id*; accord *Vahila v Hall*, 1997-Ohio-421, 77 Ohio St.3d 421.

### III. DISCUSSION

The Policy's UM/UIM endorsement provides for UM/UIM coverage for the policy holders as well as their relatives:

"We will pay compensatory damages, including derivative claims, that you or a relative are legally entitled to recover from the owner or driver of an **uninsured motor vehicle** under the tort law of the state where the **motor vehicle** accident occurred, because of **bodily injury** suffered by you or a relative and resulting from the **motor vehicle** accident. Damages must result from a **motor vehicle** accident arising out of the: 1. ownership; 2. maintenance; or 3 use; of the **uninsured motor vehicle**."

"Relative" is defined as "a natural person who regularly lives in your household and who is related to you by blood, marriage or adoption (including a ward or foster child). 'Relative' includes such person, if under the age of 25 and unmarried, while living temporarily outside your household." The undisputed affidavit of Fred Lager clearly establishes that Sara was under the age of 25, unmarried, and living temporarily in Toledo while attending college.

The Policy defines an "uninsured motor vehicle" as:

"a) one for which there is no bodily injury liability bond, insurance, or other security in effect, applicable to the vehicle owner, operator, or any other liable person or organization, at the time of the accident. b) one which is underinsured. This is a **motor vehicle** for which bodily injury liability coverage limits or other security or bonds are in effect; however, their total amount available for payment is less than the limits of this coverage. See the Declarations for those limits. c) one for which the insuring company denies coverage or becomes insolvent."

Sara's bodily injury liability coverage limits were \$50,000 each person/\$100,000 each occurrence, while the UM/UIM limits under her parents' Policy is \$300,000 each person/\$300,000 each occurrence. Therefore, even if the Bodily Injury coverage under Sara's policy would cover Mr. Miller-Gonzalez as argued by Nationwide, the vehicle meets the definition of "uninsured motor vehicle" under clause b).

However, Nationwide maintains that Fred and Cathy Lager are excluded from compensation under

the Policy's "other owned" auto exclusion. That exclusion provides:

"A. This coverage does not apply to anyone for bodily injury or derivative claims  
 3. While any **insured** operates or occupies a **motor vehicle**: a) owned by; b) furnished to; or c) available for the regular use of; **you** or a **relative**, but not insured for Auto Liability coverage under this policy. It also does not apply if any **insured** is hit by any such **motor vehicle**." (underlining added)

But the UM/UIM coverage agreement states that Nationwide "will pay compensatory damages, including derivative claims, \* \* \* because of bodily injury \* \* \* suffered by a relative \* \* \*." (underlining added) Thus, in the coverage section of the UM/UIM policy, the phrase "because of bodily injury" is used in describing the coverage which is extended, while the exclusion uses the words "for bodily injury" to define what is excluded. Plaintiff argues that since neither phrase is defined in the UM/UIM provision of the Policy, the language is ambiguous and must be construed against Nationwide.

In *Hall v. Nationwide Mutual Fire Ins. Co.*, 2005-Ohio-4572, Franklin App. No. 05AP-305, the policy in question contained language identical to that of the Policy in the instant case. The Court found that the phrase "because of bodily injury" when discussing UM/UIM coverage and then using the phrase "for bodily injury" when discussing exclusions to that coverage are not interchangeable in all situations. As in the instant case, the plaintiff in *Hall* had brought a wrongful death action on the death of a child who was operating a motor vehicle not insured under the policy. The court in *Hall* found the language contained in the policy to be ambiguous and construed the ambiguity against Nationwide and in favor of the insured.

Nationwide counters that the exclusion is consistent with R.C. 3937.18(A)(1) which, according to Nationwide, states that the person insured under the policy must be the one who sustained the bodily injury; since Sara's parents did not sustain bodily injuries as a result of the accident, they are excluded from UM/UIM coverage. However, R.C. 3937.18(A)(1) merely states what UM/UIM coverage must be offered by the insurer and nowhere does the statute state that the parties cannot agree to extend coverage to wrongful

death claims.

The cases relied on by Nationwide are distinguishable. In *Green v. Barbour* (Feb. 9, 2001), Huron App. No. H-00-026, the court was interpreting the "for bodily injury" and "because of bodily injury" phrases contained in the same "Limits of Liability" provision. The "Limits of Liability" provision was also at issue in *Incarnato v Metropolitan Property and Casualty Insurance Company* (Feb. 8, 1996), Tuscarawas App. No. 95 AP 050037, but in that case only the phrase "for bodily injury" was used in the provision. The alleged ambiguity in *Franz v. Nationwide Mutual Insurance Company* (June 14, 1993), Clermont App. No. CA93-02-012, stemmed from differences in policy limits as stated in a billing notice as compared to the policy declarations page.

Following *Hall*, this Court finds that the provisions of the Policy are reasonably susceptible to more than one interpretation and thus must be strictly construed against Nationwide. Therefore, the "other owned" auto exclusion does not apply in this case and Nationwide's motion for summary judgment must be denied.

Accordingly, this Court finds that Policy No. 91 34 C 362444 provides UM/UIM insurance coverage and such coverage must be made available to compensate Fred L. Lager and Cathy R. Lager as wrongful death beneficiaries for the injuries and damages they sustained as a direct and proximate result of the wrongful death of the decedent, Sara E. Lager.

**JOURNAL ENTRY**

It is **ORDERED** that the motion for summary judgment filed by Defendant Nationwide Mutual Fire Insurance Company is **DENIED**.

It is further **ORDERED** that Plaintiff's motion for summary judgment is **GRANTED**.

Date: April 12, 2006

  
Denise Ann Dartt, Judge