

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0954

ELIZABETH BURNETT
Plaintiff-Appellee

-vs-

MOTORISTS MUTUAL INSURANCE COMPANY
Defendant-Appellant

**BRIEF OF *AMICUS CURIAE*,
OHIO ASSOCIATION OF JUSTICE
IN SUPPORT OF PLAINTIFF-APPELLEE, ELIZABETH BURNETT**

James L. Pazol, Esq. (#0004787)
Raymond J. Tisone, Esq. (#0021726)
ANZELLOTTI, SPERLING, PAZOL & SMALL
21 N. Wickliffe Circle
Youngstown, Ohio 44515
(330) 792-6033
*Attorney for Plaintiff-Appellee, Elizabeth
Burnett*

Paul W. Flowers, Esq. (#0046625)
[Counsel of Record]
PAUL W. FLOWERS, CO., L.P.A.
50 Public Square, Ste. 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395
*Amicus Curiae Chairman, Ohio Association for
Justice*

Robert F. DiCello, Esq. (#0072020)
THE DICELLO FIRM
Western Reserve Law Building
7556 Mentor Avenue
Mentor, Ohio 44060
(440) 953-8888
FAX: (440) 953-9138
Attorney for Ohio Association for Justice

Merle D. Evans, III, Esq. (#0019230)
Jude B. Streb, Esq. (#0071529)
DAY KETTERER LTD.
Millennium Centre, Suite 300
200 Market Avenue North
P.O. Box 24213
Canton, Ohio 44701-4213
(330) 455-0173
FAX: (330) 455-2633
*Attorneys for Defendant-Appellants, Motorists
Mutual Insurance Company*

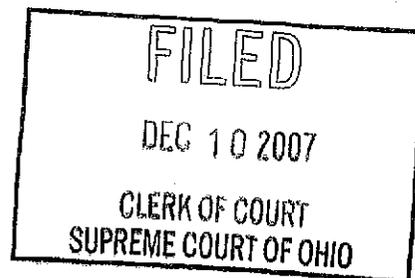


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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”). OAJ is comprised of approximately two thousand (2,000) attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

This *Amicus Curiae* is intervening in this appeal on behalf of Plaintiff-Appellee, Elizabeth Burnett, in support of her defense of the Eleventh District’s sound opinion. As was recognized by the majority, former R.C. §3937.18(K)(2) creates an illogical and unduly harsh distinction by precluding uninsured/underinsured motorist coverage for family members while permitting a recovery for unrelated claimants. Plaintiff-Appellee, Elizabeth Burnett, is being denied the insurance benefits she desperately requires solely because she had the misfortune of being injured by her own husband in a family vehicle.

No plausible explanation has ever been established for discriminating against insureds on such a counterintuitive basis. No evidence exists, as far as the undersigned counsel is aware, even remotely suggesting that “fraudulent schemes” between family members are so pervasive in Ohio that all of them must be denied a recovery regardless of the circumstances. Certainly, the legislature’s repeal of R.C. §3937.18(K)(2) is a telling indication that no legitimate public policy has been served by the peculiar provision. The OAJ therefore requests that this Court uphold the sensible reasoning that was employed by the Eleventh District in the proceedings below.

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.

On the proposition of law asserted above, this Court has certified a conflict between two appellate districts in this State. The Fourth District Court of Appeals and the Eleventh District Court of Appeals disagree as to whether R.C. 3937.18(K)(2) violates the Equal Protection Clauses of the Ohio and United States Constitutions. The Fourth Appellate District holds that R.C. 3937.18(K)(2) distinguishes vehicles, not people. This law, says the Fourth District, is concerned with the tortfeasor's vehicle, not the tortfeasor's identity. Thus, says this court, "R.C. 3937.18(K)(2) does not discriminate against claimants who are related to the tortfeasor." *Morris v. United Ohio Ins. Co.* (4 Dist.2005), No. 02CA2653, at ¶ 3.

However, the Eleventh District finds that the law discriminates against claimants who are related to the tortfeasor. Moreover, that court finds no rational basis to justify this distinction. *Burnett v. Motorists Mut. Ins.*, (11 Dist. 2007), 2006-T-0085.

The error of the Fourth District's analysis is clear. That Court rests its reasoning on the misguided assertion that the statute at issue does not create a proper class warranting an equal protection analysis. However, this astoundingly narrow view of the legislation at issue fails to consider the practical *effect* of that legislation; and it disregards a proper approach to constitutional, equal protection inquiry.

Ohio's Equal Protection clause is found at Section 2, Article I of the Ohio Constitution.

That portion of the Ohio Constitution announces:

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.

Id. The federal guarantee, the Equal Protection Clause of the Fourteenth Amendment, commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” which is essentially a direction that all persons similarly situated should be treated alike. *See, Plyler v. Doe* (1982), 457 U.S. 202, 216.

Generally, violations of the Ohio Equal Protection guarantees have been found where the *effect* of the law was to destroy certain rights via classifications of motor vehicles and thereby to create unconstitutional classifications of people. *See, e.g., City of Cleveland v. Antonio* (1955), 100 Ohio App. 334 (striking law on equal protection grounds that prohibited certain trucks from traveling during certain hours of the night on certain streets); *see also* 1990 Comment to Oh. Const. Art. I, § 2, (noting that “[a] classification which affects how *or if a law or regulation may apply* to a given class of persons violates the Equal Protection Clause if it has no reasonable relationship to a legitimate governmental purpose, *or if it applies unequally* to persons within a given class (citations omitted) (emphasis added)).

Nonetheless, under traditional equal protection analysis, a legislative classification will be sustained, if the classification itself is rationally related to a legitimate governmental interest. *See, e.g., Jefferson v. Hackney* (1972), 406 U.S. 535, 546. Similarly, the Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.” *Cleburne v. Cleburne Living Center, Inc.* (1985), 473 U.S. 432, 439.

Social legislation, such as that being challenged at bar, normally passes constitutional muster, since “the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” *Cleburne, supra*, at 440. “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Id; see also, State v. Thompkins* (1996), 75 Ohio St.3d 558. However, the United States Supreme Court has held laws unconstitutional under a rational basis Equal Protection Clause analysis where, as here, the challenged legislation “inhibits personal relationships.” *Lawrence v. Texas* (2003), 539 U.S. 558, 580.

Regarding the classification at issue here, i.e., ‘household status’ or relatives versus non-relatives, the United States Supreme Court has previously addressed the importance of a household and has found legislation unconstitutional where the practical operation of the law divides the home and targets individuals who may reside therein.

In *Department of Agriculture v. Moreno*, the High Court held that a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated the Fourteenth Amendment’s equal protection guarantee because the purpose of that law was to discriminate against certain household members. See, *Department of Agriculture v. Moreno* (1973) 413 U.S. 528. On rational basis review, the asserted governmental interest was the prevention of food stamp fraud. The Court deemed this insufficient. *Id.*, at 535-538. Justice Brennan, writing for the Court and noting what he termed the “practical operation” of the law, said, “The ‘related household’ limitations will eliminate many households from eligibility in the Food Stamp Program Traditional equal protection analysis does not require that every classification be drawn with precise mathematical nicety.

But the classification here in issue is not only 'imprecise', it is wholly without any rational basis (internal citation and quotes omitted)." *Id.* at 538-539.

Like *Moreno*, this case presents a case where members of certain households are now facing discrimination – not for the composition of their membership (as in *Moreno*) but, significantly, by the mere fact that they *are members* who come together under one roof and *are related*. The practical operation of R.C. 3937.18(K)(2) is to inhibit the personal relationships created by the bonds of marriage, birth, and law. Clearly this legislation denies uninsured motorist coverage motorist coverage solely because the tortfeasor *is related to the injured person* or household member. *See e.g., Moreno*.

The High Court's respect for the household is well documented. In *Eisenstadt v. Baird* (1972), 405 U.S. 438, the Court refused to sanction a law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to single persons. Likewise, in *Cleburne, supra*, the Court held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences - like fraternity houses and apartment buildings - did not have to obtain such a permit.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Eleventh Judicial District Court of Appeals in all respects.

Respectfully submitted,



Paul W. Flowers, Esq. (#0046625)
[Counsel of Record]
PAUL W. FLOWERS CO., L.P.A.
*Amicus Curiae Chairman, Ohio Association
for Justice*

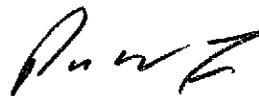
Robert F. DiCello (per authority)
Robert F. DiCello, Esq. (#0072020)
THE DICELLO FIRM
Attorney for Ohio Association for Justice

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Brief** was served by regular U.S. Mail on this 10th day of December, 2007 upon:

James L. Pazol, Esq.
Raymond J. Tisone, Esq.
ANZELLOTTI, SPERLING, PAZOL & SMALL
21 N. Wickliffe Circle
Youngstown, Ohio 44515
*Attorney for Plaintiff-Appellee, Elizabeth
Burnett*

Merle D. Evans, III, Esq.
Jude B. Streb, Esq.
DAY KETTERER LTD.
Millennium Centre, Suite 300
200 Market Avenue North
P.O. Box 24213
Canton, Ohio 44701-4213
*Attorneys for Defendant-Appellant, Motorists
Mutual Insurance Company*



Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.
*Amicus Curiae Chairman, Ohio
Association for Justice*