

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

REPLY BRIEF OF APPELLANT MOTORISTS MUTUAL INSURANCE COMPANY

James L. Pazol (#0004787)
(Counsel of Record)

Robert D. Vizmeg (#0079135)
Raymond J. Tisone (#0021726)
ANZELLOTTI, SPERLING, PAZOL
& SMALL CO., LPA
21 N. Wickliffe Circle
Youngstown, Ohio 44515
Telephone (330) 792-6033
Facsimile (330) 793-3384
Email: jlpazol@aol.com
rvizmeg@aspands.com

Counsel for Appellee
Elizabeth Burnett

Paul W. Flowers (#0046625)
(Counsel for Record)
PAUL W. FLOWERS, CO., LPA
50 Public Square, Suite 3500
Cleveland, OH 44113
Telephone (216) 344-9393
Facsimile (216) 344-9395

*Amicus Curiae Chairman, Ohio Association
for Justice*

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

Robert F. DiCello (#0072020)
THE DICELLO FIRM
Western Reserve Law Building
7556 Mentor Avenue
Mentor, OH 44060
Telephone (440) 953-8888
Facsimile (440) 953-9138
Counsel for Ohio Association for Justice

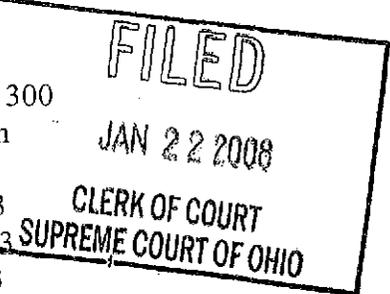


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ARGUMENT

I. The arguments set forth in the Merit Brief of Appellee Elizabeth Burnett fail to establish that former R.C. §3937.18(K)(2) violates the Equal Protection Clauses of the Ohio and United States Constitutions.

A. Former R.C. §3937.18(K)(2) does not create an arbitrary and illogical classification based on household status.

In her Merit Brief, Appellee Elizabeth Burnett asserts the following proposition of law:

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.

This proposition of law is inaccurate and ignores Ohio law. As discussed in Appellant Motorists Mutual Insurance Company's Merit Brief, former R.C. §3937.18(K)(2) addresses tortfeasors' **vehicles** and, as a result, does not create an impermissible classification of individuals which would require an Equal Protection analysis. In considering former R.C. §3937.18(K)(2), the Ohio Supreme Court has already determined that the statute "excluded certain *tortfeasors' vehicles* from being considered uninsured or underinsured". *Kyle v. Buckeye Union Ins. Co.*, 103 Ohio St.3d 170, 2004-Ohio-4885, 814 N.E.2d 1195, at ¶21. Nonetheless, Appellee asserts in her Brief that former R.C. §3937.18(K)(2) creates an arbitrary and illogical classification based upon the household status of individuals. Since former R.C. §3937.18(K)(2) addresses vehicles, rather than individuals, no classification exists which could possibly offend the Equal Protection Clauses of the Ohio and United States Constitutions. Accordingly, Appellee's argument is unpersuasive and should be rejected.

In her Merit Brief, Appellee acknowledges that “(K)(2) seemingly does define when a vehicle will not be considered uninsured/underinsured for purposes of UM/UIM coverage”. (Merit Brief of Appellee, p. 6). In support of her argument that former R.C. §3937.18(K)(2) creates an arbitrary and illogical classification of individuals, Appellee improperly modifies former R.C. §3937.18(K)(2) to read 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**”. (Merit Brief of Appellee, p. 7). Appellee argues that the substitution of the word “woman” for the phrase “named insured” illustrates that former R.C. §3937.18(K)(2), although seemingly referring to a tortfeasor’s vehicle, instead creates a classification of individuals. Appellee has conveniently inserted the word “woman” into former R.C. §3937.18(K)(2), thereby injecting gender, a quasi-suspect class which requires a higher level of scrutiny, directly into this analysis. Contrary to Appellee’s argument, this purported modification to the statute still fails to demonstrate that former R.C. §3937.18(K)(2) creates an impermissible classification of individuals.

Assuming, arguendo, that Appellee’s purported modification to former R.C. §3937.18(K)(2) is even remotely logical or valid, the effect of the statute would not change, other than the number of vehicles being affected. Inserting the word “woman” into former R.C. §3937.18(K)(2) would effectively remove a majority of vehicles on the road from classification as an “uninsured motor vehicle” or “underinsured motor vehicle”. However, contrary to Appellee’s interpretation of her own modified version of the statute, the modified version would still not preclude uninsured/underinsured motorist coverage for all women. For example, if a woman was driving a vehicle for which uninsured/underinsured motorist coverage had been purchased and which was owned by a single male friend, she would be driving a vehicle with

uninsured/underinsured motorist coverage. As this simple example and Appellee's modified version of the statute illustrate, former R.C. §3937.18(K)(2) does not create a classification of individuals, as the same individual could have uninsured/underinsured motorist coverage available to him or her depending solely on the vehicle in which they were traveling and not upon their gender or any familial relations.

Appellee then presents a pair of hypotheticals, which also purportedly illustrate that former R.C. §3937.18(K)(2) impermissibly classifies individuals. However, the conclusion reached by Appellee in the final example, which Appellee claims "clearly shows the effect of this statute and how it without question classifies individuals", is absolutely incorrect. (Merit Brief of Appellee, p. 8). In this hypothetical, Appellee modifies the hypothetical employed by the Fourth District Court of Appeals in *Morris v. United Ohio Insurance Company*, 160 Ohio App3d. 663, 2005-Ohio-2025, 828 N.E.2d 653. In *Morris*, the Plaintiff, Wanda Jean Morris, was denied uninsured motorist coverage following an accident in which she was the passenger in a vehicle being driven by her husband. In its hypothetical, the Fourth District Court of Appeals modified this factual scenario by substituting a friend of Mrs. Morris as the negligent driver of the Morris vehicle. Since the tortfeasor, Mrs. Morris' friend, was still driving a vehicle owned by a named insured, the Court determined that uninsured motorist coverage would still be precluded. *Id.* at ¶16.

In the inaccurate hypothetical presented by Appellee, Mrs. Morris' son and the friend's daughter are also passengers in the Morris vehicle. Appellee correctly concludes that Mrs. Morris and her son would be precluded from uninsured motorist coverage under the Morris' policy, but incorrectly deduces that the friend's son would be entitled to uninsured motorist coverage. Since the vehicle being driven by Mrs. Morris' friend remains a vehicle owned by a

named insured, regardless of who the passengers are, the vehicle remains an uninsured motor vehicle for which all passengers would be denied coverage under the Morris' policy. While it is possible that the friend's son would have uninsured/underinsured motorist coverage available to him under his own or his parents' insurance policy, it is the policy of the vehicle owner at issue in the present Equal Protection challenge. Appellee's apparent misunderstanding of the application of former R.C. §3937.18(K)(2) effectively invalidates Appellee's arguments. Further, Appellee's own hypothetical situation regarding the substitution of passengers in the Morris vehicle conclusively demonstrates that former R.C. §3937.18(K)(2) does, in fact, apply to vehicles and not to any classification of individuals. Accordingly, the Eleventh District Court of Appeals was in error in holding that former R.C. §3937.18(K)(2) violates the Equal Protection Clauses of the Ohio and United States Constitutions.

B. Assuming, arguendo, that a classification of individuals is created by former R.C. §3937.18(K)(2), the provision passes the rational basis test in that it is rationally related to a legitimate governmental interest.

The trial court in *Morris*, held 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 fraudulent and collusive lawsuits. *Morris* at ¶8. As admitted by Appellee, “there can be no argument against the legitimacy of preventing collusive lawsuits”. (Merit Brief of Appellee, p. 9). 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. Since former R.C. §3937.18(K)(2) was rationally related to the prevention of fraudulent and collusive lawsuits, it clearly passes the rational basis test if subjected to rational basis scrutiny.

While confirming the legitimacy of the government's interest in preventing collusive lawsuits, Appellee argues that former R.C. §3937.18(K)(2) bears no rational relationship to the achievement of that goal. In support of this argument, Appellee states that "there is nothing to suggest that spouses or resident relatives are more likely to collude in defrauding insurance companies than anyone else". (Merit Brief of Appellee, p. 9). As Appellee has produced no evidence in support of the statement that there is "nothing to suggest" that family members are more likely to collude than anyone else, the statement is nothing more than a self-serving presumption by Appellee's counsel. Further, 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. Also, implicit in Appellee's statement is an acknowledgement that collusion among family members or resident relatives is quite possible. However, the burden of proof is on the individual attacking a 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 *Lehnausen v. Lakeshore Auto Parts Co.* (1973), 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351. Appellee has failed to meet this burden in her brief. Accordingly, whether or not there is evidence to support the occurrence of fraud or collusion among family members, there can be no argument against the legitimacy of preventing collusive lawsuits, as admitted by Appellee.

In further support of her argument, Appellee analogizes the instant Equal Protection analysis to an Equal Protection challenge of former R.C. §4515.02, the "Ohio Guest Statute", in *Primes v. Tyler* (1975), 43 Ohio St.2d 195, 331 N.E.2d 723. However, while there may be an identical legislative intent behind both former R.C. §3937.18(K)(2) and the former Guest Statute,

namely the prevention of collusive lawsuits, there is little similarity beyond that. The former Guest Statute precluded liability for the “owner, operator, or person responsible for the operation of a motor vehicle” for injury to a guest “being transported without payment” in the motor vehicle, absent willful or wanton misconduct. Based on the clear language of the former Guest Statute, it undoubtedly created a classification of individuals. Since no such classification is created by former R.C. §3937.18(K)(2), any comparison between the two statutes in the context of an Equal Protection analysis is meaningless.

Further, the Ohio Supreme Court in *Primes* determined that the prevention of collusive lawsuits was not furthered by the former Guest Statute. In making this determination, the Ohio Supreme Court quoted the North Dakota Supreme Court’s opinion in *Johnson v. Hassett* (1974), 217 N.W.2d 771, 778, which stated as follows:

‘(A) guest statute is no final answer to collusion. It is still possible for the dishonest to fabricate evidence to support the higher degree of fault required by the Statute. 2 *Harper & James Torts*, 961, 1956.’ As one example, it would be simple for a colluding host and guest to assert that payment had been made for the transportation, or that the driver was intoxicated, thereby withdrawing the case from the Guest Statute.

Primes at 200-201. Since fraud and collusion between a driver and guest could so easily circumvent the former Guest Statute, as illustrated by the North Dakota Supreme Court, the Ohio Supreme Court determined in *Primes* that the Guest Statute did not suitably further the prevention of spurious claims or the differential treatment afforded to guests and passengers in a motor vehicle. *Id.* at 201. No such claim about the effectiveness of former R.C. §3937.18(K)(2) in preventing collusive lawsuits can be made, as it served as an absolute bar to fraudulent uninsured/underinsured motorist claims among family members when traveling in a vehicle

owned by, furnished to or available for the regular use of a named insured, spouse or resident relative.

It is important to note that the Ohio Supreme Court has recognized the utility and benefit in preventing collusive lawsuits in upholding the “corroborative evidence rule” applicable to uninsured motorist coverage cases involving no actual physical contact between the unidentified tortfeasor’s vehicle and the vehicle of the injured insured. In *Girgis v. State Farm Mutual Automobile Insurance Company*, 75 Ohio St.3d 302, 1996-Ohio-111, 662 N.E.2d 280, the Ohio Supreme Court held that R.C. §3937.18 and public policy precluded provisions in insurance policies from requiring physical contact between vehicles as an absolute prerequisite to recovery under the uninsured motorist coverage provision of the policies. *Id.* at paragraph one of the syllabus. In *Girgis*, the Plaintiff suffered bodily injuries in an automobile accident, allegedly at the hands of an unidentified driver who left the scene of the accident. The Court determined that the test to be applied in cases where an unidentified driver’s negligence causes injury is the “corroborative evidence rule”, which allows a claim to go forward if there is independent third-party testimony that the negligence of an unidentified driver was a proximate cause of the accident. *Id.* at paragraph two of the syllabus. The Ohio Supreme Court adopted the “corroborative evidence rule” because “we remain committed to the underlying policy of preventing fraud . . .” *Id.* at 306. Accordingly, the Ohio Supreme Court has previously acknowledged the importance of preventing fraudulent and collusive lawsuits, the same rationale behind former R.C. §3937.18(K)(2).

Coincidentally, the *Girgis* opinion was considered by the Eleventh District Court of Appeals in *Wollpert v. State Farm Automobile Insurance Company* (June 27, 1997), 11th Dist. No. 96-L-093. In acknowledging the potential for fraud and collusion among spouses or

relatives, the Eleventh District Court of Appeals stated as follows:

We, thus, recognize the concern of the *Girgis* court that, when the only known witness to an accident is the passenger-spouse, the possibility exists that the passenger-spouse could blame the accident on the unidentified driver of a non-existent second vehicle when, in actuality, the accident was caused by the negligence of the driver-spouse.

Id. at 4. Accordingly, within the context of a “physical contact” exclusion analysis, the Eleventh District Court of Appeals has acknowledged the concern over and potential for fraud and collusion among spouses or relatives in bodily injury claims. The same rationale should have been applied by the Eleventh District Court of Appeals in interpreting former R.C. §3937.18(K)(2).

A final example discussed by Appellee concerns a mother transporting her infant child to daycare in a vehicle owned by the mother. It is apparent that Appellee has proffered this example in an effort to demonstrate the sometimes seemingly unfair results of former R.C. §3937.18(K)(2). However, a classification does not fail a 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. Despite this example and Appellee’s related arguments, Appellee has clearly failed to establish that former R.C. §3937.18(K)(2) bears no rational relation to a legitimate governmental interest.

II. The arguments set forth in the Brief of the Amicus Curiae, Ohio Association of Justice, in support of Appellee Elizabeth Burnett fail to establish that former R.C. §3937.18(K)(2) violates the Equal Protection Clauses of the Ohio and United States Constitutions.

The Brief of the Amicus Curiae, Ohio Association of Justice, also fails to establish that former R.C. §3937.18(K)(2) violates the Equal Protection Clauses of the Ohio and United States

Constitutions or that it creates an arbitrary and illogical classification based on household status. The arguments of the Amicus Curiae fail for the reasons that they incorrectly place weight on the supposed lack of evidence or data to support fraud or collusion between family members in uninsured motorist coverage situations and are also supported by a number of cases which are either irrelevant to the issues at hand or do not support the proposition of law asserted by the Amicus Curiae in its Brief.

The Amicus Curiae suggests that no evidence exists, as far as counsel for the Amicus Curiae is aware, to remotely suggest that fraud among family members is so pervasive that they must all be denied uninsured/underinsured motorist coverage. (Brief of Amicus Curiae, p. 1). Notwithstanding the efforts of counsel for the Amicus Curiae in arriving at this convenient conclusion, evidence or data to support the basis for a classification is not necessary in making a determination of whether the classification bears a rational relation to a legitimate governmental interest. Rather, almost any classification will survive 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*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, at ¶18. Accordingly, the statement of counsel for the Amicus Curiae is both speculative and irrelevant.

Further, the Amicus Curiae draws the inaccurate and illogical conclusion that “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”. (Brief of Amicus Curiae, p. 1). As stated in the Merit Brief of Appellant Motorists Mutual Insurance Company, R.C. §3937.18(I)(1) currently permits a policy of insurance which includes uninsured/underinsured motorist coverage to preclude coverage for bodily injury or death suffered by an insured 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 . . .”, which is identical to the language of former R.C. §3937.18(K)(2). Accordingly, it is apparent that, 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 and unrelated to a legitimate governmental interest, as suggested by the Amicus Curiae. Instead, while Ohio law no longer mandates “intra-family” exclusions, it continues to permit them to be contained in insurance policies upon agreement of the parties.

The Amicus Curiae then suggests that the decision of the Fourth District Court of Appeals in *Morris* that former R.C. §3937.18(K)(2) does not create a classification warranting an Equal Protection analysis fails to consider the practical effect of the statute. In support of this argument, the Amicus Curiae cites a number of cases which do not support the conclusions drawn by the Amicus Curiae or are irrelevant to the instant case. For example, the Amicus Curiae cites *City of Cleveland v. Antonio* (1955), 100 Ohio App. 334, 124 N.E.2d 846, in which the Eighth District Court of Appeals struck down a law on constitutional grounds that prohibited certain trucks from traveling during certain hours of the night on certain streets. However, there was absolutely no Equal Protection analysis conducted by the Court in *City of Cleveland*. Rather, the Court considered whether the municipal ordinance was unconstitutional as being an unreasonable and arbitrary exercise of the charter municipality’s police power. *Id.* at 339. Clearly, the analysis and conclusion of the Court in *City of Cleveland* is immaterial to the Equal Protection analysis at issue in this case.

The Amicus Curiae relies heavily on the decision of the United States Supreme Court in *United States Department of Agriculture v. Moreno* (1973), 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782, in reaching the conclusion that former R.C. §3937.18(K)(2) allegedly discriminates against members of certain households. In *Moreno*, the United States Supreme Court considered an amendment to the Food Stamp Act which rendered ineligible any household containing an individual unrelated to any other member of the household. The government argued that the classification should be upheld as being rationally related to the governmental interest in minimizing fraud in the administration of the Food Stamp program. *Id.* at 535. The United States Supreme Court determined that the classification was without any rational basis for a number of reasons. For example, the Food Stamp Act itself contained provisions aimed specifically at the problems of fraud and the voluntarily poor, which were independent of and more effective than the classification at issue. *Id.* at 536. Further, the Court determined that the challenged classification simply did not operate so as to rationally further the prevention of fraud because unrelated individuals could easily become eligible for Food Stamp assistance by altering their living arrangements so as to avoid living as a single economic unit, sharing cooking facilities or purchasing food in common. *Id.* at 537. Former R.C. §3937.18(K)(2) is not vulnerable to such simple evasion in that it undeniably prevents fraud among family members when an injured insured is injured in a vehicle being driven by a tortfeasor who is a relative resident, named insured or spouse of the injured. Accordingly, the ineffectiveness at the core of the U.S. Supreme Court's decision to invalidate the amendment to the Food Stamp Act at issue in *Moreno* is simply not a concern with former R.C. §3937.18(K)(2).

In summary, the arguments set forth in the Brief of the Amicus Curiae in support of Appellee Elizabeth Burnett simply fail to establish that former R.C. §3937.18(K)(2) violates the Equal Protection Clauses of the Ohio or United States Constitutions.

CONCLUSION

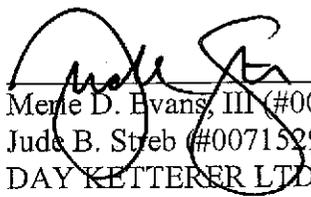
Former R.C. §3937.18(K)(2), when read in conjunction with former R.C. §3937.18(J)(1), does not violate the Equal Protection Clauses of the Ohio or United States Constitutions because it does not create an arbitrary and illogical classification based on household status that has a disparate and unfair affect by precluding coverage for individuals who may not recover solely because they were related to and live in the household of the insured. In its opinion of April 9, 2007, the Eleventh District Court of Appeals held that former R.C. §3937.18(K)(2) is unconstitutional, thereby invalidating a statute regularly enacted by the Ohio General Assembly and which was upheld by the Ohio State Supreme Court in *Kyle* and the Fourth District Court of Appeals in *Morris*. The holding of the Eleventh District Court of Appeals, which expressly states the Court's disagreement with the Supreme Court's holding in *Kyle*, conflicts with a prior decision by the Fourth District Court of Appeals on an identical Equal Protection challenge and attempts to sidestep the decision of the Ohio Supreme Court in *Kyle*.

In their Briefs, Appellee Elizabeth Burnett and the Amicus Curiae, Ohio Association of Justice, have failed to establish that former R.C. §3937.18(K)(2) violates the Equal Protection Clauses of the Ohio or United States Constitutions or that it creates an arbitrary and illogical classification based on household status. Every statute enacted by the General Assembly is enacted with a presumption in favor of its constitutionality, which remains unless proven beyond a reasonable doubt to be clearly unconstitutional. The Briefs of Appellee and the Amicus Curiae clearly fail to establish that the Eleventh District Court of Appeals has met this burden in its

holding. Because 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, assuming, arguendo, that a classification is created by former R.C. §3937.18(K)(2), the classification bears a rational relationship to the legitimate governmental interest of preventing fraudulent and collusive lawsuits. Accordingly, Appellee and the Amicus Curiae are unable to present any argument or interpretation of former R.C. §3937.18(K)(2) which would enable them to establish beyond a reasonable doubt that this former statute violates the Equal Protection Clauses of the Ohio and United States Constitutions.

Based on the foregoing, and in accordance with the Ohio Supreme Court's holding in *Kyle* and the Fourth District Court of Appeals' holding in *Morris*, as well as those reasons set forth in the Merit Brief of Appellant Motorists Mutual Insurance Company, 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,


Meme 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

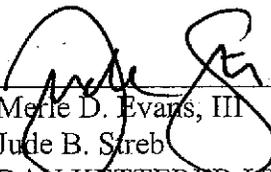
PROOF OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellant, Motorists Mutual Insurance Company, was sent by ordinary U.S. mail to the following, this 21st day of January, 2008:

James L. Pazol, Esq.
Raymond J. Tisone, Esq.
ANZELLOTTI, SPERLING, PAZOL
& SMALL CO., LPA
21 N. Wickliffe Circle
Youngstown, OH 44515
Counsel for Appellee, Elizabeth Burnett

Paul W. Flowers, Esq.
PAUL W. FLOWERS, CO., LPA
50 Public Square, Suite 3500
Cleveland, OH 44113
Amicus Curiae Chairman, Ohio Association for Justice

Robert F. DiCello, Esq.
THE DICELLO FIRM
Western Reserve Law Building
7556 Mentor Avenue
Mentor, OH 44060
Counsel for Ohio Association for Justice



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

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

Court of Appeals of Ohio, Eleventh District, Lake County.
Betty WOLLPERT, Administratrix of the Estate of Frederick Wollpert, et al.,
Plaintiffs-Appellants,

v.

STATE FARM AUTOMOBILE MUTUAL INSURANCE COMPANY, et al., Defendants-Appellees.
No. 96-L-093.

June 27, 1997.

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas Case No. 95 CV 000704.

ATTY. CLIFFORD C. MASCH ATTY. BRIAN D. SULLIVAN REMINGER & REMINGER CO., LPA
The 113 St. Clair Building Cleveland, OH 44114
(For Plaintiffs-Appellants)

ATTY. JOSEPH H. WANTZ MEYERS, HENTEMANN & REA CO. 2121 The Superior Building 815 Superior Avenue Cleveland, OH 44114
(For Defendant-Appellee, State Farm Automobile Mutual Insurance Company) ATTY. PAUL D. EKLUND ATTY. MARC A. SANCHEZ DAVID & YOUNG CO., L.P.A. 1700 Midland Building 101 Prospect Avenue West Cleveland, OH 44115 (For Defendant-Appellee, Cincinnati Insurance Companies)

CHRISTLEY, P.J.

*1 This is an accelerated calendar appeal, stemming from a final judgment of the Lake County Court of Common Pleas. Appellants, Betty Wollpert, Bonnie Wollpert, Vickie Wollpert, and LouAnn Wollpert Hiser, seek the reversal of the trial court's decision to grant summary judgment in favor of appellees, Cincinnati Insurance Companies and State Farm

Automobile Mutual Insurance Company, as to all four claims in appellants' complaint. [FN1]

FN1. For the sake of brevity and clarity, the four appellants will be referred to by their proper names throughout the statement of facts. For the same reasons, Cincinnati Insurance Companies will be referred to as "Cincinnati Insurance," and State Farm Automobile Mutual Insurance Company will be referred to as "State Farm."

Betty Wollpert is the duly appointed administratrix of the estate of her late spouse, Frederick Wollpert. The three remaining appellants, Bonnie, Vickie, and LouAnn, are the natural children of Betty and Frederick.

In July 1993, Frederick died as a result of injuries he had suffered in an automobile accident which had taken place approximately two months earlier. At the time of this accident, Frederick had been driving his vehicle eastbound on Chardon-Windsor Road in Geauga County, Ohio. Betty had been the sole passenger riding with Frederick.

Prior to his death, Frederick was able to give a statement concerning the accident to a state highway patrolman. In this statement, Frederick averred that: (1) while he was traveling eastbound at approximately forty-five m.p.h., he had come upon two cars which were traveling slowly in the same direction; (2) upon seeing that there were no other vehicles coming toward him from the opposite direction, he pulled into the other lane of the two-lane road and began to pass the cars; (3) as he was passing the first car, that car began to veer toward him; and (4) as a result, he veered his own vehicle to the left and drove it into the ditch on the south side of the road.

Following the accident, the car which had allegedly veered into Frederick's vehicle did not stop. Moreover, the identity of the driver of that car was never determined.

As of the date of the accident, Frederick and Betty were insured under a policy of automobile insurance issued by State Farm. As of that same date, Bonnie

was insured under a separate policy of automobile insurance issued by State Farm. The same was also true of Vickie; *i.e.*, she was insured under an automobile insurance policy issued by State Farm which was separate from the two policies of her parents and Bonnie. In addition, as of the date in question, LouAnn was insured under an automobile insurance policy issued by Cincinnati Insurance.

Each of the four insurance policies provided for uninsured motorist coverage. As part of this particular coverage, each policy contained a clause which essentially stated that the company in question agreed to pay benefits for harm caused by a "hit and run" driver who could not be identified. However, each of these clauses stated that benefits would be payable only if the vehicle of the unidentified driver had made actual contact with the vehicle of the insured.

Following Frederick's death, Betty and her three daughters filed claims under their respective policies. After the claims had been denied, they brought the instant action against the two insurance companies and John Doe, the unidentified driver. Besides being named as an individual plaintiff in the complaint, Betty also maintained the action on behalf of the estate.

*2 In relation to John Doe, appellants asserted three claims sounding in wrongful death, survivorship, and loss of consortium. Under their only claim against the insurance companies, appellants sought a declaratory judgment as to the extent to which the two companies were liable to them under the uninsured motorist coverage in all four policies.

After the two insurance companies had filed separate answers, Cincinnati Insurance moved for summary judgment on appellants' entire complaint. As the primary basis for this motion, Cincinnati Insurance argued that it was not liable under its uninsured motorist coverage because appellants had admitted that the vehicle of John Doe had not actually hit Frederick's vehicle. In support of its argument, the company attached to its motion certain interrogatories in which LouAnn Wollpert Hiser stated that it had been her "understanding" that the two vehicles in the accident had never collided.

Before appellants could file a response to Cincinnati Insurance's motion, the parties filed a joint motion to

stay the action because the Supreme Court of Ohio had recently heard oral arguments in a case in which the validity of the "physical contact" exclusion was being challenged. In January 1996, the trial court granted the stay on the basis that the Supreme Court's upcoming decision was relevant to the issue raised in the summary judgment motion.

In March 1996, the Supreme Court rendered its decision in *Girgis v. State Farm Mut. Auto. Ins. Co.* (1996), 75 Ohio St.3d 302, 662 N.E.2d 280. The two paragraphs in the syllabus of this decision stated:

"1. R.C. 3937.18 and public policy preclude contract provisions in insurance policies from requiring physical contact as an absolute prerequisite to recovery under the uninsured motorist coverage provision.

"2. The test to be applied in cases where an unidentified driver's negligence causes injury is the corroborative evidence test, which allows the claim to go forward if there is independent third-party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident. * * * * " (Citations omitted.)

One month after the *Girgis* decision was issued, the trial court entered a judgment lifting the stay in the instant action and ordering appellants to respond to the summary judgment motion of Cincinnati Insurance.

In their response, appellants addressed the requirement in *Girgis* that the alleged negligence of the unidentified driver in a "hit and run" accident had to be corroborated by an independent third party. Specifically, they argued that Betty Wollpert, who had been the sole passenger in Frederick's vehicle when the accident occurred, constituted an independent third-party witness because her interests in the wrongful death and survivorship claims, either personally or in her role as the administratrix, were derivative and not direct in nature.

*3 In support of their argument, appellants attached to its response Betty's affidavit, in which she averred that, although she had been looking at a road map when Frederick began to pass the first car, she did look up when she had felt their vehicle start to veer further to the left. Betty also averred that, at that moment, she had seen another vehicle very close to her side of their vehicle.

One day after appellants had filed their response to Cincinnati Insurance's motion, State Farm filed its own summary judgment motion. As the basis for its motion, State Farm asserted that, during the course of discovery, appellants had failed to set forth any evidence indicating that a "third party" had witnessed the accident. State Farm further argued that Betty would not qualify as an independent third party because she would benefit if the case was allowed to go forward.

After appellants had filed a response to State Farm's motion, the trial court issued its decision in which it granted both motions for summary judgment. Upon reviewing the *Girgis* opinion, the trial court concluded that Betty Wollpert did not qualify as an independent third party because she had a "stake" in the outcome of the case. Thus, the court held that the two insurance companies were entitled to judgment in their favor as to the entire complaint because appellants could not satisfy the *Girgis* requirement of third-party corroboration.

In appealing from this decision, appellants have assigned the following as error:

"The trial court incorrectly concluded that Mrs. Wollpert's testimony did not constitute independent third-party testimony to present plaintiffs' claims for uninsured motorist coverage to a jury.

"The trial court incorrectly granted defendants summary judgment when genuine issues of material fact existed and when defendants were not entitled to judgment as a matter of law."

Under their first assignment, appellants contend that the trial court's interpretation of the *Girgis* decision was erroneous. As they did at the trial level, appellants assert that the testimony of Betty Wollpert as to the cause of the accident was sufficient to satisfy the requirement of independent third-party testimony because both the wrongful death and survivorship claims were predicated upon injuries suffered by Frederick Wollpert in the accident, as opposed to any claim for her own bodily injuries. Stated differently, they argue that Betty constitutes an independent third party because she will only benefit indirectly from the payment of the derivative claims based on Frederick's injuries.

Prior to the *Girgis* decision, the "physical contact" requirement had been upheld as a valid exclusion under "hit and run" coverages in uninsured motorist provisions. See *State Auto. Mut. Ins. Co. v. Rowe*

(1986), 28 Ohio St.3d 143, 502 N.E.2d 1008. In overruling this prior precedent, the majority opinion in *Girgis* set forth a detailed discussion concerning why the "physical contact" exclusion was against public policy and R.C. 3937.18. As a result, although the *Girgis* majority adopted the corroborative evidence test, it did not fully explore the question of who could be considered an independent third party for purposes of this test.

*4 However, in the final paragraph of its opinion, the *Girgis* majority did indicate that the corroborative evidence test was intended to combat possible fraud:

"We do not take lightly the argument that [the holding as to the invalidity of the physical contact clause] will lead to an increase in the filing of claims. However, the corroborative evidence test we propound requires independent third-party testimony specifically to protect insurance companies from fraud. We consider the danger of possible fraud acceptable compared with the current situation where insureds with legitimate claims are prevented, as a matter of law, from recovering." *Girgis* at 307, 662 N.E.2d 280.

Given the foregoing language, it follows that, for purposes of the corroborative evidence test, a person can be considered an independent third party only when that person is not legally entitled to receive a financial benefit from the payment of any claim based on the accident regardless of whether the claims are derivative or personal.

As was noted above, the trial court in the instant action held that Betty Wollpert could not be considered an independent third-party witness because she had a "stake" in the outcome of the case. As a general proposition, this court would agree that the determination of whether a particular witness is an independent third party should turn upon whether the witness has a financial interest in the outcome of the action. Stated differently, a witness to a "hit and run" accident cannot be considered independent if the witness has a potential legal claim which could be compensable under an uninsured motorist provision.

However, this court does not agree with the manner in which the trial court applied the *Girgis* test to the specific claims in this case. Specifically, we hold that, although Betty Wollpert cannot constitute an independent third party for purposes of establishing her own claim for derivative benefits under the

uninsured motorist coverage of her policy, she can be an independent third party for purposes of establishing the individual derivative claims of her three daughters.

We, thus, recognize the concern of the *Girgis* court that, when the only known witness to an accident is the passenger-spouse, the possibility exists that the passenger-spouse could blame the accident on the unidentified driver of a non-existent second vehicle when, in actuality, the accident was caused by the negligence of the driver-spouse.

Moreover, this analysis would not change even if the passenger-spouse chose not to bring a claim for bodily injuries he or she personally suffered in the accident. When the claims are predicated solely upon the injuries sustained by the driver-spouse, *i.e.*, derivative claims, the passenger-spouse will still benefit financially in a manner to which she would not be entitled had the accident been caused solely by the negligence of the driver-spouse. As a result, for purposes of satisfying the corroborative evidence test in *Girgis*, a passenger-spouse under the instant factual scenario cannot be an independent third party for purposes of establishing his or her own claims, derivative or otherwise. [FN2]

FN2. As part of its evidentiary materials, appellants attached to their responses to both summary judgment motions copies of the report of the state highway patrolman. Since this report was based upon Frederick Wollpert's statements to the patrolman, it too cannot be considered the "testimony" of an independent third party. See *Natl. Sur. Corp. v. O'Dell* (Ga.App.1990), 195 Ga.App. 374, 393 S.E.2d 504.

*5 However, the foregoing analysis does not apply to the separate claims of Betty's three daughters, because Betty does not have a financial interest in the payment of the claims to the daughters. Accordingly, it follows that her testimony should be considered for purposes of establishing those particular claims.

In adopting the foregoing analysis, we realize that our application of *Girgis* could result in an independent third-party witness who could still be perceived as being biased in favor of the claimants, *i.e.*, a friend. But, if we were to conclude that only a

"nonbiased" person could qualify as being "independent" under the *Girgis* test, then only a person who had no prior acquaintance or relationship, familial or otherwise, with the claimants or the insured could qualify. We do not believe that the *Girgis* court intended such a result.

Moreover, this court would emphasize that any possible bias on the part of an independent third-party witness is a factor which a jury can consider in determining whether to believe the testimony of that witness.

Finally, we would note that, under the foregoing analysis, Betty would not be entitled to recover any uninsured motorist benefits which would be predicated upon any underlying wrongful death or loss of consortium causes of action brought by her against the unidentified driver. In addition, she would not be entitled to recover any uninsured motorist benefits which would be predicated upon any survivorship action brought by the estate against the unidentified driver.

In contrast, each daughter would be entitled to receive uninsured motorist benefits which would correspond to her share of any recovery under a survivorship claim brought by the estate against the unidentified driver. In addition, each daughter would be entitled to any benefits which would be predicated upon the underlying wrongful death and loss of consortium causes of action.

Pursuant to the foregoing analysis, this court holds that the trial court did not err in granting summary judgment in favor of appellees as to the claim of Betty Wollpert for uninsured motorist benefits. However, we do conclude that the trial court erred in granting summary judgment in relation to the individual claims of the three daughters, Bonnie, Vickie, and LouAnn. To that extent, appellants' first assignment has merit.

Under their second assignment, appellants contend that summary judgment should not have been granted in favor of the two insurance companies because they failed to meet their initial burden in relation to the "independent third-party" issue. Specifically, appellants argue that the insurance companies failed to present any affirmative evidence as to this point.

As a general proposition, the moving party in a

summary judgment exercise is not entitled to judgment in its favor unless that party can show that: (1) there is no genuine issue of fact; (2) it is entitled to judgment as a matter of law; and (3) even if the evidence is construed in a manner most favorable to the non-moving party, that evidence is such that reasonable minds could only reach a conclusion adverse to the non-moving party. *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 667 N.E.2d 1197.

*6 In relation to the initial burden of the moving party, the Supreme Court of Ohio has stated that this party is required to indicate the basis of the motion and identify those parts of the record which establish that there is no genuine issue of fact. If the moving party has met this burden, the non-moving party must then present evidentiary materials which raise a factual dispute. See *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

In interpreting *Dresher*, this court recently stated:
"Pursuant to *Dresher* and [*State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 477], this court concludes that, when the defendant in an action is the moving party in a summary judgment exercise, it can carry its initial burden in one of two ways. First, the defendant can submit affirmative evidence, such as an affidavit, in relation to any or all elements of the plaintiff's claim. Second, the defendant can maintain that discovery has shown that the plaintiff will not be able to produce any evidence as to an element of his claim." *Gill v. PMC Indus., Inc.* (Dec. 20, 1996), Lake App. No. 95-L-143, unreported, at 8.

In this case, State Farm moved for summary judgment after the *Girgis* decision had been rendered. In addition to arguing that Betty Wollpert could not be an independent third party, State Farm asserted that appellants had failed to disclose the name of any other person who had seen the accident. In support of its assertion, State Farm attached to its motion the affidavit of a claims representative, who averred that appellants had not given any notice of such a third party.

Since the affidavit of the representative constituted some affirmative evidence on the "independent third-party" issue, State Farm satisfied its initial burden as the moving party in the summary judgment exercise. In addition, in responding to State Farm's motion, appellants not only failed to object to State

Farm's evidentiary materials, but also failed to refer to any other third party except Betty Wollpert. Accordingly, State Farm was entitled to summary judgment.

In relation to Cincinnati Insurance, our review of the record shows that it filed its summary judgment motion before the *Girgis* decision was rendered; accordingly, this motion never addressed the "independent third-party" issue. Following the issuance of *Girgis*, the trial court ordered appellants to respond to the motion. In following this order, appellants did not object to this procedure. Nor did appellants assert that they needed more time to conduct further discovery.

Technically, this court would agree that, once the new standard was pronounced in *Girgis*, the trial court should have required Cincinnati Insurance to revise its motion to address the new issue. However, given that appellants did not object to the order of the trial court, the record before us does not support the conclusion that appellants were prejudiced by the procedure. Appellants relied solely upon their argument that Betty Wollpert was an independent third party.

*7 Thus, any error is harmless and appellants' second assignment lacks merit.

Pursuant to our analysis under the first assignment, the judgment of the trial court is reversed as to the three claims of Bonnie Wollpert, Vickie Wollpert, and LouAnn Wollpert Hiser, and the case is hereby remanded for further proceedings consistent with this opinion. As to the claim of Betty Wollpert, the judgment of the trial court is affirmed.

NADER, and O'NEILL, JJ., concur.

Not Reported in N.E.2d, 1997 WL 401558 (Ohio App. 11 Dist.)

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