

IN THE SUPREME COURT OF OHIO

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

Case No. 2007-1760

Plaintiff-Appellee,

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

vs.

Nationwide Mutual Fire Insurance Company

Court of Appeals
Case No. L-07-1022

Defendant-Appellant.

**MEMORANDUM OF APPELLEE IN RESPONSE TO MEMORANDUM IN SUPPORT
OF JURISDICTION OF APPELLANT, NATIONWIDE MUTUAL FIRE INSURANCE
COMPANY**

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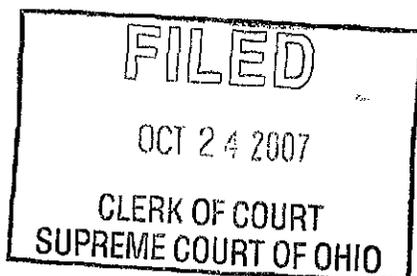


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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE SUBSTANTIAL
CONSTITUTIONAL QUESTIONS**

This case simply involves contract interpretation. More specifically, whether the language contained in the policy of insurance effectively and unambiguously excluded uninsured/underinsured insurance coverage to the wrongful death beneficiaries of the Appellee's decedent. The lower courts examined the language contained in the UM/UIM coverage provision as well as the language contained in the "other owned auto" exclusion provision of the insurance contract and, after applying well settled principles of contract interpretation, concluded that insurance coverage was not excluded.

In deciding that coverage was not excluded, the lower courts did not hold that insurers in general, or Defendant-Appellant, Nationwide, in particular, could not effectively exclude coverage by including "other owned auto" exclusion language in their insurance policies. In fact, Appellant did not, nor did the lower courts, challenge the enforceability or validity of "other owned auto" exclusions permitted by Section 3937.18(J) O.R.C. as contained in the 1997 amendments brought about by H.B. 261.

Such exclusions are permitted by statute, are otherwise valid, and are routinely enforced by the trial and appellate courts throughout this State, provided that the language employed by insurers in their contracts are unambiguously stated. The limited scope and, therefore, impact of the decisions below in the case *sub judice* is focused merely on the particular language Appellant, Nationwide, employed in its policy of insurance. Guided by the general rules of contract interpretation, and the wealth of legal authority on that issue, Appellant, Nationwide, and, in fact, all insurers, are free to

change their policy language so as to effectively exclude coverage for the types of claims presented herein.

On the other hand, the selection of words and phrases by Nationwide that are susceptible to more than one interpretation simply does not create an issue of public or great general interest that justifies, nor should justify, the intervention of this Court to correct Nationwide's error, or oversight, in the creation of its insurance contracts.

In addition to the foregoing, issues of public or great general interest justifying discretionary appeal are not created simply because courts of appeals may conflict in their respective interpretations of words or phrases contained in the provisions of an insurance contract. If, in fact, a conflict between, or among, courts of appeals conflict upon the same question, the remedy provided to litigants seeking appeal to this Court is provided pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, Supreme Court Practice Rule II, Section 1(A)(4), and Supreme Court Practice Rule IV. Appellant's Memorandum in Support of Jurisdiction requests review of this case pursuant to Supreme Court Rule II, Section 1(A)(2) and (3). Appellant's explanation that this Court should accept this appeal upon a claimed appeal of right, or discretionary appeal, due to a conflict between or among courts of appeals of this State is simply misplaced. For this Court to accept an appeal in the fashion proposed by Appellant, and short of an actual certified conflict, would provide litigants a direct avenue to this Court any time two or more courts of appeals entertained differing opinions on the same or similar issues, which they often times do.

The result would in effect open the "floodgates" of appeals to this Court, even though a certified conflict did not exist, and would provide a vehicle to litigants to circumvent S. Ct. Prac. R. II, Section 1(A)(4) and arguably emasculate the same.

For all of the reasons previously stated this case does not involve a constitutional question, substantial or otherwise. In fact, and what is most instructive, is that Appellant, Nationwide, points to none.

A decision by this Court will serve no public or great general interest and will not resolve any substantial constitutional question. Therefore, this Court should not accept this appeal and decline jurisdiction to decide this case.

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITION OF LAW

Appellant's Proposition of Law No. 1:

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

What is immediately apparent from a reading of Appellant's sole proposition of law is that the mere focus of this case is limited to an examination of the policy language contained in the Nationwide policy, and this Court's consideration of the proposed proposition of law implicates no substantial constitutional question, nor would it serve any public or great general interest to do so.

In fact, less than two years ago, this same Appellant, Nationwide Mutual Fire Insurance Company, requested that this Court accept discretionary appeal to examine

the same policy language in the same wrongful death context as presented in the instant action. This Court did not accept Appellant's request for discretionary appeal. *Hall v. Nationwide Mut. Fire Ins. Co.*, No. 05AP-305, Court of Appeals of Ohio, Tenth Appellate District, Franklin County, 2005 Ohio 4572, 2005 Ohio App. LEXIS 4132, September 1, 2005, Rendered, Discretionary appeal not allowed by *Hall v. Nationwide Mut. Fire Ins. Co.*, 2006 Ohio 179, 2006 Ohio LEXIS 88 (Ohio, Jan. 25, 2006).

As in *Hall* the UM/UIM insurance policy issued and delivered to the wrongful death beneficiaries in this case by Nationwide, provides:

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

1. ownership,
 2. maintenance; or
 3. use;
- of the **uninsured motor vehicle**.

As a **relative** the decedent, Sara E. Lager, is a covered person under the Nationwide policy. Nationwide, however, denies coverage based on the "other owned auto" exclusion, which provides, as did the exclusion in *Hall*, as follows:

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

Nationwide argues that the "other owned auto" exclusion, as written in the policy, effectively precludes coverage to the parents of the decedent because Sara E. Lager was killed while occupying a vehicle she owned which was not listed on, or insured under, the Nationwide policy of her parents.

Once again this same Appellant, as it did in *Hall*, less than two years ago, requests that this Court accept its discretionary appeal and find that no ambiguity is created when employing the phrase "because of bodily injury," when describing the coverage which is extended, and the phrase "for bodily injury," when describing the coverage which is excluded. Citing recent "evolutions in the law" Appellant argues that this Court should now accept its discretionary appeal and "re-examine" its proposition of law in light of that "evolution." The so called "evolution" of which Appellant speaks does not, nor should not, change this Court's decision previously made to disallow a discretionary appeal on the proposition advanced by Appellant.

In *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St. 3d 70, 2006-Ohio-1926, this Court simply held that:

The interpretation of R.C. 3937.18(A) in *Moore v. State Auto Mut. Ins. Co.* (2000), 88 Ohio St. 3d 27, 723 N.E. 2d 97, applies only to the 1994 S.B. 20 version of the statute. Thus, *Moore* does not apply to the version of R.C. 3937.18(A) as amended by 1997 H.B. 261. *Hedges* at p. 70, Syllabus of the Court.

Clearly *Hedges* does not overrule *Hall* specifically or otherwise by implication. The Plaintiff in *Hedges* sought UM/UIM coverage for the "non-physical, personal loss she experienced as a result of her son's death." *Hedges* at p. 71. The Plaintiff's son was not a covered person under his mother's policy because he did not live in his

mother's home and, therefore, did not meet the definition of a "relative" under the policy.

Id.

The Plaintiff in *Hedges* argued that *Moore* involved "similar facts and circumstances and applied to her claim."

The trial court in *Hedges* did not agree and held that:

Moore did not apply to the H.B. 261 version of R.C. 3937.18 and that the policy provision at issue restricted UM/UIM coverage to claims for bodily injury suffered only by an insured. Because *Hedges* did not suffer bodily injury and her son was not an insured under the policy, she was not entitled to UIM coverage under her policies.

This Court agreed with the trial court in *Hedges* and followed the analysis contained in *Cincinnati Equitable Insurance Company v. Wells*, Montgomery App. No. 20286, 2004-Ohio-2418, finding:

That the changes to the statutory language in the H.B. 261 version cured the ambiguity that concerned *Moore*.

We infer that when the General Assembly amended the statute, changing the word 'person' to 'insured,' it intended to clarify that insurers could limit UM/UIM coverage to accidents in which an insured suffers bodily injury. The clear meaning of R.C. 3937.18(A) as amended by H.B. 261 is that a UM/UIM provision may restrict coverage to damages arising from bodily injury to an insured. Because *Moore* based its analysis on a different version of R.C. 3937.18 we hold that *Moore* does not apply to the H.B. 261 version of R.C. 3937.18. (Emphasis added.)

The common fact and, therefore, the common thread running through *Sexton v. State Farm Mutual Auto Insurance Company*, (1982), 69 Ohio St. 2d 431; *Moore*; *Cincinnati Equitable*; and *Hedges*, is that the decedent was not an insured or otherwise a covered person under the UM/UIM policies sought to be enforced. Unlike the

decedent in the aforesaid line of cases, the decedent in the case *sub judice*, Sara E. Lager, was a covered person under the UM/UIM policy of insurance issued and delivered to Fred L. and Cathy R. Lager by Defendant, Nationwide Mutual.

What is also clear, and what distinguishes the facts of *Hedges* and *Cincinnati Equitable* from the instant action is that the Appellee, in the case *sub judice*, is not making a *Sexton/Moore* type of claim for UM/UIM coverage. In fact, there is no need for Appellee to make a *Sexton/Moore* claim for the simple reason that Sara E. Lager was a covered person under the policy. Therefore, while the holdings in *Hedges* and *Cincinnati Equitable* make it clear that *Moore* claims do not survive the enactment of 3937.18(A) as amended by H.B. 261, that pronouncement is simply not relevant and certainly not dispositive of the facts and law applicable to the instant action.

Appellee agrees that, according to *Hedges*, insurers can and may limit and restrict UM/UIM coverage to accidents in which an insured suffers bodily injury, however, *Hedges* does not stand for the proposition that such coverage is limited or restricted in every case. In fact, parties to an insurance contract can extend coverage to include wrongful death damages even if the beneficiaries and insureds themselves do not personally suffer bodily injury.

In fact, Section 3937.18(I) O.R.C. provides that:

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

With all due respect, Appellant is confusing what must be minimally offered by statute versus what insurers actually contract for in their policies.

Just as important to the issues present herein is that *Hedges* did not involve an "other owned auto" exclusion as did *Hall* and the instant action. Therefore, the interplay between the coverage language and the exclusion language was not before the court in *Hedges*. *Hedges*, therefore, provides no guidance, and certainly no legal precedent, for this Court to consider in its determination of the proposition of law advanced by the Appellant herein.

In further support of Appellant's request for discretionary appeal, Nationwide argues that "Judge Lanzinger's dissent" in *Kotlarczyk v. State Farm Mut. Auto Ins. Co.*, 2004 Ohio 3447 raises the same issues as those presented in the case at bar. This argument too is misguided. The court in *Kotlarczyk* never addressed issues of ambiguous policy provisions contained in the UM/UIM coverage provisions and the "other owned auto" exclusion. In fact, the court held that "R.C. 3937.18(J) does not permit a UM/UIM policy to exclude from coverage damages caused to an insured by the wrongful death of a family member arising out of the use of an 'other owned auto.'" *Id.* at paragraph 28. In that the court held that such an exclusion was impermissible in light of *Moore v. State Auto Mut. Ins. Co.*, (2000), 88 Ohio St. 3d 27, the "other owned auto" exclusion contained in the policy was never "triggered," and, therefore, issues of ambiguity were never discussed. *Kotlarczyk* at paragraph 29. Likewise, the dissent of Judge Lanzinger is devoted to her disagreement with the court's majority that the decision in *Moore* survives the amendments to R.C. 3937.18 as exacted by H.B. 261. *Id.* at paragraph 58. It is Judge Lanzinger's opinion that *Moore* does not survive the amendments of H.B. 261 and, therefore, are valid and enforceable pursuant to R.C. 3937.18(J). Like the majority, Judge Lanzinger's dissent does not discuss issues of

policy ambiguities arguably because the issue was never briefed by the parties and was, therefore, not before the court. In light of this Court's decision in *Hedges*, Judge Lanzinger's dissent in *Kotlarczyk* is certainly valid as it pertains to the ability of insurers to exclude wrongful death damages in "other owned auto" exclusions. The breath of Judge Lanzinger's dissent, however, should not be read so as to allow such an exclusion if the language employed is ambiguously stated when compared to the language contained in the provisions of UM/UIM coverage.

In view of the foregoing, Appellee respectfully submits, that the discussion of Judge Lanzinger's dissent in *Kotlarczyk* by the court in *Tuohy v. Taylor*, Case No. 4-06-23, Court of Appeals of Ohio, Third Appellate District, Defiance County, 2007 Ohio 3597; 2007 Ohio App. LEXIS 3305, July 16, 2007, Date of Judgment Entry, is a misreading or at least a misinterpretation of that dissent, given the context in which that dissent was offered. Such an interpretation ignores the concurring opinion of Justice Brown in *Cincinnati Ins. Co. v. Phillips* (1990), 52 Ohio St. 3d 162 wherein he wrote, in the context of "per person" policy limits:

The limit applies only to "damages for bodily injury." Claims for wrongful death (and loss of consortium) are not claims "for bodily injury" although they may be claims arising out of bodily injury. Thus the limit does not apply.

This court should not judicially rewrite the language of insurance policies to protect the insurer. To do so violates deeply ingrained principles of contract and insurance law. *Phillips, supra*, at 166, citations omitted.

While Appellee concedes that the above opinion of Justice Brown is not contained in the syllabus of the *Phillips* decision, this Court has "properly recognized" Justice Brown's concurring opinion in *Phillips* in *State Farm Auto Ins. Co. v. Rose*

(1991), 61 Ohio St. 3d 528, 532. In *Rose* the majority of this Court in citing Justice Brown's concurring opinion, stated in its syllabus that policy limitations must be "unambiguously stated" and policy limitations must track the "corresponding limitation on liability." *Rose*, 61 Ohio St. 3d 528.

The great weight of authority, as expressed in *Hall*, supports the conclusion that the phrases "because of bodily injury" and "for bodily injury" are simply "not interchangeable in all situations." *Hall* at paragraph 16.

By the filing of its discretionary appeal, Appellant requests that this Court accept jurisdiction and support a proposition of law that there is no rational distinction between the phrase "because of" and the word "for"; that they are always interchangeable in meaning; and are never ambiguous in the context of insurance policy contractual provisions. Appellee submits that such a request not only disregards common English usage and definition of the phrase and word, respectively, but just as important, would create a legal precedent detrimental to the public and the great general interest of the same.

CONCLUSION

For the reasons set forth above, Appellee, Fred L. Lager, Administrator of the Estate of Sara E. Lager, deceased, respectfully requests that this Court disallow this appeal and decline jurisdiction to decide this case on its merits or summarily affirm the decision of the Court of Appeals.

This case is a simple case of contract interpretation and neither raises any issues of public or great general interest, nor any substantial constitutional questions.

Respectfully submitted,



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Attorney for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing was served upon Edward T. Mohler, Attorney for Defendant-Appellant, Nationwide Mutual Fire Insurance Company, 420 Madison Avenue, Suite 650, Toledo, Ohio 43604, and Joyce V. Kimbler, Attorney for Defendant-Appellant, Nationwide Mutual Fire Insurance Company, 50 South Main Street, Suite 502, Akron, Ohio 44308; by U.S. regular mail this 24th day of October, 2007.



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