

IN THE SUPREME COURT OF OHIO

ELIZABETH BURNETT,) CASE NOS. 2007-0954
) 2007-1176
)
 Plaintiff/Appellee,)
)
 vs.) On Appeal from the Trumbull County
) Court of Appeals, Eleventh District,
) Case No. 2006-T-0085
)
 MOTORISTS MUTUAL INSURANCE)
 COMPANIES, et al.,)
)
 Defendant/Appellant)

MERIT BRIEF OF APPELLEE ELIZABETH BURNETT

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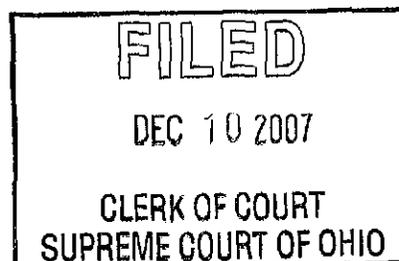


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STATEMENT OF FACTS

Plaintiff-Appellee agrees with the statement of facts provided in Appellant's brief and therefore no further facts will be provided here.

ARGUMENT

Proposition of Law No. 1

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.

Elizabeth Burnett, Appellee, first states that Appellant's brief discusses topics that fall outside the parameters of the argument framed by this Court, more specifically subsection "A" and "D"¹ of its argument. These two arguments fall outside the framed question of whether 3937.18(J)(1) (hereinafter "(J)(1)") and former R.C. §3937.18(K)(2) (hereinafter "(K)(2)") violate the equal protection clause. In order to provide this Court with a concise argument, Appellee will not directly respond to those arguments of Appellant, but rather focus her argument on the framed issue for review.

The essence of the Equal Protection Clause is that no state shall deny any person within its jurisdiction the equal protection of the laws, or, in other words, that persons similarly situated should be treated alike. *Bowers v. Gillard* (1987) 483 U.S. 587.

The analysis for determining whether a statute violates the equal protection clause is essentially the same under both federal and Ohio Law. *Beatty v. Akron City Hosp.*

¹ Sub-Section "A" argues "Former R.C. §3937.18(J)(1) and former R.C. §3937.18(K)(2) are complimentary and do not conflict with one another." Sub-Section "D" argues "Even following the abrogation of former R.C. §3937.18(J)(1) and former 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."

(1981) 67 Ohio St.2d 483, 491. The first step in an equal protection analysis involves determining the classification created by the legislation. *Conley v. Shearer* (1992) 64 Ohio St.3d 284, 290.

“A statutory classification violates the Equal Protection Clause of the Ohio Constitution if it treats similarly situated people differently based upon an illogical and arbitrary basis.” *State v. Brown* (1996), 117 Ohio App.3d 6, 10, citing *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 15, 425. Although classifications in statutes are not forbidden, the Equal Protection Clause does prevent the state ‘from treating differently people who are in all relevant respects alike’.” *Morris*, 160 Ohio App.3d at 667, citing *Park Corp. v. Brook Park* (2004), 102 Ohio St.3d 166, 169. In all equal protection cases, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92, 95.

- A. Former R.C. § 3937.18(K)(2) creates an arbitrary and illogical classification based on household status.

Revised Code § 3937.18(K)(2) does create classifications impermissibly. Those classifications are based on being a resident relative and are illogical and arbitrary classification. R.C. § 3937.18(K)(2) provides:

- (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.

R.C. 3937.18(K)(2).

In its brief, Appellant relies on *Kyle v. Buckeye Local School Dist.*, 73 Ohio St.3d 360, 1995-Ohio-298, for the proposition of law that (K)(2) refers only to the vehicle and

does not create classifications and therefore cannot be an equal protection violation. *Kyle's* limited holding more specifically stated that (J)(1) and (K)(2) were not irreconcilable, but rather were complimentary. *Kyle* held, over strenuous dissent, that (K)(2) and (J)(1) were complimentary because (J)(1) referred to individuals and (K)(2) dealt with the vehicle the tortfeasor was driving. *Kyle* did not decide whether (K)(2) violated equal protection. Its holding did not state that (K)(2) did not create a classification. It simply held that the two provisions were not in conflict with each other. *Kyle* in no way defeats Appellee's equal protection challenge of (K)(2). Appellant attempts to stretch the holding in *Kyle* in an attempt to defeat Appellee's equal protection challenge on the basis that (K)(2) apparently refers to the vehicle involved in the collision, and not the individuals.

When read, (K)(2) seemingly does define when a vehicle will not be considered uninsured/underinsured for purposes of UM/UIM coverage. However, the status of the vehicle in (K)(2) is defined by the **person** that owns the vehicle, and more specifically if they are a spouse or a resident relative. By defining the vehicle in terms of the person that owns the car, the statute has created a classification that permits an equal protection analysis. More specifically, the statute, when applied, provides uninsured motorist coverage to certain specified individuals, and precludes coverage from an entirely separate class of people. This is an obvious classification that must withstand an equal protection analysis to be considered valid and constitutional.

A classification is further evidenced when looking at the legislative intent of the (K)(2). The legislative intent of the statute is to prevent collusive lawsuits. The statute was implemented in order to prevent certain individuals, individuals that insurance

companies believed were most likely to defraud, from colluding and making false claims. This clearly shows an intent to make classifications, as it is a given that vehicles cannot collude with each other. The statute is intended to prevent **people** from colluding and defrauding insurance companies. “Insurance companies apparently have an exceedingly low opinion of their own policy holders, the citizens of Ohio.” *Kyle v. Buckeye Local School Dist.*, 73 Ohio St.3d 360, 1995-Ohio-298, ¶ 34 (dissent).

The mere fact that *Kyle* holds that the statute refers to a vehicle and not an individual does not mean there are no classifications. To make this point clear, let us alter (K)(2) somewhat. Assume (K)(2) states that an uninsured motor vehicle does not include “a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a **woman**.” The only change is that “woman” has been inserted instead of “resident relative.” This statute, according to Appellant’s interpretation of *Kyle*, would still address only the vehicle and not even be subject to an equal protection analysis, even though it clearly makes a classification based on gender. This reinforces the fact that (K)(2), although seemingly referring to the tortfeasor’s vehicle, does create classification of individuals.

In order to better understand the classifications that are created under (K)(2) we must look at several hypotheticals. In an attempt to remain consistent, Appellee will use the example presented by the Appellant which is based on *Morris v. United Ohio Insurance Company*, 160 Ohio App.3d 663. Appellant provides a lengthy quotation from *Morris* which outlines a situation in which Mrs. Morris and a friend were traveling in a motor home owned by Mrs. Morris. The friend is operating the motor home and a collision occurs in which the friend is negligent. Mrs. Morris would not be able to

recover uninsured benefits under the policy. This is because (K)(2) does not consider the vehicle Mrs. Morris was traveling as uninsured because it was owned by a named insured. On a side note, this obviously raises the question of what Mrs. Morris was paying for with her premiums.

Now alter the facts and assume that Mrs. Morris had a son and he was traveling with his mother and her friend. The collision occurs and again the friend driver is negligent. We already concluded that Mrs. Morris would not be afforded UM/UIM benefits under (K)(2). The same would be true of Mrs. Morris's son. He also would be precluded from obtaining coverage, as the vehicle he was traveling in was owned by a resident relative.

Now, for the final example, assume that along with Mrs. Morris, her son and her friend, the friend's daughter also joined them on this trip. Again the collision occurs due to the negligence of the friend. In this example, Mrs. Morris and her son would be precluded from obtaining UM/UIM coverage. However, the friend's daughter **would** have UM/UIM coverage available to them under the policy as the vehicle they were traveling in was not owned by a spouse or resident relative.

This example clearly shows the effect of this statute and how it without question classifies individuals triggering an equal protection analysis. In the example described above, two individuals, the friend and the son, who are not just similarly situated but also identically situated, are being treated differently as one is afforded coverage while the other is not.

Again the question arises as to what Mrs. Morris is paying for when she pays her premium for UM/UIM coverage. Although this issue has not been framed by this Court

for argument, (K)(2) seemingly also violates public policy as it creates a situation when the vehicle owned by Mrs. Morris is uninsured and in violation of Ohio Revised Code § 4509.51 which requires a person to have a minimum of \$12,500 insurance coverage to protect “against loss from liability ... arising out of the ... use of such vehicle.” As described above, (K)(2) creates situations in which Mrs. Morris’s vehicle is uninsured to certain individuals in violation of Ohio statute.

B. R.C. § 3937.18(K)(2) is not rationally related to achieving any legitimate governmental interest.

The next step in our equal protection analysis is to determine the level of scrutiny that is to be applied. Unless a fundamental right or a suspect class is being burdened, the rational basis test is employed to review challenged legislation. *City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 440. In order to survive the rational basis test, it must be shown that the differential treatment is rationally related to some legitimate state interest. *State ex. rel. Heller v. Miller* (1980) 61 Ohio St.2d 6, 11.

The state interest being asserted by the Appellants, and also asserted in *Morris*, the fourth district case in which Appellant so heavily relies, is that (K)(2) is needed in order to prevent collusive lawsuits. *Morris* ¶ 8.

There can be no argument against the legitimacy of preventing collusive lawsuits. However, (K)(2) does not bear any rational relationship to achieving that goal. There is nothing to suggest that spouses or resident relatives are more likely to collude in defrauding insurance companies than anyone else. Take the Mrs. Morris hypothetical as an example. In that example, there are three passengers and two of which would be denied coverage. Is Mrs. Morris and her son more likely to collude with the friend and his mother than the friend's own child? It is absurd to think that (K)(2), as written,

prevents collusion. The effect of (K)(2) is that it completely withdraws a person's remedy in an attempt to prevent a rare recovery based on collusion.

An equal protection challenge that is on point with (K)(2) is the holding by this Court in *Primes v. Tyler*. 43 Ohio St.2d 195. That case dealt with an equal protection attack on the "Ohio Guest Statute." At the time, Revised Code 4515.02, the Ohio Guest Statute read:

The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle.

R.C. 4515.02. The intent of the legislature in enacting the Guest Statute was to prevent the possibility of fraud and collusion between social friends and family members against insurance carriers. *Thomas v. Herron* (1969) 20 Ohio St.2d 62, 66. This is identical to the state interest asserted in (K)(2).

This Court, in *Primes*, analyzed whether the intentions of the legislature were sufficient to overcome the equal protection challenge. The answer was no. The Court looked at the effect of the statute and stated:

Prior to the enactment of the guest statute, paying passengers and nonpaying guests could recover for injuries negligently inflicted by their driver. Under the statute, however, a paying passenger may still recover against a driver for ordinary negligence, but a nonpaying guest is wholly precluded from such recovery. The guest is denied all opportunity to disprove that any suit filed by him would be fraudulent, collusive or destructive of hospitality. On the other hand, the statute does nothing to prevent, but perhaps encourages, a guest to present a fraudulent claim that he paid for the ride or that the driver was guilty of willful and wanton misconduct, and prove such claim with perjury and the collusive assistance of the driver.

Primes v. Tyler (1975) 43 Ohio St.2d 195, 200. The Ohio Supreme Court ruled that the classification created by the Ohio Guest Statute was not related to the legitimate interest of preventing collusive lawsuits. In fact, it went on to state that the “prevention of spurious claims is not suitably furthered by the...differential treatment afforded to guests and passengers.” *Id.* at 201.

The analysis in *Primes* is the same rationale that must be followed here. In this case, (K)(2) had the same governmental purpose as the Guest Statute which was struck down as unconstitutional. *Morris v. United Ohio Ins. Co.* (2005), 160 Ohio App.3d at 665. This statute, as with the Guest Statute, clearly and impermissibly draws an illogical and arbitrary distinction between injured parties. As described above, certain individuals are precluded from recovery because they are injured in a vehicle that is owned by a named insured, a spouse, or a resident relative, while all others can pursue recovery for their injuries.

The classifications made by (K)(2) are illogical and arbitrary and should be unenforceable as a violation of the Equal Protection Clause. Of what significance is it whether the vehicle a person is riding in is “owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured.” It is illogical to think that this would assist in preventing collusive lawsuits.

To show this, let us once again look at the *Morris* example used by the appellant. Mrs. Morris and her son would be precluded from recovery because they were riding in a vehicle that was owned by a resident relative of a named insured. However, the tortfeasor’s child would not be precluded. How can this outcome be related to preventing

collusive lawsuits? Are Mrs. Morris and her son more likely to collude with the driver than the driver's own son? There is no evidence to suggest this.

Another example that shows the illogical and arbitrariness of (K)(2) occurs when a single mother is transporting her infant child to day-care in a car that she owns. Should the mother be negligent, her own child would be precluded from coverage under this statute. In fact, in accordance with the Appellant's rationale, the infant would be denied coverage if it was injured in that vehicle driven by anyone because it is owned by a resident relative of a named insured. In order to protect its child, the mother would have to borrow the neighbor's car, and drive her child to day care. However, she would have to be careful not to use the neighbor's vehicle frequently enough so that it is not considered "for the regular use of". This example illustrates that this statute is not rationally related to furthering the legitimate governmental interest of preventing collusive lawsuits.

Conclusion

Former R.C. § 3937.18(K)(2), when read with § 3937.18 (J)(1) create ands 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 life in the household of the insured.

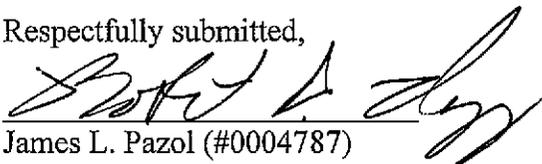
When looking at the effect of the statute it is clear that it creates inequitable results that preclude insurance coverage to certain individuals for traveling in a vehicle owned by a resident relative or spouse. It is also clear, from the face of the statute, that it is intended to exclude individuals from UM/UIM coverage. The statute cannot now survive under the guise that it refers to the vehicle involved and not the individuals.

The language of the statute, the intent of the statute, and the effect of the statute all point to one thing -- that a classification is created, and that classification is based upon whether the owner of the vehicle traveled in is a spouse or resident relative.

Not only is a classification created by (K)(2), but that classification is arbitrary and illogical. There is no rational reason to permit insurance companies to exclude coverage to people traveling in vehicles owned by spouses or resident relatives. There is nothing to suggest that resident relatives are more likely to collude and file false claims than neighbors, friends, or colleagues. There simply is no evidence to suggest resident relatives are more likely to commit insurance fraud. Furthermore, there already is a system in place to prevent such spurious claims from going forward – the judicial system itself. Ideally, a jury of our peers should decide whether a claim is fraudulent, and not the state legislature. It is inequitable to foreclose every person traveling in a vehicle owned by a spouse or a resident relative from UM/UIM to avoid a rare recovery based upon deceit.

Former § 3937.18(K)(2) violates equal protection as the classifications created by the statute are not rationally related preventing collusive claims.

Respectfully submitted,



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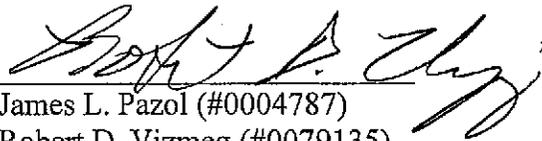
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PROOF OF SERVICE

I certify that a copy of the foregoing Memorandum In Response to Memorandum in Support of Jurisdiction by Motorists Mutual was sent by ordinary U.S. mail to the following this 22 Day of June, 2007.

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APPENDIX

4509.51 Requirements for owner's liability insurance.

Subject to the terms and conditions of an owner's policy, every owner's policy of liability insurance:

(A) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby granted;

(B) Shall insure the person named therein and any other person, as insured, using any such motor vehicles with the express or implied permission of the insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such vehicles within the United States or Canada, subject to monetary limits exclusive of interest and costs, with respect to each such motor vehicle, as follows:

(1) Twelve thousand five hundred dollars because of bodily injury to or death of one person in any one accident;

(2) Twenty-five thousand dollars because of bodily injury to or death of two or more persons in any one accident;

(3) Seven thousand five hundred dollars because of injury to property of others in any one accident.

Effective Date: 02-12-2004