

IN THE SUPREME COURT OF OHIO

Fred L. Lager, Administrator of the Estate of Sara E. Lager, deceased,	:	Supreme Court Case Nos. 2007-1762 and 2007-1760
	:	
Appellee,	:	On Appeal from the
	:	Lucas County Court of Appeals,
vs.	:	Sixth Appellate District
	:	
Nationwide Mutual Fire Insurance Company,	:	Court of Appeals
	:	Case No. L-07-1022
	:	
Appellant.	:	
	:	

---

**MERIT BRIEF OF APPELLANT,  
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY**

---

Edward T. Mohler (0041557) (COUNSEL OF RECORD)  
420 Madison Avenue, Suite 650  
Toledo, Ohio 43604  
PH: 419-242-7488; FAX: 419-242-7783  
mohlere@nationwide.com

Joyce V. Kimbler (0033767)  
50 South Main Street, Suite 502  
Akron, Ohio 44308  
PH: 330-253-8877; FAX: 330-253-8875  
kimblej@nationwide.com

COUNSEL FOR APPELLANT,  
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

W. Randall Rock (0023231)  
32 North Main Street, Suite 911  
Dayton, OH 45402  
PH: 937-224-7625; FAX: 937-223-6967

COUNSEL FOR APPELLEE, FRED E. LAGER, ADMINISTRATOR  
OF THE ESTATE OF SARA E. LAGER, DECEASED

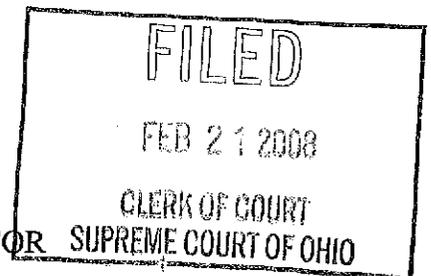


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF FACTS .....	1
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....	2
<b><u>Proposition of Law No. 1:</u></b> <b>In a claim for statutory wrongful death damages against a claimant’s uninsured/underinsured motorist coverage, ambiguity does not exist in the insurance contract when the policy grants coverage for damages sustained “because of bodily injury” and the other owned auto exclusion bars coverage for damages “for bodily injury” because there is no rational distinction between the phrases “for bodily injury” and “because of bodily injury”.....</b>	2
CONCLUSION.....	7
CERTIFICATE OF SERVICE .....	9
APPENDIX	<u>Appx. Page</u>
Notice of Appeal to the Ohio Supreme Court dated September 24, 2007 .....	1
Notice of Certified Conflict dated September 24, 2007 .....	4
Decision and Judgment Entry of the Lucas County Court of Appeals, Sixth Appellate District, Case No. L-07-1022, dated August 10, 2007 [attached as Appendix to Notice of Certified Conflict].....	22
Opinion and Journal Entry of the Lucas County Court of Common Pleas, Case No. CI 05-1322, dated April 13, 2006 .....	37
<b><u>STATUTES</u></b>	
R.C. 313.19 .....	43
R.C. 955.11(A)(4)(a)(iii).....	48
R.C. 4511.19(A)(2) .....	53

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>American Ins. Co. v. Naylor</i> , 103 Colo. 461, 87 P. 2d 260, 265.....	3-4
<i>Burriss v. Grange Mut. Cos.</i> (1989) 46 Ohio St. 3d 84, 89, 545 N.E.2d 83 .....	3
<i>Cincinnati Insurance v. Phillips</i> (1990), 52 Ohio St. 3d 162 .....	5
<i>Hall v. Nationwide Mut. Fire Ins. Co.</i> , 2006 Ohio 179 .....	6
<i>Karabin v. State Auto Mut. Ins. Co.</i> (1984), 10 Ohio St. 3d 163, 167, 462 N.E.2d 403 .....	3
<i>Kelly v. State Personnel Board of California</i> , 31 Ca. App 2d, 443, 88 P. 2d 264, 266 .....	4
<i>Kotlarczyk v. State Farm Mut. Auto. Ins. Co.</i> , 2004 Ohio 3447 at P. 61 .....	7
<i>Leber v. Smith</i> (1994), 70 Ohio St. 3d 548, 553, 639 N.E.2d 1159 .....	2
<i>Newsome v. Grange</i> (1993), Ohio App. LEXIS 1210 .....	5-6
<i>Perez v. Cleveland</i> , No. 96-108, Supreme Court of Ohio, 78 Ohio St. 3d 376; 1997 Ohio 33; 678 N.E.2d 537.....	4
<i>Schaefer v. Allstate Ins. Co.</i> (1996), 76 Ohio St. 3d 553, 668 N.E. 2d 913.....	5
<i>State vs. Anderson</i> , No. 89-2113, Supreme Court of Ohio, 57 Ohio St. 3d 168; 566 N.E.2d 1224.....	4
<i>State v. Tanner</i> , No. 84-443, Supreme Court of Ohio, at Ohio St. 3d 1; 472 N.E.2d 680.....	4
<i>Tomlinson v. Skolnik</i> (1989), 44 Ohio St. 3d 11, 540 N.E.2d 716.....	5
<i>Tuohy v. Taylor</i> , Case No. 4-06-23, Court of Appeals of Ohio, Third Appellate District, Defiance County, 2007 Ohio 3597; 2007 Ohio App. LEXIS 3305 .....	6, 7

TABLE OF AUTHORITIES (Cont'd.)

STATUTES

R.C. 313.19 .....	4
R.C. 955.11(A)(4)(a)(iii).....	4
R.C. 4511.19(A)(2).....	4

OTHER

American Heritage online dictionary.....	4-5
Black’s Law Dictionary, Sixth Edition, 1990, P. 644.....	3
Merriam-Webster Dictionary of Law, 1996 .....	4

## STATEMENT OF FACTS

Sara E. Lager died from injuries sustained in a 2003 collision while a passenger in her own vehicle, a 1992 Chevrolet Camaro. The Camaro was insured by Appellant, Nationwide Mutual Fire Insurance Company. Sara's policy of insurance had uninsured/underinsured motorist coverage in the amount of \$50,000 per person/\$100,000 per occurrence. However, this cause of action is not brought under Sara's contract of insurance with Appellant, Nationwide Mutual Fire Insurance Company. Sara's parents, Fred and Cathy Lager, were also insured by Appellant, Nationwide Mutual Fire Insurance Company, under a separate policy of insurance. This policy, numbered 91 34 C 362444, issued to Frederick L. and Cathy R. Lager, provided uninsured/underinsured motorist coverage in the amount of \$300,000 per person/\$300,000 per occurrence.

Fred and Cathy Lager seek to present a claim for the wrongful death of their daughter, Sara, under their own policy of insurance.

The policy of insurance issued to Fred and Cathy Lager provides in pertinent part:

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

1. ownership;
2. maintenance; or
3. use

of the uninsured motor vehicle.

(Page U1 of Defendant's Exhibit CC, a certified copy of the policy.)

However, after this general description of coverage, the policy goes on to provide an exclusion for situations in which any insured is in a vehicle owned by the insured but not insured under this particular policy of insurance.

A. This coverage does not apply to anyone for bodily injury or derivative claims:

3. While any insured operates or occupies a motor vehicle:

- a) owned by;
- b) furnished to; or
- c) available for regular use of:

you or a relative, but not insured for Auto Liability coverage under this policy. Policy does not apply if any insured is hit by any such motor vehicle. (Page U2 and U3 of Defendant's Exhibit CC, a certified copy of the policy.)

It is uncontroverted that the vehicle being operated by Sara Lager was owned by her and not insured for Auto Liability coverage under the policy issued to Fred and Cathy Lager.

#### ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

##### Proposition of Law No. 1:

**In a claim for statutory wrongful death damages against a claimant's uninsured/underinsured motorist coverage, ambiguity does not exist in the insurance contract when the policy grants coverage for damages sustained "because of bodily injury" and the other owned auto exclusion bars coverage for damages "for bodily injury" because there is no rational distinction between the phrases "for bodily injury" and "because of bodily injury".**

It is well-settled that the interpretation of an insurance contract involves a question of law. *Leber v. Smith* (1994), 70 Ohio St. 3d 548, 553, 639 N.E.2d 1159. The Supreme Court of Ohio has stated that: "the fundamental goal in insurance policy

interpretation is to ascertain the intent of the parties from a reading of the contract in its entirety, and to settle upon a reasonable interpretation of any disputed terms in a manner calculated to give the agreement its intended effect.” *Burris v. Grange Mut. Cos.* (1989), 46 Ohio St. 3d 84, 89, 545 N.E.2d 83. In so doing, “The meaning of a contract is to be gathered from a consideration of all its parts, and no provision is to be wholly disregarded as inconsistent with other provisions unless no other reasonable construction is possible.” *Id.*, quoting *Karabin v. State Auto Mut. Ins. Co.* (1984), 10 Ohio St. 3d 163, 167, 462 N.E.2d 403.

In construing the policy’s meaning, “the words in a policy must be given their plain and ordinary meaning, and only where a contract of insurance is ambiguous and therefore susceptible to more than one meaning must the policy language be liberally construed in favor of the claimant who seeks coverage. Nevertheless, it is axiomatic that the general rule of liberal construction cannot be employed to create an ambiguity where there is none.” *Burris*, *supra*.

Therefore, the first step which must be undertaken is to determine the plain and ordinary meaning of both phrases. Both “for bodily injury” and “because of bodily injury” are prepositional phrases. Prepositions are the subtlest and most useful words in the language for compressing a clear meaning into few words. Each preposition has its proper and general meaning, which, by frequent and exacting use, has expanded and divided into a variety of meanings more or less close to the original one.

According to Black’s Law Dictionary, Sixth Edition, 1990, P. 644, “for” means: “By reason of; with respect to; for benefit of; for use of; in consideration of; the cause, motive or occasion of an act, state or condition.” *American Ins. Co. v. Naylor*, 103 Colo

461, 87 P. 2d 260, 265. Used in sense of “because of”, “on account of” or “in consequence of”, *Kelly v. State Personnel Board of California*, 31 Ca. App 2d. 443, 88 P. 2d 264, 266, by means of or growing out of.” According to the Merriam-Webster Dictionary of Law, 1996, “for” means: 1. because of < a statute void for vagueness. The term “void for vagueness” meaning “void because of vagueness” is a common term used in the law. In fact, it has been used by the Ohio Supreme Court in that sense, and in that meaning, in multiple cases: *State v. Tanner*, No. 84-443, Supreme Court of Ohio, 15 Ohio St. 3d 1; 472 N.E.2d 689, Syllabus of the Court: R.C. 4511.19(A)(2) is constitutional; it is not void for vagueness, not overbroad, and does not create an unconstitutional presumption; *State v. Anderson*, No. 89-2113, Supreme Court of Ohio, 57 Ohio St. 3d 168; 566 N.E.2d 1224, Syllabus of the Court: R.C. 955.11(A)(4)(a)(iii), which provides that the ownership of a dog “commonly known as a pit bull dog” is prima facie evidence of the ownership of a vicious dog, is not unconstitutionally void for vagueness since dogs commonly known as pit bulls possess unique and readily identifiable physical and behavioral traits which are capable of recognition both by dog owners of ordinary intelligence and by enforcement personnel. *Perez v. Cleveland*, No. 96-108, Supreme Court of Ohio, 78 Ohio St. 3d 376; 1997 Ohio 33; 678 N.E.2d 537, Syllabus of the Court #2: R.C. 313.19 is not void for vagueness due to its lack of specificity regarding the procedure for challenging a coroner's verdict. A plain and ordinary reading of this sentence provides the unambiguous meaning of the court: the statute is not void because of vagueness.

As the plain and ordinary meaning of “for” encompasses “because of”, it is clear that the two phrases may be used interchangeably. According to the American Heritage

online dictionary, “because of” is a preposition meaning on account of; by reason of. Hence the phrase “the statute is void for vagueness” could also be read “the statute is void because of, by reason of, or on account of, vagueness”.

This is consistent with the Ohio Supreme Court’s decision in *Tomlinson v. Skolnik* (1989), 44 Ohio St. 3d 11, 540 N.E.2d 716 overruled on other grounds by *Schaefer v. Allstate Ins. Co.* (1996), 76 Ohio St. 3d 553, 668 N.E. 2d 913, interpreting the phrase “damages for bodily injury” to mean damages “arising out of” or “because of” bodily injury. *Id.* at 15.

The Supreme Court consistently both used the preposition “for” to mean “because of”, and interpreted the preposition “for” to mean “because of”.

Thereafter, former Supreme Court Justice Brown arbitrarily reasoned in a concurring opinion in *Cincinnati Insurance v. Phillips* (1990), 52 Ohio St. 3d 162:

The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident. \* \* \*

These words should be given their plain meaning. The limit applies only to “damages for bodily injury.” Claims for wrongful death (and loss of consortium) are not claims “for bodily injury” although they may be claims arising out of bodily injury. Thus, the limit does not apply.

First, it must be noted that this comment is not contained in the syllabus of the case and thus does not state the law in the State of Ohio. It is mere dicta. Second, both Justices Wright and Holmes in their dissents, examining the same language, found no ambiguity. Justices Sweeny, Douglas, Resnick and Moyer are silent on the issue of ambiguity in the language.

This comment of Justice Brown, which led to *Newsome v. Grange* (1993), Ohio

App. LEXIS 1210 and *Hall v. Nationwide Mut. Fire Ins. Co.*, 2006 Ohio 179 and their progeny, needs to be re-examined to determine if it has been given undue significance. Significantly, in none of these decisions in which it is summarily stated that an ambiguity exists, did anyone ever go back and check the dictionary for the plain and ordinary meaning of the words or compare the use of the word “for” as a preposition in like sentences. Instead, in these cases, judicial gloss was applied to the phrases to create an ambiguity to allow the person interpreting the phrase to come to their own conclusion.

Research shows there is no rational distinction between the terms “for bodily injury” and “because of bodily injury” as those terms are used in the policy of insurance. For the Court to use the prepositions “for” and “because of” interchangeable and then determine that they are not interchangeable when a contract of insurance uses the terms interchangeable is arbitrary and capricious. The contract of insurance does not contain any ambiguity and the terms of the policy should be given their plain and unambiguous meaning.

A better analysis is found in *Tuohy v. Taylor*, Case No. 4-06-23, Court of Appeals of Ohio, Third Appellate District, Defiance County, 2007 Ohio 3597; 2007 Ohio App. LEXIS 3305. In *Tuohy*, supra, the Westfield policy provided uninsured motorist coverage:

#### **UNDERINSURED MOTORISTS COVERAGE**

We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle **because of bodily injury**: (emphasis added) but then went on to preclude coverage in certain situations:

We do not provide Uninsured Motorists Coverage or Underinsured Motorists Coverage **for bodily injury** sustained by an insured while operating, occupying, or when struck by, any motor vehicle owned by or furnished or available for the regular use of you or any family

member which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle. (emphasis added)

Plaintiff in *Tuohy*, supra, argued that the use of “because of bodily injury” in the grant of coverage while using the phrase “for bodily injury” in the exclusion created an ambiguity.

The Tenth District Court of Appeals concluded: “We have carefully reviewed the terms of the insurance policy at issue. Like Judge Lanzinger in *Kotlarczyk*<sup>1</sup>, we find the language of the ‘other owned auto’ exclusion is plain. The exclusion clearly indicates that the parties intended the policy to limit coverage to the vehicles specifically covered under the insurance policy”.

While it is true that various courts at various times come to other conclusions, the time has come to end this error. As noted by the court in *Tuohy*, supra, all that currently exists is non-precedential authority. However, this non-precedential authority has taken over the rationale in this area without sufficient analysis to determine if it is grammatically correct.

#### CONCLUSION

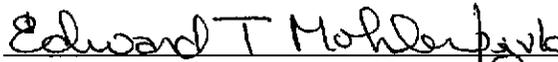
Wherefore, Appellant, Nationwide Mutual Fire Insurance Company, moves this Court for an ORDER granting Nationwide’s appeal in this matter. In particular, Nationwide asks this Court to determine that there is no rational distinction between the terms “for bodily injury” and “because of bodily injury” as those terms are used in the applicable Nationwide policy of insurance. Appellant Nationwide also asks this Court to determine that the applicable Nationwide contract of insurance does not contain any

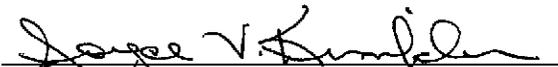
---

<sup>1</sup> *Kotlarczyk v. State Farm Mutual Aut. Ins. Co.*, 6th Dist. No. L-03-1103, 2004 Ohio 3447

ambiguity and the terms of the policy should be given in plain and unambiguous meaning. Consequently, Appellant, Nationwide Mutual Fire Insurance Company, requests this Court to reverse the decision of the Trial Court rendered in its OPINION AND JOURNAL ENTRY of April 13, 2006.

Respectfully submitted,

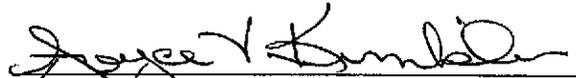
  
Edward T. Mohler, #0041557 | 0033767  
420 Madison Avenue, Suite 650  
Toledo, Ohio 43604  
PH: 419-242-7488  
FAX: 419-242-7783  
E-mail: mohlere@nationwide.com

  
Joyce V. Kimbler, #0033767  
50 South Main Street - Suite 502  
Akron, OH 44308  
PH: (330) 253-8877  
FAX: (330) 253-8875  
E-mail: kimblej@nationwide.com

ATTORNEYS FOR APPELLANT,  
NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY

CERTIFICATE OF SERVICE

I certify that a copy of this Appellant, Nationwide Mutual Fire Insurance Company's Brief, was sent by ordinary U.S. mail to W. Randall Rock, Attorney for Appellee, Fred L. Lager, Administrator of the Estate of Sara E. Lager, Deceased, 32 N. Main Street, Suite 911, Dayton, Ohio 45402, on this 20<sup>th</sup> day of February, 2008.

  
Joyce V. Kimbler, #0033767

ONE OF THE ATTORNEYS FOR  
APPELLANT, NATIONWIDE MUTUAL  
FIRE INSURANCE COMPANY

# **APPENDIX**

IN THE SUPREME COURT OF OHIO

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

Appellee,

vs.

Nationwide Mutual Fire  
Insurance Company,

Appellant

Supreme Court Case  
No. 07-1760

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

Court of Appeals  
Case No. L-07-1022

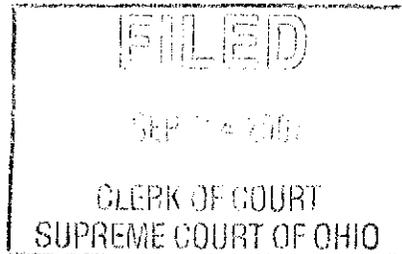
---

**NOTICE OF APPEAL OF APPELLANT,  
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY**

---

Edward T. Mohler (0041557) (COUNSEL OF RECORD)  
420 Madison Avenue, Suite 650  
Toledo, Ohio 43604  
PH: 419-242-7488; FAX: 419-242-7783  
mohlere@nationwide.com

Joyce V. Kimbler (0033767)  
50 South Main Street, Suite 502  
Akron, Ohio 44308  
PH: 330-253-8877; FAX: 330-253-8875  
kimblej@nationwide.com



COUNSEL FOR APPELLANT, NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY

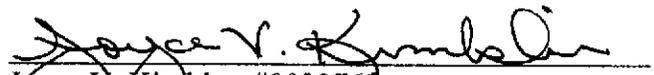
W. Randall Rock (0023231)  
32 North Main Street, Suite 911  
Dayton, OH 45402  
PH: 937-224-7625; FAX: 937-223-6967

COUNSEL FOR APPELLEE, FRED E. LAGER, ADMINISTRATOR  
OF THE ESTATE OF SARA E. LAGER, DECEASED

NOTICE OF APPEAL OF APPELLANT,  
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

Appellant, Nationwide Mutual Fire Insurance Company, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. L-07-1022 on August 10, 2007. This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



Joyce V. Kimbler, #0033767

Attorney for Appellant,

Nationwide Mutual Fire Insurance Company

50 S. Main Street, Suite 502

Akron, Ohio 44308

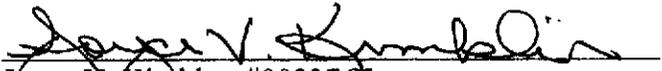
Phone: 330/253-8877

Fax: 330/253-8875

E-Mail: [kimblej@nationwide.com](mailto:kimblej@nationwide.com)

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to W. Randall Rock, Attorney for Appellee, Fred L. Lager, Administrator of the Estate of Sara E. Lager, Deceased, 32 N. Main Street, Suite 911, Dayton, Ohio 45402, on this 21st day of September, 2007.

  
Joyce V. Kimbler, #0033767  
Attorney for Appellant,  
Nationwide Mutual Fire Insurance Company

IN THE SUPREME COURT OF OHIO

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

Appellee,

vs.

Nationwide Mutual Fire  
Insurance Company,

Appellant.

Supreme Court Case,  
No. \_\_\_\_\_

**07-1762**

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

Court of Appeals  
Case No. L-07-1022

---

**NOTICE OF CERTIFIED CONFLICT**

---

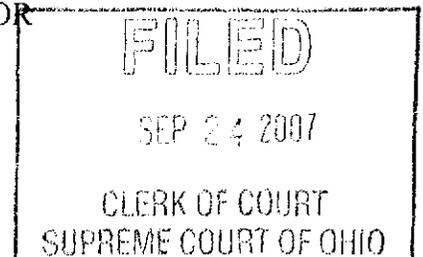
Edward T. Mohler (0041557) (COUNSEL OF RECORD)  
420 Madison Avenue, Suite 650  
Toledo, Ohio 43604  
PH: 419-242-7488; FAX: 419-242-7783  
[mohlere@nationwide.com](mailto:mohlere@nationwide.com)

Joyce V. Kimbler (0033767)  
50 South Main Street, Suite 502  
Akron, Ohio 44308  
PH: 330-253-8877; FAX: 330-253-8875  
[kimblej@nationwide.com](mailto:kimblej@nationwide.com)

COUNSEL FOR APPELLANT, NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY

W. Randall Rock (0023231)  
32 North Main Street, Suite 911  
Dayton, OH 45402  
PH: 937-224-7625; FAX: 937-223-6967

COUNSEL FOR APPELLEE, FRED E. LAGER, ADMINISTRATOR  
OF THE ESTATE OF SARA E. LAGER, DECEASED



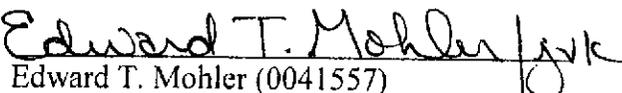
Now comes the Appellant, Nationwide Mutual Fire Insurance Company, by and through counsel, pursuant to S. Ct. Prac. R. IV, Section 1, and hereby gives notice of an order of the Sixth Appellate District Court of Appeals for Lucas County, Ohio certifying a conflict.

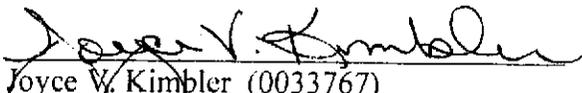
Attached hereto are copies of the applicable decisions:

1. OPINION issued by the Court of Appeals, Third Appellate District, Defiance County on July 16, 2007 in *Tuohy v. Taylor*.
2. DECISION AND JUDGMENT ENTRY of August 10, 2007 by the Court of Appeals of Ohio, Sixth Appellate District, Lucas County in *Lager v. Nationwide*.
3. DECISION AND JUDGMENT ENTRY of August 10, 2007 by the Court of Appeals of Ohio, Sixth Appellate District, Lucas County in *Lager v. Nationwide* certifying the record to the Supreme Court of Ohio for review and final determination.

Appellant, Nationwide Mutual Fire Insurance Company, requests that this Court determine that a conflict exists between the Sixth Appellate District and Third Appellate District and issue an order finding a conflict, identifying those issues raised in this case that will be considered by the Supreme Court on appeal, and ordering those issues to be briefed. (S. Ct. Prac. R. IV, Section 2.)

Respectfully submitted,

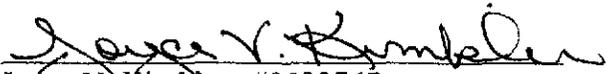
  
Edward T. Mohler (0041557)

  
Joyce V. Kimbler (0033767)

Attorneys for Appellant,  
Nationwide Mutual Fire Insurance Company

Certificate of Service

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail to W. Randall Rock, Attorney for Appellee, Fred L. Lager, Administrator of the Estate of Sara E. Lager, Deceased, 32 N. Main Street, Suite 911, Dayton, Ohio 45402, on this 21st day of September, 2007.

  
Joyce V. Kimbler, #0033767

One of the Attorneys for Appellant,  
Nationwide Mutual Fire Insurance Company

COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
DEFIANCE COUNTY

ALVA V. TUOHY, EXECUTOR OF THE  
ESTATE OF SAMUEL V. TUOHY,  
DECEASED, ET AL.,

PLAINTIFFS-APPELLANTS,

CASE NO. 4-06-23

v.

CATRENA R. TAYLOR, ET AL.,

OPINION

DEFENDANTS-APPELLEES.

---

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas  
Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: July 16, 2007

---

ATTORNEYS:

JOSEPH W. O'NEIL  
Attorney at Law  
Reg. #0002414  
Jennifer N. Brown  
Reg. #0073696  
901 Ralston Avenue  
P.O. Box 781  
Defiance, OH 43512  
For Appellants.

JOHN M. LIMING  
Attorney at Law  
Reg. #0008159

P.O. Box 787  
Defiance, OH 43512  
For Appellee, Catrena Taylor.

ROBERT J. BAHRET  
Attorney at Law  
Reg. #0014985  
Keith J. Watkins  
Attorney at Law  
Reg. #0021888  
7050 Spring Meadows West  
Holland, OH 43528  
For Appellee, Westfield Companies.

**PRESTON, J.**

{¶1} Plaintiffs-appellants, Alva and Melinda Tuohy, individually, and Alva Tuohy, as executor of Sam Tuohy's estate (collectively referred to as "appellants"), appeal the judgment of the Defiance County Court of Common Pleas, which granted summary judgment in favor of defendant-appellee Westfield Companies ("Westfield") and denied the appellants' cross-motion for summary judgment. For the reasons that follow, we affirm.

{¶2} On October 27, 2003, Sam Tuohy was killed in an automobile accident when his vehicle was struck by a vehicle driven by Catrena Taylor. At the time of the accident, Sam was driving a Chevrolet Blazer titled in his own name. Sam's parents, Alva and Melinda Tuohy, held an insurance policy with Westfield that included a \$300,000 uninsured/underinsured (UM/UTM) motorist

coverage. It is undisputed that Alva and Melinda's insurance policy did not list the Chevrolet Blazer as a covered automobile.

{¶3} On October 17, 2005, the executor of Sam's estate, Alva, filed a complaint against Taylor and Westfield. In regards to Westfield, the estate sought recovery under Alva and Melinda's UM/UIM policy. Westfield moved for summary judgment, denying coverage. The estate then filed a motion for summary judgment against Westfield, as well as a motion for summary judgment against Taylor on the issue of liability.<sup>1</sup>

{¶4} On February 22, 2006, Alva and Melinda, acting in their individual capacities, filed a motion to intervene in the case. The trial court granted their motion. In doing so, the trial court found that Westfield's motion for summary judgment also applied to Alva and Melinda.

{¶5} On May 12, 2006, the trial court granted summary judgment in favor of Westfield and denied the appellants' motion for summary judgment. The appellants now appeal the trial court's decision to this court.

{¶6} Before addressing the merits of this case, we must first address a procedural issue. In their brief, the appellants failed to state a specific assignment

---

<sup>1</sup> The complaint alleged that Taylor had an insurance policy with a \$50,000 limit. The trial court granted summary judgment in favor of appellants and against Taylor on the issue of liability. Taylor is not a party to this appeal, and the trial court's decision in favor of appellants and against Taylor on the issue of liability is not at issue in the present appeal.

of error as required under App.R. 16(A)(3). Instead, the appellants included an "issue presented". The appellants filed a motion for leave to clarify the assignment of error, but this court denied the motion.

{¶7} "An appellate court must determine an appeal based on the 'assignments of error set forth in the briefs.'" *Countrymark Cooperative, Inc. v. Smith* (1997), 124 Ohio App.3d 159, 163, 705 N.E.2d 738, citing App.R. 12(A)(1)(b). In the interests of justice, this court will rephrase the "issue presented" as the following assignment of error:

#### ASSIGNMENT OF ERROR NO. I

**The trial court erred when it granted Westfield's motion for summary judgment and denied the appellants' motion for summary judgment.**

{¶8} The appellants argue that the trial court erred when it granted summary judgment in favor of Westfield, and denied their motion for summary judgment because the Westfield insurance policy provided UM/UIM coverage. Westfield counters by arguing that the "other owned auto" exclusion in the insurance policy applies and excludes coverage.

{¶9} The trial court's grant of summary judgment is reviewed under a de novo standard. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is appropriate where "(1.) there is no

genuine issue of material fact; (2.) the moving party is entitled to judgment as a matter of law; and (3.) it appears from the evidence that reasonable minds can come to but one conclusion when viewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party.” *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241, citing *State ex. rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 219, 631 N.E.2d 150; Civ. R. 56(C).

{¶10} Neither party disputes the facts surrounding the accident that tragically killed Sam. The parties also do not dispute that the UM/UIM statute permits insurers to limit underinsured motorist coverage. Rather, the question before this court is whether the insurance policy specifically excludes coverage for the appellants’ claims.

{¶11} According to the appellants, the “other owned auto” exclusion in the Westfield insurance policy does not preclude their claims. The appellants assert that a wrongful death action is an independent cause of action and that, even if the claims of Sam’s estate are excluded from the coverage, that exclusion does not impair Alva and Melinda’s wrongful death claims. The appellants also assert: the coverage section of the insurance policy provided coverage “because of bodily injury,” while the policy exclusion only excluded coverage “for bodily injury”; wrongful death claims are “because of bodily injury” rather than “for bodily

injury”; and the wrongful death claims are not excluded under the language of the insurance policy.

{¶12} By contrast, Westfield maintains that the coverage is excluded under the “other owned auto” exclusion because: Sam was driving a vehicle titled in his own name when the accident occurred; and the vehicle was not listed under the insurance policy.<sup>2</sup>

{¶13} “[A]n insurance policy is a contract between the insurer and the insured.” *McDaniel v. Rollins*, 3d Dist. No. 1-04-82, 2005-Ohio-3079 at ¶31, citing *Wilson v. Smith*, 9th Dist. No. 22193, 2005-Ohio-337 at ¶9, citations omitted. The court must interpret the language in the insurance policy under its plain and ordinary meaning. *Id.* citing *Wilson*, 2005-Ohio-337, at ¶9, citations omitted. When the contract is clear and unambiguous, the court “may look no further than the four corners of the insurance policy to find the intent of the parties.” *Id.* citations omitted. An ambiguity exists “only when a provision in a policy is susceptible of more than one reasonable interpretation.” *Hacker v. Dickman* (1996), 75 Ohio St.3d 118, 119-120, 1996-Ohio-98, 661 N.E.2d 1005.

{¶14} When the insurance contract is ambiguous, the court “may consider extrinsic evidence to ascertain the parties’ intention.” *McDaniel* at ¶33, citing

---

<sup>2</sup> In their reply brief, the appellants argue that Westfield asserted an argument in its brief which had not been argued before the trial court. According to the appellants, Westfield argues that “only claims occurring in the listed covered autos provide insurance coverage for the wrongful death”, however, the only argument before the trial court was the “other owned auto” exclusion. We disagree with the appellants’

*Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, at ¶12. Ambiguities in an insurance policy must be interpreted against the insurer and in favor of coverage for the insured. *Id.*, citations omitted. However, “[i]t is axiomatic that this rule cannot be employed to create ambiguity where there is none.” *Hacker*, 75 Ohio St.3d at 119-120, 661 N.E.2d 1005.

{¶15} Courts have found that an “other owned auto” exclusion in a UM/UM policy may preclude coverage for *bodily injuries*. See *Blair v. Cincinnati Insurance Company*, 63 Ohio App.3d 81, 2005-Ohio-4323, 836 N.E.2d 607; *Bailey v. Progressive Ins. Co.*, 6th Dist. No. H-03-043, 2004-Ohio-4853. In addition, courts have held that “other owned auto” exclusions may in some instances preclude coverage for wrongful death claims in the context of *commercial auto policies*. See *Yoder v. Progressive Corp.*, 11th Dist. No. 2005-G-2633, 2006-Ohio-5191; See also *Geren v. Westfield Ins. Co.*, 6th Dist. No. L-01-1398, 2002-Ohio-1230 (“other owned vehicle exclusion” precluded coverage under commercial auto policy for bodily injury).

{¶16} In *Kotlarczyk v. State Farm Mutual Aut. Ins. Co.*, 6th Dist. No. L-03-1103, 2004-Ohio-3447, at ¶29, the Sixth District Court of Appeals found that the “other owned auto” exclusion in the insurance policy did not preclude a mother’s claim under the mother’s insurance policy as a result of her daughter’s wrongful

---

contention that a new argument was presented. Westfield’s argument, before the trial court and this court, is that the “other owned auto” exclusion limits coverage to vehicles listed in the policy.

death. In that case, Michelle Kotlarczyk was killed in an automobile accident while operating a vehicle that she owned but which was not listed in her mother's insurance policy. Id. at ¶¶6, 62. Michelle was an insured under her mother's insurance policy because she resided with her mother. Id. at ¶62. The "other owned auto" exclusion in that case provided that: " 'THERE IS NO COVERAGE: \* \* \* (2) FOR BODILY INJURY TO AN INSURED: (a) WHILE OPERATING OR OCCUPYING A MOTOR VEHICLE OWNED OR LEASED BY, FURNISHED TO, OR AVAILABLE FOR THE REGULAR USE OF YOU, YOUR SPOUSE, OR ANY RELATIVE IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY.'" Id. at ¶60.

{¶17} In her dissent, Judge Lanzinger found that the " 'other owned auto' exclusion [was] plain" and that "the stated intent [was] to limit coverage to vehicles specifically identified to the policy." Id. at ¶61, (Lanzinger, J. dissenting.) We find Judge Lanzinger's interpretation of the "other owned auto" exclusion to be persuasive here.

{¶18} In this case, the insurance policy provides:

**UNDERINSURED MOTORISTS COVERAGE**

We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an *underinsured motor vehicle* because of bodily injury:

1. Sustained by an insured; and
2. Caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the *underinsured motor vehicle*.

\* \* \*

(emphasis in original.) Significantly, the policy also includes an "other owned auto" exclusion, which states:

We do not provide Uninsured Motorists Coverage or Underinsured Motorists Coverage for *bodily injury* sustained by an *insured* while operating, *occupying*, or when struck by, any motor vehicle owned by or furnished or available for the regular use of you or any *family member* which is not insured for this coverage under this policy. This includes a *trailer* of any type used with that vehicle.

(emphasis in original). The policy defines bodily injury as "bodily harm, sickness or diseases, including required care, loss of services and death resulting therefrom."

{¶19} We have carefully reviewed the terms of the insurance policy at issue. And, like Judge Lanzinger in *Kotlarczyk*, we find the language of the "other owned auto" exclusion is plain. The exclusion clearly indicates that the parties intended the policy to limit coverage to the vehicles specifically covered under the insurance policy.

{¶20} At the time of the accident, Sam Tuohy was driving a Chevrolet Blazer and he was listed as the title owner of the Chevrolet Blazer. Alva and Melinda's insurance policy did not list the Chevrolet Blazer as a covered automobile. In fact, Alva and Melinda's insurance policy listed only two vehicles

as covered vehicles under the insurance policy; a 2001 Pontiac Bonneville; and a 1979 Holiday Rambler. Since the Chevrolet Blazer was not listed as a covered vehicle under the policy and it was titled in Sam's name, the "other owned auto" exclusion applies. Thus, the insurance policy in this case excludes coverage for the appellants' claims.

{¶21} Nevertheless, the appellants argue that the language "because of bodily injury" listed in the coverage portion of the insurance policy, and "for bodily injury" used in the "other owned auto" exclusion creates an ambiguity. As a basis for this argument, the appellants point to the Tenth Appellate District's decisions in *Hall v. Nationwide Mutual Fire Insurance*, 10th Dist. No. 05AP-305, 2005-Ohio-4572; *Leonhard v. Motorists Mut. Ins. Co.* (March 3, 1994), 10th Dist. No. 93AP-449; *Newsome v. Grange Mutual Casualty Company* (February 23, 1993), 10th Dist. No. 92AP-1172.

{¶22} In *Hall*, Christopher Hall died as the result of an automobile accident which occurred while Hall was driving a vehicle not insured by the insurance company. *Hall*, 2005-Ohio-4572, at ¶¶2, 4. The Tenth District found that the insurance policy was ambiguous when the phrase "because of bodily injury" was included in the coverage section, but "for bodily injury" was included in the policy exclusions. *Id.* at ¶¶13-18; *Leonhard*, 10th Dist. No. 93AP-449; *Newsome*, 10th Dist. No. 92AP-1172. The court held that the phrase "for bodily injury" did not

include an insured's wrongful death claims. Id. at ¶14, citing *Leonhard*, 10th Dist.

No. 93AP-449. In addition, the Tenth District has stated:

**\* \* \* According to appellant, the clear and unambiguous meaning of "for bodily injury" is the same as "because of bodily injury." We do not agree that this is a clear and unambiguous matter. In all situations, the modifying language "for" and "because of" cannot be interchanged without altering the meaning of the concomitant language. In its own policy, appellant has not been consistent with its choice of language. In the uninsured motorist coverage section, it used language "because of bodily injury" while in the exclusion portion of the policy, it used "for bodily injury."**

*Newsome* (February 23, 1993), 10th Dist. No. 92AP-1172 at \*3; *Hall*, 2005-Ohio-4572, at ¶13, citing *Newsome*.

{¶23} We disagree with the foregoing, non-precedential authority. As previously noted, an ambiguity exists "only when a provision in a policy is susceptible of more than one reasonable interpretation." *Hacker*, 75 Ohio St.3d 118, 119-120. We acknowledge that the insurance policy at issue includes "because of bodily injury" in the coverage section and "for bodily injury" in the policies exclusion. However we do not believe that the language in the policy is in any way ambiguous. The insurance policy at issue defines bodily injury as "bodily harm, sickness, or diseases, including required care, loss of services and death resulting therefrom." Because the definition includes "death resulting therefrom," there is no rational distinction between the phrases "for bodily injury" and "because of bodily injury." The exclusionary language used in the "other auto

exclusion" can only reasonably be interpreted as limiting coverage to vehicles specifically covered under the insurance policy.

{¶24} In short, we hold that the "other owned auto" exclusion listed in the Westfield insurance policy clearly and unambiguously precluded coverage of both Alva and Melinda's claims, individually, and the claim's of Sam's estate. Accordingly, we hold that the trial court did not err in granting summary judgment to Westfield and in denying the appellants' motion for summary judgment.

{¶25} Having found no error prejudicial to appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

*Judgment Affirmed.*

**ROGERS, P.J., concurs.**

**WILLAMOWSKI, J, dissenting.**

{¶26} **WILLAMOWSKI, J. dissents.** I must respectfully dissent from the majority's holding. This case asks us to determine whether the Tuohys are entitled to recover damages for the wrongful death of their son under the UM/UIM portion of their insurance policy issued by Westfield. The Tuohys' policy provides UM/UIM coverage to an "insured \* \* \* because of bodily injury." The policy defines "insured" as "you or any family member," and "bodily injury" is defined to include death. The decedent was the Tuohys' son, who was living in their home at the time he was killed in an automobile collision. Therefore, the decedent was

an "insured" by definition. However, the policy contained an exclusion, which stated:

**We do not provide Uninsured Motorist Coverage or Underinsured Motorist Coverage for bodily injury sustained by an insured while operating, occupying, or when struck, by any motor vehicle owned by \* \* \* you or any family member which is not insured for this coverage under this policy.**

{¶27} Sam, an "insured," was killed while operating his Chevrolet Blazer, which was titled in his name and not a "covered vehicle" on the Tuohys' policy with Westfield. The majority's holding finds the coverage language and the exception language to be clear and unambiguous in preventing both the estate and the Tuohys from recovering based on their separate and independent claims. However, I disagree and would follow the law established by other appellate districts in holding that the coverage language "because of bodily injury" is ambiguous when read in pari materia with the exclusion, which precludes coverage "for bodily injury." I agree with the other appellate courts that the phrase "because of bodily injury" is not synonymous with the phrase "for bodily injury." The phrase "because of bodily injury" is more broad than the phrase "for bodily injury" and would allow an insured to recover for the wrongful death of another "insured" under the policy. *Brunn v. Motorists Mut. Ins. Co.*, 5<sup>th</sup> Dist. 2005 CA 022, 2006-Ohio-33; *Hall v. Nationwide Mut. Fire Ins. Co.*, 10<sup>th</sup> Dist. No. 05AP-305, 2005-Ohio-4572; *Aldrich v. Pacific Indemn. Co.*, 7<sup>th</sup> Dist. No. 02 CO

Case No. 4-06-23

54, 2004-Ohio-1546; *Kotlarczyk v. State Farm Mut. Auto. Ins. Co.*, 6<sup>th</sup> Dist. No. L-03-1103, 2004-Ohio-3447; *Leonhard v. Motorists Mut. Ins. Co.* (Mar. 3, 1994), 10<sup>th</sup> Dist. No. 93AP-449; *Newsome v. Grange Mut. Cas. Co.* (Feb. 23, 1993), 10<sup>th</sup> Dist. No. 92AP-1172.

{¶28} Because we must construe ambiguous terms in an insurance contract strictly against the insurer, I would reverse the trial court's decision and remand this matter for additional proceedings.

r

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO  
DEFIANCE COUNTY

ALVA V. TUOHY, EXECUTOR OF THE ESTATE OF SAMUEL V. TUOHY,  
DECEASED, ET AL.,

CASE NUMBER 4-06-23

JOURNAL

PLAINTIFFS-APPELLANTS,

FILED  
ENTRY IN COURT OF APPEALS  
DEFIANCE COUNTY, OHIO

v.

JUL 16 2007

CATRENA R. TAYLOR, ET AL.,

DEFENDANTS-APPELLEES.

*Jan Ziegler*  
CLERK OF COURTS

For the reasons stated in the opinion of this Court rendered herein, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs to appellants for which judgment is rendered and the cause is remanded to that court for execution.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

*Vernon Z Burton*  
*[Signature]*  
(Willamowski, J., dissenting)

JUDGES

DATED: July 16, 2007

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

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

Appellee

v.

Ryan Miller-Gonzalez, et al.

Defendants

and

Nationwide Mutual Fire Insurance Co.

Appellant

Court of Appeals No. L-07-1022

Trial Court No. CI05-1322

**DECISION AND JUDGMENT ENTRY**

Decided: August 10, 2007

\* \* \* \* \*

W. Randall Rock, for appellee.

Edward T. Mohler, for appellant.

\* \* \* \* \*

SINGER, J.

{¶ 1} Appellant brings this accelerated appeal from a summary judgment awarded to a claimant for underinsured motorist coverage by the Lucas County Court of Common Pleas.

1.

{¶ 2} Sara E. Lager died from injuries she sustained in a 2003 collision while a passenger in her own car. The accident was caused by the negligence of the driver of Sara's car, Ryan Miller-Gonzalez.

{¶ 3} At the time of the accident, Sara Lager was insured by an auto policy issued by Nationwide Property and Casualty Co. with uninsured/underinsured motorist ("UM/UIM") limits of \$50,000 per person/\$100,000 per occurrence. At the same time her parents, Fred and Cathy Lager, were insured by an auto policy issued by appellant, Nationwide Mutual Fire Insurance Co. This policy provided \$300,000 per person/\$300,000 per occurrence UM/UIM coverage for the Lagers or a "relative."

{¶ 4} On January 21, 2005, appellee, Fred L. Lager as administrator of the estate of Sara E. Lager, brought a wrongful death and survivorship suit against Miller-Gonzalez and sought a declaration of UM/UIM coverage under the policies issued by Nationwide Property and Casualty Co. and appellant. Nationwide Property eventually agreed to pay its policy limits as UIM coverage and was dismissed as a defendant.<sup>1</sup>

{¶ 5} On February 2, 2006, appellant moved for summary judgment, arguing that by the terms of its policy issued to Fred and Cathy Lager, UM/UIM coverage for Sara Lager was excluded by an "other owned auto" exclusion because her vehicle was not listed as an insured vehicle on her parent's policy. Moreover, appellant asserted,

---

<sup>1</sup>Appellant represents that Miller-Gonzalez was also dismissed from the case, but we find no dismissal in the record. This is nonetheless immaterial as the judgment appealed from contained Civ.R. 54(B) language.

coverage was precluded because she was not a "relative" of her parents as defined in the policy's UM/UIM provisions.

{¶ 6} Appellee responded with a memorandum in opposition and his own cross-motion for summary judgment. In support of his cross-motion, appellee submitted affidavits and other documents tending to show that the 21-year-old Sara at the time of her death was living in Toledo to attend college, but maintained her permanent residence at the Centerville, Ohio home of her parents. Thus, appellee contended, Sara was covered under her parents' policy as a "relative:" which, in the language of the insurance contract, included a blood relation, "\* \* \* if under the age of 25 and unmarried, while living temporarily outside your household."

{¶ 7} On April 13, 2006, the trial court denied appellant's motion for summary judgment and granted appellee's. The court concluded that, on the undisputed facts before the court, Sara Lager was a "relative" entitled to UM/UIM coverage under her parents policy. With respect to the "other owned auto" exclusion that appellant asserted excluded any coverage, following *Hall v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 05AP305, 2005-Ohio-4572, the court found the language of the exclusion ambiguous and construed the policy in favor of coverage.

{¶ 8} On May 5, 2006, appellant moved for relief from judgment/reconsideration of the decision. On June 5, 2006, appellant moved to stay the effect of the summary judgment until appellant could take the deposition of Ryan Miller-Gonzalez.

{¶ 9} On August 23, 2006, appellant filed the deposition of Miller-Gonzalez. In his deposition, Miller-Gonzalez testified that at the time of the accident he was living with Sara Lager, sharing financial responsibilities with her and that the two were making plans to be married. Nevertheless, on September 26, 2006, the trial court denied appellant's Civ.R. 60(B)/reconsideration motion and found moot its motion for a stay. The court later also found moot an appellee motion to strike the Miller-Gonzalez deposition.

{¶ 10} From these judgments, appellant now brings its appeal. In three assignments of error, appellant asserts that the trial court erred in (1) denying its summary judgment motion; (2) granting appellee's motion for summary judgment; and, (3) denying its motion for reconsideration.

{¶ 11} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 12} "\* \* \* (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 13} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

#### I. Coverage/Other Owned Auto Exclusion.

{¶ 14} The policy of insurance issued by appellant to the Lagers contains the following provision in its UM/UIM endorsement:

{¶ 15} "We will pay compensatory damages, including derivative claims, that **you** or a **relative** are legally entitled to recover from the owner or driver of an **uninsured motor vehicle** under the tort law of the state where the **motor vehicle** accident occurred, because of **bodily injury** suffered by **you** or a **relative** and resulting from the **motor vehicle** accident. Damages must result from a **motor vehicle** accident arising out of the: 1. ownership; 2. maintenance; or 3. use; of the **uninsured motor vehicle**." (Emphasis in original.)

{¶ 16} As defined in the policy, an uninsured motor vehicle includes an underinsured motor vehicle. "That is a **motor vehicle** for which bodily injury liability coverage limits or other security or bonds are in effect; however, their total amount available for payment is less than the limits of this coverage." A "'RELATIVE' means a natural person who regularly lives in **your** household and who is related to **you** by blood, marriage or adoption (including a ward or foster child). '**RELATIVE**' includes such person, if under the age of 25 and unmarried, while living temporarily outside **your** household."

{¶ 17} From the affidavit of appellee, undisputed at the time the cross-motions for summary judgment became decisional, Sara satisfied the conditions of the policy for coverage as a relative. She was under 25. She was temporarily residing outside her parents' home while attending college. The \$50,000 per person limit under her own Nationwide Property insurance policy was less than the \$300,000 per person limit in her parents' policy with appellant.

{¶ 18} Without conceding the coverage issue, appellant insists that, even assuming there is coverage, recovery must be denied because of the policy's other-owned auto exclusion. Under "Coverage Exclusions," the policy provides:

{¶ 19} "A. This coverage is not applied to anyone for **bodily injury** or derivative claims:

{¶ 20} "\* \* \*

{¶ 21} "3. While any **insured** operates or occupies a motor vehicle:

{¶ 22} "a) owned by:

{¶ 23} "b) furnished to; or

{¶ 24} "c) available for the regular use of;

{¶ 25} "**you** or a **relative**, but not insured for auto liability coverage under this policy. \* \* \*"

{¶ 26} Appellant maintained that Sara Lager died of bodily injuries sustained in a vehicle owned by her, but not insured under its policy. Consequently, appellant insists, coverage for her was excluded.

{¶ 27} Appellee responded that Sara Lager's parents are legally entitled to recover under Ohio tort law from an underinsured driver for the presumptive damages they sustained as the result of Sara's death. See R.C. 2125.02(A). Such injuries, according to appellee, are "because of" Sara's bodily injury, not "for" Sara's bodily injuries.

Appellant's policy coverage clause grants coverage "because of **bodily injury** \* \* \* suffered by **you** or a **relative** \* \* \*." Consequently, appellee argued, coverage exists. Since the parents' claim is for their own loss resulting "because of" Sara's death, not "for" her death, appellee insisted, the exclusion does not apply.

{¶ 28} Following *Hall*, supra, the trial court found ambiguous the "because of" – "for" discrepancies in the policy. Construing the language of the policy in favor of the insured, see *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, syllabus, the court concluded that coverage existed and appellee was entitled to judgment as a matter of law.

{¶ 29} On appeal, appellant contends that the trial court's reliance on *Hall* is misplaced as that decision came from the Tenth District Court of Appeals and is not binding on courts in this jurisdiction.

{¶ 30} While it is true that the decisions of other courts of appeals are not binding on us, they do carry a substantial persuasive authority. *Stapleton v. Holstein* (1998), 131 Ohio App.3d 596, 598. *Hall* examined the exact same policy language applied in circumstances materially the same as those presented here. The *Hall* court found this language ambiguous. *Hall* at ¶ 18, discretionary appeal not accepted, 108 Ohio St.3d 1416, 2006-Ohio-179. We are persuaded that this is the proper interpretation of this insurance contract.

{¶ 31} Accordingly, the trial court properly denied appellant's motion for summary judgment and did not err in granting appellee's motion for summary judgment.

Appellant's first and second assignments of error are not well-taken.

## II. Relief from Judgment/Reconsideration

{¶ 32} In its remaining assignment of error, appellant asserts that the trial court erred in denying its motion for relief from judgment or reconsideration.

{¶ 33} In their briefs, neither party addresses the relief from judgment question. This is as well, as Civ.R. 60(B) applies to a "final judgment, order or proceeding." The summary judgment here was interlocutory until Civ.R. 54(B) language was added well after the decision about which appellant complains was entered.

{¶ 34} A motion for reconsideration after a final judgment is not recognized in the Ohio Rules of Civil Procedure. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, paragraph two of the syllabus. Prior to a ruling becoming final, however, a trial court may entertain a motion for reconsideration. *Picciuto v. Lucas Cty. Bd. of Commrs.* (1990), 69 Ohio App.3d 789, 797. Whether to grant a motion for reconsideration rests within the sound discretion of the court and will not be disturbed absent an abuse of discretion. *Id.* An abuse of discretion is more than a mistake of law or an error of judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Harman v. Baldwin*, 107 Ohio St.3d 232, 235, 2005-Ohio-6264, ¶ 16.

{¶ 35} Appellant insists that we carefully examine the September 26, 2006 entry denying its reconsideration motion. Appellant suggests that, because the entry did not even mention the Miller-Gonzalez deposition, the court failed to consider this evidence. What appellant fails to provide is authority that would necessitate the court considering such a late filing, months after the cross-motions for summary judgment became decisional.

{¶ 36} The trial court issued its judgment on the cross-motions for summary judgment on April 12, 2006. On May 5, 2006, appellant moved for reconsideration, premising its motion on what it asserted were cases undermining the court's reasoning in granting summary judgment. On August 23, 2006, appellant filed the Miller-Gonzalez deposition with a document captioned, "Notice of Filing by Nationwide Mutual Fire Insurance Company." It is in this pleading only that appellant argues that the Miller-

Gonzales deposition demonstrates that Sara Lager was not a "relative" within the meaning of the policy.

{¶ 37} After a case has been set for pretrial or trial, a motion for summary judgment may be made only with leave of the court. Civ.R. 56(B). Civ.R. 56(C) directs, in part, "\* \* \* Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, *timely filed* in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *No evidence or stipulation may be considered except as stated in this rule.*" (Emphasis added.) Civ.R. 56(E) provides that, "[t]he court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. \* \* \*." The trial court has discretion as to whether accept or reject consideration of late filed affidavits or depositions. *Smitley v. Smith* (Mar. 8, 1988), 4th Dist. No. 455.

{¶ 38} The deposition appellant insists should have been considered was filed well out of rule and we find no indication in the record to suggest that appellant sought the court's permission for such untimely filing. Consequently, we cannot say that the court abused its discretion in failing to consider the deposition or denying appellant's motion for reconsideration. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 39} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant

to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, P.J.

\_\_\_\_\_  
JUDGE

Arlene Singer, J.

William J. Skow, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

SEP 07 2007

FILED  
COURT OF APPEALS  
2007 SEP -5 A 10:33

MAHON  
FRANK BOWLER  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

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

Appellee

v.

Ryan Miller-Gonzalez, et al.

Defendants

and

Nationwide Mutual Fire Insurance Co.

Appellant

Court of Appeals No. L-07-1022

Trial Court No. CI05-1322

**DECISION AND JUDGMENT ENTRY**

Decided:

SEP 05 2007

\*\*\*\*\*

This matter is before the court on the motion of appellant, Nationwide Mutual Fire Insurance Co., to certify a conflict.

Section 3(B)(4), Article IV of the Ohio Constitution requires that when a court of appeals finds itself in conflict with another court of appeals on the same question of law, that court must certify its decision and the record of the matter to the Supreme Court of

**E-JOURNALIZED**

SEP 05 2007

**FAXED**

Ohio for a resolution of the question. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596.

In the principal case, following *Hall v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 05AP305, 2005-Ohio-4572, ¶ 18, discretionary appeal not accepted, 108 Ohio St.3d 1416, 2006-Ohio-179, we held that the phrases "because of bodily injury" in the coverage clause of appellant's policy and "for bodily injury" in a coverage exclusion clause of the same policy constituted an ambiguity under the facts of the case. *Lager v. Gonzalez*, 6th Dist. No. L-07-1022, 2007-Ohio-4094, ¶ 30.

In its motion to certify, appellant suggests that this case conflicts with the decision of the Third District in *Tuohy v. Taylor*, 3d Dist. No. 4-06-23, 2007-Ohio-3597. *Tuohy* also was determined on an analysis of possible ambiguity from the use of the words "for" and "because" in coverage and exclusion clauses, with a conclusion different than that obtained in the principal case or in *Hall*.

Appellee asserts in his memorandum in opposition to certification, however, that the *Tuohy* policy is distinguishable from the one at issue here in that the Westfield policy in *Tuohy* defined "bodily injury" as "bodily harm, sickness, or diseases, including required care, loss of services and death resulting therefrom." *Tuohy* at ¶ 23. The *Tuohy* court found that the phrase "death resulting therefrom" rendered the phrases without "rational distinction." *Id.* Appellant's policy does not contain the phrase "death resulting therefrom." consequently, appellee argues, these cases are not in direct conflict so certification should be denied.

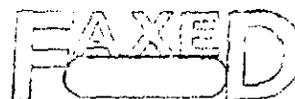
FAKED

Moreover, appellee asserts, neither this case nor the others which have found ambiguity in this language, have held that the "because" – "for" clauses create a per se ambiguity. For this reason, according to appellee, there should be no conflict because each case relies on its own facts.

The policy at issue defines "bodily injury" as, "\* \* \* a) physical injury; b) sickness; c) disease; or d) resultant death; of any person which results directly from a motor vehicle accident." In our view "resultant death" and "death resulting therefrom" are not materially distinguishable.

All cases rely on their facts. The question is whether the facts between cases are sufficiently different so as to affect the application of the law. *Tuohy* was a statutory wrongful death claim for underinsured motorists insurance by a decedent's parents against their own insurer. The decedent was in his own vehicle which was not insured on his parent's policy. As we have discussed, the language of the *Tuohy* policy was materially the same as that at issue here. *Tuohy*, thus, is not materially distinguishable from this case.

On consideration, we conclude that our decision in *Lager v. Gonzalez*, 6th Dist. No. L-07-1022, 2007-Ohio- 4094, the decision of the Tenth District in *Hall v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 05AP-305, 2005-Ohio-4572, ¶ 18, and *Brunn v. Motorist Mut. Ins. Co.*, 5th Dist. No. 2005 CA 022, 2006-Ohio-33, ¶ 30, conflict with that of the Third District in *Tuohy v. Taylor*, 3d Dist. No. 4-06-23, 2007-Ohio-3597. Finding



such conflict we certify the record in this matter to the Supreme Court of Ohio for review and final determination.

The issue presented is whether, in a claim for statutory wrongful death damages against a claimant's underinsured motorists coverage, ambiguity exists in the insurance contract when the policy grants coverage for damages sustained "because of bodily injury," yet under an other-owned auto exclusion bars coverage for damages by the less inclusive "for bodily injury."

Mark L. Pietrykowski, P.J.

Arlene Singer, J.

William J. Skow, J.  
CONCUR.

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

**FAXED**

FILED  
LUCAS COUNTY

2006 APR 13 A 9 35

COMMON PLEAS COURT  
BERNIE OSULTON  
CLERK OF COURTS



Received  
4-27-06  
C.V.M.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

**Fred L. Lager, etc.,**

Plaintiff,

-vs-

**Ryan J. Miller-Gonzalez, et al.,**

Defendant.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

Case No.: CI 05-1322

Honorable Denise Ann Dartt

**OPINION AND JOURNAL ENTRY**

I. FACTS

Sara E. Lager was the owner of a 1992 Chevrolet Camaro which was insured by Defendant Nationwide Property and Casualty Company ("Nationwide"). On January 26, 2003, the Camaro was being driven by Sara's boyfriend, Defendant Ryan J. Miller-Gonzalez, and Sara was a passenger when the vehicle was involved in an automobile accident. Sara died as a result of the accident.

Sara's parents, Fred L. and Cathy R. Lager, were also owners of a policy of motor vehicle insurance issued by Nationwide, Policy No 91 34 C 362444 ("the Policy"). Fred L. Lager, administrator of the Estate of Sara E. Lager, filed the instant action against Nationwide, among others, claiming that Fred and Cathy Lager are entitled to uninsured/underinsured motor vehicle ("UM/UIM") coverage under the Policy as wrongful death beneficiaries for the injuries and damages they sustained as a direct and proximate result of

the wrongful death of their daughter Sara.

This cause is before the Court upon cross motions for summary judgment. Plaintiff contends that Sara was a "relative" as defined in the policy and thus a covered person under the UM/UM provision. Nationwide counters that, even if Sara was a covered person, the parents are excluded from compensation under the policy's "other owned" auto exclusion.

## II. SUMMARY JUDGMENT STANDARD

The Supreme Court of Ohio has set forth a tripartite test that must be met before a motion for summary judgment can be granted: that there is no genuine issue as to any material fact; that movant is entitled to judgment as a matter of law; and that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66, 375 N.E.2d 46.

A party who claims to be entitled to summary judgment on the grounds that a nonmovant cannot prove its case bears the initial burden of: 1) specifically identifying the basis of its motion, and 2) identifying those portions of the record that demonstrate the absence of a genuine issue of material fact regarding an essential element of the nonmovant's case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The movant satisfies this burden by calling attention to some competent summary judgment evidence, of the type listed in Civ.R. 56(C), affirmatively demonstrating that the nonmovant has no evidence to support his or her claims. *Id.* Once the movant has satisfied this initial burden, the burden shifts to the nonmovant to set forth specific facts, in the manner prescribed by Civ. R. 56(E), indicating that a genuine issue of material fact exists for trial. *Id.*; accord *Vahila v. Hall*, 1997-Oh:o-421, 77 Ohio St.3d 421.

### III. DISCUSSION

The Policy's UM/UIM endorsement provides for UM/UIM coverage for the policy holders as well as their relatives:

"We will pay compensatory damages, including derivative claims, that you or a relative are legally entitled to recover from the owner or driver of an **uninsured motor vehicle** under the tort law of the state where the **motor vehicle** accident occurred, because of **bodily injury** suffered by you or a relative and resulting from the **motor vehicle** accident. Damages must result from a **motor vehicle** accident arising out of the: 1. ownership; 2. maintenance; or 3 use; of the **uninsured motor vehicle**."

"Relative" is defined as "a natural person who regularly lives in your household and who is related to you by blood, marriage or adoption (including a ward or foster child). 'Relative' includes such person, if under the age of 25 and unmarried, while living temporarily outside your household." The undisputed affidavit of Fred Lager clearly establishes that Sara was under the age of 25, unmarried, and living temporarily in Toledo while attending college.

The Policy defines an "uninsured motor vehicle" as:

"a) one for which there is no bodily injury liability bond, insurance, or other security in effect, applicable to the vehicle owner, operator, or any other liable person or organization, at the time of the accident. b) one which is underinsured. This is a **motor vehicle** for which bodily injury liability coverage limits or other security or bonds are in effect; however, their total amount available for payment is less than the limits of this coverage. See the Declarations for those limits. c) one for which the insuring company denies coverage or becomes insolvent."

Sara's bodily injury liability coverage limits were \$50,000 each person/\$100,000 each occurrence, while the UM/UIM limits under her parents' Policy is \$300,000 each person/\$300,000 each occurrence. Therefore, even if the Bodily Injury coverage under Sara's policy would cover Mr. Miller-Gonzalez as argued by Nationwide, the vehicle meets the definition of "uninsured motor vehicle" under clause b).

However, Nationwide maintains that Fred and Cathy Lager are excluded from compensation under

the Policy's "other owned" auto exclusion. That exclusion provides:

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

But the UM/UIM coverage agreement states that Nationwide "will pay compensatory damages, including derivative claims, \* \* \* because of bodily injury \* \* \* suffered by a relative \* \* \*." (underlining added) Thus, in the coverage section of the UM/UIM policy, the phrase "because of bodily injury" is used in describing the coverage which is extended, while the exclusion uses the words "for bodily injury" to define what is excluded. Plaintiff argues that since neither phrase is defined in the UM/UIM provision of the Policy, the language is ambiguous and must be construed against Nationwide.

In *Hall v. Nationwide Mutual Fire Ins. Co.*, 2005-Ohio-4572, Franklin App. No. 05AP-305, the policy in question contained language identical to that of the Policy in the instant case. The Court found that the phrase "because of bodily injury" when discussing UM/UIM coverage and then using the phrase "for bodily injury" when discussing exclusions to that coverage are not interchangeable in all situations. As in the instant case, the plaintiff in *Hall* had brought a wrongful death action on the death of a child who was operating a motor vehicle not insured under the policy. The court in *Hall* found the language contained in the policy to be ambiguous and construed the ambiguity against Nationwide and in favor of the insured.

Nationwide counters that the exclusion is consistent with R.C. 3937.18(A)(1) which, according to Nationwide, states that the person insured under the policy must be the one who sustained the bodily injury; since Sara's parents did not sustain bodily injuries as a result of the accident, they are excluded from UM/UIM coverage. However, R.C. 3937.18(A)(1) merely states what UM/UIM coverage must be offered by the insurer and nowhere does the statute state that the parties cannot agree to extend coverage to wrongful

death claims.

The cases relied on by Nationwide are distinguishable. In *Green v. Barbour* (Feb. 9, 2001), Huron App. No. H-00-026, the court was interpreting the "for bodily injury" and "because of bodily injury" phrases contained in the same "Limits of Liability" provision. The "Limits of Liability" provision was also at issue in *Incarinato v Metropolitan Property and Casualty Insurance Company* (Feb. 8, 1996), Tuscarawas App. No. 95 AP 050037, but in that case only the phrase "for bodily injury" was used in the provision. The alleged ambiguity in *Franz v. Nationwide Mutual Insurance Company* (June 14, 1993), Clermont App. No. CA93-02-012, stemmed from differences in policy limits as stated in a billing notice as compared to the policy declarations page.

Following *Hall*, this Court finds that the provisions of the Policy are reasonably susceptible to more than one interpretation and thus must be strictly construed against Nationwide. Therefore, the "other owned" auto exclusion does not apply in this case and Nationwide's motion for summary judgment must be denied.

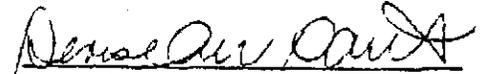
Accordingly, this Court finds that Policy No. 91 34 C 362444 provides UM/UIM insurance coverage and such coverage must be made available to compensate Fred L. Lager and Cathy R. Lager as wrongful death beneficiaries for the injuries and damages they sustained as a direct and proximate result of the wrongful death of the decedent, Sara E. Lager.

**JOURNAL ENTRY**

It is **ORDERED** that the motion for summary judgment filed by Defendant Nationwide Mutual Fire Insurance Company is **DENIED**.

It is further **ORDERED** that Plaintiff's motion for summary judgment is **GRANTED**.

Date: April 12, 2006

  
Denise Ann Dartt, Judge

PAGE'S OHIO REVISED CODE ANNOTATED  
Copyright (c) 2008 by Matthew Bender & Company, Inc  
a member of the LexisNexis Group  
All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 \*\*\*

TITLE 3. COUNTIES  
CHAPTER 313. CORONER

Go to the Ohio Code Archive Directory

*ORC Ann. 313.19 (2008)*

§ 313.19. Coroner's verdict the legally accepted cause of death

The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death.

**HISTORY:**

GC § 2855-16; 121 v 591; Bureau of Code Revision. Eff 10-1-53.

**NOTES:**

Related Statutes & Rules

Cross-References to Related Statutes

Coroner's writs, *RC § 313.20*.

Duties of coroner or deputies, *RC § 313.06*.

ALR

Admissibility of evidence relating to accused's attempt to commit suicide. 73 ALR5th 615.

Admissibility of testimony of coroner or mortician as to cause of death in homicide prosecution. 71 ALR3d 1265.

Certificate of death, official death certificate as evidence of cause of death in civil or criminal action. 21 ALR3d 418.

Coroner's verdict or report as evidence on issue of suicide. (Insurance policy.) 28 ALR2d 352.

Reviewing, setting aside, or quashing of verdict at coroner's inquest. 78 ALR2d 1218.

Case Notes & OAGs

ANALYSIS Constitutionality --Factual determinations are nonbinding --Judicial review Admissibility Autopsy report Change in death certificate Coroner Coroner's verdict Court of common pleas, authority to direct coroner to change his decision Criminal responsibility, effect of findings on Declaratory judgment Factual determinations are nonbinding Factual determinations are nonbonding --Coroner's verdict Jurisdiction Jury instructions Manadamus Miranda warnings Presumptions Standing Suicide Testimony in civil proceedings Victim's reparation award, qualification for

#### CONSTITUTIONALITY.

Because *RC § 313.19* delimits the procedure for challenging a coroner's verdict, use of declaratory judgment to resolve those same issues is inappropriate. *RC § 313.19* is not void for vagueness due to its lack of specificity regarding the procedure for challenging a coroner's verdict: *Perez v. Cleveland*, 78 Ohio St. 3d 376, 678 N.E.2d 537, 1997 Ohio LEXIS 1039, 1997 Ohio 33, (1997).

*Revised Code § 313.19* is not unconstitutional. A party contesting the coroner's finding must prove by a preponderance that it is inaccurate: *Estate of Severt v. Wood*, 107 Ohio App. 3d 123, 667 N.E.2d 1250, 1995 Ohio App. LEXIS 4760 (1995).

That part of *RC § 313.19* (former GC § 2855-16) which provides that the finding of a coroner shall be the legally accepted cause of death unless the common pleas court of the county in which the death occurred, after hearing, directs the coroner to change his decision, attempts to vest the common pleas court with jurisdiction to review the findings of the coroner but does not provide the method or means by which such jurisdiction shall be invoked or exercised, and does not provide some mode or method which will guarantee the parties their constitutional rights to have their day in court and is inoperative and void for uncertainty and indefiniteness: *State ex rel. Dana v. Gerber*, 79 Ohio App. 1, 70 N.E.2d 111 (1946).

By its enactment of *RC § 313.19* (former GC § 2855-16), the legislature has attempted to authorize the coroner to make "legally accepted" findings having the force of judicial decisions affecting civil rights in ex parte proceedings and is invalid because it fails to make adequate provisions for persons adversely affected thereby to be made parties or become parties for the purpose of asserting and protecting their rights: *State ex rel. Dana v. Gerber*, 79 Ohio App. 1, 70 N.E.2d 111 (1946).

By its enactment of *RC § 313.19* (former GC § 2855-16) the legislature has attempted to vest the coroner with judicial power in civil matters between private parties which is repugnant to *OConst art IV, § 1*, vesting full judicial power in the courts: *State ex rel. Dana v. Gerber*, 79 Ohio App. 1, 70 N.E.2d 111 (1946).

*Revised Code § 313.19* (former GC § 2855-16) as enacted is invalid and void because it deprives a party of fundamental rights and is violative of *OConst art I, §§ 1 and 16*; *OConst art IV, § 1*; and is contrary to the due process clause of *USConst amend XIV*: *State ex rel. Dana v. Gerber*, 79 Ohio App. 1, 70 N.E.2d 111 (1946).

#### --FACTUAL DETERMINATIONS ARE NONBINDING.

*Revised Code § 313.19* does not deprive a civil litigant of due process of law. The statute does not compel the finder to accept, as a matter of law, the coroner's factual findings concerning the manner, mode and cause of decedent's death: *Vargo v. Travelers Ins. Co.*, 34 Ohio St. 3d 27, 516 N.E.2d 226 (1987).

#### --JUDICIAL REVIEW.

That portion of *RC § 313.19* providing for judicial review of the county coroner's findings is void for vagueness: *Goldsby v. Gerber*, 31 Ohio App. 3d 268, 511 N.E.2d 417 (1987).

#### ADMISSIBILITY.

Under EvR 703, a coroner's opinion as to the cause of death is inadmissible where it is based entirely on facts perceived by others and evidence not admitted at trial: *State v. Fouty*, 110 Ohio App. 3d 130, 673 N.E.2d 681, 1996 Ohio App. LEXIS 1131 (1996).

#### AUTOPSY REPORT.

Amended autopsy report that contained finding of death due to unusual circumstances but that did not mention or involve appellant in any manner was properly admitted into evidence: *State v. Simpson*, 1994 Ohio App. LEXIS 4472 (11th Dist. 1994).

#### CHANGE IN DEATH CERTIFICATE.

Trial court improperly granted summary judgment, on the complaint by the decedent's wife and stepdaughter seeking to have the decedent's death certificate changed, on the basis of res judicata because the trial court was merely speculating as to the intended use of a changed coroner's verdict, thinking that it had to do with the wife's criminal action. *LeFever v. Licking County Coroner's Officer*, 2006 Ohio App. LEXIS 6729, 2006 Ohio 6795, (2006).

#### CORONER.

A coroner's verdict pursuant to RC § 313.19 can be challenged by way of declaratory judgment by any interested party: *Hirus v. Balraj*, 1994 Ohio App. LEXIS 4 (8th Dist. 1994).

By enacting RC § 313.19, the General Assembly has provided a way to challenge a coroner's determination of cause of death as set forth in a death certificate: *Perez v. Cleveland*, 66 Ohio St. 3d 397, 613 N.E.2d 199, 1993 Ohio LEXIS 1206 (1993).

A death certificate may not be conclusive proof of the actual time of death: *In re Estate of Price*, 62 Ohio Misc. 2d 26, 587 N.E.2d 995, 1990 Ohio Misc. LEXIS 65 (CP 1990).

#### CORONER'S VERDICT.

The death certificate was not conclusive as to the cause of death where there were differing copies of it and it contradicted the testimony of the officer who responded to the accident: *Reidling v. Valle*, 132 Ohio App. 3d 310, 724 N.E.2d 1222, 1999 Ohio App. LEXIS 495 (1999).

There was no coroner's verdict or expert medical testimony establishing that the shooting was the direct, proximate cause of the victim's death twenty-five days later. However, there was circumstantial evidence that the shooting caused the decedent's complications: *State v. Beaver*, 119 Ohio App. 3d 385, 695 N.E.2d 332, 1997 Ohio App. LEXIS 1707 (1997).

#### COURT OF COMMON PLEAS, AUTHORITY TO DIRECT CORONER TO CHANGE HIS DECISION.

The court of common pleas of the county in which death occurred can direct the coroner to change his decision pursuant to RC § 313.19, unless the court of appeals for that district has held that statute unconstitutional: OAG No. 75-011 (1975).

#### CRIMINAL RESPONSIBILITY, EFFECT OF FINDINGS ON.

Revised Code § 313.19 makes the coroner's verdict and death certificate the "legally accepted manner and mode in which such death occurred, and the legally accepted cause of death" only as to the physiological cause of death and the immediate mechanical, chemical or biological means by which death was caused, but does not extend to the determination of the criminal responsibility of any human agency involved in the causal chain: *State v. Cousin*, 5 Ohio App. 3d 32, 449 N.E.2d 32 (1982).

#### DECLARATORY JUDGMENT.

Declaratory judgment is a proper avenue to challenge a coroner's findings pursuant to RC § 313.19; however, it does not follow that appellant was entitled to either a declaration of his rights or, more specifically, the alteration of the decedent's cause of death: *Girts v. Raaf*, 1995 Ohio App. LEXIS 1862 (8th Dist. 1995).

#### FACTUAL DETERMINATIONS ARE NONBINDING.

The coroner's factual determinations concerning the manner, mode and cause of death, as expressed in the coroner's report and the death certificate, create a nonbinding rebuttable presumption concerning such facts in the absence of competent, credible evidence to the contrary: *Vargo v. Travelers Ins. Co.*, 34 Ohio St. 3d 27, 516 N.E.2d 226 (1987).

A coroner's verdict as to the cause of death and the manner and mode in which death occurred is entitled to much weight, *RC § 313.19*. However, in this case, the deputy coroner's testimony with respect to the cause of death was limited to the physiological cause of death, with an additional elicited opinion that it was "possible" that the alleged victim met her death by falling down a flight of steps: *State v. Manago*, 38 Ohio St. 2d 223, 313 N.E.2d 10 (1974).

#### FACTUAL DETERMINATIONS ARE NONBONDING.

#### --CORONER'S VERDICT.

The coroner's determinations were nonbinding and created a rebuttable presumption concerning the manner, mode and cause of death: *Bernal v. Lindholm*, 133 Ohio App. 3d 163, 727 N.E.2d 145, 1999 Ohio App. LEXIS 874 (1999).

#### JURISDICTION.

The common pleas court does not have jurisdiction to review the findings of the coroner, since GC § 2855-16 (*RC § 313.19*) is invalid and void: *Roark v. Lyle*, 52 Ohio Op. 166, 116 N.E.2d 817 (CP 1953), [affirmed, 52 Ohio Op. 168 (App), in accordance with, *State ex rel. Dana v. Gerber*, 79 Ohio App. 1, 34 Ohio Op. 48 (1946)].

#### JURY INSTRUCTIONS.

In a deceased patient's estate executor's wrongful death action that was resolved by a jury verdict in favor of the medical individual and entities sued, her claim on appeal that the trial court erred in providing the jury with an instruction regarding the coroner's opinion pursuant to the precedent of *Vargo* and under *RC § 313.19* was not reviewable, as she failed to provide a transcript of the jury instructions that were read to the jury pursuant to *Ohio R. App. P. 9(B)*; accordingly, the court presumed the regularity of the trial court proceedings. *Frazier v. Pruitt*, 2007 Ohio App. LEXIS 3002, 2007 Ohio 3256, (2007).

#### MANADAMUS.

In describing the cause of death, a coroner is not limited to stating the physical and physiological mechanisms leading to death. Mandamus relief is precluded where declaratory judgment is specifically provided as the means for challenging a coroner's report: *State ex rel. Blair v. Balraj*, 69 Ohio St. 3d 310, 631 N.E.2d 1044, 1994 Ohio LEXIS 1036, 1994 Ohio 40, (1994).

#### MIRANDA WARNINGS.

It is not necessary for a coroner to give Miranda warnings to a witness unless he has been taken into custody. A coroner may proceed with an informal inquiry of persons having knowledge of the facts for the purpose of determining the cause of death; a person may refuse to answer questions during a coroner's informal inquiry. A person may refuse to answer during a formal inquest under oath on the ground of privilege: OAG No. 75-011 (1975).

#### PRESUMPTIONS.

Where the county coroner ruled that the first decedent's death was indeterminate, and such created a non-binding, rebuttable presumption, and the second decedent's administratrix failed to present sufficient evidence that the first decedent committed suicide, summary judgment against the administratrix was affirmed. *Fuerst v. Ford*, 2004 Ohio App. LEXIS 1334, 2004 Ohio 1510, (2004).

#### STANDING.

Because *RC § 313.19* did not limit who may initiate judicial review of a coroner's verdict, the decedent's stepdaughter was a real party in interest, and the trial court erred in dismissing her from the action. *LeFever v. Licking County Coroner's Officer*, 2006 Ohio App. LEXIS 6729, 2006 Ohio 6795, (2006).

#### SUICIDE.

A person may not compel the county coroner to delete a suicide finding from a death certificate by an action in mandamus, or by actions seeking declaratory or injunctive relief: *Goldsby v. Gerber*, 31 Ohio App. 3d 268, 511 N.E.2d 417 (1987).

**TESTIMONY IN CIVIL PROCEEDINGS.**

Absent a statute that either expressly or by necessary implication authorizes a county coroner to charge an expert witness fee for the testimony of the coroner or the coroner's staff members in a civil proceeding concerning a death investigation performed by the coroner's office, a county coroner is without authority to impose such a charge, whether such fee is paid to the coroner, a staff member of the county coroner, or to the county. If a county coroner or a member of the coroner's staff, while being paid his regular compensation by the county, is also paid witness fees under *RC* § 2335.06 for providing testimony in civil litigation regarding a death investigation by the coroner's office, the county coroner or member of the coroner's staff is not entitled to retain such fees for his personal use, but must remit such fees to the county. Opinion No. 2006-036 (2006).

**VICTIM'S REPARATION AWARD, QUALIFICATION FOR.**

A surviving spouse may qualify for a crime victim's reparation award based on an assault committed on the decedent even though the coroner's report listed the immediate cause of death as lung cancer: *In re Lewis*, 61 Ohio Misc. 2d 542, 580 N.E.2d 538, 1990 Ohio Misc. LEXIS 43 (1990).

PAGE'S OHIO REVISED CODE ANNOTATED  
 Copyright (c) 2008 by Matthew Bender & Company, Inc  
 a member of the LexisNexis Group  
 All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
 WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 \*\*\*  
 \*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*  
 \*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 \*\*\*

TITLE 9. AGRICULTURE -- ANIMALS -- FENCES  
 CHAPTER 955. DOGS  
 DOG AND KENNEL LICENSES

**Go to the Ohio Code Archive Directory**

*ORC Ann. 955.11 (2008)*

§ 955.11. Transfer of ownership or possession of dog

(A) As used in this section:

(1) (a) "Dangerous dog" means a dog that, without provocation, and subject to division (A)(1)(b) of this section, has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person, while that dog is off the premises of its owner, keeper, or harbinger and not under the reasonable control of its owner, keeper, harbinger, or some other responsible person, or not physically restrained or confined in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top.

(b) "Dangerous dog" does not include a police dog that has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person while the police dog is being used to assist one or more law enforcement officers in the performance of their official duties.

(2) "Menacing fashion" means that a dog would cause any person being chased or approached to reasonably believe that the dog will cause physical injury to that person.

(3) "Police dog" means a dog that has been trained, and may be used, to assist one or more law enforcement officers in the performance of their official duties.

(4) (a) "Vicious dog" means a dog that, without provocation and subject to division (A)(4)(b) of this section, meets any of the following:

(i) Has killed or caused serious injury to any person;

(ii) Has caused injury, other than killing or serious injury, to any person, or has killed another dog.

(iii) Belongs to a breed that is commonly known as a pit bull dog. The ownership, keeping, or harboring of such a breed of dog shall be prima-facie evidence of the ownership, keeping, or harboring of a vicious dog.

(b) "Vicious dog" does not include either of the following:

(i) A police dog that has killed or caused serious injury to any person or that has caused injury, other than killing or serious injury, to any person while the police dog is being used to assist one or more law enforcement officers in the performance of their official duties;

(ii) A dog that has killed or caused serious injury to any person while a person was committing or attempting to commit a trespass or other criminal offense on the property of the owner, keeper, or harbinger of the dog.

(5) "Without provocation" means that a dog was not teased, tormented, or abused by a person, or that the dog was not coming to the aid or the defense of a person who was not engaged in illegal or criminal activity and who was not using the dog as a means of carrying out such activity.

(B) Upon the transfer of ownership of any dog, the seller of the dog shall give the buyer a transfer of ownership certificate that shall be signed by the seller. The certificate shall contain the registration number of the dog, the name of the seller, and a brief description of the dog. Blank forms of the certificate may be obtained from the county auditor. A transfer of ownership shall be recorded by the auditor upon presentation of a transfer of ownership certificate that is signed by the former owner of a dog and that is accompanied by a fee of twenty-five cents.

(C) Prior to the transfer of ownership or possession of any dog, upon the buyer's or other transferee's request, the seller or other transferor of the dog shall give to the person a written notice relative to the behavior and propensities of the dog.

(D) Within ten days after the transfer of ownership or possession of any dog, if the seller or other transferor of the dog has knowledge that the dog is a dangerous or vicious dog, he shall give to the buyer or other transferee, the board of health for the district in which the buyer or other transferee resides, and the dog warden of the county in which the buyer or other transferee resides, a completed copy of a written form on which the seller shall furnish the following information:

- (1) The name and address of the buyer or other transferee of the dog;
- (2) The age, sex, color, breed, and current registration number of the dog.

In addition, the seller shall answer the following questions which shall be specifically stated on the form as follows:

"Has the dog ever chased or attempted to attack or bite a person? if yes, describe the incident(s) in which the behavior occurred."

"Has the dog ever bitten a person? if yes, describe the incident(s) in which the behavior occurred."

"Has the dog ever seriously injured or killed a person? if yes, describe the incident(s) in which the behavior occurred."

The dog warden of the county in which the seller resides shall furnish the form to the seller at no cost.

(E) No seller or other transferor of a dog shall fail to comply with the applicable requirements of divisions (B) to (D) of this section.

#### **HISTORY:**

GC § 5652-7c; 112 v 347; Bureau of Code Revision, 10-1-53; 135 v H 152 (Eff 11-21-73); 142 v H 352. Eff 7-10-87.

#### **NOTES:**

##### Related Statutes & Rules

##### Cross-References to Related Statutes

Penalty, *RC § 955.99.*

Disposition of fines, *RC § 955.44.*

##### Law Reviews & Journals

Man bites dog with Ohio's vicious dog statute. Note. *37 Clev. St. L. Rev. 119 (1989).*

Taking the bite out of pit bull attacks: Is there an answer? Comment. *15 Ohio N.U.L. Rev. 83 (1989).*

Vicious-dog legislation -- controlling the pit bull: Am. Sub. H.B. 352: an overview -- dogs under control. Note. 13 DaytonULRev 297 (1988).

Vicious-dog legislation -- controlling the pit bull: banning the pit bull: why breed-specific legislation is constitutional. Note. 13 DaytonULRev 279 (1988).

Vicious-dog legislation -- controlling the pit bull: humane concerns about dangerous dog laws. Randall Lockwood. 13 DaytonULRev 267 (1988).

#### Case Notes & OAGs

ANALYSIS Constitutionality Dangerous dog Dog's right to travel Due process Exemption from section Filing of transfer Insurance policies Pit bulls Registration tags Vagueness

#### CONSTITUTIONALITY.

State of Ohio and city of Toledo have a legitimate interest in protecting citizens from the dangers associated with pit bulls, and RC §§ 955.11(A)(4)(a)(iii) and 955.22 and Toledo Municipal Code 505.14 are rationally related to that interest and are constitutional: *City of Toledo v. Tellings*, 114 Ohio St. 3d 278, 871 N.E.2d 1152, 2007 Ohio LEXIS 1850, 2007 Ohio 3724, (2007).

Court of Appeals of Ohio for the Sixth Appellate District, Lucas County, concludes that both *Ohio Rev. Code Ann.* § 955.11(A)(4)(a)(iii) and Toledo, Ohio, Code § 505.14(a) are unconstitutionally vague under due process principles of *U.S. Const. amend. XIV*, as both statutory sections are based upon a subjective identification process of pit bulls to the extent that an ordinary citizen would not understand that he was breaking the law and which would result in the occurrence of arbitrary arrests and criminal charges. *City of Toledo v. Tellings*, 2006 Ohio App. LEXIS 884, 2006 Ohio 975, (Mar. 3, 2006), reversed by 114 Ohio St. 3d 278, 2007 Ohio 3724, 871 N.E.2d 1152, 2007 Ohio LEXIS 1850 (2007).

Ohio Court of Appeals for the Sixth Appellate District, Lucas County, concludes that both *Ohio Rev. Code Ann.* §§ 955.22 and 955.11(A)(4)(a)(iii) and Toledo, Ohio, Code § 505.14(a), which relied on the disproved presumption that pit bulls, as a breed, are inherently dangerous, are unconstitutional under equal protection and substantive due process pursuant to *Ohio Const. art. I, § 1* and *U.S. Const. amend. XIV*, as they lack a rational or real and substantial relationship to a legitimate governmental interest. *City of Toledo v. Tellings*, 2006 Ohio App. LEXIS 884, 2006 Ohio 975, (Mar. 3, 2006), reversed by 114 Ohio St. 3d 278, 2007 Ohio 3724, 871 N.E.2d 1152, 2007 Ohio LEXIS 1850 (2007).

Pursuant to the Ohio Supreme Court's holding in *Cowen*, the Court of Appeals of Ohio, Sixth Appellate District, Lucas County, holds that both *Ohio Rev. Code Ann.* § 955.11(A)(4)(a)(iii) and Toledo, Ohio, Code § 505.14(a), violate the constitutional right to procedural due process under *U.S. Const. amend. V* as, similar to the finding of unconstitutionality with respect to *Ohio Rev. Code Ann.* § 955.22, the objectionable statutes depend upon a dog warden's initial determination that a dog is "vicious" because it is a pit bull or looks like a pit bull, and does not provide any procedure to challenge this finding prior to being penalized or charged with non-compliance with the "vicious dog" laws. *City of Toledo v. Tellings*, 2006 Ohio App. LEXIS 884, 2006 Ohio 975, (Mar. 3, 2006), reversed by 114 Ohio St. 3d 278, 2007 Ohio 3724, 871 N.E.2d 1152, 2007 Ohio LEXIS 1850 (2007).

#### DANGEROUS DOG.

Because there was no evidence that a genuine issue of material fact existed as to whether the landlord harbored the dog who attacked the victim, or harbored the dog with knowledge of its dangerous propensities, summary judgment was warranted in favor of the landlord as to the statutory claim and the common law claims. The landlord did not retain sufficient control over the leased premises to support a finding that she was a "harborer" of the tenant's dog; the attack did not occur in a common area of the leased premises, or on the leased premises at all; and there was no evidence that the landlord had prior knowledge of the dog's alleged vicious or dangerous propensities or that she was ever made aware of any incidents involving the dog prior to the incident. *Richeson v. Leist*, 2007 Ohio App. LEXIS 3309, 2007 Ohio 3610, (July 16, 2007).

#### DOG'S RIGHT TO TRAVEL.

A dog does not have a constitutionally protected right to travel under the United States and Ohio Constitutions: *Akron v. Tipton*, 53 Ohio Misc. 2d 18, 559 N.E.2d 1385 (MC 1989).

#### DUE PROCESS.

Given the inherently dangerous nature of pit bulls, an ordinance designating the breed as vicious and imposing certain requirements on owners did not violate due process: *City of Cleveland v. Johnson*, 130 Ohio Misc. 2d 17, 825 N.E.2d 700, 2005 Ohio Misc. LEXIS 137, 2005 Ohio 1638, (2005).

RC § 955.22 violates the constitutional right to procedural due process insofar as it fails to provide dog owners a meaningful opportunity to be heard on the issue of whether a dog is "vicious" or "dangerous" as defined in RC § 955.11(A)(1)(a) and (A)(4)(a): *State v. Cowan*, 103 Ohio St. 3d 144, 814 N.E.2d 846, 2004 Ohio LEXIS 2132, 2004 Ohio 4777, (2004).

#### EXEMPTION FROM SECTION.

This section does not apply to dogs bred or kept for sale in a duly authorized registered kennel: 1928 OAG p. 414 (1928).

#### FILING OF TRANSFER.

Transfer of ownership certificate should be filed with auditor of county where dog is registered: 1927 OAG p. 2186 (1927).

#### INSURANCE POLICIES.

Dog owner was bound by the terms of the insurance policy exclusion regarding his vicious or dangerous dog because the insurer's failure to provide a copy of the entire section of the Ohio Revised Code in the exclusion did not create an ambiguity. The evidence supported that the exclusion applied and that the dog owner was not entitled to coverage because: the dog was not on a leash, tethered or in any way confined or restrained; it was not provoked; it caused bodily injury to the neighbor, requiring stitches and plastic surgery; the dog had previously bitten a person and another dog; and the owner admitted that his dog bites people and then runs away. *Choby v. Aylsworth*, 2007 Ohio App. LEXIS 3091, 2007 Ohio 3375, (June 29, 2007).

#### PIT BULLS.

RC ? 955.11(A)(4) establishes only a presumption that a pit bull is a vicious dog; the statute clearly contemplates the possibility that a defendant may rebut the presumption with proper evidence: *State v. Murphy*, 168 Ohio App. 3d 530, 860 N.E.2d 1068, 2006 Ohio App. LEXIS 4504, 2006 Ohio 4549, (2006).

Defendant's conviction for failure to confine a vicious dog under *Ohio Rev. Code Ann. § 955.22* was reversed because defendant presented uncontroverted evidence to rebut statutory presumption in *Ohio Rev. Code Ann. § 955.11(A)(4)(a)(iii)* that pit bulls were "vicious dogs." The trial court erred in finding the dogs to be vicious simply because of the history and temperament of pit bulls in general in light of more recent empirical data noticed in a recent appellate court case in which § 955.11(A)(4)(a)(iii) had been declared unconstitutional. *State v. Murphy*, 168 Ohio App. 3d 530, 860 N.E.2d 1068, 2006 Ohio App. LEXIS 4504, 2006 Ohio 4549, (2006).

*Revised Code § 955.11(A)(4)(a)(iii)*, which provides that the ownership of a dog "commonly known as a pit bull dog" is prima facie evidence of the ownership of a vicious dog, is not unconstitutionally void for vagueness since dogs commonly known as pit bulls possess unique and readily identifiable physical and behavioral traits which are capable of recognition both by dog owners of ordinary intelligence and by enforcement personnel: *State v. Anderson*, 57 Ohio St. 3d 168, 566 N.E.2d 1224, 1991 Ohio LEXIS 251 (1991) *State v. Ferguson*, 57 Ohio St. 3d 176, 566 N.E.2d 1230, 1991 Ohio LEXIS 246 (1991).

Because RC § 955.11(A)(4)(a) defines "vicious dog" in the alternative, a dog may be deemed a vicious dog under subsection (iii) thereof if the dog belongs to the breed commonly known as a pit bull dog, even if such dog has not, without provocation, killed or caused injury to any person, or killed another dog: *State v. Ferguson*, 76 Ohio App. 3d 747, 603 N.E.2d 345, 1991 Ohio App. LEXIS 5961 (1991).

A city ordinance which sets forth requirements for owners of "pit bull terriers," including controlling, restraining, insuring, registering and tattooing such dogs, does not violate due process provisions of the United States Constitution, as long as in the judgment of the legislature, such regulations are necessary for the protection of its citizens, and sufficient evidence is presented to the court identifying "pit bull terriers" as inherently potentially vicious animals. This is true even though some harmless or unoffensive dogs may be affected: *Akron v. Tipton*, 53 Ohio Misc. 2d 18, 559 N.E.2d 1385 (MC 1989).

The term "commonly known as a pit bull dog," as used in RC § 955.11, is not so vague as to violate due process: *State v. Robinson*, 44 Ohio App. 3d 128, 541 N.E.2d 1092 (1989).

"Pit bull dog" as used in RC § 955.11(A)(4)(a)(iii) refers to those animals which display the general characteristics of a bull terrier: OAG No. 89-091 (1989).

Any individual charged with the enforcement of RC §§ 955.11 and 955.22 is qualified to identify pit bull dogs in order to enforce the provisions of such sections against the owners, sellers or other transferors of such dogs. Any identification, however, must be reasonable: OAG No. 89-091 (1989).

Pursuant to RC § 955.11(A)(4)(a)(iii), the ownership, keeping, or harboring of a pit bull dog is evidence sufficient to establish that an individual is the owner, keeper, or harbinger of a vicious dog, unless overcome by other evidence to the contrary: OAG No. 89-091 (1989).

#### REGISTRATION TAGS.

Dog registration tag is valid in any county of the state: 1927 OAG p. 2278 (1927).

#### VAGUENESS.

RC § 955.11 is not void for vagueness because a reasonable pet owner of ordinary intelligence would understand what kind of conduct would cause a dog to be deemed dangerous. *State v. Cowan*, 2003 Ohio App. LEXIS 3252, 2003 Ohio 3547, (2003), affirmed by 103 Ohio St. 3d 144, 2004 Ohio 4777, 814 N.E.2d 846, 2004 Ohio LEXIS 2132 (2004).

PAGE'S OHIO REVISED CODE ANNOTATED  
Copyright (c) 2008 by Matthew Bender & Company, Inc  
a member of the LexisNexis Group  
All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 \*\*\*

TITLE 45. MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT  
CHAPTER 4511. TRAFFIC LAWS -- OPERATION OF MOTOR VEHICLES  
DRIVING WHILE INTOXICATED

Go to the Ohio Code Archive Directory

*ORC Ann. 4511.19 (2008)*

§ 4511.19. Operation while under the influence of alcohol or drug of abuse or with specified concentration of alcohol or drug in certain bodily substances; chemical test; penalties

(A) (1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.

(b) The person has a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

(c) The person has a concentration of ninety-six-thousandths of one per cent or more but less than two hundred four-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(e) The person has a concentration of eleven-hundredths of one gram or more but less than two hundred thirty-eight-thousandths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(f) The person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood.

(g) The person has a concentration of two hundred four-thousandths of one per cent or more by weight per unit volume of alcohol in the person's blood serum or plasma.

(h) The person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath.

(i) The person has a concentration of two hundred thirty-eight-thousandths of one gram or more by weight of alcohol per one hundred milliliters of the person's urine.

(j) Except as provided in division (K) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:

(i) The person has a concentration of amphetamine in the person's urine of at least five hundred nanograms of amphetamine per milliliter of the person's urine or has a concentration of amphetamine in the person's whole blood or

blood serum or plasma of at least one hundred nanograms of amphetamine per milliliter of the person's whole blood or blood serum or plasma.

(ii) The person has a concentration of cocaine in the person's urine of at least one hundred fifty nanograms of cocaine per milliliter of the person's urine or has a concentration of cocaine in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine per milliliter of the person's whole blood or blood serum or plasma.

(iii) The person has a concentration of cocaine metabolite in the person's urine of at least one hundred fifty nanograms of cocaine metabolite per milliliter of the person's urine or has a concentration of cocaine metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine metabolite per milliliter of the person's whole blood or blood serum or plasma.

(iv) The person has a concentration of heroin in the person's urine of at least two thousand nanograms of heroin per milliliter of the person's urine or has a concentration of heroin in the person's whole blood or blood serum or plasma of at least fifty nanograms of heroin per milliliter of the person's whole blood or blood serum or plasma.

(v) The person has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's urine of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's urine or has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's whole blood or blood serum or plasma of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's whole blood or blood serum or plasma.

(vi) The person has a concentration of L.S.D. in the person's urine of at least twenty-five nanograms of L.S.D. per milliliter of the person's urine or a concentration of L.S.D. in the person's whole blood or blood serum or plasma of at least ten nanograms of L.S.D. per milliliter of the person's whole blood or blood serum or plasma.

(vii) The person has a concentration of marihuana in the person's urine of at least ten nanograms of marihuana per milliliter of the person's urine or has a concentration of marihuana in the person's whole blood or blood serum or plasma of at least two nanograms of marihuana per milliliter of the person's whole blood or blood serum or plasma.

(viii) Either of the following applies:

(I) The person is under the influence of alcohol, a drug of abuse, or a combination of them, and, as measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least fifteen nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least five nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(II) As measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(ix) The person has a concentration of methamphetamine in the person's urine of at least five hundred nanograms of methamphetamine per milliliter of the person's urine or has a concentration of methamphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of methamphetamine per milliliter of the person's whole blood or blood serum or plasma.

(x) The person has a concentration of phencyclidine in the person's urine of at least twenty-five nanograms of phencyclidine per milliliter of the person's urine or has a concentration of phencyclidine in the person's whole blood or blood serum or plasma of at least ten nanograms of phencyclidine per milliliter of the person's whole blood or blood serum or plasma.

(2) No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, division (A)(1) or (B) of this section, or a municipal OVI offense shall do both of the following:

(a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

(b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under *section*

4511.191 [4511.19.1] of the Revised Code, and being advised by the officer in accordance with section 4511.192 [4511.19.2] of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

(B) No person under twenty-one years of age shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

(1) The person has a concentration of at least two-hundredths of one per cent but less than eight-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

(2) The person has a concentration of at least three-hundredths of one per cent but less than ninety-six-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(3) The person has a concentration of at least two-hundredths of one gram but less than eight-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(4) The person has a concentration of at least twenty-eight one-thousandths of one gram but less than eleven-hundredths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(C) In any proceeding arising out of one incident, a person may be charged with a violation of division (A)(1)(a) or (A)(2) and a violation of division (B)(1), (2), or (3) of this section, but the person may not be convicted of more than one violation of these divisions.

(D) (1) (a) In any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(a) of this section or for an equivalent offense, the result of any test of any blood or urine withdrawn and analyzed at any health care provider, as defined in section 2317.02 of the Revised Code, may be admitted with expert testimony to be considered with any other relevant and competent evidence in determining the guilt or innocence of the defendant.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent offense, the court may admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. The three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (A) of section 4511.192 [4511.19.2] of the Revised Code as the maximum period of time during which a person may consent to a chemical test or tests as described in that section. The court may admit evidence on the concentration of alcohol, drugs of abuse, or a combination of them as described in this division when a person submits to a blood, breath, urine, or other bodily substance test at the request of a law enforcement officer under section 4511.191 [4511.19.1] of the Revised Code or a blood or urine sample is obtained pursuant to a search warrant. Only a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may refuse to withdraw blood under this division, if in that person's opinion, the physical welfare of the person would be endangered by the withdrawing of blood.

The bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 [3701.14.3] of the Revised Code.

(2) In a criminal prosecution or juvenile court proceeding for a violation of division (A) of this section or for an equivalent offense, if there was at the time the bodily substance was withdrawn a concentration of less than the applicable concentration of alcohol specified in divisions (A)(1)(b), (c), (d), and (e) of this section or less than the applicable concentration of a listed controlled substance or a listed metabolite of a controlled substance specified for a violation of division (A)(1)(j) of this section, that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant. This division does not limit or affect a criminal prosecution or juvenile court proceeding for a violation of division (B) of this section or for an equivalent offense that is substantially equivalent to that division.

(3) Upon the request of the person who was tested, the results of the chemical test shall be made available to the person or the person's attorney, immediately upon the completion of the chemical test analysis.

If the chemical test was obtained pursuant to division (D)(1)(b) of this section, the person tested may have a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist of the person's own choosing administer a chemical test or tests, at the person's expense, in addition to any administered at the request of a law enforcement officer. The form to be read to the person to be tested, as required under *section 4511.192 [4511.19.2] of the Revised Code*, shall state that the person may have an independent test performed at the person's expense. The failure or inability to obtain an additional chemical test by a person shall not preclude the admission of evidence relating to the chemical test or tests taken at the request of a law enforcement officer.

(4) (a) As used in divisions (D)(4)(b) and (c) of this section, "national highway traffic safety administration" means the national highway traffic safety administration established as an administration of the United States department of transportation under *96 Stat. 2415 (1983), 49 U.S.C.A. 105*.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the blood, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:

(i) The officer may testify concerning the results of the field sobriety test so administered.

(ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

(iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate.

(c) Division (D)(4)(b) of this section does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that division, from considering evidence or testimony that is not otherwise disallowed by division (D)(4)(b) of this section.

(E) (1) Subject to division (E)(3) of this section, in any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(b), (c), (d), (e), (f), (g), (h), (i), or (j) or (B)(1), (2), (3), or (4) of this section or for an equivalent offense that is substantially equivalent to any of those divisions, a laboratory report from any laboratory personnel issued a permit by the department of health authorizing an analysis as described in this division that contains an analysis of the whole blood, blood serum or plasma, breath, urine, or other bodily substance tested and that contains all of the information specified in this division shall be admitted as prima-facie evidence of the information and statements that the report contains. The laboratory report shall contain all of the following:

(a) The signature, under oath, of any person who performed the analysis;

(b) Any findings as to the identity and quantity of alcohol, a drug of abuse, a controlled substance, a metabolite of a controlled substance, or a combination of them that was found;

(c) A copy of a notarized statement by the laboratory director or a designee of the director that contains the name of each certified analyst or test performer involved with the report, the analyst's or test performer's employment relationship with the laboratory that issued the report, and a notation that performing an analysis of the type involved is part of the analyst's or test performer's regular duties;

(d) An outline of the analyst's or test performer's education, training, and experience in performing the type of analysis involved and a certification that the laboratory satisfies appropriate quality control standards in general and, in this particular analysis, under rules of the department of health.

(2) Notwithstanding any other provision of law regarding the admission of evidence, a report of the type described in division (E)(1) of this section is not admissible against the defendant to whom it pertains in any proceeding,

other than a preliminary hearing or a grand jury proceeding, unless the prosecutor has served a copy of the report on the defendant's attorney or, if the defendant has no attorney, on the defendant.

(3) A report of the type described in division (E)(1) of this section shall not be prima-facie evidence of the contents, identity, or amount of any substance if, within seven days after the defendant to whom the report pertains or the defendant's attorney receives a copy of the report, the defendant or the defendant's attorney demands the testimony of the person who signed the report. The judge in the case may extend the seven-day time limit in the interest of justice.

(F) Except as otherwise provided in this division, any physician, registered nurse, or qualified technician, chemist, or phlebotomist who withdraws blood from a person pursuant to this section, and any hospital, first-aid station, or clinic at which blood is withdrawn from a person pursuant to this section, is immune from criminal liability and civil liability based upon a claim of assault and battery or any other claim that is not a claim of malpractice, for any act performed in withdrawing blood from the person. The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

(G) (1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (A)(1)(j) of this section is guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:

(a) Except as otherwise provided in division (G)(1)(b), (c), (d), or (e) of this section, the offender is guilty of a misdemeanor of the first degree, and the court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of three consecutive days. As used in this division, three consecutive days means seventy-two consecutive hours. The court may sentence an offender to both an intervention program and a jail term. The court may impose a jail term in addition to the three-day mandatory jail term or intervention program. However, in no case shall the cumulative jail term imposed for the offense exceed six months.

The court may suspend the execution of the three-day jail term under this division if the court, in lieu of that suspended term, places the offender under a community control sanction pursuant to *section 2929.25 of the Revised Code* and requires the offender to attend, for three consecutive days, a drivers' intervention program certified under *section 3793.10 of the Revised Code*. The court also may suspend the execution of any part of the three-day jail term under this division if it places the offender under a community control sanction pursuant to *section 2929.25 of the Revised Code* for part of the three days, requires the offender to attend for the suspended part of the term a drivers' intervention program so certified, and sentences the offender to a jail term equal to the remainder of the three consecutive days that the offender does not spend attending the program. The court may require the offender, as a condition of community control and in addition to the required attendance at a drivers' intervention program, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose on the offender any other conditions of community control that it considers necessary.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of at least three consecutive days and a requirement that the offender attend, for three consecutive days, a drivers' intervention program that is certified pursuant to *section 3793.10 of the Revised Code*. As used in this division, three consecutive days means seventy-two consecutive hours. If the court determines that the offender is not conducive to treatment in a drivers' intervention program, if the offender refuses to attend a drivers' intervention program, or if the jail at which the offender is to serve the jail term imposed can provide a driver's intervention program, the court shall sentence the offender to a mandatory jail term of at least six consecutive days.

The court may require the offender, under a community control sanction pursuant to *section 2929.25 of the Revised Code*, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services, in addition to the required attendance at drivers' intervention program, that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the

programs. The court also may impose any other conditions of community control on the offender that it considers necessary.

(iii) In all cases, a fine of not less than two hundred fifty and not more than one thousand dollars;

(iv) In all cases, a class five license suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(5) of *section 4510.02 of the Revised Code*. The court may grant limited driving privileges relative to the suspension under *sections 4510.021 [4510.02.1]* and *4510.13 of the Revised Code*.

(b) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to one violation of division (A) or (B) of this section or one other equivalent offense is guilty of a misdemeanor of the first degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of ten consecutive days. The court shall impose the ten-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court may require the offender to attend a drivers' intervention program that is certified pursuant to *section 3793.10 of the Revised Code*. If the operator of the program determines that the offender is alcohol dependent, the program shall notify the court, and, subject to division (I) of this section, the court shall order the offender to obtain treatment through an alcohol and drug addiction program authorized by *section 3793.02 of the Revised Code*.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of twenty consecutive days. The court shall impose the twenty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the twenty-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court may require the offender to attend a driver's intervention program that is certified pursuant to *section 3793.10 of the Revised Code*. If the operator of the program determines that the offender is alcohol dependent, the program shall notify the court, and, subject to division (I) of this section, the court shall order the offender to obtain treatment through an alcohol and drug addiction program authorized by *section 3793.02 of the Revised Code*.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than three hundred fifty and not more than one thousand five hundred dollars;

(iv) In all cases, a class four license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of *section 4510.02 of the Revised Code*. The court may grant limited driving privileges relative to the suspension under *sections 4510.021 [4510.02.1]* and *4510.13 of the Revised Code*.

(v) In all cases, if the vehicle is registered in the offender's name, immobilization of the vehicle involved in the offense for ninety days in accordance with *section 4503.233 [4503.23.3] of the Revised Code* and impoundment of the license plates of that vehicle for ninety days.

(c) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to two violations of division (A) or (B) of this section or other equivalent offenses is guilty of a misdemeanor. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of thirty consecutive days. The court shall impose the thirty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the thirty-day mandatory jail term. Notwithstanding the jail terms set forth in *sections 2929.21 to 2929.28 of the Revised Code*, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory jail term of sixty consecutive days. The court shall impose the sixty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the sixty-day mandatory jail term. Notwithstanding the jail terms set forth in *sections 2929.21 to 2929.28 of the Revised Code*, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than five hundred fifty and not more than two thousand five hundred dollars;

(iv) In all cases, a class three license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of *section 4510.02 of the Revised Code*. The court may grant limited driving privileges relative to the suspension under *sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code*.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with *section 4503.234 [4503.23.4] of the Revised Code*. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by *section 3793.02 of the Revised Code*, subject to division (I) of this section.

(d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1413 [2941.14.13] of the Revised Code* or, in the discretion of the court, either a mandatory term of local incarceration of sixty consecutive days in accordance with division (G)(1) of *section 2929.13 of the Revised Code* or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the sixty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of *section 2929.13 of the Revised Code*, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of *section 2929.14 of the Revised Code*, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of *section 2929.13 of the Revised Code*. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender also is convicted of or also pleads guilty to a speci-

cation of the type described in *section 2941.1413 [2941.14.13] of the Revised Code* or, in the discretion of the court, either a mandatory term of local incarceration of one hundred twenty consecutive days in accordance with division (G)(1) of *section 2929.13 of the Revised Code* or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the one hundred twenty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of *section 2929.13 of the Revised Code*, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of *section 2929.14 of the Revised Code*, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of *section 2929.13 of the Revised Code*. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding *section 2929.18 of the Revised Code*, a fine of not less than eight hundred nor more than ten thousand dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of *section 4510.02 of the Revised Code*. The court may grant limited driving privileges relative to the suspension under *sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code*.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with *section 4503.234 [4503.23.4] of the Revised Code*. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by *section 3793.02 of the Revised Code*, subject to division (I) of this section.

(vii) In all cases, if the court sentences the offender to a mandatory term of local incarceration, in addition to the mandatory term, the court, pursuant to *section 2929.17 of the Revised Code*, may impose a term of house arrest with electronic monitoring. The term shall not commence until after the offender has served the mandatory term of local incarceration.

(e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:

(i) If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1413 [2941.14.13] of the Revised Code* or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1413 [2941.14.13] of the Revised Code* or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a one hundred twenty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a commu-

nity control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding *section 2929.18 of the Revised Code*, a fine of not less than eight hundred nor more than ten thousand dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of *section 4510.02 of the Revised Code*. The court may grant limited driving privileges relative to the suspension under *sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code*.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with *section 4503.234 [4503.23.4] of the Revised Code*. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by *section 3793.02 of the Revised Code*, subject to division (I) of this section.

(2) An offender who is convicted of or pleads guilty to a violation of division (A) of this section and who subsequently seeks reinstatement of the driver's or occupational driver's license or permit or nonresident operating privilege suspended under this section as a result of the conviction or guilty plea shall pay a reinstatement fee as provided in division (F)(2) of *section 4511.191 [4511.19.1] of the Revised Code*.

(3) If an offender is sentenced to a jail term under division (G)(1)(b)(i) or (ii) or (G)(1)(c)(i) or (ii) of this section and if, within sixty days of sentencing of the offender, the court issues a written finding on the record that, due to the unavailability of space at the jail where the offender is required to serve the term, the offender will not be able to begin serving that term within the sixty-day period following the date of sentencing, the court may impose an alternative sentence under this division that includes a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring.

As an alternative to a mandatory jail term of ten consecutive days required by division (G)(1)(b)(i) of this section, the court, under this division, may sentence the offender to five consecutive days in jail and not less than eighteen consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the five consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The five consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of twenty consecutive days required by division (G)(1)(b)(ii) of this section, the court, under this division, may sentence the offender to ten consecutive days in jail and not less than thirty-six consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the ten consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The ten consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to a mandatory jail term of thirty consecutive days required by division (G)(1)(c)(i) of this section, the court, under this division, may sentence the offender to fifteen consecutive days in jail and not less than fifty-five consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the fifteen consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The fifteen consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of sixty consecutive days required by division (G)(1)(c)(ii) of this section, the court, under this division, may sentence the offender to thirty consecutive days in jail and not less than one hundred ten consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the thirty consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring

shall not exceed one year. The thirty consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

(4) If an offender's driver's or occupational driver's license or permit or nonresident operating privilege is suspended under division (G) of this section and if *section 4510.13 of the Revised Code* permits the court to grant limited driving privileges, the court may grant the limited driving privileges in accordance with that section. If division (A)(7) of that section requires that the court impose as a condition of the privileges that the offender must display on the vehicle that is driven subject to the privileges restricted license plates that are issued under *section 4503.231 [4503.23.1] of the Revised Code*, except as provided in division (B) of that section, the court shall impose that condition as one of the conditions of the limited driving privileges granted to the offender, except as provided in division (B) of *section 4503.231 [4503.23.1] of the Revised Code*.

(5) Fines imposed under this section for a violation of division (A) of this section shall be distributed as follows:

(a) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii), thirty-five dollars of the fine imposed under division (G)(1)(b)(iii), one hundred twenty-three dollars of the fine imposed under division (G)(1)(c)(iii), and two hundred ten dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to an enforcement and education fund established by the legislative authority of the law enforcement agency in this state that primarily was responsible for the arrest of the offender, as determined by the court that imposes the fine. The agency shall use this share to pay only those costs it incurs in enforcing this section or a municipal OVI ordinance and in informing the public of the laws governing the operation of a vehicle while under the influence of alcohol, the dangers of the operation of a vehicle under the influence of alcohol, and other information relating to the operation of a vehicle under the influence of alcohol and the consumption of alcoholic beverages.

(b) Fifty dollars of the fine imposed under division (G)(1)(a)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section and was confined as a result of the offense prior to being sentenced for the offense but is not sentenced to a term of incarceration, the fifty dollars shall be paid to the political subdivision that paid the cost of housing the offender during that period of confinement. The political subdivision shall use the share under this division to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs of any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(c) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii) and fifty dollars of the fine imposed under division (G)(1)(b)(iii) of this section shall be deposited into the county or municipal indigent drivers' alcohol treatment fund under the control of that court, as created by the county or municipal corporation under division (N) of *section 4511.191 [4511.19.1] of the Revised Code*.

(d) One hundred fifteen dollars of the fine imposed under division (G)(1)(b)(iii), two hundred seventy-seven dollars of the fine imposed under division (G)(1)(c)(iii), and four hundred forty dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. The political subdivision shall use this share to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs for any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(e) The balance of the fine imposed under division (G)(1)(a)(iii), (b)(iii), (c)(iii), (d)(iii), or (e)(iii) of this section shall be disbursed as otherwise provided by law.

(6) If title to a motor vehicle that is subject to an order of criminal forfeiture under division (G)(1)(c), (d), or (e) of this section is assigned or transferred and division (B)(2) or (3) of *section 4503.234 [4503.23.4] of the Revised Code* applies, in addition to or independent of any other penalty established by law, the court may fine the offender the value of the vehicle as determined by publications of the national auto dealers association. The proceeds of any fine so imposed shall be distributed in accordance with division (C)(2) of that section.

(7) As used in division (G) of this section, "electronic monitoring," "mandatory prison term," and "mandatory term of local incarceration" have the same meanings as in *section 2929.01 of the Revised Code*.

(H) Whoever violates division (B) of this section is guilty of operating a vehicle after underage alcohol consumption and shall be punished as follows:

(1) Except as otherwise provided in division (H)(2) of this section, the offender is guilty of a misdemeanor of the fourth degree. In addition to any other sanction imposed for the offense, the court shall impose a class six suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or non-resident operating privilege from the range specified in division (A)(6) of *section 4510.02 of the Revised Code*.

(2) If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one or more violations of division (A) or (B) of this section or other equivalent offenses, the offender is guilty of a misdemeanor of the third degree. In addition to any other sanction imposed for the offense, the court shall impose a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of *section 4510.02 of the Revised Code*.

(3) If the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1416 [2941.14.16] of the Revised Code* and if the court imposes a jail term for the violation of division (B) of this section, the court shall impose upon the offender an additional definite jail term pursuant to division (E) of *section 2929.24 of the Revised Code*.

(I) (1) No court shall sentence an offender to an alcohol treatment program under this section unless the treatment program complies with the minimum standards for alcohol treatment programs adopted under Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services.

(2) An offender who stays in a drivers' intervention program or in an alcohol treatment program under an order issued under this section shall pay the cost of the stay in the program. However, if the court determines that an offender who stays in an alcohol treatment program under an order issued under this section is unable to pay the cost of the stay in the program, the court may order that the cost be paid from the court's indigent drivers' alcohol treatment fund.

(J) If a person whose driver's or commercial driver's license or permit or nonresident operating privilege is suspended under this section files an appeal regarding any aspect of the person's trial or sentence, the appeal itself does not stay the operation of the suspension.

(K) Division (A)(1)(j) of this section does not apply to a person who operates a vehicle, streetcar, or trackless trolley while the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the amount specified in that division, if both of the following apply:

(1) The person obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

(2) The person injected, ingested, or inhaled the controlled substance in accordance with the health professional's directions.

(L) The prohibited concentrations of a controlled substance or a metabolite of a controlled substance listed in division (A)(1)(j) of this section also apply in a prosecution of a violation of division (D) of *section 2923.16 of the Revised Code* in the same manner as if the offender is being prosecuted for a prohibited concentration of alcohol.

(M) All terms defined in *section 4510.01 of the Revised Code* apply to this section. If the meaning of a term defined in *section 4510.01 of the Revised Code* conflicts with the meaning of the same term as defined in *section 4501.01* or *4511.01 of the Revised Code*, the term as defined in *section 4510.01 of the Revised Code* applies to this section.

(N) (1) The Ohio Traffic Rules in effect on January 1, 2004, as adopted by the supreme court under authority of *section 2937.46 of the Revised Code*, do not apply to felony violations of this section. Subject to division (N)(2) of this section, the Rules of Criminal Procedure apply to felony violations of this section.

(2) If, on or after January 1, 2004, the supreme court modifies the Ohio Traffic Rules to provide procedures to govern felony violations of this section, the modified rules shall apply to felony violations of this section.

**HISTORY:**

GC § 6307-19; 119 v 766, § 19; Bureau of Code Revision, 10-1-53; 125 v 461; 130 v 1083 (Eff 7-11-63); 132 v H 380 (Eff 1-1-68); 133 v H 874 (Eff 9-16-70); 134 v S 14 (Eff 12-3-71); 135 v H 995 (Eff 1-1-75); 139 v S 432 (Eff 3-16-83); 141 v S 262 (Eff 3-20-87); 143 v S 131 (Eff 7-25-90); 143 v H 837 (Eff 7-25-90); 145 v S 82 (Eff 5-4-94); 148 v S 22 (Eff 5-17-2000); 149 v S 163, § 1, Eff 4-9-2003; 149 v S 123, § 1, eff. 1-1-04; 149 v H 490, § 1, eff. 1-1-04; 149 v S 163, § 3, eff. 1-1-04; 150 v H 87, § 1, eff. 6-30-03; 150 v H 87, § 4, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 151 v S 8, § 1, eff. 8-17-06; 151 v H 461, § 1, eff. 4-4-07.