

IN THE SUPREME COURT OF OHIO

ELIZABETH BURNETT,

Appellee,

v.

MOTORISTS MUTUAL INSURANCE
COMPANIES, et al.,

Appellant.

CASE NOS. 2007-0954
2007-1176

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

MERIT BRIEF OF APPELLANT MOTORISTS MUTUAL INSURANCE COMPANY

James L. Pazol (#0004787)
(Counsel of Record)
Raymond J. Tisone (#0021726)
ANZELLOTTI, SPERLING, PAZOL
& SMALL CO., LPA
21 N. Wickliffe Circle
Youngstown, Ohio 44515
Telephone (330) 792-6033

*Counsel for Appellee
Elizabeth Burnett*

Merle D. Evans, III (#0019230)
(Counsel of Record)
Jude B. Streb (#0071529)
DAY KETTERER LTD.
Millennium Centre, Suite 300
200 Market Avenue North
P.O. Box 24213
Canton, Ohio 44701-4213
Telephone (330) 455-0173
Facsimile (330) 455-2633
Email: mdevans@day-ketterer.com
Email: jbstreb@day-ketterer.com

*Counsel for Appellant
Motorists Mutual Insurance Company*

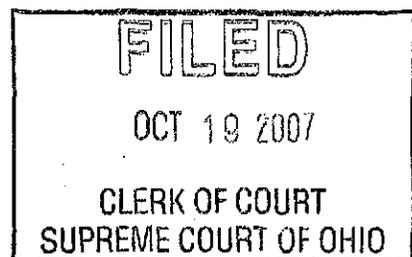


TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii
STATEMENT OF FACTS 1
ARGUMENT 4

Proposition of Law No. 1:

Former R.C. §3937.18(K)(2), when read in conjunction with former R.C. §3937.18(J)(1), does not violate the Equal Protection Clauses of the Ohio or United States Constitutions because it does not create an arbitrary and illogical classification based on household status that has a disparate and unfair effect by precluding coverage for individuals who may not recover solely because they are related to and live in the household of the insured 4

A. Former R.C. §3937.18(J)(1) and former R.C. §3937.18(K)(2) are complimentary and do not conflict with one another 5

B. Former R.C. §3937.18(K)(2) does not create an impermissible classification of individuals such that a violation of the Equal Protection Clauses of the United States and Ohio Constitutions is possible 9

C. Assuming arguendo that a classification of individuals is created by former R.C. §3937.18(K)(2), this provision passes the rational basis test and, as a result, does not violate the Equal Protection Clauses of the United States and Ohio Constitutions 12

D. Even following the abrogation of former R.C. §3937.18(J)(1) and R.C. §3937.18(K)(2), the parties to an insurance contract are still permitted to include an “intra-family” exclusion in the insurance policy. 19

CONCLUSION 24

PROOF OF SERVICE 26

APPENDIX

Notice of Appeal to the Ohio Supreme Court
(May 23, 2007).....1

Judgment Entry of the Trumbull County Court of Appeals
(June 20, 2007).....3

Opinion of the Trumbull County Court of Appeals
(April 9, 2007,)6

Judgment Entry of the Trumbull County Court of Appeals
(April 9, 2007)14

UNREPORTED CASES:

Burnett v. Motorists Mut. Ins. Co., 11th Dist. No. 2003-T-0101, 2005-Ohio-433315

Green v. Westfield Insurance Company, 9th Dist. No. 06CA0025-M, 2006-Ohio-5057.....20

Howard v. Howard, 4th Dist. No. 06CA755, 2007-Ohio-3940.....27

Wertz v. Wertz, 6th Dist. No. H-06-036, 2007-Ohio-460537

CONSTITUTIONAL PROVISIONS: STATUTES:

Ohio Constitution, Article I, Section 241

United States Constitution, Amendment 14.....42

R.C. §3937.18, former44

R.C. §3937.18, current.....50

TABLE OF AUTHORITIES

Page(s)

CASES:

<i>Adamsky v. Buckeye Local School Dist.</i> , 73 Ohio St.3d 360, 1995-Ohio-298, 653 N.E.2d 212	13
<i>Battig v. Forshey</i> (1982), 7 Ohio App.3d 72, 74, 7 O.B.R. 85, 454 N.E.2d 168.....	9
<i>Burnett v. Motorists Mut. Ins. Co.</i> , 11 th Dist. No. 2003-T-0101, 2005-Ohio-4333	2
<i>Clark v. Jeter</i> (1988), 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.E.2d 465	12
<i>Conley v. Shearer</i> , 64 Ohio St.3d 284, 1992-Ohio-133, 595 N.E.2d 862	9, 17
<i>Dandridge v. Williams</i> (1970), 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491	19
<i>Green v. Westfield Insurance Company</i> , 9th Dist. No. 06CA0025-M, 2006-Ohio-5057.....	23, 24
<i>Harsco Corp. v. Tracy</i> , 86 Ohio St.3d 189, 1999-Ohio-155, 712 N.E.2d 1249	12
<i>Heller v. Doe</i> (1993), 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257	19
<i>Howard v. Howard</i> , 4th Dist. No. 06CA755, 2007-Ohio-3940.....	21-23
<i>Krase v. State</i> (1972), 31 Ohio St.2d 132, 60 O.O.2d 100, 285 N.E.2d 736	9
<i>Kyle v. Buckeye Union Ins. Co.</i> , 103 Ohio St.3d. 170, 2004-Ohio-4885, 814 N.E.2d 1195	2, 3, 4, 7, 8, 9, 11, 14, 15, 25
<i>Lehnhausen v. Lake Shore Auto Parts Co.</i> (1973), 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351.....	19
<i>Lindsley v. Natural Carbonic Gas Co.</i> (1911), 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369.....	19
<i>McCrone v. Bank One Corp</i> , 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1	11, 13
<i>McGowan v. Maryland</i> (1961), 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393.....	12
<i>Menefee v. Queen City Metro</i> (1990), 49 Ohio St.3d 27, 550 N.E.2d 181	13
<i>Morris v. United Ohio Insurance Company</i> , 103 Ohio St.3d 462, 2004-Ohio-5706, 816 N.E.2d 1060.....	14

<i>Morris v. United Ohio Insurance Company</i> , 160 Ohio App.3d 663 2005-Ohio-2025, 828 N.E.2d 653.....	14-18, 25
<i>Morris v. United Ohio Insurance Company</i> , 160 Ohio St.3d 1534 2005-Ohio-5146, 835 N.E.2d 383.....	16
<i>Park Corp. v. Brook Park</i> , 102 Ohio St.3d 166, 2004-Ohio-2237, 807 N.E.2d 913	12
<i>Snyder v. American Family Insurance Company</i> , 114 Ohio St.3d 239 2007-Ohio-4004, 871 N.E.2d 574.....	21, 23
<i>State v. Thompson</i> , 95 Ohio St.3d 264, 2002-Ohio-2124, 76 N.E.2d 251	12, 18
<i>State v. Williams</i> , 88 Ohio St.3d 513, 2000-Ohio-428, 728 N.E.2d 342	12, 13
<i>Wertz v. Wertz</i> , 6th Dist. No. H-06-036, 2007-Ohio-4605	23

CONSTITUTIONAL PROVISIONS; STATUTES:

Ohio Constitution, Article I, Section 2	3-7, 9-14, 16, 17, 24, 25
United States Constitution, Amendment 14.....	3-7, 9-14, 16, 17, 24, 25
R.C. §3937.18, former	5, 8, 21
R.C. §3937.18, current.....	21, 22, 23
R.C. §3937.18(I)	21, 22
R.C. §3937.18(I)(1).....	5, 19, 20, 23, 24
R.C. §3937.18(J)(1), former	2-4, 5, 7-10, 11, 13, 14, 19, 20, 21, 24
R.C. §3937.18(K)(2), former	1-19, 21-26

STATEMENT OF FACTS

This litigation arises out of a motor vehicle accident which occurred on February 13, 2000, on State Route 7 in Brookfield Township, Trumbull County, Ohio. (Trial Court Record 29, p. 1). At the time of the accident, the Appellee, Elizabeth Burnett, was a passenger in a motor vehicle owned and operated by her husband, Albert Burnett (hereinafter "Mr. Burnett"). (T.C.R. 29, p. 2). It is undisputed that the negligence of Mr. Burnett directly and proximately caused the subject motor vehicle accident. (T.C.R. 29, p. 1). The Appellee alleges bodily injuries and medical expenses as a result of the accident. (T.C.R. 29, p. 1). At the time of the accident, Mr. Burnett was a named insured under a policy of insurance in effect with Motorists Mutual Insurance Company (hereinafter "Motorists"), designated as Policy No. 1035-05-183639-03. (T.C.R. 29, p. 1). The original effective date of this policy was March 18, 1981, but it had most recently been renewed on March 18, 1999. (T.C.R. 36, pp. 12-13). The vehicle being driven by Mr. Burnett at the time of the subject accident, a 1995 Ford Taurus, was a listed vehicle in the Motorists policy. (T.C.R. 29, p. 2).

Subsequent to the accident, Motorists denied liability coverage to Mr. Burnett for those claims asserted by the Appellee arising out of the motor vehicle accident, due to the "intra-family" exclusion contained in the liability portion of the subject Motorists policy, which denial is not at issue in this appeal. (T.C.R. 29, p. 2; Court of Appeals Record 3). Motorists also denied the claim of the Appellee for uninsured motorist coverage for damages arising out of the motor vehicle accident due to the "intra-family" exclusion contained in the uninsured/underinsured coverage portion of the policy, which is found in Endorsement PP 70 07 12 97. (T.C.R. 29, p. 3; T.C.R. 29, Ex. "A"). This exclusion very closely tracks the language of the "intra-family" exclusion authorized by former R.C. §3937.18(K)(2) and expressly provides that an uninsured

motor vehicle does not include any vehicle “owned by or furnished or available for the regular use of you or any family member.” (T.C.R. 29, Ex. “A”).

At the time of the subject accident, the Appellee and Mr. Burnett were married and residing together at 7231 Crawford Road in Williamsfield, Ohio. (T.C.R. 29, p. 1-2). Thus, the Appellee was a “family member” of Mr. Burnett, as defined by the Motorists policy. (T.C.R. 29, p. 2). Furthermore, the motor vehicle being operated by Mr. Burnett was owned by Mr. Burnett, available for the regular use of Mr. Burnett, and listed as an insured vehicle in Mr. Burnett’s Motorists policy. (T.C.R. 29, p. 2). As a result, Mr. Burnett’s motor vehicle was not uninsured at the time of the subject accident, according to the express terms of the policy and the definition of “uninsured motor vehicle” as permitted by former R.C. §3937.18(K)(2). (T.C.R. 29, Ex. “A”).

On March 1, 2001, the Appellee filed a Complaint against Motorists asserting an uninsured motorist claim for injuries allegedly sustained in the subject motor vehicle accident. (T.C.R. 1). The Trial Court initially determined that the Appellee was entitled to uninsured motorist benefits under the Motorists policy issued to Mr. Burnett for the purported reason that former R.C. §3937.18(J)(1) and R.C. §3937.18(K)(2) were ambiguous and irreconcilable, thereby rendering the “intra-family” exclusion in the Motorists policy unenforceable. (T.C.R. 49). On appeal by Motorists, the Eleventh District Court of Appeals reversed the Trial Court’s decision on the basis of the Ohio Supreme Court’s holding in *Kyle v. Buckeye Union Ins. Co.*, 103 Ohio St.3d. 170, 2004-Ohio-4885, 814 N.E.2d 1195, wherein the Ohio Supreme Court held that the above statutes were not in conflict and that the “intra-family” exclusion found in former R.C. §3937.18(K)(2) is valid and enforceable. *Burnett v. Motorists Mut. Ins. Co.*, 11th Dist. No. 2003-T-0101, 2005-Ohio-4333. On remand, the Trial Court was instructed to address the public policy and constitutional issues raised by the Appellee, which had not yet been considered. *Id.* at

¶31. On June 22, 2006, the Trial Court issued a Judgment Entry denying the Appellee's Motion for Summary Judgment, rejecting her public policy and constitutional arguments, and entering Final Judgment in favor of Motorists. (Not transmitted with Trial Court Record).

Appellee filed a Notice of Appeal of the Trial Court's decision on July 13, 2006. (T.C.R. 66). On appeal, Appellee argued that the "intra-family" exclusion authorized by former R.C. §3937.18(J)(1) and R.C. §3937.18(K)(2) was against public policy and unconstitutional for allegedly violating the Contracts Clause of the Ohio Constitution and the Due Process and Equal Protection Clauses of the Ohio and United States Constitutions. (C.A.R. 3). In its Opinion of April 9, 2007, the Eleventh District Court of Appeals expressly stated its disagreement with the Supreme Court's holding in *Kyle*, but acknowledged that it was nonetheless bound to follow the holding in *Kyle* as to statutory interpretation. (Appendix, p. 9). However, because the Supreme Court did not address the constitutionality of former R.C. §3937.18(K)(2) in *Kyle*, the Eleventh District Court of Appeals considered the Appellee's constitutional arguments. (Appendix, p. 9).

Following a consideration of the Appellee's constitutional challenges, the Eleventh District Court of Appeals held that former R.C. §3937.18(K)(2) violated the Equal Protection Clauses of the Ohio and United States Constitutions in that it creates an arbitrary and illogical distinction, that it does not further a legitimate interest and has no rational basis. (Appendix, p. 13). In other words, the Eleventh District Court of Appeals concluded that former R.C. §3937.18(K)(2) was unconstitutional because it impermissibly classified individuals based upon familial relations, so that injured persons related to the tortfeasor were precluded from recovery, while unrelated injured persons or even non-resident relatives could pursue recovery under the policy. (Appendix, p. 10).

Motorists has prosecuted this appeal to the Ohio Supreme Court because the holding by the Eleventh District Court of Appeals conflicts with a prior decision by the Fourth District Court of Appeals on an identical Equal Protection challenge and violates the spirit of the Ohio Supreme Court's ruling in *Kyle*. On April 18, 2007, Motorists filed its Motion to Certify Conflict to the Supreme Court of Ohio. The Motion to Certify Conflict was granted by the Eleventh District Court of Appeals on June 20, 2007. Motorists also filed its Notice of Appeal and Memorandum in Support of Jurisdiction with the Supreme Court of Ohio on May 29, 2007. On August 29, 2007, the Supreme Court granted jurisdiction to hear this case, determined that a conflict exists, and allowed this appeal.

ARGUMENT

Proposition of Law No. 1: Former R.C. §3937.18(K)(2), when read in conjunction with former R.C. §3937.18(J)(1), does not violate the Equal Protection Clauses of the Ohio or United States Constitutions because it does not create an arbitrary and illogical classification based on household status that has a disparate and unfair effect by precluding coverage for individuals who may not recover solely because they are related to and live in the household of the insured.

Former R.C. §3937.18(J)(1) and former R.C. §3937.18(K)(2) have been the subject of much litigation throughout Ohio. Initially, many claimants argued that former R.C. §3937.18(J)(1) and former R.C. §3937.18(K)(2) were ambiguous and irreconcilable, but this argument has been rejected by the Ohio Supreme Court. In *Kyle*, supra, the Ohio Supreme Court determined that former R.C. §3937.18(J)(1) and former R.C. §3937.18(K)(2) addressed different subjects and, as a result, are complimentary and do not conflict. Subsequently, former R.C. §3937.18(K)(2) has been challenged on public policy and constitutional grounds, primarily under an Equal Protection argument. However, since former R.C. §3937.18(K)(2) addresses vehicles, rather than individuals, no classification exists which could offend the Equal Protection Clauses

of the Ohio and United States Constitutions. Further, even if any classification was allegedly created by former R.C. §3937.18(K)(2), then such classification passes the rational basis test and, as a result, does not violate the Equal Protection Clauses. Although former R.C. §3937.18(K)(2) was repealed on September 21, 2000, it remains the subject of litigation in the sense that “intra-family” exclusions similar to that established by former R.C. §3937.18(K)(2) are still contained in many automobile liability insurance policies issued in Ohio. While many injured insureds have argued that the General Assembly’s repeal of former R.C. §3937.18(K)(2) indicated an intent to preclude insurers from including the “intra-family” exclusion in their policies, Courts have consistently upheld such provisions on the basis that R.C. §3937.18(I)(1), which superseded former R.C. §3937.18(J)(1), permits the parties to an insurance contract considerable flexibility in agreeing to coverage exclusions and devising specific restrictions on any offered uninsured or underinsured motorist coverage. For all of these reasons, former R.C. §3937.18(K)(2) does not violate the Equal Protection Clauses of the United States and Ohio Constitutions, and the Opinion of the Eleventh District Court of Appeals in favor of the Appellee must be reversed.

A. Former R.C. §3937.18(J)(1) and former R.C. §3937.18(K)(2) are complimentary and do not conflict with one another.

Through Am. Sub. H.B. No. 261 (hereinafter “H.B. 261”), which became effective on September 3, 1997, the Ohio General Assembly amended Ohio’s uninsured/underinsured motorist statute, R.C. §3937.18. The H.B. 261 amendments to R.C. §3937.18, which were in force at the time of the subject motor vehicle accident, allowed insurers to include an “other owned vehicle” exclusion in the uninsured motorist coverage provisions of their policies. Specifically, the H.B. 261 amendments to R.C. §3937.18 authorized, in pertinent part, as follows:

(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 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, or is not a newly acquired replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided; . . .

In other words, this provision permits an insurer to preclude uninsured/underinsured coverage when an insured is operating or occupying a vehicle owned by, furnished to, or available for the regular use of a named insured and/or a spouse or resident relative of a named insured, and that vehicle is not specifically listed in the policy.

In the H.B. 261 amendments, the General Assembly of Ohio also enacted former R.C. §3937.18(K)(2), which stated, in pertinent part, as follows:

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

* * *

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

As such, this provision defines or articulates when a tortfeasor's vehicle will not be considered uninsured or underinsured for purposes of uninsured/underinsured motorist coverage.

In the instant case, the Appellee is challenging R.C. §3937.18(K)(2) on the proposition that it allegedly violates the Equal Protection Clauses of the Ohio and United States Constitutions by creating an arbitrary and illogical classification based on household status that

has a disparate and unfair effect, is not furthered by a legitimate interest, and has no rational basis. In a decision that is fundamentally inaccurate in its reasoning and which has potentially far-reaching implications, the Eleventh District Court of Appeals upheld the Appellee's Equal Protection challenge and determined that R.C. §3937.18(K)(2) does violate the Equal Protection Clauses of the Ohio and United States Constitutions. This decision is not only in conflict with a prior decision of the Fourth District Court of Appeals on an identical Equal Protection challenge, but also violates the spirit of the Ohio Supreme Court holding in *Kyle v. Buckeye Union Insurance Co.*, supra.

In *Kyle*, the Ohio Supreme Court was asked to decide whether former R.C. §3937.18(J)(1), effective September 3, 1997, through October 31, 2001, and former R.C. §3937.18(K)(2), effective September 3, 1997, through September 21, 2000, were in conflict and, if so, whether these provisions could be reconciled. First, the Supreme Court determined that former subsection (J)(1) permitted the exclusion of uninsured/underinsured coverage when the injured insured was occupying a vehicle owned by an insured but not covered under the liability portion of the policy. *Kyle* at ¶9. The Supreme Court also noted that subsection (J)(1) protected the balance of interests between the insured and the insurance company because the identification of all owned vehicles intended to be covered would result in coverage for the insured while the insurance company received premiums for all risks being covered under the policy. *Kyle* at ¶12. The Ohio Supreme Court then recognized that former R.C. §3937.18(K)(2) performed a different function. In fact, the Court found that former R.C. §3937.18(K)(2) provided that when the tortfeasor who caused the injured insured's loss operated a vehicle owned by an insured, the tortfeasor would not be considered to be uninsured or underinsured. *Kyle* at ¶13.

Since former R.C. §3937.18(J)(1) and former R.C. §3937.18(K)(2) do not regulate the same thing, the Ohio Supreme Court determined in *Kyle* that these provisions could function in the alternative or together. *Kyle* at ¶17. In arriving at this conclusion, the Supreme Court considered a number of hypothetical examples to illustrate the interaction between former R.C. §3937.18(J)(1) and (K)(2). Each of these examples involved the tortfeasor, Kathryn Kyle, and her sister, Andrea Kyle, the injured plaintiff in the case. These examples are as follows:

First, assume that the driver of the other vehicle involved in the collision had been at fault and Andrea had not been negligent. In this case, (J)(1) would not permit exclusion of coverage because the vehicle Kathryn occupied was identified under the policy. Likewise, (K)(2) would not exclude coverage because the tortfeasor was not operating a vehicle owned by a member of the Kyle household. Thus, under this scenario, Kathryn would be eligible for UM/UIM coverage.

For the second hypothetical, assume that the other driver had been at fault and Andrea's car had not been insured under the policy. Paragraph (J)(1) would permit the exclusion of coverage for Kathryn's injuries because Andrea's car was owned by the Kyle family but was not insured under the policy. Paragraph (K)(2), however, would not require exclusion of coverage because a third party driving his own car was responsible for the collision. Thus, under R.C. 3937.18, the contracting parties may choose to cover or not cover this scenario.

For the third hypothetical, assume that Andrea had been at fault and Andrea's car had not been insured under the policy. Here, as in the second hypothetical, (J)(1) would permit the exclusion of coverage for Kathryn's injuries. In this scenario, (K)(2) would preclude Andrea from being considered uninsured or underinsured because the tortfeasor occupied a vehicle owned by the Kyle family.

Kyle at ¶18-20. As illustrated by these examples, former R.C. §3937.18(J)(1) and R.C. §3937.18(K)(2) address different topics, are complimentary and do not conflict. *Kyle* at ¶21. Former R.C. §3937.18(J)(1) addresses certain **circumstances** in which a policy could exclude uninsured and underinsured coverage for an insured, while former R.C. §3937.18(K)(2) excludes certain **tortfeasors' vehicles** from being considered uninsured or underinsured. *Kyle*. This distinction recognized by the Ohio Supreme Court in *Kyle* is very important for purposes of this appeal.

B. Former R.C. §3937.18(K)(2) does not create an impermissible classification of individuals such that a violation of the Equal Protection Clauses of the Ohio and United States Constitutions is possible.

Given the determination of the Ohio Supreme Court in *Kyle* that former R.C. §3937.18(K)(2) addresses tortfeasors' vehicles, the Eleventh District Court of Appeals was in error in determining that the provision creates an impermissible classification of individuals. It is a fundamental rule that decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to the correctness of such decisions, until they have been reversed or overruled. *Battig v. Forshey* (1982), 7 Ohio App.3d 72, 74, 7 O.B.R. 85, 454 N.E.2d 168, citing *Krase v. State* (1972), 31 Ohio St.2d 132, 148, 60 O.O.2d 100, 285 N.E.2d 736. As such, the Eleventh District Court of Appeals was bound by the Supreme Court's determination in *Kyle* that former R.C. §3937.18(K)(2) addressed the exclusion of certain vehicles and not individuals from uninsured and underinsured motorists coverage. Without a classification of individuals, there is no discrimination which would offend the Equal Protection Clauses of the Ohio or United States Constitutions. *Conley v. Shearer*, 64 Ohio St.3d 284, 290, 1992-Ohio-133, 595 N.E.2d 862. In concluding that former R.C. §3937.18(K)(2) classified groups of vehicles and not individuals, the Supreme Court's holding in *Kyle* effectively mandated the Eleventh District Court of Appeals to decide in this case that former R.C. §3937.18(K)(2) did not violate the Equal Protection Clauses of the Ohio and United States Constitutions.

The Motorists policy in effect for Mr. Burnett at the time of the subject motor vehicle accident contained an unambiguous "intra-family" exclusion to uninsured/underinsured motorist coverage, which was expressly authorized by former R.C. §3937.18(K)(2). In considering the constitutionality of former R.C. §3937.18(J)(1) and (K)(2), the Eleventh District Court of

Appeals determined that there was a legitimate interest and rational basis for the requirement of subsection (J)(1) that all covered vehicles be specifically listed in the policy, in that it allows insurance companies to assess their risk and set premiums accordingly. (Appendix, p. 11). However, the Court found that subsection (K)(2) creates an arbitrary and illogical distinction by taking “away uninsured/underinsured coverage based on the identity of the driver, not the identity of the vehicle.” (Appendix, p. 11). As a point of emphasis, the Court stated that “the insured believes that part of the premium is being paid for exactly this type of coverage.” (Appendix, p. 11). However, the Motorists policy in effect for Mr. Burnett at the time of the subject accident specifically excludes from uninsured motor vehicle coverage any vehicle “owned by or furnished or available for the regular use” of an insured or any family member, which policy language is in direct compliance with former R.C. §3937.18(K)(2). Thus, Motorists and Mr. Burnett expressly agreed at the time the insurance contract was issued that those vehicles covered under the subject policy would not be uninsured vehicles when driven by an insured or family member. As a result, the Eleventh District Court of Appeals was clearly mistaken in concluding that Mr. Burnett, or any other insured whose auto policy contains similar language for that matter, believed he had paid a premium for uninsured/underinsured coverage in those circumstances outlined in former R.C. §3937.18(K)(2). This critical error was a fundamental element in the Court’s conclusion that this provision violates the Equal Protection Clauses of the Ohio and United States Constitutions. Nonetheless, the Eleventh District Court of Appeals has determined through its decision that Motorists, and every other insurance company whose policies contain the language authorized by former R.C. §3937.18(K)(2), must provide this unintended coverage to their insureds.

In its Opinion of April 9, 2007, the Eleventh District Court of Appeals expressly disagreed with the Ohio Supreme Court's holding in *Kyle* that former R.C. §3937.18(J)(1) and (K)(2) do not conflict and, in fact, stated that it found the dissent in *Kyle* to be more persuasive. (Appendix, p. 9). Further, the Eleventh District Court of Appeals held that former R.C. §3937.18(K)(2) is unconstitutional in that it violates the Equal Protection Clauses of the Ohio and United States Constitutions. (Appendix, p. 13). In so doing, the Eleventh District Court of Appeals effectively sidestepped the authority of the Supreme Court and violated the spirit of the *Kyle* holding, despite acknowledging that it was bound to follow the Ohio Supreme Court's holding in *Kyle* as to statutory interpretation. (Appendix, p. 9).

The Equal Protection Clause, found in Article I, Section 2, of the Ohio Constitution, provides as follows:

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

In turn, the Fourteenth Amendment to the United States Constitution states that, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;...nor deny to any person within its jurisdiction the equal protection of the laws.” The limitations placed upon governmental action by the federal and state Equal Protection Clauses are essentially the same. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, at ¶7. Simply stated, the Equal Protection Clauses require that individuals be treated in a manner similar to others in like circumstances.

There are well-established principles and standards to be followed when considering the constitutionality of a regularly-enacted statute under an Equal Protection analysis. In most cases,

courts give a large degree of deference to legislatures when reviewing a statute on an Equal Protection basis. *Park Corp. v. Brook Park*, 102 Ohio St.3d 166, 2004-Ohio-2237, 807 N.E.2d 913 at ¶20. A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 147, 57 O.O. 134, 128 N.E.2d 59. This presumption of constitutionality remains unless it is proven beyond a reasonable doubt that the legislation is clearly unconstitutional. *State v. Williams*, 88 Ohio St.3d 513, 521, 2000-Ohio-428, 728 N.E.2d 342. Further, as a general rule, “legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” *Harsco Corp. v. Tracy*, 86 Ohio St.3d 189, 192, 1999-Ohio-155, 712 N.E.2d 1249, quoting *McGowan v. Maryland* (1961), 366 U.S. 420, 425-426, 81 S.Ct. 1101, 6 L.Ed.2d 393. In this case, it is respectfully submitted that the Eleventh District Court of Appeals has violated these well-established principles and standards by invalidating a statute regularly enacted by the Ohio Legislature and for which the Appellee failed to demonstrate beyond a reasonable doubt a violation of the Equal Protection Clauses of the Ohio or United States Constitutions.

- C. **Assuming arguendo that a classification of individuals is created by former R.C. §3937.18(K)(2), this provision passes the rational basis test and, as a result, does not violate the Equal Protection Clauses of the Ohio and United States Constitutions.**

The preliminary step in analyzing an Equal Protection challenge to a statute is to identify classifications created by the legislation. In considering whether state legislation violates the Equal Protection Clause, courts apply different levels of scrutiny to different types of classifications. *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 76 N.E.2d 251, at ¶13, quoting *Clark v. Jeter* (1988), 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L.Ed.2d 465. A statutory classification which involves neither a suspect class nor a fundamental right does not violate the

Equal Protection Clause of the Ohio or United States Constitutions if it bears a rational relationship to a legitimate governmental interest. *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181. A suspect class has traditionally been defined as one involving race, national origin, religion, or sex. *Adamsky v. Buckeye Local School Dist.*, 73 Ohio St.3d 360, 362, 1995-Ohio-298, 653 N.E.2d 212. As the Eleventh District Court of Appeals has determined that former R.C. §3937.18(K)(2) creates a classification based on household status, a suspect class is not involved in the instant dispute. Recognized fundamental rights include the right to vote, the right of interstate travel, rights guaranteed by the First Amendment to the United States Constitution, the right to procreate and other rights of a uniquely personal nature. *State v. Williams*, supra, at 530. Certainly, the right to uninsured or underinsured motorist coverage while traveling in a motor vehicle owned by, furnished to, or available for the regular use of a resident family member is not such a fundamental right. Accordingly, an Equal Protection analysis of former R.C. §3937.18(J)(1) and R.C. §3937.18(K)(2) is subject to a rational basis test.

The rational basis test involves a two-step analysis. *McCrone*, supra, at ¶9. In considering a statute under an Equal Protection challenge, the Court must first identify a valid State interest and, second, must determine whether the method or means by which the State has chosen to advance that interest is rational. *Id.* In regards to the first step of this analysis, the Eleventh District Court of Appeals found there to be a legitimate interest and rational basis for defining and limiting the scope of coverage under R.C. §3937.18(J)(1) to specifically listed vehicles, so that the insurance company can assess their risks and set premiums accordingly. (Appendix, p. 11). In other words, the Court determined that R.C. §3937.18(J)(1) ensured that premiums were paid to cover risks for only specifically identified vehicles. However, the Court

determined that no legitimate governmental interests can be furthered by excluding only injured household members from recovery. (Appendix, p. 12). Further, the Court determined that former R.C. §3937.18(K)(2) took away the coverage extended by former R.C. §3937.18(J)(1) based on the identity of the driver, not the identity of the vehicle, which, in the Court's opinion, creates an arbitrary and illogical distinction. (Appendix, p. 11). The Court also stated that the insurance policy does not cover what the insured expects it to cover and what by its terms it promises to cover, based on an arbitrary distinction of familial status, which in effect creates an illusory promise of coverage. (Appendix, p. 12). The Court concluded that no legitimate state interest could be furthered by this exclusionary provision. (Appendix, p. 12). As a result of this conclusion, the Eleventh District Court of Appeals determined that R.C. §3937.18(K)(2) violated the Equal Protection Clauses of the Ohio and United States Constitutions. (Appendix, p. 13).

The Eleventh District Court of Appeals' holding in the instant matter is in direct conflict with the Fourth District Court of Appeals' holding in *Morris v. United Ohio Insurance Company*, 160 Ohio App.3d 663, 2005-Ohio-2025, 828 N.E.2d 653, in which the Court had previously held that former R.C. §3937.18(K)(2) does not violate the Equal Protection Clauses. *Morris* followed a path nearly identical to the instant matter in that it was on appeal for the second time, the first appeal having reversed the judgment of the trial court on the basis of the Supreme Court's decision in *Kyle* and the case being remanded for consideration of an Equal Protection challenge. *Morris v. United Ohio Insurance Company*, 103 Ohio St.3d. 462, 2004-Ohio-5706, 816 N.E.2d 1060. In *Morris*, as in the instant matter, the Appellant argued that R.C. §3937.18(K)(2) violated the Equal Protection Clauses of the Ohio and United States Constitutions because it discriminated against claimants who are related to the tortfeasor and that no rational basis existed

to justify this distinction. The Fourth District Court of Appeals rejected the Appellant's argument and held as follows:

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.

Morris at ¶3. Rather, the Court determined, former R.C. §3937.18(K)(2) "differentiates between insureds injured by a tortfeasor driving a vehicle owned by, furnished to, or available for the regular use of a named insured or his or her family members and insureds injured by a tortfeasor driving a different vehicle." *Id.* Due to the Appellant's failure to identify a proper class for analysis, her Equal Protection challenge was summarily rejected by the Fourth District Court of Appeals. *Id.*

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

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

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

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

different vehicle (a vehicle that is not owned by a named insured or a family member of a named insured), then (K)(2) will not preclude coverage. Accordingly, (K)(2) differentiates between insureds injured by a tortfeasor driving a vehicle owned by, furnished to, or available for the regular use of a named insured (or his or her family members) and insureds injured by a tortfeasor driving a different vehicle.

Morris at ¶15-17. As these examples illustrate, the focus of former R.C. §3937.18(K)(2) is the vehicle being driven by the tortfeasor, not the relationship between the tortfeasor and the injured party or the identity of these parties.

In *Morris*, the Fourth District Court of Appeals determined that former R.C. §3937.18(K)(2) does not violate the Equal Protection Clauses of the Ohio and United States Constitutions because the same injured insured who is denied uninsured/underinsured motorist coverage when the tortfeasor is driving one vehicle can be entitled to uninsured/underinsured motorist coverage when the tortfeasor is driving a different vehicle. *Morris* at ¶17. Accordingly, former R.C. §3937.18(K)(2) differentiates between vehicles, but does not create any class of individuals. As a result, the *Morris* court affirmed the judgment of the trial court and held that former R.C. §3937.18(K)(2) does not violate the Equal Protection Clauses.¹ *Morris* at ¶18, 19.

The Eleventh District Court of Appeals in the instant matter expressly rejected the reasoning and conclusion of the *Morris* Court that former R.C. §3937.18(K)(2) does not improperly classify individuals. (Appendix, p. 11). In its Opinion of April 9, 2007, the Eleventh District Court of Appeals held as follows:

We hold that the former version of R.C. §3937.18(K)(2) effective at the time of this policy was unconstitutional because it created an arbitrary and illogical classification based on household status that has a disparate and unfair effect, is not furthered by a legitimate interest, and has no rational

¹ The Supreme Court of Ohio refused to accept *Morris*' appeal of the Fourth District Court of Appeals' holding in this matter, thereby denying to hear *Morris*' Equal Protection challenge to former R.C. §3937.18(K)(2), which was nearly identical to that of the Appellee in the instant matter. *Morris v. United Ohio Ins. Co.*, 160 Ohio St.3d 1534, 2005-Ohio-5146, 835 N.E.2d. 383. This refusal shall not be considered a statement of opinion as to the merits of the law in *Morris*, but is nevertheless worth noting. Sup. Ct. Rules for Reporting of Opinions, Rep. R. 8(B).

basis. We reverse, finding that appellee's policy affords coverage in this case because the vehicle involved in the collision was listed under the policy as required by (J) and premiums were paid for this coverage.

(Appendix, p. 13). Further, the Court stated that "to say the focus of (K)(2) is solely on the vehicle," as the Fourth Appellate District concluded, "is to put aside the fundamental fact that vehicles do not drive themselves." (Appendix, p. 11). The Eleventh District Court of Appeals readily acknowledged in its Opinion that its holding is in conflict with the holding in *Morris* by specifically rejecting the Fourth Appellate District's rationale. (Appendix, p. 11). However, in recognizing that former R.C. §3937.18(K)(2) classifies vehicles, rather than individuals, the Eleventh District Court of Appeals stated that "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." (Appendix, p. 11). Accordingly, the Eleventh District Court of Appeals acknowledges that, while the injured individual may be ultimately affected, it is a classification of vehicles which is created by former R.C. §3937.18(K)(2).

There is no impermissible classification of individuals created by former R.C. §3937.18(K)(2) such that an Equal Protection violation is possible. Where there is no classification, there is no discrimination that would offend the federal or state Equal Protection Clauses. *Conley*, supra, at 290. Under former R.C. §3937.18(K)(2), Appellee could have been entitled to uninsured/underinsured motorist coverage when traveling as a passenger of her husband in any vehicle not owned or available for the regular use of a named insured or resident family member. It is only when traveling in a vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured that former R.C. §3937.18(K)(2) is applicable and results in a preclusion of uninsured/underinsured motorist

coverage. As a result, R.C. §3937.18(K)(2) is, in fact, dependent upon the vehicle, and not the individual tortfeasor, and no classification sufficient to warrant an Equal Protection analysis is created by the statute. There is simply nothing in former R.C. §3937.18(K)(2) which would suggest the type of unequal treatment of a class of individuals that is the hallmark of an Equal Protection claim.

Assuming, arguendo, that a classification of individuals is created by former R.C. §3937.18(K)(2), the provision still passes the rational basis test in that it is rationally related to a legitimate government interest. In *Morris*, the trial court concluded that the classification created by former R.C. §3937.18(K)(2) was reasonably related to the accomplishment of the legitimate governmental interest of preventing collusive lawsuits. *Morris* at ¶8. Without any indication of an analysis or consideration of potential government interests in its Opinion, the Eleventh District Court of Appeals in the instant matter arrived at the conclusion that “no legitimate governmental interest can be said to be furthered by excluding only injured household members from recovery.” (Appendix, p. 12). Because courts may not indulge any personal intuition to the contrary, almost any classification survives a mere rationality review and the classification must be upheld so long as it is conceivable that the classification bears a rational relationship to a legitimate governmental objective. *State v. Thompson*, supra, at ¶18. It is more than conceivable that former R.C. §3937.18(K)(2) bears a rational relationship to a legitimate government interest, specifically the prevention of collusive lawsuits and insurance fraud. Accordingly, it is beyond conceivable that any purported classification in former R.C. §3937.18(K)(2) bears a rational relationship to a legitimate government interest and must be upheld.

Notwithstanding the fact that no classification is created by the provision, the Appellee cannot establish that former R.C. §3937.18(K)(2) does not bear a rational relationship to a

legitimate government interest. A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. *F.C.C. v. Beach Communications, Inc.* (1993), 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211. Further, the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it, whether or not the basis has a foundation on the record. *Heller v. Doe* (1993), 509 U.S. 312, 320-321, 113 S.Ct. 2637, 125 L.Ed.2d 257, quoting *Lehnhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351. The Appellee in this case cannot do so, as the prevention of fraudulent, collusive lawsuits is a conceivable and rational basis for the alleged classification created by former R.C. §3937.18(K)(2). Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because in practice it is imperfect or results in some inequality. *Dandridge v. Williams* (1970), 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491, quoting *Lindsley v. Natural Carbonic Gas Co.* (1911), 220 U.S. 61, 78, 31 S.Ct. 337, 55 L.Ed. 369. Clearly, even assuming that some classification of individuals is created by former R.C. §3937.18(K)(2), the provision bears a rational relation to a legitimate government interest and passes the rational basis test.

D. Even following the abrogation of former R.C. §3937.18(J)(1) and R.C. §3937.18(K)(2), the parties to an insurance contract are still permitted to include an “intra-family” exclusion in the insurance policy.

Former R.C. §3937.18(J)(1) was abrogated through the enactment of Senate Bill 97, effective October 31, 2001, and former R.C. §3937.18(K)(2) was abrogated through the enactment of Senate Bill 267, effective September 21, 2000. However, such legislative action does not have any impact on this appeal. While R.C. §3937.18(K)(2) was repealed altogether by

S.B. 2677, R.C. §3937.18(J)(1) was minimally revised and renumbered as R.C. §3937.18(I)(1),

which reads as follows:

- (I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:
 - (1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided; . . .

While the language in Section (I) itself was modified, the language in Subsection (I)(1) remains identical to the language found in former R.C. §3937.18(J)(1), which is currently under review in this case.

In enacting Senate Bill 97, the General Assembly expressly stated its intent to do the following:

* * *

- (2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverage as being implied as a matter of law in any insurance policy;
- (3) Provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverage; . . .

While the General Assembly failed to advise through its legislative intent or otherwise the government's interest or purpose in the enactment or repeal of former R.C. §3937.18(K)(2), several cases which have considered the modification of former R.C. §3937.18(J)(1) and the repeal of former R.C. §3937.18(K)(2) are informative on the issue. In *Snyder v. American Family Insurance Company*, 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574 at ¶15, the Court pointed out that the S.B. 97 amendments to R.C. §3937.18 for the first time permit insurers to limit or exclude uninsured/underinsured motorists coverage under circumstances that are specified in the policy, even if those circumstances are not also specified in the statute. Further, eliminating a mandatory coverage offering and simultaneously permitting the parties to agree to coverage exclusions not listed in the statute provides insurers considerable flexibility in drafting specific restrictions on any offered uninsured or underinsured motorist coverage. *Id.* R.C. §3937.18(I) expressly permits the parties to agree to specified conditions to, or exclusions from, uninsured and underinsured motorist coverage. *Id.* at ¶26. Thus, the Ohio Supreme Court determined that former R.C. §3937.18(K)(2) was repealed not due to public policy or constitutional concerns or due to a lack of government interest in regulating "intra-family" uninsured and underinsured motorist claims, but because the General Assembly preferred to allow the parties to an insurance policy the choice of which coverages and which limitations on coverage would be included in a policy.

In considering the General Assembly's repeal of former R.C. §3937.18(K)(2), the Fourth District Court of Appeals determined in *Howard v. Howard*, 4th Dist. No. 06CA755, 2007-Ohio-3940, that the absence of the "intra-family" exclusion in the present version of R.C. §3937.18, as found in former R.C. §3937.18(K)(2), does not mean that such an exclusion is impermissible in an insurance policy. *Id.* at ¶20. In *Howard*, the Plaintiff suffered injuries in an automobile while

a passenger in a vehicle that her husband was driving. *Id.* at ¶3. The Plaintiff sought uninsured/underinsured motorist coverage under her husband's policy, which listed the Plaintiff's husband as the named insured. *Id.* The policy at issue excluded from the definition of uninsured motor vehicle "any vehicle . . . owned by . . . you." *Id.* at ¶4. In other words, the policy in question contained an "intra-family" exclusion for purposes of uninsured/underinsured motorist coverage.

The Plaintiff in *Howard* argued that R.C. §3937.18 no longer permits insurers to include the "intra-family" exclusion in policies because the current version of R.C. §3937.18 does not contain a provision similar to former R.C. §3937.18(K)(2). *Id.* at ¶5. The Plaintiff suggested that this indicated a clear intent by the General Assembly to restrict "intra-family" exclusions. *Id.* The Defendant countered that the legislature did not intend R.C. §3937.18, as enacted by S.B. 97, to contain an exhaustive list of restrictions or exclusions that insurers could include in the policy. *Id.* at ¶6. Instead, the Defendant argued that insurers may include various other restrictions in their automobile liability policies as evidenced by the "including but not limited to" language in R.C. §3937.18(I). *Id.* The Defendant further contended that S.B. 97 does not require specific statutory authorization to permit insurers to preclude coverage in arguing that a "counter-part of former R.C. §3937.18(K)(2) is neither necessary nor appropriate, in view of the fact that offering of UM/UIM coverage is no longer mandatory and in view of the fact that the statute now contains a general authorization for insurers to preclude coverage in specified circumstances." *Id.* at ¶7. In addressing these arguments, the Fourth District Court of Appeals determined that the statute's plain language, with its use of the phrase "including but not limited to," indicates that the list of terms and conditions that may preclude coverage is not exhaustive. *Id.* at ¶19. Thus, the Court held that while the General Assembly elected to repeal the "intra-

family” exclusion contained in former R.C. §3937.18(K)(2), it by no means intended to prohibit insurers from including language similar to the “intra-family” exclusion in their policies. *Id.* at ¶20.

In *Wertz v. Wertz*, 6th Dist. No. H-06-036, 2007-Ohio-4605, the Sixth District Court of Appeals reversed the trial court’s decision that the “intra-family” exclusion in the subject insurance policy issued by American Standard Insurance Company is against the public policy of Ohio and unenforceable under current R.C. §3937.18. The Sixth District Court of Appeals in *Wertz* cited to the decisions in both *Snyder* and *Howard* in determining that the “intra-family” exclusion in the applicable uninsured motorist policy was enforceable under R.C. §3937.18(I)(1). *Id.* at ¶22.

In *Green v. Westfield Insurance Company*, 9th Dist. No. 06CA0025-M, 2006-Ohio-5057, the Ninth District Court of Appeals engaged in an analysis similar to that in *Howard*, *supra*. The *Green* court determined that the Westfield insurance policy at issue precluded any vehicle “owned by, or furnished, or available for the regular use of you or a family member” from being considered an uninsured motor vehicle. *Id.* at ¶11. The Court determined that, because the vehicle involved in the subject accident was owned by the Plaintiff’s husband, it did not qualify as an uninsured vehicle, and the Plaintiff was not entitled to uninsured/underinsured motorist coverage. The Court concluded that, post S.B. 97, insurance companies and their customers are free to contract in any manner they see fit because the language chosen by the legislature in R.C. §3937.18(I)(1) necessarily means that an insured is allowed to include terms and conditions which preclude uninsured and underinsured motorist coverage for circumstances other than those listed in the statute, provided that they are specified within the policy. *Id.* at ¶16, 20. As such, the Court determined that the plain language of R.C. §3937.18(I)(1) evidences a clear intent on

the part of the General Assembly to recognize the “intra-family” or household exclusion. *Id.* at ¶23.

As clearly established by these cases, although the General Assembly did not reveal its legislative intent in either enacting or repealing former R.C. §3937.18(K)(2), it was not repealed because the General Assembly determined that the “intra-family” exclusion contained therein was against public policy or unrelated to a legitimate government interest. Had the General Assembly reached such a conclusion, it is probable that the General Assembly would have specifically precluded the type of “intra-family” exclusion that the Appellee in the instant matter is seeking to have declared unconstitutional. Instead, these “intra-family” exclusions are still valid and enforceable under current Ohio law.

CONCLUSION

Former R.C. §3937.18(K)(2), when read in conjunction with former R.C. §3937.18(J)(1), does not violate the Equal Protection Clauses of the Ohio or United States Constitutions because it does not create an arbitrary and illogical classification based on household status that has a disparate and unfair effect by precluding coverage for individuals who may not recover solely because they were related to and live in the household of the insured. The Motorists policy in effect for Mr. Burnett at the time of the subject motor vehicle accident contained an unambiguous exclusion to uninsured/underinsured motorist coverage, which was expressly authorized by and in direct compliance with former R.C. §3937.18(K)(2). In its Opinion of April 9, 2007, the Eleventh District Court of Appeals held that former R.C. §3937.18(K)(2) is unconstitutional and that Mr. Burnett’s policy affords coverage because the vehicle was listed under the policy and premiums were paid for the vehicle. (Appendix, p. 12, 13). This holding invalidates a statute regularly enacted by the Ohio General Assembly and which was upheld by

the Ohio Supreme Court in *Kyle* and the Fourth Appellate District in *Morris v. United Ohio Insurance Company*, supra.

Former R.C. §3937.18(K)(2), as with every other regularly enacted statute, was enacted by the General Assembly with every presumption in favor of its constitutionality. This presumption of constitutionality remains unless it is proven beyond a reasonable doubt that the legislation is clearly unconstitutional. Since there is no impermissible classification created by former R.C. §3937.18(K)(2), there is no discrimination that could offend the federal or state Equal Protection Clauses. Further, almost any classification survives a mere rationality review and the classification must be upheld so long as it is conceivable that the classification bears a rational relationship to a legitimate governmental objective. As former R.C. §3937.18(K)(2) bears a rational relationship to the legitimate government interest of preventing fraudulent, collusive lawsuits, it survives a rational basis review notwithstanding the fact that it does not create any impermissible classification in the first instance. The Appellee can present no argument and no interpretation of former R.C. §3937.18(K)(2) which would enable the Appellee to establish beyond a reasonable doubt that this provision is in violation of the Equal Protection Clauses of the Ohio and United States Constitutions.

Despite the Ohio Supreme Court's holding in *Kyle* and in direct conflict with the Fourth Appellate District's holding in *Morris*, the Eleventh District Court of Appeals has erroneously held that former R.C. §3937.18(K)(2) is in violation of the Equal Protection Clauses of the United States and Ohio Constitutions. In accord with this Court's holding in *Kyle* and the holding of the Fourth District Court of Appeals in *Morris*, and for all of the reasons set forth herein, the Appellant strongly believes that former R.C. §3937.18(K)(2) is valid and enforceable and not in violation of the Equal Protection Clauses of the Ohio or United States Constitutions.

Accordingly, Appellant Motorists Mutual Insurance Company respectfully requests this Court to reverse the Opinion and Judgment Entry of the Eleventh District Court of Appeals filed on April 9, 2007, and to enter final judgment in its favor.

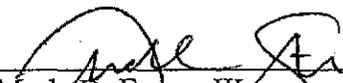
Respectfully submitted,


Merle D. Evans, III (#0019230)
Jude B. Streb (#0071529)
DAY KETTERER LTD.
P.O. Box 24213
Canton, Ohio 44701-4213
Telephone (330) 455-0173
Facsimile (330) 455-2633
Email: mdevans@day-ketterer.com
Email: jbstreb@day-ketterer.com
Counsel for Appellant, Motorists Mutual Insurance Company

PROOF OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellant, Motorists Mutual Insurance Company, was sent by ordinary U.S. mail to the following, this 19th day of October, 2007:

James L. Pazol, Esq.
Raymond J. Tisone, Esq.
21 N. Wickliffe Circle
Youngstown, OH 44515
Counsel for Appellee, Elizabeth Burnett


Merle D. Evans, III
Jude B. Streb
DAY KETTERER LTD.

IN THE SUPREME COURT OF OHIO

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

CASE NO. 07-0954

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

NOTICE OF APPEAL OF DEFENDANT/APPELLANT
 MOTORISTS MUTUAL INSURANCE COMPANY

James L. Pazol (#0004787)
 Raymond J. Tisone (#0021726)
 ANZELLOTTI, SPERLING, PAZOL
 & SMALL CO., LPA
 21 N. Wickliffe Circle
 Youngstown, Ohio 44515
 Telephone (330) 792-6033

Attorney for Plaintiff/Appellee
 Elizabeth Burnett

Merle D. Evans, III (#0019230)
 Jude B. Streb (#0071529)
 DAY KETTERER LTD.
 Millennium Centre, Suite 300
 200 Market Avenue North
 P.O. Box 24213
 Canton, Ohio 44701-4213
 Telephone (330) 455-0173
 Facsimile (330) 455-2633
 Email: mdevans@day-ketterer.com
 Email: jbstreb@day-ketterer.com

Attorneys for Defendant/Appellant
 Motorists Mutual Insurance Company

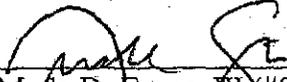
FILED
 MAY 23 2007
 MARCIA J MENGEL, CLERK
 SUPREME COURT OF OHIO

Notice of Appeal of Defendant/Appellant Motorists Mutual Insurance Company

Now comes Defendant/Appellant Motorists Mutual Insurance Company and hereby gives notice of its appeal to the Supreme Court of Ohio from the Opinion and Judgment Entry of the Trumbull County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2006-T-0085 on April 9, 2007.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,


Merle D. Evans, III (#0019230)
Jude B. Streb (#0071329)
DAY KETTERER LTD.
Millennium Centre, Suite 300
200 Market Avenue North
P.O. Box 24213
Canton, Ohio 44701-4213
Telephone (330) 455-0173
Facsimile (330) 455-2633
Email: mdevans@day-ketterer.com
Email: jbstreb@day-ketterer.com

Attorneys for Defendant/Appellant,
Motorists Mutual Insurance Company

PROOF OF SERVICE

A copy of the foregoing Notice of Appeal of Defendant-Appellant, Motorists Mutual Insurance Company, was sent by ordinary U.S. mail to the following, this 23rd day of May, 2007:

James L. Pazol, Esq.
Raymond J. Tisone, Esq.
21 N. Wickliffe Circle
Youngstown, OH 44515
Counsel for Plaintiff/Appellee Elizabeth Burnett


Jude B. Streb
DAY KETTERER LTD.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ELIZABETH BURNETT,

Plaintiff-Appellant,

-vs-

JUDGMENT ENTRY

CASE NO. 2006-T-0085

MOTORISTS MUTUAL INSURANCE
COMPANIES, et.al.,

Defendant-Appellee.

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.

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."

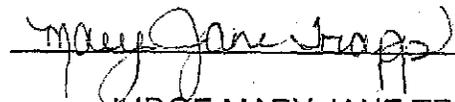
Thus, we held: "****that the former version of R.C. 3937.18(K)(2), effective at the time of this policy was unconstitutional because it created an arbitrary and

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
KAREN INFANTE ALLEN, CLERK

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS

APR 09 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

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

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

Judgment: Reversed and remanded.

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.

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

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

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

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

{¶6} **Standard of Review**

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

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

{¶9} **The Intrafamily Exclusion**

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

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

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

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

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

{¶15} **Kyle's Statutory Interpretation**

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

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

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

{¶19} **Equal Protection Challenge**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ELIZABETH BURNETT,

Plaintiff-Appellant,

- vs -

MOTORISTS MUTUAL INSURANCE
COMPANIES, et al.,

Defendant-Appellee.

JUDGMENT ENTRY

CASE NO. 2006-T-0085

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



JUDGE MARY JANE TRAPP

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

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

FILED
COURT OF APPEALS

APR 09 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

Slip Copy
Slip Copy, 2005 WL 2002282 (Ohio App. 11 Dist.), 2005 -Ohio- 4333
(Cite as: Slip Copy)

Burnett v. Motorists Mut. Ins. Cos.
Ohio App. 11 Dist., 2005.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.
Elizabeth BURNETT, Plaintiff-Appellee,

v.

MOTORISTS MUTUAL INSURANCE COMPANIES, et al., Defendant-Appellant.
No. 2003-T-0101.

Aug. 19, 2005.

Background: Insured's wife, who was injured while a passenger in insured's automobile, brought declaratory judgment action against insured and insurer, seeking a declaration as to coverages available under insured's policy. The Court of Common Pleas, Trumbull County, No. 01 CV 414, entered judgment finding that policy's intra-family exclusion was unenforceable. Insurer appealed.

Holding: The Court of Appeals, Ford, J., held that statutory provision limiting the definition of "uninsured motor vehicle" did not conflict with provision permitting insurers to exclude certain damages from uninsured motorist (UM) coverage.

Reversed, judgment rendered in part, and remanded.
West Headnotes

Insurance 217 ⇨ 2654

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(A) In General

217k2651 Automobiles Covered

217k2654 k. Automobiles Not in Policy in General. Most Cited Cases

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

Statutory provision excluding from the definition of "uninsured motor vehicle" vehicles owned by the named insured did not conflict with provision permitting insurers to exclude from uninsured motorist (UM) coverage any damages arising from use of a vehicle owned by the insured that was not named in the policy, and thus intra-family exclusion in insured's policy that was based on statutory definition of uninsured motor vehicle, and pursuant to which insurer denied UM coverage to insured's wife for injuries sustained while she was a

passenger in insured's car, was enforceable; provisions addressed two different topics and were complementary in nature. R.C. § 3937.18(J)(1)(2000), (K)(2)(2000).

Civil Appeal from the Court of Common Pleas, Case No. 01 CV 414. Reversed and judgment entered for appellant in part; reversed and remanded in part.

James L. Pazol, Anzellotti, Sperling, Pazol & Small Co., L.P.A., Youngstown, OH, for Plaintiff-Appellee.

Merle D. Evans, III, Canton, OH, for Defendant-Appellant.

OPINION

FORD, J.

*1 {¶ 1} This is an appeal from the July 14, 2003 judgment of the Trumbull County Court of Common Pleas granting judgment in favor of appellee, Elizabeth Burnett, on the issue of uninsured motorist coverage.

{¶ 2} The following facts have been stipulated to by the parties in this case and, therefore, are not in dispute. Appellee was involved in a motor vehicle accident on February 13, 2000, on State Route 7 in Brookfield Township, Trumbull County, Ohio. At the time of the accident, appellee was a passenger in a car owned and operated by her husband, defendant, Albert R. Burnett ("Mr. Burnett"). The accident was solely caused by the negligence of Mr. Burnett. As a result of the accident, appellee incurred bodily injuries and medical expenses.

{¶ 3} Appellant, Motorists Mutual Insurance Companies ("Motorists"), had issued a policy of insurance to its named insured, Mr. Burnett, which was in effect at the time of the accident. Appellee and Mr. Burnett resided together in Williamsfield, Ohio, and, thus, appellee was a "family member" of Mr. Burnett and resident of his household, as those terms are defined in the subject insurance policy. Additionally, the vehicle being operated by Mr. Burnett at the time of the accident was owned by him and listed as an insured vehicle under the policy.

{¶ 4} Subsequent to the accident, Motorists denied liability insurance to Mr. Burnett for those claims asserted by appellee, which stemmed from the accident, due to the family member exclusion contained in the policy. Motorists also denied the claim of appellee for uninsured motorists benefits for damages arising out of the accident due to the intra-family exclusion contained in the policy.

{¶ 5} On March 1, 2001, appellee filed a complaint against Motorists and Mr. Burnett seeking a declaration as to coverages available under the insurance policy issued by Motorists to Mr. Burnett. In response, Mr. Burnett filed a cross-claim against Motorists. Motorists then filed a counterclaim against appellee and a cross-claim against Mr. Burnett.

{¶ 6} Subsequently, appellee and Motorists each filed motions for summary judgment. On July 14, 2003, the trial court held that "Revised Code 3937.18(J)(1) and Revised Code 3937.18(K)(2) are ambiguous and irreconcilable thus rendering any insurance policy provisions based on Revised Code 3937.18(K)(2) unenforceable."

{¶ 7} Motorists timely filed a notice of appeal and has now set forth the following assignments of error:

{¶ 8} “[1.] The trial court erred in holding that former Ohio Revised Code 3937.18(K)(2) is unenforceable and that the intra-family exclusion in Motorists' uninsured motorists coverage form is likewise unenforceable.

{¶ 9} “[2.] The trial court erred in failing to determine that Ohio Revised Code 3937.18(J)(3) precludes the plaintiff's uninsured motorists claim.

{¶ 10} “[3.] The trial court erred in overruling the motion for summary judgment filed by Motorists.

*2 {¶ 11} “[4.] The trial court erred in ruling that the issue of damages is to be determined at a separate hearing, and not a jury trial.”

{¶ 12} In the first assignment of error, Motorists contends that the trial court erred in holding that former R.C. 3937.18(K)(2), and the intra-family exclusion in its uninsured motorists coverage form, are both unenforceable.

{¶ 13} To begin with, it is undisputed that R.C. 3937.18, as amended by H.B. 261 on September 3, 1997, was the statutory law in effect at the time of the accident and, therefore, controls the rights and duties of the parties to the insurance contract in this case. This was the conclusion of the trial court and neither party takes issue with that portion of the trial court's decision.

{¶ 14} R.C. 3937.18(K)(2) provided as follows:

{¶ 15} “As used in this section, ‘uninsured motor vehicle’ and ‘underinsured motor vehicle’ do not include any of the following motor vehicles:

{¶ 16} “ * * *

{¶ 17} “(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 the named insured* * *.”

{¶ 18} The foregoing provision is commonly referred to as a household exclusion or an intra-family exclusion. The Supreme Court of Ohio had ruled that the prior version of R.C. 3937.18 was unenforceable. *State Farm Automobile Ins. Co. v. Alexander* (1992), 62 Ohio St.3d 397, 583 N.E.2d 309. Subsequently, however, the legislature enacted H.B. 261 which authorized the use of the intra-family exclusion by adding section (K)(2). Thus, the *Alexander* decision was no longer controlling.

{¶ 19} It is clear that until recently, there was a division in Ohio among various appellate districts as to whether intra-family exclusions were permissible. The trial court in this case chose to follow the line of authority which held that R.C. 3937.18(K)(2) was unenforceable because it conflicted with R.C. 3937.18(J)(1) which provided in relevant part:

{¶ 20} “The coverage offered under * * * [uninsured and underinsured motorist coverage] may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under any of the following circumstances: (1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named

insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided * * *.”

{¶ 21} The trial court reasoned that R.C. 3937.18(J)(1) excludes from coverage only those vehicles that the claimant owns, but which are not covered under the policy. “If the vehicle is listed in the uninsured motorist coverage, the exclusion cannot apply by its own terms. That is, the claimant has provided uninsured motorist coverage for that vehicle. The claimant in that situation is not attempting to stack coverage. * * * The claimant is simply attempting to claim coverage for which he had paid a premium. This court reads Revised Code (J)(1) to mean that you have no coverage for a vehicle you own unless it is listed in the policy.”

*3 {¶ 22} The trial court then interpreted R.C. 3937.18(K)(2) to mean that one's vehicle can never be an uninsured vehicle even if it is listed in the policy and a premium is paid for that vehicle. Thus, the trial court concluded that since section (K)(2) precludes uninsured motorist coverage where the claimant, a spouse, or resident family member owns the vehicle, the promise set forth in section (J)(1) for coverage of a listed vehicle is illusory in nature.

{¶ 23} In reaching its decision, the trial court relied heavily on *Morris v. United Ohio Ins. Co.*, 4th Dist. No. 02CA2653, 2003-Ohio-1708, and cases that followed the *Morris* line of reasoning.

{¶ 24} However, subsequent to the trial court's decision in this case, the Supreme Court of Ohio overturned *Morris* and all other cases that used that line of reasoning. *Kyle v. Buckeye Union Ins. Co.*, 103 Ohio St.3d 170, 814 N.E.2d 1195, 2004-Ohio-4885; *Morris v. United Ohio Ins. Co.*, 103 Ohio St.3d 462, 816 N.E.2d 1060, 2004-Ohio 5706.

{¶ 25} In a case on point with the present case, the Supreme Court of Ohio in *Kyle* held that R.C. 3937.18(J)(1) and (K)(2) were not conflicting but, instead, were complementary. The court stated:

{¶ 26} “Paragraph (J) addressed certain *circumstances* in which a policy could exclude UM/ UIM coverage for an insured. Paragraph (K) excluded certain *tortfeasors' vehicles* from being considered uninsured or underinsured. Because these paragraphs address different topics, they do not conflict.” *Id.* at ¶ 21, 814 N.E.2d 1195. (Emphasis sic.)

{¶ 27} Based upon the *Kyle* decision, it is clear that appellee is precluded from coverage under the uninsured provisions of the policy issued by Motorists to Mr. Burnett. Hence, the trial court's decision must be reversed.

{¶ 28} Motorists' first assignment of error is sustained.

{¶ 29} In the second assignment of error, Motorists submits that the trial court erred by failing to determine that R.C. 3937.18(J)(3) precludes appellee's uninsured motorist claims.

{¶ 30} Based upon the conclusion reached in Motorists' first assignment of error, its second, third and fourth assignments of error are moot and will not be addressed by this court.

{¶ 31} Accordingly, the decision of the trial court is hereby reversed and judgment entered in favor of appellant on the *Kyle* issue. Namely, appellee is precluded from coverage under the uninsured provisions of the policy issued by Motorists. However, as to any other issues raised by appellee in the trial court which were not previously addressed, such as the constitutionality of the intra-family exclusions under either the liability or uninsured motorists provisions, this case is remanded to the trial court so that these issues can be properly addressed.

WILLIAM M. O'NEILL, J., COLLEEN MARY O'TOOLE, J., concur.

Ohio App. 11 Dist., 2005.

Burnett v. Motorists Mut. Ins. Cos.

Slip Copy, 2005 WL 2002282 (Ohio App. 11 Dist.), 2005 -Ohio- 4333

END OF DOCUMENT

Slip Copy

Slip Copy, 2006 WL 2788192 (Ohio App. 9 Dist.), 2006 -Ohio- 5057

(Cite as: Slip Copy)

Green v. Westfield Natl. Ins. Co.
Ohio App. 9 Dist., 2006.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Medina County.
Janice GREEN, Appellant

v.

WESTFIELD INSURANCE COMPANY, Appellee.
No. 06CA0025-M.

Decided Sept. 29, 2006.

Appeal from Judgment Entered in the Court of Common Pleas, County of Medina, Ohio, Case
No. 05civ1135.

Scott P. Wood, Attorney at Law, Lancaster, OH, for appellant.

Mark F. Fischer and Cari Fusco Evans, Attorneys at Law, Canton, OH, for appellee.

*1 This cause was heard upon the record in the trial court. Each error assigned has been re-
viewed and the following disposition is made:

WHITMORE, Presiding Judge.

{¶ 1} Plaintiff-Appellant Janice Green has appealed the judgment of the Medina County Court
of Common Pleas which granted summary judgment in favor of Defendant-Appellee West-
field National Insurance Company. This Court affirms.

I

{¶ 2} The present action stems from a motor vehicle accident in 2003, in which Plaintiff-App-
pellant Janice Green sustained severe injuries when the car in which she was riding as a pas-
senger, and which was operated by her husband, Chester Green, was struck by a vehicle driv-
en by Byron White.^{FN1} At the time of the accident, Appellant and her husband were covered
under an automobile policy (the "Westfield policy") issued by Defendant-Appellee Westfield
National Insurance Company ("Westfield") which provided \$1,000,000 in liability coverage
and \$1,000,000 in uninsured/underinsured motorist coverage ("UM/UIM"). It is undisputed
that the vehicle the Greens were operating at the time of the accident was an identified vehicle
under the Westfield policy. Because the liability portion of the Westfield policy specifically
excluded coverage for bodily injury to family members, Appellant made a claim for her dam-
ages under the UI/UIM portion of the Westfield policy. Westfield rejected Appellant's claim
and denied coverage.

FN1. Mr. Green made a left hand turn into oncoming traffic.

{¶ 3} On January 18, 2005, Appellant filed a claim in the Fairfield County Court of Common
Pleas, alleging breach of contract, bad faith, and class action certification. Appellant filed an

amended complaint on January 21, 2005. On February 23, 2005, Westfield filed its answer and counterclaim seeking declaratory judgment. On August 17, 2005, and upon Westfield's motion, the trial court transferred the matter to Medina County.

{¶ 4} Appellant filed a motion for partial summary judgment as to liability on her breach of contract claim on November 16, 2005. On December 30, 2005, Westfield filed a cross-motion for summary judgment as to all of Appellant's claims and its own claim for declaratory judgment. On March 23, 2006, the trial court granted Westfield's motion for summary judgment and entered judgment for Westfield on all of Appellant's claims.

{¶ 5} Appellant has timely appealed, asserting one assignment of error.

II

Assignment of Error

“THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT-APPELLEE AND IN DENYING SUMMARY JUDGMENT TO PLAINTIFF-APPELLANT ON HER CLAIM FOR BREACH OF CONTRACT.”

{¶ 6} In her sole assignment of error, Appellant has argued the trial court improperly granted summary judgment to Westfield. Specifically, Appellant has argued that R.C. 3937.18(I)(1) precludes an insurer from denying UM/UIM coverage for an automobile that is specifically identified in the policy and for which the insured has been charged a premium. We disagree.

*2 {¶ 7} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the nonmoving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12. “We review the same evidentiary materials that were properly before the trial court at the time it ruled on the summary judgment motion.” *Am. Energy Servs., Inc. v. Lekan* (1992), 75 Ohio App.3d 205, 208. Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(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 to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶ 8} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of a genuine issue of material fact as to some essential element of the non-moving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. To support the motion, such evidence must be present in the record and of the type listed in Civ.R. 56(C). *Id.* at 292-293.

{¶ 9} Once the moving party's burden has been satisfied, the non-moving party must meet its burden as set forth in Civ.R. 56(E). *Id.* at 293. The non-moving party may not rest upon the

mere allegations and denials in the pleadings, but instead must point to or submit some evidentiary material to demonstrate a genuine dispute over the material facts. *Id.* See, also, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶ 10} Pursuant to Civ.R. 56(C):

“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.”

{¶ 11} It is uncontested that Appellant's vehicle was an uninsured motor vehicle to the extent that Westfield had denied coverage based on an intra-family exclusion on liability coverage. However, the Westfield policy also precluded any vehicle “[o]wned by or furnished or available for the regular use of you or a family member[]” from being considered an uninsured motor vehicle. Therefore, under the Westfield policy, the vehicle that was involved in the crash did not qualify as an uninsured vehicle because it was owned by Appellant's husband. Accordingly, under this exclusion, Appellant was not entitled to UM/UIM motorist coverage. It is the validity of this exclusion which Appellant has challenged.

*3 {¶ 12} Appellant argued below that the critical factor in the matter was the applicability of R.C. 3937.18. R.C. 3937.18 has been amended several times in recent history. It is well established that “ ‘for the purpose of determining the scope of coverage of an underinsured motorist claim, the statutory law in effect at the time of entering into a contract for automobile liability insurance controls the rights and duties of the contracting parties.’ ” *Likens v. Westfield Ins. Co.*, 9th Dist. No. 22408, 2005-Ohio-3948, at ¶ 12, quoting *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281, 289. As the automobile insurance policy at issue herein was effective May 28, 2003, the most recent version of R.C. 3927.18, as amended by Senate Bill 97 and effective October 31, 2001, is applicable. Specifically, Appellant has relied on R.C. 3937.18(I)(1), which provides that:

“Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

“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, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided[.]”

In its cross motion for summary judgment, Westfield agreed that R.C. 3937.18 was dispositive, but argued that R.C. 3937.18, as amended by Senate Bill 97, eliminated the requirement of mandatory UM/UIM coverage and granted insurers the latitude to include exclusions and limitations in its contract.

{¶ 13} In granting summary judgment to Westfield, the trial court noted that Appellant's argument was grounded in R.C. 3937.18(I)(1) which allows an exclusion of coverage if 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, which is not specifically identified in the policy. According to the trial court, Appellant's argument relied upon a construction of R.C. 3937.18(I)(1) in which the inverse is also true: that 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, *cannot be excluded* from the definition of an uninsured or underinsured motor vehicle if it is specifically identified in the UM/UIM policy.

{¶ 14} In its decision, the trial court reasoned that the phrase “including to but not limited to” employed by the legislature clearly allowed other means of excluding vehicles owned by, furnished to, or available for the regular use of a named insured, spouse, or resident relative. The trial court concluded that an insurance company is permitted under R.C. 3937.18 “to draft the very exclusion that Westfield drafted in this contract.”

*4 {¶ 15} Appellant's argument is identical on appeal. Appellant has contended that the trial court placed too much emphasis on the “including but not limited to” language contained in the statute. Appellant has argued that in doing so, the trial court construed the statute to effectively eliminate the legislature's intent “to declare that if a vehicle is specifically identified in the automobile policy and the insured pays a premium for the coverage, the insurance company can not avoid its contractual obligations by precluding coverage elsewhere.” Because we conclude that the neither the statute's plain meaning nor the legislative intent supports Appellant's argument, we find that the trial court properly granted summary judgment to Westfield.

{¶ 16} First, the plain language of R.C. 3937.18(I)(1) supports Westfield's preclusion of vehicles “[o]wned by or furnished or available for the regular use of you or a family member[.]” from its definition of uninsured motor vehicle. R.C. 3937.18(I)(1) specifically allows insurers to “include terms and conditions that preclude coverage for bodily injury * * * suffered by an insured under specified circumstances, *including not limited to* any of the following circumstances[.]” (Emphasis added). The language chosen by the legislature necessarily means that an insurer is allowed to include terms and conditions which preclude UM/UIM coverage *for circumstances other* than those listed in the statute, provided they are specified within the policy. In the present case, the Westfield policy clearly sets out its terms and conditions: vehicles owned by or furnished or available for regular use of the insured or a family member are not uninsured motor vehicles for purposes of UM/UIM coverage.

{¶ 17} Additionally, the plain language of the R.C. 3937.18(A)(1) does not support Appellant's premise that because UM/UIM coverage *may be precluded* if a vehicle *is not* specifically identified, that UM/UIM coverage *may not be precluded* if a vehicle *is* specifically identified. In order to reach the conclusion which Appellant proposes, this Court must read into the statute the inverse of that which the statute clearly states. Appellant has not provided any case law or statutory authority to support this proposition, and in the absence of such authority, we are constrained to adhere to the plain meaning of the statute. It is clear to this Court that R.C. 3937.18(I) does not provide that UM/UIM coverage is mandatory if a vehicle is specifically identified in the policy.

{¶ 18} Second, Appellant's interpretation of the legislative intent underlying R.C. 3937.18 is not accurate. Appellant has posited that the legislature intended “to declare that if a vehicle is specifically identified in the automobile policy and the insured pays a premium for the coverage, the insurance company can not avoid its contractual obligations by precluding coverage

elsewhere." In essence, Appellant has sought this Court to interpret R.C. 3937.18 to impose mandatory UM/UIM coverage if a vehicle is identified in the automobile policy. Such an interpretation is in direct conflict with the legislative intent clearly evidenced by Senate Bill 97. Senate Bill 97, effective October 31, 2001 amended R.C. 3937.18 and states, in relevant part:

*5 "In enacting this act, it is the intent of the General Assembly to do all of the following:

" * * *

"(B) Express the public policy of the state to:

"(1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

"(2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;

"(3) Provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages[.]" 2001 S 97 at § 3.

{¶ 19} Section 3 of Senate Bill 97 clearly demonstrates that it was the intent of the legislature to: (1) eliminate the requirement of mandatory UM/UIM coverage; (2) eliminate UM/UIM coverage being implied as a matter of law in any insurance policy; and (3) to provide statutory authority for including exclusions or other limitations in UM/UIM coverage should it be offered by the insurer. This stated intent is consistent with the plain language of the statute as amended. In fact, numerous sections of R.C. 3937.18, not just (I)(1), allow the insurer to include terms and provisions. See R.C. 3937.18(F);(G);(H). Further, we find it illustrative that Appellant has failed to indicate where in the legislative history for R.C. 3937.18 her position is supported.

{¶ 20} This Court concludes that, post Senate Bill 97, insurance companies and their customers are free to contract in any manner that they see fit. Insurers are not required by law to offer UM/UIM coverage. However, if insurers opt to offer UM/UIM coverage, they are free to include exclusions or limitations on that coverage.

{¶ 21} Appellant has relied on the Ohio Supreme Court's 2004 decision in *Kyle v. Buckeye Union Ins. Co.*, 103 Ohio St.3d 170, 2004-Ohio-4885 to support her contentions. Specifically, Appellant has argued that the Court summarized the legislature's intent in enacting R.C. 3937.18 in the following manner:

"For more than 30 years, this court has made clear that the purpose behind R.C. 3937.18 is to protect persons from losses that, because of the tortfeasor's lack of liability coverage, would otherwise go uncompensated." *Id.* at ¶ 27, (Sweeney, J., dissenting) citing *Abate v. Pioneer Mut. Cas. Co.* (1970); 22 Ohio St.2d 161, 165.

However, we find *Kyle* to be inapposite to the matter before us. In *Kyle*, the Court was asked to decide "whether former R.C. 3937.18(J)(1) and (K)(2), effective September 3, 1997, through October 31, 2001, and September 21, 2000, respectively, are in conflict and, if so, whether they can be reconciled." *Id.* at ¶ 7. Essentially, the Court was asked to interpret the former version of R.C. 3937.18, as amended by House Bill 261, and enacted in 1997. Notably, the text quoted above which Appellant has chosen to rely upon was offered in dissent by Justice Sweeney and not in the majority opinion.

*6 {¶ 22} We agree with the reasoning of *Snyder v. Am. Family Ins. Co.*, 10th Dist. No. 05AP-116, 2005-Ohio-6751, in which the Tenth District noted that:

“The multiple changes to R.C. 3937.18 effected by S.B. 97 and S .B: 267 reveal a clear legislative intent to disengage from earlier attempts to dictate that UM coverage be offered or provided, and to dictate which limitations on coverage will or will not be enforceable. For instance, the legislature completely eliminated the requirement that UM coverage be offered with each automobile liability policy. Moreover, the General Assembly added the following language, which had never before been a part of that statute:

“Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances[.]” (Emphasis added). *Id.* at ¶ 21, quoting R.C. 3937.18(I).

We also agree with the Tenth District that when the legislature amended R.C. 3937.18 via Senate Bill 97, “it expressly left to the contracting parties to agree upon any ‘terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances.’” *Id.* at ¶ 22, quoting R.C. 3937.18(I).

{¶ 23} This Court concludes that Appellant's contention that the “General Assembly, through R.C. 3937.18(I)(1), * * * made it clear that if an automobile insurance company and its insured agree to provide UM/UM coverage to a vehicle specifically identified in the policy, for which the automobile insurance company benefits through charging premiums, that the coverage can not be otherwise excluded[]” is wholly unsupported by the plain language of R.C. 3937.18(I)(1), by the legislative intent evidenced by Senate Bill 97, and by the case law as cited by Appellant.

{¶ 24} Based on the foregoing, we find that Westfield established that no genuine issue as to any material fact remained to be litigated and that they were entitled to judgment as a matter of law. See Civ.R. 56(C). Accordingly, the trial court did not err when it granted summary judgment in favor of Westfield.

{¶ 25} Appellant's sole assignment of error lacks merit.

III

{¶ 26} Appellant's sole assignment of error is overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed

to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

*7 Costs taxed to Appellant.

BOYLE, J., concurs.

CARR, J., dissents, saying.

{¶ 27} I respectfully dissent. Although it appears from the legislative history that the legislature intended to give great leeway to the contracting parties to agree upon terms and conditions that preclude coverage for bodily injury or death suffered by an insured, it is difficult to get around the plain wording of R.C. 3937.18(I). R.C. 3937.18(I) limits its provisions to a "motor vehicle [that] is not specifically identified in the policy under which a claim is made"

{¶ 28} Perhaps the answer lies with more guidance from the legislature or the Ohio Supreme Court where this issue is currently being reviewed.

Ohio App. 9 Dist., 2006.

Green v. Westfield Natl. Ins. Co.

Slip Copy, 2006 WL 2788192 (Ohio App. 9 Dist.), 2006 -Ohio- 5057

END OF DOCUMENT

Howard v. Howard
Ohio App. 4 Dist., 2007.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Pike County.
Opal F. HOWARD, Plaintiff-Appellant,

v.

Ruben HOWARD, et al., Defendants-Appellees.
No. 06CA755.

Decided May 31, 2007.

Civil Appeal from Common Pleas Court.

Matthew J. Carty and Peter D. Traska, Mayfield Heights, OH, for appellant.
James H. Ledman and James M. Roper, Columbus, OH, for appellee.
ABELE, J.

*1 {¶ 1} This is an appeal from a Pike County Common Pleas Court summary judgment in favor of Westfield Insurance Company, defendant below and appellee herein.

{¶ 2} Opal F. Howard, plaintiff below and appellant herein, raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY FAILING TO ACCOUNT FOR THE FACT THAT THE GENERAL ASSEMBLY SPECIFICALLY DELETED THE FORMER ALLOWANCE AT 3937.18(K)(1-2) OF 'INTRA-FAMILY' UM/UIM EXCLUSIONS."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT FAILED TO ACCOUNT FOR THE SUPREME COURT'S DISTINCTION BETWEEN A POLICY 'DEFINITION' AND A POLICY 'EXCLUSION.' "

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY ENFORCING THE INTRA-FAMILY EXCLUSIONS IN THE APPELLANTS' POLICY NOTWITHSTANDING THE FACT THAT THE APPELLEE HAS NOT MADE THE EXCLUSIONS CONSPICUOUS AND EASY TO UNDERSTAND."

{¶ 3} On April 17, 2004, appellant suffered injuries in an automobile while a passenger in a vehicle that her husband drove. Appellant filed a complaint against her husband and appellee. She alleged negligence against her husband and sought uninsured/underinsured motorist (UM/UIM) coverage under appellee's policy, which listed appellant's husband as the named insured. Appellee answered and filed a counterclaim seeking a declaration that appellant is not entitled to UM/UIM coverage.

{¶ 4} On July 20, 2006, appellee requested summary judgment. It asserted that appellant is not entitled to UM/UIM coverage because she is only entitled to recover damages from the owner or operator of an uninsured motor vehicle and the policy excludes from the definition

of uninsured motor vehicle "any vehicle * * * owned by * * * you." Appellee claimed that because appellant's husband owns the vehicle, the vehicle is not "uninsured" as defined in the policy and appellant thus is not entitled to coverage.

{¶ 5} Appellant argued that R.C. 3937.18 no longer permits insurers from prohibiting the "intrafamily" stacking provision that appellee sought to enforce. Appellant contended that because the current version of R.C. 3937.18 does not contain a provision similar to former R.C. 3937.18(K)(2), the Ohio General Assembly did not intend to restrict intrafamily stacking.

{¶ 6} Appellee countered that the legislature did not intend R.C. 3937.18, as enacted by S.B. 97, to contain an exhaustive list of restrictions, exclusions, etc., that insurers could include in the policy. Instead, insurers may include various other restrictions in their automobile liability policies as the "including but not limited to" language used in R.C. 3937.18(I) evinces. Appellee argued:

"For nearly a decade, the General Assembly sought to reign in the effect of a series of Ohio Supreme Court decisions which had found UM/UIM coverage in circumstances obviously never intended by insurers. Those decisions all stemmed from a common fact. R.C. 3937.18 required insurers writing business in Ohio to offer UM/UIM coverage and contained numerous provisions stating what terms could and could not be included in UM/UIM coverage. Finally, the General Assembly had had enough. In 2001, the General Assembly removed the mandatory offer requirement and, in the clearest of terms, stated that insurers are free to include in their policies 'terms and conditions that preclude coverage for bodily injury or death under specified circumstances, including but not limited to the following circumstances.' R.C. 3937.18(I). The list of 'circumstances' contained in subdivisions (I)(1)-(5), which was an exclusive list under S.B. 267 and its predecessor, H.B. 261, is no longer exclusive. Insurers may preclude coverage in other circumstances as well. Westfield has done that via its policy's definition of 'uninsured motor vehicle' which excepts from that definition any vehicle owned by its named insureds or their family members."

*2 {¶ 7} Appellee further contended that S.B. 97 does not require specific statutory authorization to permit insurers to preclude coverage. Appellee argued: "A counterpart of former R.C. 3937.18(K)(2) is neither necessary nor appropriate, in view of the fact that offering of UM/UIM coverage is no longer mandatory and in view of the fact that the statute now contains a general authorization for insurers to preclude coverage in specified circumstances."

{¶ 8} The trial court granted appellee summary judgment and denied appellant's cross-summary judgment motion. The court concluded "that the unambiguous language of the insurance contract that is a subject of this action excludes from the definition of 'uninsured motor vehicle' any vehicle '[o]wned by or furnished or available for the regular use of you or any family member.'" The court thus determined that appellant was not entitled to UM/UIM coverage under appellee's policy. This appeal followed.

{¶ 9} Because appellant's three assignments of error challenge the propriety of the trial court's summary judgment decision, we address them together.

A

SUMMARY JUDGMENT STANDARD

{¶ 10} Appellate courts review trial court summary judgment decisions de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, appellate courts must independently review the record to determine if summary judgment is appropriate. In other words, appellate courts need not defer to trial court summary judgment decisions. See *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786. Thus, to determine whether a trial court properly awarded summary judgment, an appellate court must review the Civ.R. 56 summary judgment standard as well as the applicable law. Civ.R. 56(C) provides:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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 or stipulation construed most strongly in the party's favor.

Thus, trial courts may not award summary judgment unless the evidence demonstrates that (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 to but one conclusion, and after viewing the evidence most strongly in favor of the non-moving party that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429-430, 674 N.E.2d 1164.

B

INTERPRETATION OF STATUTES

*3 {¶ 11} The case at bar requires us to interpret R.C. 3937.18 by deciding whether it permits the provision appellee seeks to enforce. Regarding the interpretation of statutes, the Ohio Supreme Court recently stated:

"The primary goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute. *Brooks v. Ohio State Univ.* (1996), 111 Ohio App.3d 342, 349, 676 N.E.2d 162. The court must first look to the plain language of the statute itself to determine the legislative intent. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519. We apply a statute as it is written when its meaning is unambiguous and definite. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language. *State ex rel. Burrows*, 78 Ohio St.3d at 81, 676 N.E.2d 519."

State v. Lowe, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, at ¶ 9.

{¶ 12} Courts must give effect to the words used in a statute and must not delete words used or insert words not used. *Erb v. Erb* (2001), 91 Ohio St.3d 503, 507, 747 N.E.2d 230, citing *Cleveland Elec. Illuminating Co. v. Cleveland* (1988), 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus. If the meaning of a statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*(1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463. Additionally, we note that “[f]or the purpose of determining the scope of coverage of an [uninsured or] underinsured motorist claim, the statutory law in effect at the time of entering into a contract for automobile liability insurance controls the rights and duties of the contracting parties.” *Ross v. Farmers Ins. Group of Cos.*(1998), 82 Ohio St.3d 281, 695 N.E.2d 732, syllabus. The parties do not dispute that the S.B. 97 version of R.C. 3937.18 applies in the case sub judice.

C

INTERPRETATION OF INSURANCE CONTRACTS

{¶ 13} We also must interpret appellee's policy to determine whether it specifies the exclusion appellee seeks to enforce in the case at bar.

{¶ 14} An insurance policy is a contract. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 9. A court interpreting a contract should give effect to the contracting parties' intent. *Id.* at ¶ 11. In doing so, courts must examine the insurance contract as a whole and presume that the language used in the policy reflects the parties' intent. *Id.*, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus. “We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy.” *Id.*, citing *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus. “[W]ords and phrases used in an insurance policy must be given their natural and commonly accepted meaning.” *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-168, 436 N.E.2d 1347. When the words used are clear, courts “may look no further than the writing itself to find the intent of the parties.” *Id.*

D

R.C. 3937.18

*4 {¶ 15} In her first assignment of error, appellant asserts that the trial court failed to consider the legislative intent in not re-enacting a provision similar to former R.C. 3937.18(K)(2). She contends that the legislature's decision not to include in the Ohio Revised Code a similar provision reflects its intent to prohibit such restrictions. We disagree.

{¶ 16} Former R.C. 3937.18(K), as enacted by H.B. 261, provided:

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

- (1) A motor vehicle that has applicable liability coverage in the policy under which the uninsured and underinsured motorist coverages are provided;
- (2) A motor vehicle owned by, furnished to, or available for the regular use of a named in-

sured, a spouse, or a resident relative of a named insured.

R.C. 3937.18(K)(2) was commonly referred to as the household or intra-family exclusion. See, e.g., *Burnett v. Motorists Mut. Ins. Cos.*, Trumbull App. No.2003-T-0101, 2005-Ohio-4333. The legislature enacted this provision in response to the Ohio Supreme Court's decision in *State Farm Automobile Ins. Co. v. Alexander* (1992), 62 Ohio St.3d 397, 583 N.E.2d 309. In *Alexander*, the court held that the household exclusion was invalid because, by eliminating coverage for torts that occur in the insured's vehicle, the exclusion restricted coverage in a manner contrary to the intent of former R.C. 3937.18, which was to ensure that insured motorists who were injured by negligent, uninsured motorists were not left without compensation simply because the tortfeasor lacked liability coverage. *Id.* at 400. The court stated: "An automobile insurance policy may not eliminate or reduce uninsured or underinsured motorist coverage, required by R.C. 3937.18, to persons injured in a motor vehicle accident, where the claim or claims of such persons arise from causes of action that are recognized by Ohio tort law." *Id.* at syllabus; see, also, *Fazio v. Hamilton Mut. Ins. Co.*, 106 Ohio St.3d 327, 2005-Ohio-5126, 835 N.E.2d 20 (discussing *Alexander*).

{¶ 17} In September of 2000, the legislature removed subdivision (K)(2) when it amended R.C. 3937.18 upon the enactment of S.B. 267. This version of the statute removed the household/intra-family exclusion from the definition of "uninsured motor vehicle" or "underinsured motor vehicle" as used in R.C. 3937.18(K).

{¶ 18} The next amendment to R.C. 3937.18 eliminated the requirement of the mandatory offering of UM/UIM coverage. See S.B. 97. The current version of the statute does not contain a provision similar to former R.C. 3937.18(K)(2). However, R.C. 3937.18(I) contains a non-exhaustive list of terms and conditions that insurers may include in their policies to preclude coverage for bodily injury or death that an insured suffers:

(I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, *including but not limited to any of the following circumstances:*

*5 (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, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(4) While any employee, officer, director, partner, trustee, member, executor, administrator, or beneficiary of the named insured, or any relative of any such person, is operating or occupy-

ing a motor vehicle, unless the employee, officer, director, partner, trustee, member, executor, administrator, beneficiary, or relative is operating or occupying a motor vehicle for which uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided in the policy;

(5) When the person actually suffering the bodily injury, sickness, disease, or death is not an insured under the policy.

(Emphasis added.)

{¶ 19} Contrary to appellant's arguments, the statute's plain language, with its use of the phrase "including but not limited to," indicates that the list of "terms and conditions" that may preclude coverage is not exhaustive. Rather, the list of circumstances and examples in the statutes are not the only types of "terms and conditions" that are permissible. *Kelly v. Auto-Owners Ins. Co.*, Hamilton App. No. C-050450, 2006-Ohio-3599, appeal not allowed, 112 Ohio St.3d 1406, 2006-Ohio-6447, 858 N.E.2d 817 (stating that "the exclusions in the statute serve only as examples; a UM policy may include any terms and conditions precluding coverage, as long as these circumstances are specified in the policy"). As one court explained:

"[W]hile the General Assembly removed from the statute preconditions or preclusions to coverage, * * * it expressly left to the contracting parties to agree upon any 'terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances.' The fact that the legislature removed its own 'terms and conditions that preclude coverage' from the statute does not mean that no such terms and conditions are permitted to be placed in policies with UM coverage. Rather, R.C. 3937.18(I) reveals that the legislature sought to 'deregulate' such policies, leaving to the parties whether any preconditions or exclusions to coverage will govern their relationship."

*6 *Snyder v. Am. Family Ins. Co.*, Franklin App. No. 05AP-116, 2005-Ohio-6751, at ¶ 22, appeal allowed, 109 Ohio St.3d 1455, 847 N.E.2d 5, 2006-Ohio-2226.

{¶ 20} Thus, simply because the statute does not list the exception that appellee seeks to enforce in the case at bar does not mean that it constitutes an impermissible exception. "[The] exclusion can be enforced to deny UM coverage because the current UM statute, unlike former versions of the statute, eliminates the mandatory offering of UM coverage and expressly allows insurers to include terms and conditions in UM policies that preclude coverage." *Kelly*, at ¶ 12. "The legislature appears to have swapped an interest in providing compensation for 'uninsured' motorists with an interest in providing reasonable rates. Thus, the UM statute does not prevent an insurance company from eliminating UM coverage when one spouse becomes legally liable to another for personal injuries." *Id.*, citing S.B. No. 97, Section 3(A) ("In enacting this act, it is the intent of the General Assembly to do all of the following: (A) protect and preserve stable markets and reasonable rates for automobile insurance for Ohio consumers. * * *").

{¶ 21} In *Green v. Westfield Natl. Ins. Co.*, Medina App. No. 06CA25-M, 2006-Ohio-5057, appeal not allowed, 112 Ohio St.3d 1491, 2007-Ohio-724, 862 N.E.2d 118, the court upheld the validity of an exclusion similar to the one at issue in the case sub judice. In *Green*, the policy precluded UM/UIM coverage for any vehicle "[o]wned by or furnished or available for the regular use of you or a family member[]." The court determined that R.C. 3937.18(I) plainly supported the insurer's policy provision that precluded UM/UIM coverage for vehicles

"[o]wned by or furnished or available for the regular use of you or a family member[]." The court stated that the Ohio General Assembly's choice of words in the statute, i.e., "including but not limited to," "necessarily means that an insurer is allowed to include terms and conditions which preclude UM/UIM coverage for circumstances other than those listed in the statute, provided they are specified within the policy." *Id.* at ¶ 16.

{¶ 22} The *Green* court additionally rejected the appellant's argument that because UM/UIM coverage may be precluded if a vehicle is not specifically identified, then UM/UIM coverage may not be precluded if a vehicle is specifically identified in the policy. The court noted that the appellant failed to cite any case law or statutory authority to support this proposition. The court also found unavailing the appellant's argument "that the legislature intended 'to declare that if a vehicle is specifically identified in the automobile policy and the insured pays a premium for the coverage, the insurance company can not avoid its contractual obligations by precluding coverage elsewhere.' *Id.* at ¶ 18. The court observed that the appellant's argument essentially requested the court 'to interpret R.C. 3937.18 to impose mandatory UM/UIM coverage if a vehicle is identified in the automobile policy.' *Id.* The court determined that the appellant's interpretation was "in direct conflict with the legislative intent clearly evidenced by Senate Bill 97." *Id.* The court noted that S.B. 97 also states:

*7 "In enacting this act, it is the intent of the General Assembly to do all of the following:

* * *

(B) Express the public policy of the state to:

- (1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;
- (2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;
- (3) Provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages[.]"

The *Green* court then stated: "Section 3 of Senate Bill 97 clearly demonstrates that it was the intent of the legislature to: (1) eliminate the requirement of mandatory UM/UIM coverage; (2) eliminate UM/UIM coverage being implied as a matter of law in any insurance policy; and (3) to provide statutory authority for including exclusions or other limitations in UM/UIM coverage should it be offered by the insurer. This stated intent is consistent with the plain language of the statute as amended. In fact, numerous sections of R.C. 3937.18, not just (I)(1), allow the insurer to include terms and provisions. See R.C. 3937.18(F); (G); (H)."

Id. at ¶ 19.

{¶ 23} The *Green* court thus concluded that under current R.C. 3937.18 "insurance companies and their customers are free to contract in any manner that they see fit. Insurers are not required by law to offer UM/UIM coverage. However, if insurers opt to offer UM/UIM coverage, they are free to include exclusions or limitations on that coverage." *Id.* at ¶ 20.

{¶ 24} We agree with the *Green* court's analysis of the issues. R.C. 3937.18(I) is not an exhaustive list of the terms and conditions that insurers may include in their policies. See, also, *Foss v. Cincinnati Ins. Co.*, Stark App. No.2005CA246, 2006-Ohio-1671, *Kelly*, supra. Insurers

may include other terms and conditions as long as those terms and conditions do not otherwise violate R.C. 3937.18. Cf. *Moore*, supra; *Ross*, supra.

{¶ 25} Appellant asserts that because current R.C. 3937.18 does not contain a provision similar to former R.C. 3937.18(K), then the legislature obviously intended to disallow such restrictions. We do not agree. As we determined above, R.C. 3937.18(I) does not restrict the type of exclusions or limitations that insurers may place on UM/UIM coverage, except as otherwise indicated in R.C. 3937.18. The Ohio General Assembly could have determined that a provision similar to former R.C. 3937.18(K)(2) was unnecessary in light of R.C. 3937.18(I).

{¶ 26} We also find appellant's reliance on *Shay v. Shay*, 164 Ohio App.3d 518, 2005-Ohio-5874, 843 N.E.2d 194, misplaced. In *Shay*, the court held that a household exclusion was invalid without the statutory authorization that former R.C. 3937.18(K)(2) provided. However, *Shay* involved the S.B. 267 version of the statute, which eliminated R.C. 3937.18(K)(2). Furthermore, at the time *Shay* was decided, insurers were required to offer UM/UIM coverage that complied with R.C. 3937.18. Currently, insurers need not offer UM/UIM coverage and R.C. 3937.18(I) authorizes insurers to write terms and conditions in their policies that preclude UM/UIM coverage.

*8 {¶ 27} We further disagree with appellant that R.C. 3937.18 is ambiguous because its provisions conflict with each other. According to appellant, the statute is "selfcontradictory" because R.C. 3937.18(I) "urports to allow any and every contractual limitation, while the other sections of the same statute clearly proscribe other common limitations." Under R.C. 3937.18, as we have previously recognized, exclusions and restrictions in an UM/UIM policy are valid as long as not otherwise proscribed in the statute. We see nothing ambiguous about a statute that sets forth a non-exhaustive list of terms and conditions that insurers may include in their UM/UIM policies and, at the same time, contains provisions that limit the types of terms and conditions insurers may include in their policies. The limiting provisions serve to circumscribe the apparent limitless terms and conditions that R.C. 3937.18(I) otherwise authorizes.

{¶ 28} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

E

DEFINITION VS. EXCLUSION

{¶ 29} In her second assignment of error, appellant asserts that the trial court failed to recognize that R.C. 3937.18(I) regulates "exclusions," while the provision appellee seeks to enforce to deny her coverage is a "definition." She asserts that R.C. 3937.18(I) does not allow insurers to limit definitions, but only allows insurers to specify exclusions. We disagree with appellant.

{¶ 30} Appellant cites *Kyle v. Buckeye Union Ins. Co.*, 103 Ohio St.3d 170, 2004-Ohio-4885, 814 N.E.2d 1195, to support this argument. In *Kyle*, the court held that former R.C. 3937.18(J)(1) and former R.C. 3937.18(K)(2) do not conflict. "Former R.C. 3937.18(J) addressed certain circumstances where a policy could exclude uninsured/underinsured motorist (UM/UIM) coverage for an insured." *Id.* at ¶ 1. The statute provided: [UM/UIM coverage] may include terms and conditions that preclude coverage for bodily in-

jury or death suffered by an insured under any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided.

“Former R.C. 3937.18(K) excluded certain tortfeasors' vehicles from being considered uninsured or underinsured.” *Kyle*, at ¶ 1. The statute provided: 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.

*9 The *Kyle* court determined that the two subdivisions “address[ed] different topics” and did not conflict. *Id.* at ¶ 1. The court explained that “[p]aragraphs (J) and (K) * * * do not regulate the same thing. Where paragraph (J) states circumstances in which an insured can be denied 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.” *Id.* at ¶ 17.

{¶ 31} The court thus held that “former R.C. 3937.18(J)(1) and (K)(2) are complementary. Paragraph (J) addressed certain circumstances in which a policy could exclude UM/UIM coverage for an insured. Paragraph (K) excluded certain tortfeasors' vehicles from being considered uninsured or underinsured. Because these paragraphs address different topics, they do not conflict.” *Id.* at ¶ 21.

{¶ 32} Appellant contends that the *Kyle* court found that paragraph K addresses definitions, while paragraph J addresses exclusions. She contends that the *Kyle* court “found that the difference between exclusions and definitions concerning what is and is not an uninsured motor vehicle is the key to understanding the interrelation between former section K and former section J.” Appellant then asserts that current R.C. 3937.18(I) is similar to former paragraph J and regulates exclusions. She claims that it does not govern definitions. We do not agree with appellant's interpretation of *Kyle*. None of the language in *Kyle* makes any distinction between definitions and exclusions. Instead, the *Kyle* court determined that section (J)(1) contained an exclusion for when an insured would be denied UM/UIM and that (K)(2) contained an exclusion stating that certain vehicles would not be covered under UM/UIM coverage. Thus, we disagree with appellant that to be valid under R.C. 3937.18(I), the provision must be exclusionary as opposed to definitional. The statute, the case law appellant cites, and the legislative history do not support appellant's argument that a distinction exists between definitions and exclusions. The uncodified law, as the *Green* court noted, clearly evinces the legislature's intent to allow insurers to limit coverage. Furthermore, R.C. 3937.18(I) does not state that it is a list of “exclusions.” Instead, the statute states that insurers may include “terms and conditions that preclude coverage.” The statute does not distinguish whether that “preclusion” must be in the form of a “definition” or an “exclusion.”

{¶ 33} Accordingly, we overrule appellant's second assignment of error.

F

CONSPICUOUS

{¶ 34} In her third assignment of error, appellant argues that the provision at issue in the case at bar is invalid because it is not conspicuous.

{¶ 35} Ohio courts generally uphold exclusions, with the following caveat: “[A]n exclusion must be conspicuous and in terminology easily understood by a customer. A customer must be aware of the provision, understand the meaning and voluntarily agree to any restrictions * * *.” *Ady v. W. Am. Ins. Co.* (1982), 69 Ohio St.2d 593, 599, 433 N.E.2d 547. Additionally, an insured is charged with knowledge of the contents of an insurance contract. *Nickschinski v. Sentry Ins. Co.* (1993), 88 Ohio App.3d 185, 195, 623 N.E.2d 660; *Grange Mut. Cas. Co. v. Fodor* (1984), 21 Ohio App.3d 258, 487 N.E.2d 571.

*10 {¶ 36} In the case at bar, appellee's definition of an “uninsured motor vehicle,” which excluded any vehicle that the insured owned, was clear and conspicuous such that appellant and her husband should have understood its meaning. The policy stated that “uninsured motor vehicle does not include any vehicle or equipment * * * [o]wned by * * * you.” Nothing about this language is ambiguous. Furthermore, the language is not hidden in the policy, but instead, appears within the policy provisions and applicable endorsements. Appellant only had to read the policy to discover this exclusion for vehicles that she and her husband own.

{¶ 37} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFARLAND, P.J. & KLINE, J.: Concur in Judgment & Opinion.

Ohio App. 4 Dist., 2007.

Howard v. Howard

Slip Copy, 2007 WL 2206889 (Ohio App. 4 Dist.), 2007 -Ohio- 3940

END OF DOCUMENT

Wertz v. Wertz

Ohio App. 6 Dist., 2007.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Huron County.

Helen J. WERTZ, Appellee

v.

Ronald L. WERTZ, et al., Defendants

and American Standard Insurance Company, Appellant.

No. H-06-036.

Decided Sept. 7, 2007.

Matthew J. Carty and Peter D. Traska, for appellee.

Raymond H. Pittman, III, and Andrea L. Deis, for appellant.

PIETRYKOWSKI, P.J.

*1 ¶ 1 This case is before the court on appeal of a judgment of the Huron County Court of Common Pleas which granted appellee Helen J. Wertz's motion for partial summary judgment and denied appellant American Standard Insurance Company's motion for partial summary judgment. Because we find the intra-family exclusion of uninsured motorist coverage is enforceable, we reverse.

¶ 2 At issue in this case is the operation of an intra-family or household exclusion in an un-insured motorist ("UM") insurance policy. On June 9, 2003, appellee was injured in a motor vehicle accident. Appellee was a passenger in a vehicle owned and operated by her spouse, Ronald L. Wertz. FN1 Mr. Wertz and the vehicle were insured under a policy issued by appellant. The policy included UM coverage with the aforementioned exclusion.

FN1. Appellee eventually dismissed her claim against her spouse, leaving appellant as the only defendant.

¶ 3 On June 27, 2006, the trial held that the intra-family exclusion in the policy issued by appellant is against the public policy of Ohio and is unenforceable under R.C. 3937.18. Therefore, the trial court granted appellee's motion for partial summary judgment and denied appellant's motion for partial summary judgment

¶ 4 Appellant asserts the following two assignments of error:

¶ 5 "1. THE TRIAL COURT ERRED IN DETERMINING THAT APPELLEE WAS ENTITLED TO UNINSURED MOTORIST COVERAGE FROM APPELLANT, AMERICAN STANDARD, FOR DAMAGES SHE SUSTAINED AS A RESULT OF HER HUSBAND'S NEGLIGENT OPERATION OF HIS VEHICLE.

¶ 6 "2. THE TRIAL COURT ERRED IN DENYING APPELLANT AMERICAN STANDARD'S MOTION FOR PARTIAL SUMMARY JUDGMENT."

{¶ 7} Appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 1996-Ohio-336. Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294, 1996-Ohio-107. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 8} In the present case, the UM endorsement definitions states in pertinent part:

{¶ 9} "Uninsured motor vehicle, however, does not mean a vehicle:

*2 {¶ 10} "a. Owned by or furnished or available for the regular use of you or any resident of your household."

{¶ 11} The parties agree that this language is unambiguous and appears to preclude UM coverage for the household vehicle Mr. Wertz was operating at the time of appellee's injury. However, the parties disagree regarding whether this provision is enforceable under Ohio's UM coverage statute, R.C. 3937.18.

{¶ 12} The main objective in construing a statute is to determine legislative intent. *Featzka v. Millcraft Paper Co.* (1980), 62 Ohio St.2d 245, 247. To determine the legislative intent, a court must look to the language of the statute. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105. Words used in a statute are to be taken in their usual, normal, and customary meaning. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173, 1996-Ohio-161, citing R.C. 1.42.

{¶ 13} The current version of R.C. 3937.18, as amended by S.B. 97, is applicable and provides in pertinent part:

{¶ 14} " * * * (I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages *may include terms and conditions that preclude coverage* for bodily injury or death suffered by an insured under specified circumstances, *including but not limited to* any of the following circumstances:

{¶ 15} " * * * ." (Emphasis added.)

{¶ 16} Former R.C. 3937.18(K), as enacted by H.B. 261, provided that "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."

{¶ 17} Appellant argues that the current version of R.C. 3937.18 with division (I)'s non-exclusive ("including but not limited to") list, clearly indicates that various kinds of exclusions are permitted and that the particular intra-family UM policy exclusion at issue is enforceable. Appellee contends that the trial court was correct in concluding that the intra-family exclusion is not enforceable and cites *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, *State Automobile Insurance Co. v. Pasquale*, 113 Ohio St.3d 11, 2007-Ohio-970, and *Burnett v. Motorists Mutual Insurance Companies*, 8th Dist. No.2006-T0085, 2007-Ohio-1639. However, all of these cases are distinguishable from the present case primarily because they did not analyze the current version of R.C. 3937.18 with division (I) which is at issue in the present case. Furthermore, *Pasquale* did not analyze an intra-family exclusion and *Burnett* addressed constitutionality arguments not presented in the present case.

{¶ 18} Clearly, the three appellate districts that have already reviewed the issue have found in favor of enforceability of an intra-family UM coverage exclusion under the language of the current UM coverage statute. Appellant cites two of these cases, *Kelly v. Auto-Owners Ins. Co.*, 1st Dist. No. C-050450, 2006-Ohio-3599 and *Green v. Westfield Ins. Co.*, 9th Dist. No. 06CA0025-M, 2006-Ohio-5057. In both *Kelly* and *Green*, citing R.C. 3937.18(I), the court found an intra-family exclusion was enforceable under the current UM coverage statute. We find these cases, as well as the more recent case of *Howard v. Howard*, 4th Dist. No. 06CA755, 2007-Ohio-3940, and the Supreme Court of Ohio's recent discussion of R.C. 3937.18(I) in *Snyder v. American Family Insurance Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, to be persuasive.

*3 {¶ 19} Similar to the present case, in *Howard*, the UM policy excluded from the definition of uninsured motor vehicle "any vehicle * * * owned by * * * you." Further, the appellant in *Howard* made arguments nearly identical to those being made by appellee in the present case: (1) the legislative decision not to re-enact a provision similar to former R.C. 3937.18(K)(2) signaled an intent to prohibit such restrictions to UM coverage; (2) R.C. 3937.18(I) regulates "exclusions" rather than "definitions," and therefore is inapposite; (3) the intra-family provision at issue is invalid because it is not conspicuous. All of these arguments were rejected by the court in *Howard*.

{¶ 20} In response to the first argument in *Howard*, the court found that the Ohio General Assembly could have determined that a provision similar to former R.C. 3937.18(K)(2) was unnecessary in light of the non-exhaustive nature of the list of terms and conditions that insurers may include in the policies under current R.C. 3937.18(I). *Id.*, ¶ 24-25. The court concluded that by adding R.C. 3937.18(I), " * * * the legislature sought to 'deregulate' such policies, leaving to the parties whether any preconditions or exclusions to coverage will govern their relationship." *Id.*, ¶ 19 quoting *Snyder v. American Family Insurance Co.*, 10th Dist. No. 05AP-116, 2005-Ohio-6751, ¶ 22. Rejecting the second argument, the court found that R.C. 3937.18(I) does not distinguish whether the permitted "terms and conditions that preclude coverage" must be in the form of a "definition" or an "exclusion." *Id.*, ¶ 32. Finally, regarding the third argument, the court concluded that the unambiguous language of exclusion was not hidden and that the appellant only had to read the policy to discover this exclusion for vehicles that she and her husband own. *Id.*, ¶ 36.

{¶ 21} Lastly, the Supreme Court of Ohio has recently noted the expansive language of R.C. 3937.18(I) in *Snyder v. American Family Insurance Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004. Although the case did not involve an intra-family exclusion, in reference to R.C. 3937.18(I), the court stated that it “ * * * permits policies with uninsured-motorist coverage to limit or exclude coverage under circumstances that are specified in the policy *even if those circumstances are not also specified in the statute.*” (Emphasis added.) *Id.*, ¶ 15. The court further noted the clear legislative intent behind enacting the current R.C. 3937.18(I) as follows: “ * * * permitting the parties to agree to coverage exclusions not listed in the statute provides insurers considerable flexibility in devising specific restrictions on any offered uninsured- or underinsured-motorist coverage.” *Id.* Thus, the court held that a policy provision limiting the insured's recovery of uninsured- or underinsured-motorist benefits to amounts which the insured is “legally entitled to recover” is enforceable. *Id.*, ¶ 29. Likewise, we believe that the Supreme Court of Ohio would find the intra-family exclusion enforceable under the current UM coverage statute.

*4 {¶ 22} Similar to *Howard, Kelly and Green*, we find that the intra-family coverage exclusion in the UM policy is enforceable under R.C. 3937.18(I). Appellant's two assignments of error are well-taken.

{¶ 23} The judgment of the Huron County Court of Common Pleas is reversed, and the case is remanded for further proceedings consistent with this decision. Appellee 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 Huron County.

JUDGMENT REVERSED.

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., ARLENE SINGER and WILLIAM J. SKOW, JJ., concur.
Ohio App. 6 Dist., 2007.

Wertz v. Wertz

Slip Copy, 2007 WL 2553419 (Ohio App. 6 Dist.), 2007 -Ohio- 4605

END OF DOCUMENT

Const. Art. I, § 2

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs & Annos)

▣ Article I. Bill of Rights (Refs & Annos)

→ O Const I Sec. 2 Equal protection and benefit

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

(1851 constitutional convention, adopted eff. 9-1-1851)

U.S.C.A. Const. Amend. XIV-Full Text

United States Code Annotated Currentness

Constitution of the United States

☐ Annotated

☐ Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

→ AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

U.S.C.A. Const. Amend. XIV-Full Text

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV-Full Text, USCA CONST Amend. XIV-Full Text

Current through P.L. 110-94 approved 10-09-07

Copr. © 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

END OF DOCUMENT

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XXXIX. INSURANCE
CHAPTER 3937. CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE
MOTOR VEHICLE INSURANCE.

Copr. © West Group 2000. All rights reserved.

3937.18 UNINSURED AND UNDERINSURED MOTORIST COVERAGE

(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy for loss due to bodily injury or death suffered by such insureds:

(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury, sickness, or disease, including death under provisions approved by the superintendent of insurance, for the protection of insureds thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

For purposes of division (A) (1) of this section, an insured is legally entitled to recover damages if the insured is able to prove the elements of the insured's claim that are necessary to recover damages from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity under Chapter 2744. of the Revised Code or a diplomatic immunity that could be raised as a defense in an action brought against the owner or operator by the insured does not affect the insured's right to recover under uninsured motorist coverage. However, any other type of statutory or common law immunity that may be a defense for the owner or operator of an uninsured motor vehicle shall also be a defense to an action brought by the insured to recover under uninsured motorist coverage.

(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for insureds thereunder against loss for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the in-

insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

(C) A named insured or applicant may reject or accept both coverages as offered under division (A) of this section, or may alternatively select both such coverages in accordance with a schedule of limits approved by the superintendent. The schedule of limits approved by the superintendent may permit a named insured or applicant to select uninsured and underinsured motorists coverages with limits on such coverages that are less than the limit of liability coverage provided by the automobile liability or motor vehicle liability policy of insurance under which the coverages are provided, but the limits shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. A named insured's or applicant's rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be in writing and shall be signed by the named insured or applicant. A named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's written, signed selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be effective on the day signed, shall create a presumption of an offer of coverages consistent with division (A) of this section, and shall be binding on all other named insureds, insureds, or applicants.

Unless a named insured or applicant requests such coverages in writing, such coverages need not be provided in or made supplemental to a policy renewal or replacement policy where a named insured or applicant has rejected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer. If a named insured or applicant has selected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer, with limits in accordance with the schedule of limits approved by the superintendent, such coverages need not be provided with limits in excess of the limits of liability previously issued for such coverages, unless a named insured or applicant requests in writing higher limits of liability for such coverages.

(D) For the purpose of this section, a motor vehicle shall be deemed uninsured in either of the following circumstances:

(1) The liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction;

(2) The identity of the owner and operator of the motor vehicle cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of this division, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(E) In the event of payment to any person under the coverages offered under this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer which is or becomes the subject of insolvency proceedings, to the extent of those rights against such insurer which such insured assigns to the paying insurer.

(F) The coverages offered under this section shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(H) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section and that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable re-

ardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(I) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage provided in compliance with this section.

(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 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, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured and underinsured motorist coverages are provided.

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

(1) A motor vehicle that has applicable liability coverage in the policy under which the uninsured and underinsured motorist coverages are provided;

(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;

(3) A motor vehicle owned by a political subdivision, unless the operator of the motor vehicle has an immunity under Chapter 2744. of the Revised Code that could be raised as a defense in an action brought against the operator by the insured;

(4) A motor vehicle self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

(L) As used in this section, "automobile liability or motor vehicle liability policy of insurance" means either of the following:

(1) Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance;

(2) Any umbrella liability policy of insurance written as excess over one or more policies described in division (L)(1) of this section.

CREDIT(S)

(1999 S 57, eff. 11-2-99; 1997 H 261, eff. 9-3-97; 1994 S 20, eff. 10-20-94; 1987 H 1, eff. 1-5-88; 1986 S 249; 1982 H 489; 1980 H 22; 1976 S 545; 1975 S 25; 1970 H 620; 132 v H 1; 131 v H 61)

UNCODIFIED LAW

1994 S 20, § 7 to 10, eff. 10-20-94, read:

Section 7. It is the intent of the General Assembly in amending division (A)(2) of section 3937.18 of the Revised Code to supersede the effect of the holding of the Ohio Supreme Court in the October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St. 3d 500, relative to the application of underinsured motorist coverage in those situations involving accidents where the tortfeasor's bodily injury liability limits are greater than or equal to the limits of the underinsured motorist coverage.

Section 8. It is the intent of the General Assembly in amending division (A)(2) of section 3937.18 of the Revised Code to declare and confirm that the purpose and intent of the 114th General Assembly in enacting division (A)(2) of section 3937.18 in Am. H.B. 489 was, and the intent of the General Assembly in amending section 3937.18 of the Revised Code in this act is, to provide an offset against the limits of the underinsured motorist coverage of those amounts available for payment from the tortfeasor's bodily injury liability coverage.

Section 9. It is the intent of the General Assembly in amending division (G) of section 3937.18 of the Revised Code to supersede the effect of the holding of the Ohio Supreme Court in its October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St. 3d 500, relative to the stacking of insurance coverages, and to declare and confirm that the purpose and intent of the 114th General Assembly in enacting division (G) of section 3937.18 in Am. H.B. 489 was, and the intent of the General Assembly in amending section 3937.18 of the Revised Code in this act is, to permit any motor vehicle insurance policy that includes uninsured motorist coverage and underinsured motorist coverage to include terms and conditions to preclude any and all stacking of such coverages, including interfamily and intrafamily stacking.

Section 10. It is the intent of the General Assembly in enacting division (H) of section 3937.18 of the Revised Code to supersede the effect of the holding of the

Ohio Supreme Court in its October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St. 3d 500, that declared unenforceable a policy limit that provided that all claims for damages resulting from bodily injury, including death, sustained by any one person in any one automobile accident would be consolidated under the limit of the policy applicable to bodily injury, including death, sustained by one person, and to declare such policy provisions enforceable.

1986 § 249, § 3, eff. 10-14-86, reads: The General Assembly hereby declares that in the amendment of section 3937.18 of the Revised Code in Amended House Bill No. 489 of the 114th General Assembly, effective with respect to automobile or motor vehicle liability policies delivered, issued for delivery, or renewed in this state on or after October 1, 1982, it was assumed that the legal principles opposed to authorization for insurance that would indemnify a person for conduct leading to the award of punitive damages were so well established that it was unnecessary to negate such an intention. Such being the case, no claim for punitive damages under coverage written pursuant to section 3937.18 of the Revised Code shall be paid after the effective date of this act unless a judgment to that effect had been rendered prior to such effective date and is no longer subject to the determination of an appeal after such date.

HISTORICAL AND STATUTORY NOTES

Amendment Note: 1999 S 57 inserted "written as excess over one or more policies described in division (L)(1) of this section" in division (L)(2).

Amendment Note: 1997 H 261 rewrote this section, which prior thereto read:

"(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are provided to persons insured under the policy for loss due to bodily injury or death suffered by such persons:

"(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury or death under provisions approved by the superintendent of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

"For purposes of division (A)(1) of this section, a person is legally entitled to recover damages if he is able to prove the elements of his claim that are necessary to recover damages from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity, whether based upon a statute or the common law, that could be raised as a

R.C. § 3937.18

Baldwin's Ohio Revised Code Annotated Currentness

Title XXXIX. Insurance

▣ Chapter 3937. Casualty Insurance; Motor Vehicle Insurance (Refs & Annos)

▣ Motor Vehicle Insurance

→ 3937.18 Uninsured and underinsured motorist coverage

(A) Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state that insures against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.

Unless otherwise defined in the policy or any endorsement to the policy, "motor vehicle," for purposes of the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, means a self-propelled vehicle designed for use and principally used on public roads, including an automobile, truck, semi-tractor, motorcycle, and bus. "Motor vehicle" also includes a motor home, provided the motor home is not stationary and is not being used as a temporary or permanent residence or office. "Motor vehicle" does not include a trolley, streetcar, trailer, railroad engine, railroad car, motorized bicycle, golf cart, off-road recreational vehicle, snowmobile, fork lift, aircraft, watercraft, construction equipment, farm tractor or other vehicle designed and principally used for agricultural purposes, mobile home, vehicle traveling on treads or rails, or any similar vehicle.

(B) For purposes of any uninsured motorist coverage included in a policy of insurance, an "uninsured motorist" is the owner or operator of a motor vehicle if any of the following conditions applies:

- (1) There exists no bodily injury liability bond or insurance policy covering the owner's or operator's liability to the insured.
- (2) The liability insurer denies coverage to the owner or operator, or is or becomes the subject of insolvency proceedings in any state.
- (3) The identity of the owner or operator cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of division (B)(3) of this section, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.
- (4) The owner or operator has diplomatic immunity.
- (5) The owner or operator has immunity under Chapter 2744. of the Revised Code.

An "uninsured motorist" does not include the owner or operator of a motor vehicle that is self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

(C) If underinsured motorist coverage is included in a policy of insurance, the underinsured motorist coverage shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the underinsured motorist coverage. Underinsured motorist coverage in this state is not and shall not be excess coverage to other applicable liability coverages, and shall only provide the insured an amount of protection not

R.C. § 3937.18

greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

For purposes of underinsured motorist coverage, an "underinsured motorist" does not include the owner or operator of a motor vehicle that has applicable liability coverage in the policy under which the underinsured motorist coverage is provided.

(D) With respect to the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance, an insured shall be required to prove all elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured or underinsured motor vehicle.

(E) The uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance shall not be subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(F) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(G) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages and that provides a limit of coverage for payment of damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(H) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions requiring that, so long as the insured has not prejudiced the insurer's subrogation rights, each claim or suit for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages be made or brought within three years after the date of the accident causing the bodily injury, sickness, disease, or death, or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the insured has become the subject of insolvency proceedings in any state, whichever is later.

(I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

R.C. § 3937.18

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(4) While any employee, officer, director, partner, trustee, member, executor, administrator, or beneficiary of the named insured, or any relative of any such person, is operating or occupying a motor vehicle, unless the employee, officer, director, partner, trustee, member, executor, administrator, beneficiary, or relative is operating or occupying a motor vehicle for which uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided in the policy;

(5) When the person actually suffering the bodily injury, sickness, disease, or death is not an insured under the policy.

(J) In the event of payment to any person under the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, and subject to the terms and conditions of that coverage, the insurer making such payment is entitled, to the extent of the payment, to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of that person against any person or organization legally responsible for the bodily injury or death for which the payment is made, including any amount recoverable from an insurer that is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer that is or becomes the subject of insolvency proceedings, to the extent of those rights against the insurer that the insured assigns to the paying insurer.

(K) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage included in a policy of insurance.

(L) The superintendent of insurance shall study the market availability of, and competition for, uninsured and underinsured motorist coverages in this state and shall, from time to time, prepare status reports containing the superintendent's findings and any recommendations. The first status report shall be prepared not later than two years after the effective date of this amendment. To assist in preparing these status reports, the superintendent may require insurers and rating organizations operating in this state to collect pertinent data and to submit that data to the superintendent.

The superintendent shall submit a copy of each status report to the governor, the speaker of the house of representatives, the president of the senate, and the chairpersons of the committees of the general assembly having primary jurisdiction over issues relating to automobile insurance.

(2001 S 97, eff. 10-31-01; 2000 S 267, eff. 9-21-00; 1999 S 57, eff. 11-2-99; 1997 H 261, eff. 9-3-97; 1994 S 20, eff. 10-20-94; 1987 H 1, eff. 1-5-88; 1986 S 249; 1982 H 489; 1980 H 22; 1976 S 545; 1975 S 25; 1970 H 620; 132 v H 1; 131 v H 61)

UNCODIFIED LAW

2001 S 97, § 3, eff. 10-31-01, reads:

In enacting this act, it is the intent of the General Assembly to do all of the following:

(A) Protect and preserve stable markets and reasonable rates for automobile insurance for Ohio consumers;

R.C. § 3937.18

(B) Express the public policy of the state to:

(1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;

(3) Provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(4) Eliminate any requirement of a written offer, selection, or rejection form for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages from any transaction for an insurance policy;

(5) Ensure that a mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages not be construed to be required by the provisions of section 3937.181 of the Revised Code, as amended by this act, that make uninsured motorist property damage coverage available under limited conditions.

(C) Provide statutory authority for provisions limiting the time period within which an insured may make a claim under uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages to three years after the date of the accident causing the injury;

(D) To supersede the holdings of the Ohio Supreme Court in those cases previously superseded by Am. Sub. S.B. 20 of the 120th General Assembly, Am. Sub. H.B. 261 of the 122nd General Assembly, S.B. 57 of the 123rd General Assembly, and Sub. S.B. 267 of the 123rd General Assembly;

(E) To supersede the holdings of the Ohio Supreme Court in *Linko v. Indemnity Ins. Co. of N. America* (2000), 90 Ohio St. 3d 445, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St. 3d 660, *Schumacher v. Kreiner* (2000), 88 Ohio St. 3d 358, *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St. 2d 431, *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St. 3d 565, and their progeny.

2000 S 267, § 3 and 4, eff. 9-21-00, read:

Section 3. It is the intent of the General Assembly in amending division (A) of section 3937.18 of the Revised Code to supersede the holdings of the Ohio Supreme Court in *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St.2d 431, and *Moore v. State Auto. Mut. Ins. Co.* (2000), 88 Ohio St.3d 27, that division (A)(1) of section 3937.18 of the Revised Code does not permit an insurer to limit uninsured or underinsured motorist coverage in such a way that an insured must suffer bodily injury, sickness, death or disease for any other insured to recover from the insurer.

Section 4. It is the intent of the General Assembly in amending division (C) of section 3937.18 of the Revised Code to make it clear that new rejections of uninsured and underinsured motorist coverages or decisions to accept lower limits of coverages need not be obtained from an insured or applicant at the beginning of each policy period in which the policy provides continuing coverage to the named insured or applicant, regardless of whether a new, replacement, or renewal policy that provides continuing coverage to the named insured or applicant is issued by the insurer or affiliate of that insurer with or without new policy terms or new policy numbers.

1994 S 20, § 7 to 10, eff. 10-20-94, read:

Section 7. It is the intent of the General Assembly in amending division (A)(2) of section 3937.18 of the Revised Code to supersede the effect of the holding of the Ohio Supreme Court in the October 1, 1993 decision in *Savoie v.*

R.C. § 3937.18

Grange Mut. Ins. Co. (1993), 67 Ohio St. 3d 500, relative to the application of underinsured motorist coverage in those situations involving accidents where the tortfeasor's bodily injury liability limits are greater than or equal to the limits of the underinsured motorist coverage.

Section 8. It is the intent of the General Assembly in amending division (A)(2) of section 3937.18 of the Revised Code to declare and confirm that the purpose and intent of the 114th General Assembly in enacting division (A)(2) of section 3937.18 in Am. H.B. 489 was, and the intent of the General Assembly in amending section 3937.18 of the Revised Code in this act is, to provide an offset against the limits of the underinsured motorist coverage of those amounts available for payment from the tortfeasor's bodily injury liability coverage.

Section 9. It is the intent of the General Assembly in amending division (G) of section 3937.18 of the Revised Code to supersede the effect of the holding of the Ohio Supreme Court in its October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St. 3d 500, relative to the stacking of insurance coverages, and to declare and confirm that the purpose and intent of the 114th General Assembly in enacting division (G) of section 3937.18 in Am. H.B. 489 was, and the intent of the General Assembly in amending section 3937.18 of the Revised Code in this act is, to permit any motor vehicle insurance policy that includes uninsured motorist coverage and underinsured motorist coverage to include terms and conditions to preclude any and all stacking of such coverages, including interfamily and intrafamily stacking.

Section 10. It is the intent of the General Assembly in enacting division (H) of section 3937.18 of the Revised Code to supersede the effect of the holding of the Ohio Supreme Court in its October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St. 3d 500, that declared unenforceable a policy limit that provided that all claims for damages resulting from bodily injury, including death, sustained by any one person in any one automobile accident would be consolidated under the limit of the policy applicable to bodily injury, including death, sustained by one person, and to declare such policy provisions enforceable.

1986 S 249, § 3, eff. 10-14-86, reads: The General Assembly hereby declares that in the amendment of section 3937.18 of the Revised Code in Amended House Bill No. 489 of the 114th General Assembly, effective with respect to automobile or motor vehicle liability policies delivered, issued for delivery, or renewed in this state on or after October 1, 1982, it was assumed that the legal principles opposed to authorization for insurance that would indemnify a person for conduct leading to the award of punitive damages were so well established that it was unnecessary to negate such an intention. Such being the case, no claim for punitive damages under coverage written pursuant to section 3937.18 of the Revised Code shall be paid after the effective date of this act unless a judgment to that effect had been rendered prior to such effective date and is no longer subject to the determination of an appeal after such date.

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2001 S 97 rewrote this section which prior thereto read:

"(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

"(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury, sickness, or disease, including death under provisions approved by the superintendent of insurance, for the protection of insureds thereunder who are legally entitled to recover from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

"For purposes of division (A)(1) of this section, an insured is legally entitled to recover if the insured is able to prove the elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured motor

R.C. § 3937.18

vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity under Chapter 2744. of the Revised Code or a diplomatic immunity that could be raised as a defense in an action brought against the owner or operator by the insured does not affect the insured's right to recover under uninsured motorist coverage. However, any other type of statutory or common law immunity that may be a defense for the owner or operator of an uninsured motor vehicle shall also be a defense to an action brought by the insured to recover under uninsured motorist coverage.

"(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

"(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

"(C) A named insured or applicant may reject or accept both coverages as offered under division (A) of this section, or may alternatively select both such coverages in accordance with a schedule of limits approved by the superintendent. The schedule of limits approved by the superintendent may permit a named insured or applicant to select uninsured and underinsured motorists coverages with limits on such coverages that are less than the limit of liability coverage provided by the automobile liability or motor vehicle liability policy of insurance under which the coverages are provided, but the limits shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. A named insured's or applicant's rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be in writing and shall be signed by the named insured or applicant. A named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's written, signed selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be effective on the day signed, shall create a presumption of an offer of coverages consistent with division (A) of this section, and shall be binding on all other named insureds, insureds, or applicants.

"Unless a named insured or applicant requests such coverages in writing, such coverages need not be provided in or made supplemental to a policy renewal or a new or replacement policy that provides continuing coverage to the named insured or applicant where a named insured or applicant has rejected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer or affiliate of that insurer. If a named insured or applicant has selected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer or affiliate of that insurer, with limits in accordance with the schedule of limits approved by the superintendent, such coverages need not be provided with limits in excess of the limits of liability previously issued for such coverages, unless a named insured or applicant requests in writing higher limits of liability for such coverages.

"(D) For the purpose of this section, a motor vehicle shall be deemed uninsured in either of the following circumstances:

"(1) The liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction;

"(2) The identity of the owner and operator of the motor vehicle cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For

R.C. § 3937.18

purposes of this division, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

"(E) In the event of payment to any person under the coverages offered under this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer which is or becomes the subject of insolvency proceedings, to the extent of those rights against such insurer which such insured assigns to the paying insurer.

"(F) The coverages offered under this section shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

"(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

"(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

"(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

"(H) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section and that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

"(I) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage provided in compliance with this section.

"(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 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, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided;

"(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

"(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured and underinsured motorist coverages are provided.

R.C. § 3937.18

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

"(1) A motor vehicle that has applicable liability coverage in the policy under which the uninsured and underinsured motorist coverages are provided;

"(2) A motor vehicle owned by a political subdivision, unless the operator of the motor vehicle has an immunity under Chapter 2744. of the Revised Code that could be raised as a defense in an action brought against the operator by the insured;

"(3) A motor vehicle self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

"(L) As used in this section, "automobile liability or motor vehicle liability policy of insurance" means either of the following:

"(1) Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance;

"(2) Any umbrella liability policy of insurance written as excess over one or more policies described in division (L)(1) of this section."

Amendment Note: 2000 S 267 deleted "for loss" before "due to bodily injury" in the introductory paragraph in division (A); deleted "damages" before "from owners or operators", before "if the insured is able to prove", and before "from the owner or operator", in division (A)(1); deleted "against loss" before "for bodily injury" in division (A)(2); inserted "a new or", "that provides continuing coverage to the named insured or applicant", and "or affiliate of that insurer" twice, in the second paragraph in division (C); deleted former division (K)(2); and redesignated former divisions (K)(3) and (K)(4) as new divisions (K)(2) and (K)(3). Prior to deletion, former division (K)(2) read:

"(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 [.]"

Amendment Note: 1999 S 57 inserted "written as excess over one or more policies described in division (L)(1) of this section" in division (L)(2).

Amendment Note: 1997 H 261 rewrote this section, which prior thereto read:

"(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are provided to persons insured under the policy for loss due to bodily injury or death suffered by such persons:

"(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury or death under provisions approved by the superintendent of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

"For purposes of division (A)(1) of this section, a person is legally entitled to recover damages if he is able to prove the elements of his claim that are necessary to recover damages from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity, whether based upon a

R.C. § 3937.18

statute or the common law, that could be raised as a defense in an action brought against him by the person insured under uninsured motorist coverage does not affect the insured person's right to recover under his uninsured motorist coverage.

"(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for an insured against loss for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

"(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

"(C) The named insured may only reject or accept both coverages offered under division (A) of this section. The named insured may require the issuance of such coverages for bodily injury or death in accordance with a schedule of optional lesser amounts approved by the superintendent, that shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. Unless the named insured requests such coverages in writing, such coverages need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverages in connection with a policy previously issued to him by the same insurer. If the named insured has selected uninsured motorist coverage in connection with a policy previously issued to him by the same insurer, such coverages offered under division (A) of this section need not be provided in excess of the limits of the liability previously issued for uninsured motorist coverage, unless the named insured requests in writing higher limits of liability for such coverages.

"(D) For the purpose of this section, a motor vehicle is uninsured if the liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction.

"(E) In the event of payment to any person under the coverages required by this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer which is or becomes the subject of insolvency proceedings, to the extent of his rights against such insurer which such insured assigns to the paying insurer.

"(F) The coverages required by this section shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

"(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

"(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

"(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

R.C. § 3937.18

"(H) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section and that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125 of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

"(I) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage provided in compliance with this section."