

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. _____

07-1762

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

Court of Appeals
Case No. L-07-1022

NOTICE OF CERTIFIED CONFLICT

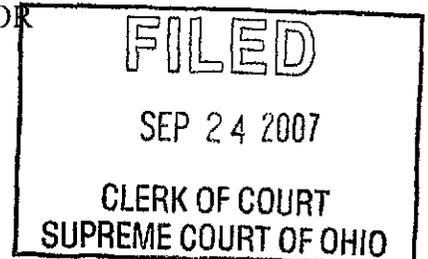
Edward T. Mohler (0041557) (COUNSEL OF RECORD)
420 Madison Avenue, Suite 650
Toledo, Ohio 43604
PH: 419-242-7488; FAX: 419-242-7783
mohlere@nationwide.com

Joyce V. Kimbler (0033767)
50 South Main Street, Suite 502
Akron, Ohio 44308
PH: 330-253-8877; FAX: 330-253-8875
kimblej@nationwide.com

COUNSEL FOR APPELLANT, NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY

W. Randall Rock (0023231)
32 North Main Street, Suite 911
Dayton, OH 45402
PH: 937-224-7625; FAX: 937-223-6967

COUNSEL FOR APPELLEE, FRED E. LAGER, ADMINISTRATOR
OF THE ESTATE OF SARA E. LAGER, DECEASED



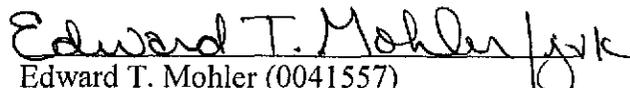
Now comes the Appellant, Nationwide Mutual Fire Insurance Company, by and through counsel, pursuant to S. Ct. Prac. R. IV, Section 1, and hereby gives notice of an order of the Sixth Appellate District Court of Appeals for Lucas County, Ohio certifying a conflict.

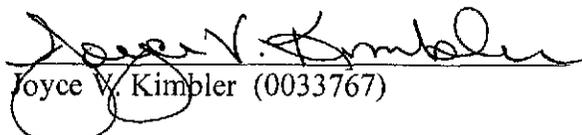
Attached hereto are copies of the applicable decisions:

1. OPINION issued by the Court of Appeals, Third Appellate District, Defiance County on July 16, 2007 in *Tuohy v. Taylor*.
2. DECISION AND JUDGMENT ENTRY of August 10, 2007 by the Court of Appeals of Ohio, Sixth Appellate District, Lucas County in *Lager v. Nationwide*.
3. DECISION AND JUDGMENT ENTRY of August 10, 2007 by the Court of Appeals of Ohio, Sixth Appellate District, Lucas County in *Lager v. Nationwide* certifying the record to the Supreme Court of Ohio for review and final determination.

Appellant, Nationwide Mutual Fire Insurance Company, requests that this Court determine that a conflict exists between the Sixth Appellate District and Third Appellate District and issue an order finding a conflict, identifying those issues raised in this case that will be considered by the Supreme Court on appeal, and ordering those issues to be briefed. (S. Ct. Prac. R. IV, Section 2.)

Respectfully submitted,

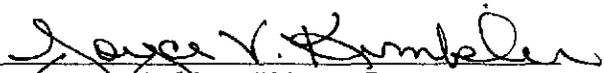

Edward T. Mohler (0041557)


Joyce V. Kimbler (0033767)

Attorneys for Appellant,
Nationwide Mutual Fire Insurance Company

Certificate of Service

I certify that a copy of this Notice of Certified Conflict 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

COURT OF APPEALS
THIRD APPELLATE DISTRICT
DEFIANCE COUNTY

ALVA V. TUOHY, EXECUTOR OF THE
ESTATE OF SAMUEL V. TUOHY,
DECEASED, ET AL.,

PLAINTIFFS-APPELLANTS,

CASE NO. 4-06-23

v.

CATRENA R. TAYLOR, ET AL.,

OPINION

DEFENDANTS-APPELLEES.

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: July 16, 2007

ATTORNEYS:

JOSEPH W. O'NEIL
Attorney at Law
Reg. #0002414
Jennifer N. Brown
Reg. #0073696
901 Ralston Avenue
P.O. Box 781
Defiance, OH 43512
For Appellants.

JOHN M. LIMING
Attorney at Law
Reg. #0008159

P.O. Box 787
Defiance, OH 43512
For Appellee, Catrena Taylor.

ROBERT J. BAHRET
Attorney at Law
Reg. #0014985
Keith J. Watkins
Attorney at Law
Reg. #0021888
7050 Spring Meadows West
Holland, OH 43528
For Appellee, Westfield Companies.

PRESTON, J.

{¶1} Plaintiffs-appellants, Alva and Melinda Tuohy, individually, and Alva Tuohy, as executor of Sam Tuohy's estate (collectively referred to as "appellants"), appeal the judgment of the Defiance County Court of Common Pleas, which granted summary judgment in favor of defendant-appellee Westfield Companies ("Westfield") and denied the appellants' cross-motion for summary judgment. For the reasons that follow, we affirm.

{¶2} On October 27, 2003, Sam Tuohy was killed in an automobile accident when his vehicle was struck by a vehicle driven by Catrena Taylor. At the time of the accident, Sam was driving a Chevrolet Blazer titled in his own name. Sam's parents, Alva and Melinda Tuohy, held an insurance policy with Westfield that included a \$300,000 uninsured/underinsured (UM/UIM) motorist

coverage. It is undisputed that Alva and Melinda's insurance policy did not list the Chevrolet Blazer as a covered automobile.

{¶3} On October 17, 2005, the executor of Sam's estate, Alva, filed a complaint against Taylor and Westfield. In regards to Westfield, the estate sought recovery under Alva and Melinda's UM/UIM policy. Westfield moved for summary judgment, denying coverage. The estate then filed a motion for summary judgment against Westfield, as well as a motion for summary judgment against Taylor on the issue of liability.¹

{¶4} On February 22, 2006, Alva and Melinda, acting in their individual capacities, filed a motion to intervene in the case. The trial court granted their motion. In doing so, the trial court found that Westfield's motion for summary judgment also applied to Alva and Melinda.

{¶5} On May 12, 2006, the trial court granted summary judgment in favor of Westfield and denied the appellants' motion for summary judgment. The appellants now appeal the trial court's decision to this court.

{¶6} Before addressing the merits of this case, we must first address a procedural issue. In their brief, the appellants failed to state a specific assignment

¹ The complaint alleged that Taylor had an insurance policy with a \$50,000 limit. The trial court granted summary judgment in favor of appellants and against Taylor on the issue of liability. Taylor is not a party to this appeal, and the trial court's decision in favor of appellants and against Taylor on the issue of liability is not at issue in the present appeal.

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of error as required under App.R. 16(A)(3). Instead, the appellants included an “issue presented”. The appellants filed a motion for leave to clarify the assignment of error, but this court denied the motion.

{¶7} “An appellate court must determine an appeal based on the ‘assignments of error set forth in the briefs.’” *Countrymark Cooperative, Inc. v. Smith* (1997), 124 Ohio App.3d 159, 163, 705 N.E.2d 738, citing App.R. 12(A)(1)(b). In the interests of justice, this court will rephrase the “issue presented” as the following assignment of error:

ASSIGNMENT OF ERROR NO. I

The trial court erred when it granted Westfield’s motion for summary judgment and denied the appellants’ motion for summary judgment.

{¶8} The appellants argue that the trial court erred when it granted summary judgment in favor of Westfield, and denied their motion for summary judgment because the Westfield insurance policy provided UM/UIM coverage. Westfield counters by arguing that the “other owned auto” exclusion in the insurance policy applies and excludes coverage.

{¶9} The trial court’s grant of summary judgment is reviewed under a de novo standard. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is appropriate where “(1.) there is no

genuine issue of material fact; (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 to but one conclusion when viewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party.” *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241, citing *State ex. rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 219, 631 N.E.2d 150; Civ. R. 56(C).

{¶10} Neither party disputes the facts surrounding the accident that tragically killed Sam. The parties also do not dispute that the UM/UIM statute permits insurers to limit underinsured motorist coverage. Rather, the question before this court is whether the insurance policy specifically excludes coverage for the appellants’ claims.

{¶11} According to the appellants, the “other owned auto” exclusion in the Westfield insurance policy does not preclude their claims. The appellants assert that a wrongful death action is an independent cause of action and that, even if the claims of Sam’s estate are excluded from the coverage, that exclusion does not impair Alva and Melinda’s wrongful death claims. The appellants also assert: the coverage section of the insurance policy provided coverage “because of bodily injury,” while the policy exclusion only excluded coverage “for bodily injury”; wrongful death claims are “because of bodily injury” rather than “for bodily

injury”; and the wrongful death claims are not excluded under the language of the insurance policy.

{¶12} By contrast, Westfield maintains that the coverage is excluded under the “other owned auto” exclusion because: Sam was driving a vehicle titled in his own name when the accident occurred; and the vehicle was not listed under the insurance policy.²

{¶13} “[A]n insurance policy is a contract between the insurer and the insured.” *McDaniel v. Rollins*, 3d Dist. No. 1-04-82, 2005-Ohio-3079 at ¶31, citing *Wilson v. Smith*, 9th Dist. No. 22193, 2005-Ohio-337 at ¶9, citations omitted. The court must interpret the language in the insurance policy under its plain and ordinary meaning. *Id.* citing *Wilson*, 2005-Ohio-337, at ¶9, citations omitted. When the contract is clear and unambiguous, the court “may look no further than the four corners of the insurance policy to find the intent of the parties.” *Id.* citations omitted. An ambiguity exists “only when a provision in a policy is susceptible of more than one reasonable interpretation.” *Hacker v. Dickman* (1996), 75 Ohio St.3d 118, 119-120, 1996-Ohio-98, 661 N.E.2d 1005.

{¶14} When the insurance contract is ambiguous, the court “may consider extrinsic evidence to ascertain the parties’ intention.” *McDaniel* at ¶33, citing

² In their reply brief, the appellants argue that Westfield asserted an argument in its brief which had not been argued before the trial court. According to the appellants, Westfield argues that “only claims occurring in the listed covered autos provide insurance coverage for the wrongful death”, however, the only argument before the trial court was the “other owned auto” exclusion. We disagree with the appellants’

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 797 N.E.2d 1256, at ¶12. Ambiguities in an insurance policy must be interpreted against the insurer and in favor of coverage for the insured. *Id.*, citations omitted. However, “[i]t is axiomatic that this rule cannot be employed to create ambiguity where there is none.” *Hacker*, 75 Ohio St.3d at 119-120, 661 N.E.2d 1005.

{¶15} Courts have found that an “other owned auto” exclusion in a UM/UIM policy may preclude coverage for *bodily injuries*. See *Blair v. Cincinnati Insurance Company*, 63 Ohio App.3d 81, 2005-Ohio-4323, 836 N.E.2d 607; *Bailey v. Progressive Ins. Co.*, 6th Dist. No. H-03-043, 2004-Ohio-4853. In addition, courts have held that “other owned auto” exclusions may in some instances preclude coverage for wrongful death claims in the context of *commercial* auto policies. See *Yoder v. Progressive Corp.*, 11th Dist. No. 2005-G-2633, 2006-Ohio-5191; See also *Geren v. Westfield Ins. Co.*, 6th Dist. No. L-01-1398, 2002-Ohio-1230 (“other owned vehicle exclusion” precluded coverage under commercial auto policy for bodily injury).

{¶16} In *Kotlarczyk v. State Farm Mutual Aut. Ins. Co.*, 6th Dist. No. L-03-1103, 2004-Ohio-3447, at ¶29, the Sixth District Court of Appeals found that the “other owned auto” exclusion in the insurance policy did not preclude a mother’s claim under the mother’s insurance policy as a result of her daughter’s wrongful

contention that a new argument was presented. Westfield’s argument, before the trial court and this court, is that the “other owned auto” exclusion limits coverage to vehicles listed in the policy.

death. In that case, Michelle Kotlarczyk was killed in an automobile accident while operating a vehicle that she owned but which was not listed in her mother's insurance policy. Id. at ¶¶6, 62. Michelle was an insured under her mother's insurance policy because she resided with her mother. Id. at ¶62. The "other owned auto" exclusion in that case provided that: "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." Id. at ¶60.

{¶17} In her dissent, Judge Lanzinger found that the " 'other owned auto' exclusion [was] plain" and that "the stated intent [was] to limit coverage to vehicles specifically identified to the policy." Id. at ¶61, (Lanzinger, J. dissenting.) We find Judge Lanzinger's interpretation of the "other owned auto" exclusion to be persuasive here.

{¶18} In this case, the insurance policy provides:

UNDERINSURED MOTORISTS COVERAGE

We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an *underinsured motor vehicle* because of bodily injury:

- 1. Sustained by an insured; and**
- 2. Caused by an accident.**

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the *underinsured motor vehicle*.

*** * ***

(emphasis in original.) Significantly, the policy also includes an "other owned auto" exclusion, which states:

We do not provide Uninsured Motorists Coverage or Underinsured Motorists Coverage for *bodily injury* sustained by an *insured* while operating, *occupying*, or when struck by, any motor vehicle owned by or furnished or available for the regular use of you or any *family member* which is not insured for this coverage under this policy. This includes a *trailer* of any type used with that vehicle.

(emphasis in original). The policy defines bodily injury as "bodily harm, sickness or diseases, including required care, loss of services and death resulting therefrom."

{¶19} We have carefully reviewed the terms of the insurance policy at issue. And, like Judge Lanzinger in *Kotlarczyk*, we find the language of the "other owned auto" exclusion is plain. The exclusion clearly indicates that the parties intended the policy to limit coverage to the vehicles specifically covered under the insurance policy.

{¶20} At the time of the accident, Sam Tuohy was driving a Chevrolet Blazer and he was listed as the title owner of the Chevrolet Blazer. Alva and Melinda's insurance policy did not list the Chevrolet Blazer as a covered automobile. In fact, Alva and Melinda's insurance policy listed only two vehicles

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as covered vehicles under the insurance policy: a 2001 Pontiac Bonneville; and a 1979 Holiday Rambler. Since the Chevrolet Blazer was not listed as a covered vehicle under the policy and it was titled in Sam's name, the "other owned auto" exclusion applies. Thus, the insurance policy in this case excludes coverage for the appellants' claims.

{¶21} Nevertheless, the appellants argue that the language "because of bodily injury" listed in the coverage portion of the insurance policy, and "for bodily injury" used in the "other owned auto" exclusion creates an ambiguity. As a basis for this argument, the appellants point to the Tenth Appellate District's decisions in *Hall v. Nationwide Mutual Fire Insurance*, 10th Dist. No. 05AP-305, 2005-Ohio-4572; *Leonhard v. Motorists Mut. Ins. Co.* (March 3, 1994), 10th Dist. No. 93AP-449; *Newsome v. Grange Mutual Casualty Company* (February 23, 1993), 10th Dist. No. 92AP-1172.

{¶22} In *Hall*, Christopher Hall died as the result of an automobile accident which occurred while Hall was driving a vehicle not insured by the insurance company. *Hall*, 2005-Ohio-4572, at ¶¶2, 4. The Tenth District found that the insurance policy was ambiguous when the phrase "because of bodily injury" was included in the coverage section, but "for bodily injury" was included in the policy exclusions. *Id.* at ¶¶13-18; *Leonhard*, 10th Dist. No. 93AP-449; *Newsome*, 10th Dist. No. 92AP-1172. The court held that the phrase "for bodily injury" did not

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include an insured's wrongful death claims. *Id.* at ¶14, citing *Leonhard*, 10th Dist.

No. 93AP-449. In addition, the Tenth District has stated:

*** * * According to appellant, the clear and unambiguous meaning of "for bodily injury" is the same as "because of bodily injury." We do not agree that this is a clear and unambiguous matter. In all situations, the modifying language "for" and "because of" cannot be interchanged without altering the meaning of the concomitant language. In its own policy, appellant has not been consistent with its choice of language. In the uninsured motorist coverage section, it used language "because of bodily injury" while in the exclusion portion of the policy, it used "for bodily injury."**

Newsome (February 23, 1993), 10th Dist. No. 92AP-1172 at *3; *Hall*, 2005-Ohio-4572, at ¶13, citing *Newsome*.

{¶23} We disagree with the foregoing, non-precedential authority. As previously noted, an ambiguity exists "only when a provision in a policy is susceptible of more than one reasonable interpretation." *Hacker*, 75 Ohio St.3d 118, 119-120. We acknowledge that the insurance policy at issue includes "because of bodily injury" in the coverage section and "for bodily injury" in the policies exclusion. However we do not believe that the language in the policy is in any way ambiguous. The insurance policy at issue defines bodily injury as "bodily harm, sickness, or diseases, including required care, loss of services and death resulting therefrom." Because the definition includes "death resulting therefrom," there is no rational distinction between the phrases "for bodily injury" and "because of bodily injury." The exclusionary language used in the "other auto

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exclusion” can only reasonably be interpreted as limiting coverage to vehicles specifically covered under the insurance policy.

{¶24} In short, we hold that the “other owned auto” exclusion listed in the Westfield insurance policy clearly and unambiguously precluded coverage of both Alva and Melinda’s claims, individually, and the claim’s of Sam’s estate. Accordingly, we hold that the trial court did not err in granting summary judgment to Westfield and in denying the appellants’ motion for summary judgment.

{¶25} Having found no error prejudicial to appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

ROGERS, P.J., concurs.

WILLAMOWSKI, J, dissenting.

{¶26} **WILLAMOWSKI, J. dissents.** I must respectfully dissent from the majority’s holding. This case asks us to determine whether the Tuohys are entitled to recover damages for the wrongful death of their son under the UM/UIM portion of their insurance policy issued by Westfield. The Tuohys’ policy provides UM/UIM coverage to an “insured * * * because of bodily injury.” The policy defines “insured” as “you or any family member,” and “bodily injury” is defined to include death. The decedent was the Tuohys’ son, who was living in their home at the time he was killed in an automobile collision. Therefore, the decedent was

an "insured" by definition. However, the policy contained an exclusion, which stated:

We do not provide Uninsured Motorist Coverage or Underinsured Motorist Coverage for bodily injury sustained by an insured while operating, occupying, or when struck, by any motor vehicle owned by * * * you or any family member which is not insured for this coverage under this policy.

{¶27} Sam, an "insured," was killed while operating his Chevrolet Blazer, which was titled in his name and not a "covered vehicle" on the Tuohys' policy with Westfield. The majority's holding finds the coverage language and the exception language to be clear and unambiguous in preventing both the estate and the Tuohys from recovering based on their separate and independent claims. However, I disagree and would follow the law established by other appellate districts in holding that the coverage language "because of bodily injury" is ambiguous when read in pari materia with the exclusion, which precludes coverage "for bodily injury." I agree with the other appellate courts that the phrase "because of bodily injury" is not synonymous with the phrase "for bodily injury." The phrase "because of bodily injury" is more broad than the phrase "for bodily injury" and would allow an insured to recover for the wrongful death of another "insured" under the policy. *Brunn v. Motorists Mut. Ins. Co.*, 5th Dist. 2005 CA 022, 2006-Ohio-33; *Hall v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 05AP-305, 2005-Ohio-4572; *Aldrich v. Pacific Indemn. Co.*, 7th Dist. No. 02 CO

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54, 2004-Ohio-1546; *Kotlarczyk v. State Farm Mut. Auto. Ins. Co.*, 6th Dist. No. L-03-1103, 2004-Ohio-3447; *Leonhard v. Motorists Mut. Ins. Co.* (Mar. 3, 1994), 10th Dist. No. 93AP-449; *Newsome v. Grange Mut. Cas. Co.* (Feb. 23, 1993), 10th Dist. No. 92AP-1172.

{¶28} Because we must construe ambiguous terms in an insurance contract strictly against the insurer, I would reverse the trial court's decision and remand this matter for additional proceedings.

r

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
DEFIANCE COUNTY

ALVA V. TUOHY, EXECUTOR OF THE ESTATE OF SAMUEL V. TUOHY,
DECEASED, ET AL.,

CASE NUMBER 4-06-23

JOURNAL

PLAINTIFFS-APPELLANTS,

FILED
ENTRY IN COURT OF APPEALS
DEFIANCE COUNTY, OHIO

v.---

JUL 16 2007

CATRENA R. TAYLOR, ET AL.,

DEFENDANTS-APPELLEES.

Jan Ziegler
CLERK OF COURTS

For the reasons stated in the opinion of this Court rendered herein, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs to appellants for which judgment is rendered and the cause is remanded to that court for execution.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

Vernon Z Burton

[Signature]

(Willamowski, J., dissenting)

JUDGES

DATED: July 16, 2007

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

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

Appellee

v.

Ryan Miller-Gonzalez, et al.

Defendants

and

Nationwide Mutual Fire Insurance Co.

Appellant

Court of Appeals No. L-07-1022

Trial Court No. CI05-1322

DECISION AND JUDGMENT ENTRY

Decided: August 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.

{¶ 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.¹

{¶ 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,

¹Appellant 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.

JUDGE

Arlene Singer, J.

JUDGE

William J. Skow, J.
CONCUR.

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>.

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RYAN MILLER-GONZALEZ
BERNIE DUILER
CLERK OF COURTS

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. C105-1322

v.

Ryan Miller-Gonzalez, et al.

Defendants

and

Nationwide Mutual Fire Insurance Co.

DECISION AND JUDGMENT ENTRY

Appellant

Decided:

SEP 05 2007

This matter is before the court on the motion of appellant, Nationwide Mutual Fire Insurance Co., to certify a conflict.

Section 3(B)(4), Article IV of the Ohio Constitution requires that when a court of appeals finds itself in conflict with another court of appeals on the same question of law, that court must certify its decision and the record of the matter to the Supreme Court of

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Ohio for a resolution of the question. *Whitelock v. Gilbane Blg. Co.* (1993), 66 Ohio St.3d 594, 596.

In the principal case, following *Hall v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 05AP305, 2005-Ohio-4572, ¶ 18, discretionary appeal not accepted, 108 Ohio St.3d 1416, 2006-Ohio-179, we held that the phrases "because of bodily injury" in the coverage clause of appellant's policy and "for bodily injury" in a coverage exclusion clause of the same policy constituted an ambiguity under the facts of the case. *Lager v. Gonzalez*, 6th Dist. No. L-07-1022, 2007-Ohio-4094, ¶ 30.

In its motion to certify, appellant suggests that this case conflicts with the decision of the Third District in *Tuohy v. Taylor*, 3d Dist. No. 4-06-23, 2007-Ohio-3597. *Tuohy* also was determined on an analysis of possible ambiguity from the use of the words "for" and "because" in coverage and exclusion clauses, with a conclusion different than that obtained in the principal case or in *Hall*.

Appellee asserts in his memorandum in opposition to certification, however, that the *Tuohy* policy is distinguishable from the one at issue here in that the Westfield policy in *Tuohy* defined "bodily injury" as "bodily harm, sickness, or diseases, including required care, loss of services and death resulting therefrom." *Tuohy* at ¶ 23. The *Tuohy* court found that the phrase "death resulting therefrom" rendered the phrases without "rational distinction." *Id.* Appellant's policy does not contain the phrase "death resulting therefrom," consequently, appellee argues, these cases are not in direct conflict so certification should be denied.

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Moreover, appellee asserts, neither this case nor the others which have found ambiguity in this language, have held that the "because" – "for" clauses create a per se ambiguity. For this reason, according to appellee, there should be no conflict because each case relies on its own facts.

The policy at issue defines "bodily injury" as, "* * * a) physical injury; b) sickness; c) disease; or d) resultant death; of any person which results directly from a motor vehicle accident." In our view "resultant death" and "death resulting therefrom" are not materially distinguishable.

All cases rely on their facts. The question is whether the facts between cases are sufficiently different so as to affect the application of the law. *Tuohy* was a statutory wrongful death claim for underinsured motorists insurance by a decedent's parents against their own insurer. The decedent was in his own vehicle which was not insured on his parent's policy. As we have discussed, the language of the *Tuohy* policy was materially the same as that at issue here. *Tuohy*, thus, is not materially distinguishable from this case.

On consideration, we conclude that our decision in *Lager v. Gonzalez*, 6th Dist. No. L-07-1022, 2007-Ohio- 4094, the decision of the Tenth District in *Hall v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 05AP-305, 2005-Ohio-4572, ¶ 18, and *Brunn v. Motorist Mut. Ins. Co.*, 5th Dist. No. 2005 CA 022, 2006-Ohio-33, ¶ 30, conflict with that of the Third District in *Tuohy v. Taylor*, 3d Dist. No. 4-06-23, 2007-Ohio-3597. Finding

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such conflict we certify the record in this matter to the Supreme Court of Ohio for review and final determination.

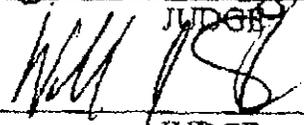
The issue presented is whether, in a claim for statutory wrongful death damages against a claimant's underinsured motorists coverage, ambiguity exists in the insurance contract when the policy grants coverage for damages sustained "because of bodily injury," yet under an other-owned auto exclusion bars coverage for damages by the less inclusive "for bodily injury."

Mark L. Pietrykowski, P.J.

Arlene Singer, J.

William I. Skow, J.
CONCUR.

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JUDGE~~

JUDGE

JUDGE

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