

IN THE SUPREME COURT OF OHIO

JEFFREY HOSTOTTLE, et al.,)	SUPREME COURT CASE NO.
)	2007 - 2355
Appellants,)	
)	COURT OF APPEALS CASE NO.
vs.)	89035 NO.
)	
NATIONWIDE MUTUAL INSURANCE)	
COMPANY, et al.)	
)	
Appellees.)	

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE,
NATIONWIDE MUTUAL INSURANCE COMPANY**

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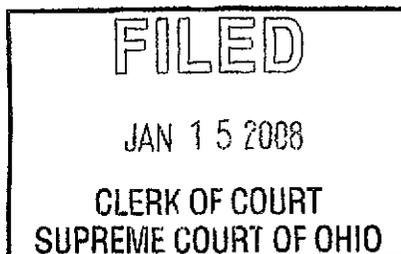
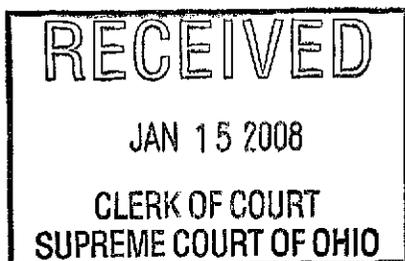


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EXPLANATION OF WHY CASE IS NOT OF GREAT GENERAL INTEREST

The issue for which appellant seeks further discretionary review was resolved by this Court more than 40 years ago in *Kenney v. Employers' Liability Assurance Corp.* (1966), 5 Ohio St.2d 131, 214 N.E.2d 219.

In the *Kenney* case, this Court ruled that the regular use exclusion of an automobile insurance policy applies even though the vehicle operated by the insured was one of several vehicles supplied by his employer. Contrary to the suggestions of opposing counsel, this Court has already determined that the focus of the inquiry in a regular use case is not on the specific vehicle used by the insured. Rather, "[i]n order to be excluded under this exclusionary clause, an automobile need not be a single particular automobile regularly furnished to the named insured. Thus it is well settled that an automobile will be excluded under such provisions although it is only one of a group of automobiles from which an automobile is regularly furnished to the named insured by his employer." *Kenney*, 5 Ohio St.2d at 134, 214 N.E.2d at 221.

The decision of this Court in *Kenney* is sound, clear and well reasoned. It has been consistently followed by trial and appellate courts for more than 40 years. It has produced stability and predictability in this area of the law. There is no reason to believe that any trial or appellate court is unclear regarding how *Kenney* is to be applied to a given set of facts. While this case is certainly important to the parties, it is not a case which presents issues of great general interest.

STATEMENT OF FACTS

Since 1998, appellant, Jeffrey Hostottle, has been employed by the City of Cleveland, Department of Public Utilities as a police officer. (Hostottle depo. at 10.) In that position, appellant was responsible for the properties under the Department's control such as the water treatment plants, Cleveland Public Power, and utilities plants. (*Id.* at 9.) Specifically, appellant investigated the theft of water and electricity and incidents of tampering with water and electricity. (*Id.*) He held the rank of Patrolman in the Department. (*Id.* at 10.) During his employment with the City, the Plaintiff worked the 11:00 p.m. to 7:00 a.m. shift. (*Id.* at 11.)

In appellant's position as a Patrolman, he was assigned a city-owned vehicle to use during his work day. (*Id.* at 11.) On the date of the accident, he was assigned to the facility known as Cleveland Public Power, which is located at W. 41st Street and I-90. (*Id.*) Cleveland Public Power is a mobile post which means that officers assigned there respond to most of the alarms, back-up calls and arrests. (*Id.*)

Typically, appellant began his work day by checking the perimeter fence lines at Cleveland Public Power, making sure that there were no cuts in the fence, and checking all the doors and locks. (*Id.* at 11, 13.) He was the sole Police Officer assigned to duty at Cleveland Public Power during the night shift. (*Id.* at 13.) Two hours later, he would go back and do it again. (*Id.* at 11.) If an alarm sounded at another plant during his shift, appellant was responsible for responding to the alarm. (*Id.* at 13.) All told, there were 125 properties for which the plaintiff may receive a call during any given shift. (*Id.* at 21.)

Appellant was also responsible for responding to calls which came in as a result of people turning on the fire hydrants, for example, to fill their pools. (*Id.* at 20.)

During his shift, appellant used a city-owned vehicle that was available to him to patrol the property of Cleveland Public Power and to check security and responding to calls at other plants or facilities. (*Id.* at 18, 33.) Use of the city-owned vehicle was necessary to patrol Cleveland Public Power because it was a large property with many access points. (*Id.* at 33.) On occasion, he used a city-owned vehicle to respond to a call, return to Cleveland Public Power, and then go back out again later to respond to another call. (*Id.* at 18.) Even if he did not leave the property of Cleveland Public Power, appellant used a city-owned vehicle to patrol the vast property of Cleveland Public Power on every day except for perhaps two to three days a year. (*Id.* at 33, 35.)

On December 17, 2003, appellant was driving a city-owned 2001 Jeep Cherokee in the scope and course of his employment for the City of Cleveland when he was involved in an automobile accident. (*Id.* at 23.) Prior to the accident, he was dispatched from Cleveland Public Power and drove the city vehicle to a water facility located at Harvard Yard in response to an alarm. (*Id.* at 24-25.) As he was driving back to Cleveland Public Power, he was involved in the accident on the exit ramp of I-90 at West 41st Street. (*Id.* at 26-27.)

At the time of the accident, appellant had a personal policy of automobile insurance with Nationwide Mutual Insurance Company. (*Id.* at 32; Exhibit A.) The policy insured a 1998 Jeep Cherokee, 2001 Chevrolet Suburban and 1996 Coac Trailer. (*Id.*) The 2001

Jeep Cherokee that the plaintiff was driving at the time of the accident was not the same Jeep that was covered by his Nationwide policy. (*Id.* at 32.)

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: An automobile will be excluded from the uninsured/underinsured motorist coverage of an automobile liability policy even though it is only one of a group of automobiles from which an automobile is regularly furnished to the insured by his employer.

The regular use exclusion is authorized by statute, namely, R.C. §3937.181(I)(1), which provides 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;

The Nationwide policy contains an exclusion from UM/UIM coverage where, as here, appellant operates a motor vehicle that is available for his regular use and which is not insured under the auto liability policy.

It is undisputed that appellant used his employer's vehicle virtually every work day to patrol the property of Cleveland Public Power and to respond to calls at other city-owned properties. In fact, he was returning to Cleveland Public Power from another location at the time of the accident. Appellant regularly used the employer-owned vehicle. The

Nationwide exclusion is designed to preclude UM/UIM coverage under these facts and was properly enforced by the Eight District Court of Appeals in its well reasoned decision.

Nevertheless, appellant seeks to manufacture an issue based upon the specific city-owned vehicle that he operated on the date of the accident. In so doing, he not only ignores this Court's ruling in *Kenney* but he also ignores his own deposition testimony wherein he stated that the vehicle that he was operating on the date of the accident was among the pool of vehicles available for his use. Specifically, he testified as follows:

Q. Oh, okay. Have you driven this vehicle before this day?

A. A couple of times, yeah. He [the Chief] was waiting on a car. The car came. It wasn't done. **He released his Jeep before the car was done.** He was using the Jeep during the day and **we were using it at night.** It was crazy.

(Hostottle depo. at 34.) (Emphasis supplied.) Plainly, appellant was driving "the Chief's Jeep" on the date of the accident because the Chief received a new vehicle but before it was ready, he released the Jeep to the pool of vehicles that was used by appellant and others. The vehicle belonged to the City and, at one time, was assigned to the Chief. When the Chief was to receive a new vehicle, he turned the Jeep over to the pool of vehicles to be used by officers on duty including appellant.

To accept the plaintiff-appellant's claims would lead to inconsistent results because coverage under his personal policy would depend on the specific city-owned vehicle that he was operating on the date of the accident. There is no rational basis for distinguishing the one city owned vehicle that was available for his regular use from another city owned vehicle that was available for his regular use. Both vehicles were owned by the city; both vehicles were available for the regular use of employees; and both vehicles were used by

employees to carry out their duties. The fact that one vehicle was previously assigned to the Chief is insignificant.

Furthermore, this Court has already ruled in the *Kenney* case that the focus of the inquiry is not on the specific vehicle operated by the insured on the date of the accident but on whether an automobile was regularly furnished to the named insured. As this Court stated in *Kenney*:

Thus it is well settled that an automobile will be excluded under such provisions although it is only one of a group of automobiles from which an automobile is regularly furnished to the named insured by his employer." *Kenney*, 5 Ohio St.2d at 134, 214 N.E.2d at 221.

On the date of the accident, the appellant was operating one of a group of automobiles that were regularly furnished to him by his employer. The Court of Appeals properly applied the *Kenney* decision and correctly ruled that the regular use exclusion precluded the claim. There is no reason to believe that the Eighth District Court of Appeals in this case or other trial or appellate courts in the state have had difficulty applying the straight-forward ruling in *Kenney*. This Court should reject appellants' request to accept jurisdiction in this case.

CONCLUSION

For the foregoing reasons, defendant-appellee, Nationwide Mutual Insurance Company, respectfully requests that the Court decline to accept jurisdiction in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant was mailed this 11th day of January, 2008, by regular U.S. Mail, postage prepaid, to:

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