
IN THE SUPREME COURT OF OHIO

TIMOTHY J. BROWN, Administrator :
of the Estate of Kourtney T. Brown, et al. : **CASE NO. 08-0483**
: :
Plaintiffs-Appellants : :
: : **ON APPEAL FROM THE**
VS. : **FRANKLIN COUNTY COURT OF**
: **APPEALS, TENTH APPELLATE**
: **DISTRICT**
: :
NATIONWIDE MUTUAL INSURANCE : **COURT OF APPEALS**
COMPANY : **CASE NO. 07-APE-07-0570**
: :
Defendant-Appellee :

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

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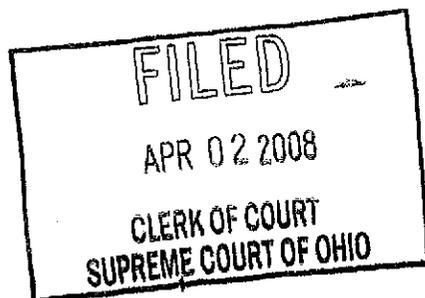


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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND DOES NOT
INVOLVE ANY CONSTITUTIONAL QUESTION**

Section 6, Article IV, of the Ohio Constitution provides that a judgment of a court of appeals of this State shall serve as the ultimate and final adjudication of all cases except those involving constitutional questions, conflict cases, felony cases, cases in which the court of appeals has original jurisdictions, and cases of great general interest. *Williamson v. Rubich (1960), 171 Ohio St. 253.* “Except in these special circumstances, it is abundantly clear that in this jurisdiction a party to litigation has a right to but one appellate review of his cause.” *Id. at pp. 253-254.* Where a party believes his cause to be one of public or great general interest, this Court has held that “*the sole issue for determination...is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the party.*” *Id. at p. 254.* (Emphasis in original). This Court has emphasized that it will not review cases where “it became manifest that the question was of importance merely to the litigants and did not present an issue of immediate public significance.” *Id. at p. 255.*

A review of appellants’ memorandum in support of jurisdiction in this case reveals that this is certainly not a case of great general interest and it does not involve any constitutional question. First, appellants claim that this case provides this Court with an opportunity to interpret and clarify the most recent amendments to R.C. § 3937.18 and to clarify “when a person qualifies as an underinsured motorist.” This Court has had the opportunity to interpret and clarify the amendments to R.C. § 3937.18 in Am.Sub.S.B. No. 20, effective October 20, 1994, and the appellate court followed and applied this Court’s prior case law. As such, in light of this Court’s prior case law, which was appropriately followed and applied by the appellate court below, this case is of no public significance and merely presents questions of interest solely to the parties herein.

First and foremost, appellants' memorandum incorrectly states that the appellate court below disregarded the statute's plain language and applied a strict "limits to limits" comparison of UM/UIM coverage of the tortfeasor and appellants. That is simply not true. In fact, the Tenth District Court of Appeals made it eminently clear in its opinion that appellants were precluded from UIM coverage in this case, not simply because of a "limits to limits" comparison, but rather because "[i]n a case such as this, where the claimant's *recovery*, either individually or collectively, would exceed the amount that they would have recovered had their injuries been caused by an uninsured motorist, we must conclude, as a matter of law, that no UIM coverage is available." (Appellate Court Opinion at ¶30.) (Emphasis added.) Thus, contrary to appellant's argument, the lower court did not find UIM coverage was precluded based on a strict "limits to limits" approach, but simply followed prior case law from this Court interpreting and applying the most recent amendments to R.C. § 3937.18 as it pertains to setoffs. The appellate court, applying the fundamental UIM principles expressed in R.C. § 3937.19 and by this Court in *Littrell v. Wigglesworth (2001)*, 91 Ohio St.3d 425 and *Webb v. McCarty (2007)*, 114 Ohio St.3d 292, 2007-Ohio-4162, determined that appellants were not entitled to UIM coverage since they had already received the same amount they would have received had the tortfeasor been uninsured. In short, appellants' "explanation of why this case is a case of public or great general interest" on this first issue does not accurately reflect the actual holding of the appellate court below.

In addition, appellants believe that the appellate court's decision is inconsistent with the policies behind R.C. § 3937.18 as far as setoffs and will "read a rule of collective setoff into all automobile insurance policies in Ohio, regardless of policy language." However, as correctly determined by the appellate court below in this case, the consideration of whether a collective setoff applies to UIM benefits, based upon this Court's decision in *Littrell*, applies only to multiple claims

being presented under one UIM policy. As the appellate court below held, and other appellate districts have similarly held, support for this conclusion is based upon the fact that to find otherwise “would blatantly disregard the Supreme Court’s analysis in *Littrell* and *Webb*.” (Appellate Opinion, p. 20.) The *Littrell* analysis applied by the appellate court below in this case, favoring a collective setoff when multiple claims are presented against a single limit UIM policy, leads to the conclusion that no UIM coverage is available under the Nationwide policy issued to appellants Timothy Brown and Kimberly Brown. The appellants received exactly what they “bargained for and paid for” and the appellate court’s decision below does not “lead to countless Ohioans losing their rights to UIM coverage.” Accordingly, the appellate court below properly affirmed summary judgment in favor of appellee on this issue.

The second issue raised by appellants in support of jurisdiction likewise reveals that there is no great interest in this case beyond that of Appellants. Appellants have not posed to this Court a constitutional question, and cannot demonstrate that their case is one of great general interest. Appellants only claim that this Court should accept jurisdiction of their appeal because the claimed error below “will have far reaching effects and will change the rights of countless policy holders.” The contractual ambiguity argument contrived by appellants in this case does not present an opportunity for this Court to address any new issue of public or great general interest. Appellants simply take issue with the Appellate Court’s manner of interpreting the insurance policy terms and conditions involved herein.

In this case, the Appellate Court properly applied the well-settled principles of insurance contract interpretation. Moreover, in *Pyros v. Loparo*, Franklin App. No. 03AP-1126, 2005-Ohio-577, at ¶24, the same appellate court below interpreted identical policy language and held that the policy language at issue was clear and unambiguous. Accordingly, the manner and method of contract interpretation employed by the appellate court below was consistent with that required by

this Court.

In the end, Appellants struggle to assert reversible error on the part of the appellate court below. Appellants simply are left to rehash the arguments they made in the Court of Appeals, and outline to this Court their disagreement with the appellate court decision in failing to construe the Appellant Edward Walker's umbrella policy in a manner consistent with Appellants' incorrect construction. Appellants claim ambiguity. However, the Court of Appeals rightly saw no ambiguity because no ambiguity exists. UIM coverage under Appellant Edward Walker's umbrella policy only arises when the Appellants are entitled to UIM coverage under one of the underlying policies listed in the umbrella policy's declarations.

In both instances, Appellants have not articulated an issue sufficient to invoke this Court's discretionary jurisdiction and, as such, Appellants' case is not appropriate for this Court's review.

**STATEMENT OF FACTS RELEVANT
TO APPELLEE'S POSITION**

This matter arises out of an automobile accident which occurred on April 30, 2004 on Interstate 71 in Wayne County, Ohio. Appellant Kimberly A. Brown was operating a 2004 Pontiac Grand Prix in the northbound lanes of Interstate 71, with her daughter, Kourtney T. Brown, and her son, Joshua W. Brown, as passengers. Rufus Womak, was operating a 1989 Jeep Cherokee in the southbound lanes of Interstate 71, when he attempted to pass another vehicle and, in the process of doing so, came into contact with that vehicle. Mr. Womak lost control of his vehicle and then traveled through the median separating the southbound and northbound lanes of Interstate 71. Mr. Womak's vehicle entered the northbound lanes directly in front of the Appellant Kimberly A. Brown's vehicle and a collision ensued between the Womak vehicle and the Brown vehicle. Appellant Kimberly A. Brown suffered personal injuries, Joshua W. Brown suffered personal injuries and Appellants' decedent, Kourtney T. Brown, was killed.

At the time of the accident, Rufus Womak was insured by Allstate Insurance Company with automobile liability coverage in the amount of \$100,000 per person/\$300,000 per occurrence. Allstate Insurance Company paid Appellants the sum of \$300,000 to resolve all claims asserted against Rufus Womak arising out of the accident as follows: \$100,000 to Appellant Timothy J. Brown, as Administrator of the Estate of Kourtney T. Brown for the benefit of the beneficiaries of the Estate of Kourtney T. Brown, \$100,000 to Appellants Timothy J. Brown and Kimberly A. Brown for the bodily injuries sustained by Kimberly A. Brown, and \$100,000 to Appellants Timothy J. Brown and Kimberly A. Brown, as the parents and natural guardians of Joshua W. Brown, a minor, for the bodily injuries sustained by Joshua W. Brown.

Appellants' UIM claims against Nationwide arose under three (3) insurance policies issued by Nationwide: (1) Policy No. 9234N330281, a Nationwide Auto Policy issued to Appellants Timothy J. Brown and Kimberly A. Brown (the "Brown Auto Policy"); (2) Policy No. 9234H802561, a Nationwide Auto Policy issued to Plaintiff Edward Walker (the "Walker Auto Policy"); and (3) Policy No. 9234PU036597, a Nationwide Personal Umbrella Policy issued to Plaintiff Edward Walker (the "Walker Umbrella Policy").

Appellants and Nationwide filed cross-motions for summary judgment in the trial court. By a Decision and Entry filed June 19, 2007, the trial court granted Nationwide's motion for summary judgment with respect to all claims asserted against it, finding that Appellants were not entitled to UIM coverage under any of Nationwide policies referenced above and was entitled to judgment as a matter of law on Appellants' claims for UIM coverage. Further, the trial court granted judgment as a matter of law in favor of Nationwide with respect to Appellants' claim of bad faith. The trial court denied Appellants' cross-motion for summary judgment as a matter of law. On August 20, 2007, the appellate court below affirmed the trial court's decision, finding that Appellants were not entitled to UIM coverage under either the Brown Auto Policy or the Walker Umbrella Policy.

**ARGUMENT IN OPPOSITION TO
PROPOSITIONS OF LAW**

Counter Proposition Of Law 1:

When determining whether a claimant is underinsured, a court should collectively setoff the “amount available for payment” to each claimant presenting underinsured motorist claims against a single limit policy to ensure that a UIM claimant’s recovery does not exceed the amount that they would have recovered had their injuries been caused by an uninsured motorist.

The Brown Auto Policy with Nationwide defined an “underinsured motorist,” not an “underinsured claimant,” as “a motor vehicle for which bodily injury coverage limits or other security bonds are in effect, however, their total amount available for payment is less than the limits of this coverage.” Under this definition, Nationwide can properly consider the per occurrence limits of \$300,000 to the tortfeasor’s per occurrence limits of the Brown Auto Policy of \$300,000 to determine whether the tortfeasor was an “underinsured motorist.”

In doing so, Nationwide properly considered the “amounts available for payment” for multiple claimants each submitting claims arising out of once occurrence under the Brown Auto Policy, and simply did not take a “limits to limits” approach as argued by Appellants. When the “amounts available for payment” of multiple claimants under a single limit policy’s per occurrence limit is in fact equal to the per occurrence limits of a tortfeasor’s liability policy, under Nationwide’s policy, as well as statutory law and case law interpreting UIM coverage, the tortfeasor is not an “underinsured motorist.”

As such the appellate court below properly concluded that Appellants are not entitled to UIM coverage under the Brown Auto Policy because Appellants received \$100,000 per claim on three separate claims presented under the Brown Auto Policy, or \$300,000 collectively per occurrence. Appellants received the same amount under the tortfeasor’s policy as they would have received had the tortfeasor been uninsured. Accordingly, the appellate court properly applied statutory law and

followed the precedent of this Court that a person injured by an underinsured motorist should not be afforded greater protection than that which would have been available had he been injured by an uninsured motorist. R.C. 3937.18; *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271.

The appellate court applied the analysis set forth in *Littrell v. Wigglesworth* (2001), 91 Ohio St.3d 245, and subsequently applied by other appellate courts in *Luckenbill v. Hamilton Mut. Ins. Co.* (2001), 2001-Ohio-1465, and *Gleason v. Collier* (2006), 2006-Ohio-6293, to conclude that Appellants were not entitled to any further recover of UIM benefits under the Brown Auto Policy. On the other hand, Appellants are espousing what the appellate court labeled a “blatant disregard [of] the Supreme Court’s analysis in *Littrell* and *Webb*.” (Appellate Opinion, p. 20.) Appellants seek an outcome in which they will receive not \$300,000 per occurrence, under either the tortfeasor’s liability policy or their UIM coverage with Nationwide, but rather \$500,000 in insurance proceeds for one occurrence. As the appellate court below stated, had the tortfeasor been uninsured, Appellants would have only been able to collect \$300,000 collectively from Nationwide. Pursuant to Appellants’ argument, they will receive \$300,000 from Allstate and an additional \$200,000 from Nationwide. Such an outcome clearly contradicts the statutory intent of R.C. 3937.18 and the case law in this area of the law.

Appellants’ argument for UIM coverage fails under either the UIM statutes or Ohio case law, both from this Court and other appellate courts, that have been faced with matters involving multiple claims presented against a single insurance policy. R.C. 3739.18(A)(2), as applicable to this case, states in pertinent part:

* * * Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured’s uninsured motorist coverage. If the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts

available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

In *Littrell*, the tortfeasor had \$1,300,000 in liability coverage. At the time of the accident, Westfield insured all five occupants in a minivan. Westfield provided \$500,000 in UIM coverage. *Id.* at 426. The trial court held that the tortfeasor was not underinsured and the court of appeals affirmed. As to Westfield, this Court affirmed the granting of summary judgment. This Court held that, because the tortfeasor's liability coverage exceeded Westfield's UIM coverage, the occupants of the minivan were not entitled to UIM benefits. *Id.* at 431. Footnote seven in *Littrell* states that *Littrell* illustrates well the multiple-policy issue. If each of the five occupants of the minivan had had a separate policy of insurance, then each would have had UIM coverage under his or her own policy up to the single limit less any sums received from the tortfeasor's policy. However, in *Littrell*, this court addressed several important points relevant to the resolution of the instant matter: (1) *Littrell* concerned a straight UIM claim, not a Sexton-Moor claim; *Moore v. State Auto Mut. Ins. Co.* (2000), 88 Ohio St.3d 27; (2) Westfield's policy therein covered everyone in Pratt's minivan; (3) Westfield's UIM policy limits had to be divided among everyone in the minivan; and (4) The tortfeasor's liability coverage was equal to or greater than Westfield's UIM coverage.

As applied to this case, Appellants are making straight UIM claims against Nationwide under the Brown Auto Policy, not *Sexton-Moore* claims. Like *Littrell*, the Brown Auto Policy covered everyone occupying the Browns' vehicle at the time of the accident. Like *Littrell*, Nationwide's UIM coverage under the Brown Auto Policy will have to be divided among everyone in the claimants' vehicle. Thus, the UIM coverage available under the Brown Auto Policy (\$300,000) would be divided among all claims arising out of said accident. And, like *Littrell*, the tortfeasor's liability coverage (\$300,000 per occurrence), is not less than Nationwide's UIM coverage (\$300,000 per occurrence). In other words, in this particular case, with straight UIM claims involving multiple

parties, payments to other insureds under the Brown Auto Policy reduce the total amount of UIM coverage available to an insured. *Littrell, supra*. If the liability coverage available for payment for the benefit of the insureds who are claiming UIM benefits is not less than the UIM coverage, there is no basis for an UIM claim. *Littrell, supra*.

More recently, the Sixth District Court of Appeals relied upon *Littrell* and held that “because decedent was an insured under Progressive’s policies, the amount of underinsured motorist coverage available from Progressive was completely reduced by the \$50,000 payment from the tortfeasor to decedent’s estate.” *Wickerham v. Progressive Insurance Companies* (2006), 166 Ohio App.3d 180 at P11. In coming to its decision, the appellate court stated that:

Appellant is correct that, in general, payments recovered by persons who are not insureds under a underinsured motorist policy cannot be used to offset the limits of underinsured motorist coverage available to the insureds. See *Littrell v. Wigglesworth* (2001), 91 Ohio St.3d 425, 432, 2001 Ohio 87, 746 N.E.2d 1077. However, payments to other insureds under a policy do reduce the total amount of underinsured motorist coverage available to an insured. *Id. at 431*.

Following this Court’s holding in *Littrell*, the Second District Court of Appeals in *Luckenbill, supra*, addressed a case in which multiple claims were presented by Plaintiffs under a single policy with single-limit UIM coverage of \$100,000 arising out of the death of Hilda Luckenbill. The tortfeasor carried liability coverage totaling \$200,000, which was paid to Plaintiffs. Defendant argued for a collective setoff, and that since the Plaintiffs collective received \$200,000, which exceeded the single-limit maximum under the policy, no UIM coverage was available under the policy. Plaintiffs, like the Appellants in the present matter, relied upon *Derr v. Westfield Cos.* (1992), 63 Ohio St.3d 537, and argued that each claim, for setoff purposes, must be considered separately.

The *Luckenbill* court held that “* * * the sole issue now in multiple claimant cases is

whether any injured party compensated by a tortfeasor may also be classified as an insured under the UIM policy. If so, *regardless of policy content*, the UIM carrier may statutorily set off all amounts received *by all persons who could be considered "insureds" under the policy*. This would be true regardless of the amount, if any, that a particular injured insured actually recovers from the tortfeasor. *Id.*, at *38-40. (Emphasis added.)

The *Gleason* case involved claims brought on behalf of multiple insureds, each with separate claims under a \$300,000 per person/\$300,000 per occurrence UIM policy, just like the present matter. Further, in *Gleason*, each claimant received the per person limit under the tortfeasor's liability insurance coverage, \$100,000. As indicated by Appellants herein, the *Gleason* court first noted that "[s]ince UIM coverage 'applies separately to each injured person,' we find that, pursuant to the terms of the policy, each insured is entitled to UIM coverage up to the \$300,000 'each person' limit of liability, subject overall to the 'each occurrence' limit." The court in its analysis did state that it would appear that, "pursuant to the terms of the policy, even though the Gleasons and Mrs. Clemons seemingly would each be entitled to \$200,000 of UIM coverage, their recovery is capped by the "each occurrence" limit of \$300,000. Therefore, the actual balance of UIM coverage available to appellants to share is \$300,000, or \$150,000 each."

Appellants would have this Court believe that the appellate court below "misconstrued this case." (Appellants' Brief, p. 10.) This is simply not accurate. In fact, appellants completely overlook, or rather ignore, the crucial part of the *Gleason* court's further analysis upon which the appellate court below based its conclusion, finding that appellants were indeed not entitled to UIM coverage under the Brown Auto Policy. In *Gleason*, the court did not end its analysis as referenced above and hold that the claimants were entitled to UIM benefits, as Appellants would do in this case. The court went further and reiterated this Court's statement in *Clark* that the current version of R.C.

3937.18 ensures that a person injured by an underinsured motorist should not be afforded greater protection than that which would have been available had he been injured by an uninsured motorist.

After doing so, the court held:

In this case, had Collier been uninsured, the total amount of uninsured coverage the Gleasons and Mrs. Clemons could have received pursuant to Auto Owners' policy would have been \$300,000 "each person"/\$300,000 "each occurrence." Because appellants' injuries exceeded the "each occurrence" limit of liability, the most the insureds could have collectively received in uninsured motorist coverage from Auto Owners was \$300,000, or \$150,000 when divided between them. Appellants each have already received a total of \$200,000 in damages from the tortfeasor and Auto Owners. Accordingly, we find that Auto Owners is not required to pay any further UIM benefits to appellants for this occurrence.

Gleason, at P28-31.

Taking the holdings in *Littrell*, *Luckenbill* and *Gleason* and applying it to this case leads to the following: had the tortfeasor Rufus Womak been uninsured, the total amount of uninsured coverage Appellants could have received pursuant to Nationwide's policy would have been \$300,000. Because Appellants' injuries exceeded the "each occurrence" limit of liability, the most Appellants could have collectively received in uninsured motorist coverage from Nationwide was \$300,000, or \$100,000 when divided between them. Appellants each have received a total of \$100,000 in damages from the tortfeasor. Accordingly, Nationwide is not required to pay any UIM benefits to Appellants related to the underlying occurrence.

Counter Proposition Of Law 2:

An umbrella policy that limits UIM coverage under the umbrella policy to when an insured is first entitled to UIM coverage under one of the underlying policies listed in the umbrella policy's declaration is not ambiguous.

Appellant Edward Walker's argument as to UIM coverage under his umbrella policy must be considered in light of established rules of interpretation of insurance contracts. When doing so,

the Walker Umbrella Policy with Nationwide clearly provides excess *follow form* coverage if and only if: (1) Appellant Walker is entitled to UIM coverage in an underlying policy identified in the declarations to such policy, and (2) the required underlying policy limits have been exhausted. The Walker Umbrella Policy lists in its Schedule of Required Underlying Insurance the Walker Auto Policy (Policy No. 9234H 802561) – not the Browns Auto Policy – and Appellant Walker’s Nationwide Homeowner’s policy (Policy No. 9234HO750265) as underlying policies for which it provides excess follow form coverage.

Based upon Appellants’ recognition that there is no coverage for Appellant Walker – or any other Appellant – under the Walker Auto Policy, the determination of whether or not there is coverage under Walker’s Personal Umbrella Policy, should be a simple issue to resolve. Nonetheless, Appellant Walker has put forth a “creative” argument that since he was an insured under the Browns Auto Policy, and since he sustained an alleged underinsured loss, the Walker Umbrella Policy is triggered. This is simply not the case.

The Walker Umbrella Policy first and foremost requires that the loss be covered under the Walker Auto Policy prior to Nationwide being obligated to provide coverage under the umbrella policy. There is no ambiguity in the umbrella policy as argued by Appellant Walker. First, the umbrella policy establishes that coverage thereunder “is subject to the terms and conditions of the uninsured motorists coverage included in an underlying policy or policies of insurance described in the Declarations page..[.]” It is undisputed that the Declarations to the Walker Umbrella Policy identifies only the *Walker Auto Policy*, not the *Brown Auto Policy* as the required underlying insurance. Thus, based upon this clear and unambiguous coverage requirement, coverage under the Walker Auto Policy must be present to obtain coverage under the Personal Umbrella Policy.

Section 4 of the Uninsured Motorist Coverage Endorsement in the Walker Umbrella Policy

states that UIM coverage “will only apply to losses that are payable by your underlying coverage.”

Appellant Walker argues that the phrase “underlying coverage” is ambiguous and should be read in the broadest sense, thus allowing the Brown Auto Policy to qualify as his “underlying coverage” to trigger coverage under his umbrella policy. This is simply not the case. First, this policy language can not be read exclusively to establish coverage. Rather, all of the conditions for coverage must be satisfied by Appellant Walker to establish coverage. As set forth above, this he cannot do.

Moreover, the phrase “payable by your underlying coverage” does, in fact, tie umbrella coverage to the *Walker Auto Policy*, not the Brown Auto Policy. Probably the most fundamental principle of construction of an insurance contract is that the construction can only arise when the language of the contract is in need of construction. *Cox v. United States Fire Ins. Co.* (Franklin Cty. 1974), 41 Ohio Misc. 128. It is well-settled law that if the language employed is unambiguous and clear, there is no occasion for construction unless the plain meaning of the language would lead to an absurd result. *Saba v. Homeland Ins. Co.* (1953), 159 Ohio St. 237.

Here, this Court need not engage in any construction or interpretation of the phrase “underlying coverage” in the Walker Umbrella Policy. It is absolutely clear and unambiguous even when taken out context as Appellant Walker does. In other words, even standing alone, the phrase “underlying coverage” makes it eminently clear that an insured cannot attempt to seek UIM coverage under the umbrella policy when the underlying Walker Auto Policy does not provide the insured UIM coverage.

It is also a fundamental rule of construction that a contract of insurance must be construed as a whole, and the entire policy, with all its provisions, words and parts, must be construed together as one contract, and the intent of each part gathered from a consideration of the whole. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353,

361; *Heritage Mut. Ins. Co. v. Ricart Ford, Inc.* (Franklin Cty. 1996), 105 Ohio App.3d 261. In other words, the plain, unequivocal rule is that the contract must be construed as a whole and the intent of the parties must be determined from the entire instrument, and not from detached parts. *Foster, supra.*

Appellant Walker's unreasonable "interpretation" of Nationwide's policy language totally ignores the entirety principle of construction. Instead, Appellant Walker attempts to argue that the term "underlying coverage," when isolated from its context, is susceptible to more than one meaning. Throughout the Walker Umbrella Policy, the term "underlying insurance coverage" is solely used to describe the *Walker Auto Policy*. In the Declarations Page of the Walker Umbrella Policy it states "Named insured agrees to maintain the following Required Underlying Insurance Coverages" and "Required Underlying Insurance Coverage"; Uninsured Motorist Coverage Endorsement, Condition 2(a) – "your required underlying uninsured motorist coverage." Under each of these sections, there are distinct provisions which discuss and reference the *Walker Auto Policy* that applies to the umbrella coverage.

With these principles in mind, and reading the Uninsured Motorist Coverage Endorsement in its entirety and giving effect to all parts, Nationwide's Uninsured Motorist Coverage Endorsement clearly and ambiguously limits coverage under the umbrella policy to claims which are covered under the underlying Walker Auto Policy. Throughout Nationwide's policy, the term "underlying coverage" refers to the Walker Auto Policy, and does not leave room for dispute that it may refer or apply to other coverage allegedly available to Appellant Walker.

In *Pyros v. Loparo* (Feb. 15, 2005), 2005 Ohio 577, the Tenth District Court of Appeals held that before coverage in a Nationwide Personal Umbrella Policy is triggered the insured must first be entitled to coverage in the underlying policies in the policy declarations in the umbrella policy. The

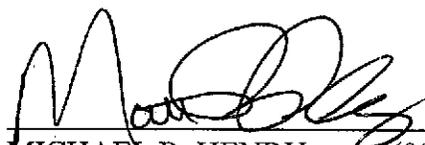
appellate court in *Pyros*, interpreting identical policy language in a Nationwide Personal Umbrella Policy, found that the language claimed by Appellants herein was, indeed, not ambiguous and held that the since the plaintiffs therein were not entitled to UM/UIM coverage because they were not entitled to UM/UIM coverage under either the auto policy or the homeowner's policy identified in the declarations to the Nationwide Personal Umbrella Policy.

Therefore, since there was admittedly no coverage for Appellant Walker in this case under the underlying Walker Auto Policy, or any other policy identified in the Declarations Page to the Walker Umbrella Policy, there simply can be no coverage under the Walker Umbrella Policy.

CONCLUSION

Appellant has simply failed to articulate to this Court any compelling reason to accept jurisdiction in this case. This case does not present a question of public or great general interest, and does not involve any constitutional question. For these reasons, appellee respectfully requests that this Court decline jurisdiction in this matter.

Respectfully submitted,



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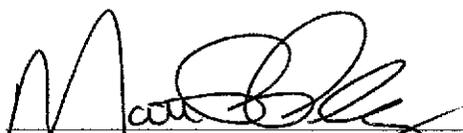
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served, via regular U.S. Mail, this 2nd day of April, 2008, to the following:

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