

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 Nos.
2007-1762 and 2007-1760

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

Court of Appeals
Case No. L-07-1022

**MERIT BRIEF OF APPELLEE,
FRED L. LAGER, ADMINISTRATOR OF THE ESTATE OF SARA E. LAGER,
DECEASED**

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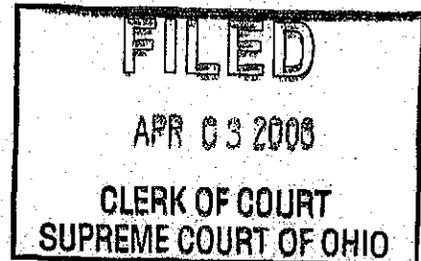


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OTHER

Webster's New World Dictionary of the American Language,
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STATEMENT OF FACTS

Appellee, Fred L. Lager, Administrator of the Estate of Sara E. Lager, deceased, generally agrees with the STATEMENT OF FACTS contained in the Merit Brief of Appellant, Nationwide Mutual Fire Insurance Company and in the interest of brevity, and this Court's Rules of Practice, will not restate them here.

Appellee refers to the contract and policy of insurance, and various parts thereof issued and delivered by Appellant, Nationwide Mutual Fire Insurance Company to Fred L. Lager and Cathy R. Lager, which contract is at issue and which is specifically defined by policy number 9134C362444. The contract and policy of insurance can be found as Defendant, Nationwide Mutual and Fire Insurance Company Exhibit CC, attached to Defendant's Motion for Summary Judgment filed, February 2, 2006 and Plaintiff's, Fred L. Lager, Administrator of the Estate of Sara E. Lager, deceased, Exhibit 1 attached to Plaintiff's Motion for Summary Judgment and Response to Motion for Summary Judgment of Defendant, filed February 27, 2006. Both the aforesaid motions were filed in the trial court and are identified in the INDEX filed in this Court from the lower courts and are more particularly identified in the INDEX in lines numbered 30 and 35 respectively.

At the trial level, Appellant indicated that "(t)his January 26, 2003 automobile accident is subject to the language of O.R.C. 3937.18 as amended on September 3, 1997."(H.B.261).

Appellee is in agreement that the version of R.C. 3937.18 as amended on September 3, 1997, more commonly referred to as H.B. 261 is applicable to this case. (See Defendant, Nationwide Mutual Fire Insurance Company's Reply on its Motion for

Summary Judgment and Response to Plaintiff's Motion for Summary Judgment filed in the trial court on March 29, 2006 and identified in the INDEX filed in this case by the lower courts as line 46.)

When the competing motions for summary judgment were pending in the trial court, Defendant/Appellant, Nationwide Mutual Fire Insurance Company had conceded that it "does not contest that Sara E. Lager's permanent address, residence, or domicile as of January 26, 2003 was her parent's home." (Defendant, Nationwide Mutual Fire Insurance Company's Reply on its Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment, filed in the trial court on March 29, 2006, page 2). Defendant further argued that pursuant to the policy of insurance at issue Fred L. Lager and Cathy R. Lager would have to sustain bodily injury themselves in order to recover and that neither Fred L. Lager nor Cathy R. Lager were involved in the motor vehicle collision, and therefore, sustained no bodily injury coverage under the policy (Id at pages 3-4).

As a simple point of clarification, the Camaro motor vehicle occupied by Sara E. Lager, at the time of the collision, was insured, not by this Appellant, but rather by an affiliate of Appellant, namely, Nationwide Property and Casualty Company.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law

In a claim for statutory wrongful death damages against a claimant's uninsured/underinsured motorist coverage, language providing coverage to claimants "because of bodily injury suffered" is not excluded by the language contained in the other owned auto exclusion of the policy excluding coverage "for bodily injury or derivative claims." The phrase "because of bodily injury" and "for bodily injury" are ambiguous as used in the policy and such ambiguity is construed and resolved in favor of coverage for the wrongful death claimants.

This case involves the interpretation of a policy of insurance. The "familiar rules of construction and interpretation" applicable to contracts in general apply. *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St. 2d 166, 167, 24 O.O. 3d 274, 275, 436 N.E. 2d 1347, 1348, and cases cited therein. Generally, "words and phrases used in an insurance policy must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the extent that a reasonable interpretation of the insurance contract, consistent with the apparent object and plain intent of the parties, may be determined." *Id* at 167-168, see also *Dealers Dairy Products Co. v. Royal Ins. Co.* (1960), 170 Ohio St. 336, paragraph one of the syllabus.

This general rule is qualified in some circumstances to allow for an interpretation consistent with a "contractual definition, or a commercial or technical meaning acquired by usage and intended to be used by the parties, or a special meaning manifested in the contractual context" *Gomolka, supra*, at 172-173, and cases cited therein.

If after employing the above general rules of contract construction and it is reasonably concluded that the language employed in the policy is ambiguous, "it is well-settled that, where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and

liberally in favor of the insured." *King v. Nationwide Ins. Co.* (1988), 35 Ohio St. 3d 208, 211, 519 N.E. 2d 1380, Syllabus. The rationale behind the rule of strict interpretation of ambiguities against the insurer has been expressed as warranted because, "(t)he insurer, having prepared the policy, must be prepared to accept any reasonable interpretation" *Gomolka, supra*, at 168, citing *Home Indem. Co. v. Plymouth* (1945), 146 Ohio St. 96, 101. The rule of strict construction against the insurer and liberal construction in favor of the insured has been given added significance in the context of ambiguities found between coverage provisions and exclusions from coverage. In *American Financial Corp. v. Firemans Fund Ins. Co.* (1968), 15 Ohio St. 2d 171, 44 O.O. 2d 147, 239 N.E. 2d 33, this Court expressed ambiguities involving exclusions from coverage in the following manner:

It is a fundamental rule of law that a contract of insurance prepared by an insurer and in language selected by the insurer must be construed liberally in favor of the insured and strictly against the insurer if the language used is doubtful, uncertain or ambiguous. *Munchick v. Fidelity & Casualty Co. of New York*, 2 Ohio St. 2d 303, and *Butche v. Ohio Casualty Ins. Co.*, 174 Ohio St. 144. This is especially true where an exception or exclusion from liability is contained in the policy. *Home Indemnity Co. v. Plymouth*, 146 Ohio St. 96.

In other words, the insurer, being the one who selects the language, must be specific in its use, and an exclusion from the liability must be clear and exact in order to be given effect. *Am. Fin. Corp.*, *supra*, at 173-174.
(Emphasis added.)

Likewise in *United States Fid. & Guar. Co. v. Lightning Rod Mut. Ins. Co.* (1997), 80 Ohio St. 3d 584, this Court, citing *Am. Fin. Corp.*, held that "for a fee" exclusion contained in the policy is ambiguous and stated further that, "(w)hether *Lightning Rod* intended to cover commercial use of Spurlock's vehicle is irrelevant

because the policy language is imprecise." *United States Fid. & Guar. Co.*, *supra*, at 586.

The added significance afforded ambiguities when considering the interplay between coverage provisions and exclusions from coverage has been expressed as creating a "presumption" in favor of coverage if not "clearly excluded." "Where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that, that which is not clearly excluded from the operation of such contract is included in the operation thereof." *Home Indemnity Co. v. Plymouth* (1945), 146 Ohio St. 96, 32 O.O. 30, 64 N.E. 2d 248, paragraph two of the syllabus. See also, *King v. Nationwide Ins. Co.* (1988), 35 Ohio St. 3d 208, 213-214, "actual language of uninsured or underinsured . . . provisions, because broadly written, may cause coverage to exceed the scope impliedly intended . . .", and *Moorman v. Prudential Ins. Co.* (1983), 4 Ohio St. 3d 20, 22, 4 OBR 17, 19, 445 N.E. 2d 1122, 1124.

This Court has also expressed the proper construction of contract provisions, not necessarily in terms of ambiguity, but rather in the nature of reconciling clauses which are "certain" versus clauses which are "uncertain" on the same subject. In *Brown ET AL. v. Fowler ET AL.*, 65 Ohio St. 507 (1902) the court stated:

Certainty in one part of an instrument will always prevail over uncertainty on the same subject matter in other parts. True, an instrument must be considered and construed as a whole, taking it by the four corners as it were, and giving effect to every part; but when one part is certain on a given subject, and all the other parts are uncertain on that subject, the certain will prevail over the uncertain, even though there seems to be a general indefinite intention pervading the whole instrument to some extent inconsistent with such certainty. *Id.* at 523.

In the present case the uninsured/underinsured policy of insurance issued and delivered to Fred L. and Cathy R. Lager provides:

YOU AND A RELATIVE

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**.

For the purpose of determining the meaning of certain words contained in the policy of UM/UIM insurance, the policy refers the reader to the definition section of the coverage agreement. The definitions' section defines the following words to mean as follows:

"POLICYHOLDER" means the first person named in the Declarations. The **policyholder** is the named insured under this policy but does not include the **policyholder's** spouse. If the first named insured is an organization, that organization is the **policyholder**.

"YOU" and "YOUR" mean:

- a) the **policyholder** and spouse, if resident of the same household, when the **policyholder** is a natural person; or
- b) the sole proprietor or majority shareholder of an organization, or general partner of a family limited partnership, as shown in the Declarations, and spouse, if resident of the same household, when the **policyholder** is an organization.

"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.

"INSURED" means one who is described as entitled to protection under each coverage.

"WE," "US," "OUR," and "THE COMPANY" mean or refer to **the company** issuing the policy - Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Property and Casualty Insurance Company, or Nationwide General Insurance Company.

"YOUR AUTO" means the vehicle(s) described in the Declarations.

"MOTOR VEHICLE" means a land **motor vehicle** designed primarily to be driven on public roads. This does not include vehicles operated on rails or crawler treads. Other motorized vehicles designed for use mainly off public roads shall be included within the definition of **motor vehicle** while being driven on public roads.

The contract defines "bodily injury" as:

"BODILY INJURY" means:

- a) physical injury;
 - b) sickness;
 - c) disease; or
 - d) resultant death;
- of any person which results directly from a **motor vehicle** accident.

Clearly Fred L. and Cathy R. Lager are covered persons under the UM/UIM insurance policy. Fred L. Lager is the first person named in the Declarations and is, therefore, the "Policyholder." As the "Policyholder" Fred L. Lager further fits the meaning of "you" and "your." Cathy R. Lager is a covered person as the spouse of Fred

L. Lager and lives in the same household as her husband, Fred L. Lager, as defined by the word(s) "you" and "your" in the policy.

Sara E. Lager is likewise a covered person under the uninsured contract in that she fits the definition of a "RELATIVE." This is true either because she regularly lives in the household of her parents, or at the very least, lived temporarily outside of her parents' household at the time of the collision and her death. Sara was under the age of 25, unmarried, and was temporarily living in Toledo, Ohio, for the purpose of pursuing her college education.

It is clear that Fred L. and Cathy R. Lager, as parents of their daughter, Sara E. Lager, are legally entitled to recover from the owner or driver of an uninsured motor vehicle under the tort law of this State for damages they sustained as a result of Sara's death. In fact, pursuant to Ohio's Wrongful Death Statute they are rebuttably presumed to have suffered damages. See R.C. 2125.01-2125.02.

The UM/UIM insurance policy issued and delivered to Fred L. and Cathy R. Lager by Appellant, Nationwide Mutual, clearly provides that they will pay "compensatory damages, including derivative claims," that Fred L. and Cathy R. Lager 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 . . . a relative, and resulting from the motor vehicle accident.

The definition of "Bodily Injury" contained in the aforesaid policy means in pertinent part "physical injury" or "resultant death."

The Appellee, as personal representative of the estate of the decedent, Sara E. Lager, and pursuant to Ohio's Wrongful Death statute has brought this action and is seeking damages for the benefit of the parents of Sara E. Lager.

It is clear that coverage is afforded for the claims of Appellee for wrongful death, pursuant to the UM/UIM motor vehicle policy of insurance issued and delivered to Fred L. and Cathy R. Lager by Appellant, Nationwide Mutual.

Appellant, Nationwide Mutual, argues, because the decedent, Sara E. Lager, was occupying a motor vehicle she owned at the time of the collision, and because the aforesaid motor vehicle was not insured for auto liability coverage under the policy issued and delivered by Appellant, Nationwide Mutual, to Sara's parents, UM/UIM coverage is excluded.

Appellant, Nationwide Mutual, refers to "Coverage Exclusions" contained on page U2-U3 of the UM/UIM policy. The coverage exclusion states in pertinent part:

Coverage Exclusions

- 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.

As previously stated, the UM/UIM coverage agreement states that Appellant, Nationwide Mutual "will pay compensatory damages, including derivative claims because of bodily injury . . . suffered by a relative."

In the coverage section of the UM/UIM policy, the phrase "because of bodily injury" is used in describing the coverage which is extended.

The coverage exclusion, however, uses the words "for bodily injury" to define what is excluded.

Neither phrase, "because of bodily injury," nor "for bodily injury" is defined anywhere in the Policy.

"Bodily Injury," however, is defined, not in the UM/UIM contract provisions, but in the general definition section, as including within the meaning of "bodily injury," "physical injury . . . or resultant death of any person which results directly from a motor vehicle accident." Clearly Sara E. Lager suffered "bodily injury" as defined in the definitional section because she suffered "physical injury" and as a result of the "physical injury" death ensued. It is also just as clear that Fred L. and Cathy R. Lager did not themselves suffer "bodily injury", either under the definitional section of the Policy defining "bodily injury" nor pursuant to the case law of this State. Neither Fred L. nor Cathy R. Lager suffered "physical injury" in the "motor vehicle accident." They were not occupants of the "motor vehicle" which took Sara's life, and therefore, suffered no "physical injury" as a direct result of the "motor vehicle accident." In fact Fred L. and Cathy R. Lager have not suffered "physical injury" whether they occupied the vehicle or not, and they certainly did not die, nor are they making claims for their own "physical injury" or "resultant death" for the reasons just expressed. Likewise, Fred L. and Cathy R. Lager are not making a claim "for the bodily injury" suffered by Sara E. Lager. Such claims for "physical injury" would have been available to Sara E. Lager pursuant to the coverage provisions, had she survived the impact of the collision, as well as

survivorship claims if she subsequently died as a result of those physical injuries, so long as the representative of her estate could establish conscious pain and suffering experienced by her. In that Sara E. Lager occupied an "other owned motor vehicle" at the time of the collision, she would have been precluded from any recovery for her own physical injury, had she survived, and the representative of her estate is precluded from recovering damages for Sara's claims of survivorship, if any, for the same reason. It is clear, therefore, that the only claims pending before this Court are the claims not "for" the "bodily injury" actually suffered by Sara E. Lager personally in the nature of survivorship, but rather for the "exclusive benefit of the . . . parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death" See R.C. 2125.02(A)(1) (Emphasis added.) More specifically still, the claims currently pending are "because of" or "by reason of" the wrongful death. Webster's New World Dictionary of the American Language, College Edition (1966) at 131 defines "because of" as "by reason of; on account of."

Appellant, Nationwide Mutual, it would appear from the arguments now presented, that they would agree that the "because of bodily injury" language in the coverage section of the policy would provide for claims sounding in wrongful death "because of" or by reason of the bodily injury suffered by Sara E. Lager.¹ Appellant's focus now, and therefore, their argument is, that although claims of wrongful death are covered, they are excluded because the word "for" in the other owned auto exclusion has the same meaning as "because of" in the coverage provision.

¹ It should be noted that Nationwide Mutual's position on this issue has changed from its original position at the trial level and that this change in position is relevant on the issue of what Nationwide Mutual intended the word "for" to mean in the other owned auto exclusion clause which Appellee will discuss later.

Appellee agrees with Appellant that the word "for" can sometimes have the same meaning as the phrase "because of." Appellee further agrees that, as stated by Appellant, the word and phrase, respectively, "may be used interchangeably (emphasis added)"² at least in certain contexts. It would logically follow, just as easily, that the word and phrase may not be used interchangeably in every context. *Hall v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 05AP305, 2005-Ohio-4572, discretionary appeal not accepted, 108 Ohio St. 3d 1416, 2006-Ohio-179. In the universe of logical possibilities "for" can always be substituted for "because of" but "because of" cannot always be substituted for the word "for." Just as all "cars" can be included in the "universe" of "motor vehicles" yet all "motor vehicles" cannot be included in the "universe" of "cars."

While Appellant has directed this Court to just one of the definitions, and possible usage of the word "for" they ignore a myriad of others. One reasonable definition of the word "for" that would, could, or in fact, does apply in the context of the exclusion clause is "notwithstanding" or "in spite of." Webster's New World Dictionary of the American Language, College Edition (1966) at 564. "Notwithstanding" is defined as "in spite of." *Id.* at 1005. Both the word and the phrase, when used in this sense are prepositions. *Id.* at page 1005. The word "for" can also mean "as concerns." *Id.* at 564. "As concerns" meaning "in regard to"; "with reference to." *Id.* at 303. The word "concerning" is also defined as "in regard to" "with reference to" and additionally, "having to do with." *Id.* The word "for" may also mean "to the extent of." *Id.* at 564. "Extent" can mean "coverage," *Id.* at 515. and therefore, the exclusion could read, "(t)his coverage does not apply to anyone 'to the coverage' of bodily injury or derivative claims." "For" may also mean "in defense of," or "in favor of." *Id.* at 564. "In favor of" can be defined as

² Merit Brief of Appellant at 4.

"supporting," "to take advantage of," "payable to." *Id.* at 530. "For" may also mean "meant to be used in a specified way," as in "money for bills" *Id.* at 564 or in this case "coverage . . . for bodily injury." "For" can mean "suitable to" or "appropriate to." *Id.* "Suitable" can mean "that suits a given purpose." *Id.* at 1458. This list of definitions and possible usages of the word "for" is not meant to be exhaustive, but is intended to demonstrate that there are many other reasonable and rational definitions of the word that might apply in the context of the exclusion clause and would, therefore, render the clause susceptible to more than the single interpretation advanced by the Appellant.³ Likewise the cases of *American Ins. Co. v. Naylor*, 103 Colo 461, 87 P. 2d 260 and *Kelly v. State Personnel Board of California*, 31 Ca. App. 2d 443, 88 P. 2d 264, do not stand for the proposition that "for" means "because of" in every, or specifically in this particular, context.⁴

As previously stated, words and phrases may not only possess "naturally and commonly" accepted meanings, but they may also acquire meanings consistent with "commercial or technical" applications within the industry in which they are used.

³ It is important to point out that the phrase "Bodily Injury" as contained in the other owned auto exclusion is expressed in bold print and, therefore, has a specific meaning given to the words by the definitional section of the policy. That definition is peculiar only to the injuries sustained by Sara E. Lager and does not encompass the injuries and damages sustained by Fred and Cathy Lager for, as previously discussed, Fred and Cathy Lager did not sustain bodily injury.

⁴ For example, in *Naylor* the Plaintiff sought interest on a judgment for damages "for the death of his wife" and for "loss of services and companionship." *Naylor*, 103 Colo 461, p. 260. Interest was allowable pursuant to statute "for personal injuries," "fatal and non-fatal," "sustained by any person." *Id.* at 264. The trial court denied the Plaintiff's request. The court of appeals "amended" the decision to include interest, *Id.* at 265, reasoning that the statute did not restrict interest on judgments only to the decedent wife, but was broad enough to include interest on loss of society, companionship and services. In the context of the statute "for personal injury" included "fatal injuries" and, therefore, the person bringing the claim would by necessity be someone other than the decedent. Interpreting "for" in that context not to also mean "because of" would not be appropriate. *Id.* at 264-265. Appellee submits that the outcome in *Naylor* might have been different if the statute had read, "for" but not "because of" or if the word "fatal" was not included in the statute, or if the statute had read, "for bodily injury" instead of "personal injury" and if the word "fatal" had not been included. Put simply, *Naylor* did not involve the interplay between the words "for" and "because of" as in the instant action.

Gomolka (1982), 70 Ohio St. 2d 166, 167-168, 172-173. The motor vehicle liability insurance industry, and particularly in the area of uninsured/underinsured motorists coverage is, and has been, governed by R.C. 3937.18, commonly referred to as the uninsured and underinsured motorist statute. While the statute has undergone many changes throughout the years the language of the statute relevant to this discussion has not.⁵ The statute reads in pertinent part that "(u)ninsured motorist coverage . . . shall provide protection for bodily injury . . . including death . . . for the protection of insureds . . . because of bodily injury . . . including death, suffered by any person insured under the policy." R.C. 3937.18(A)(1) (Emphasis added.) The legislative intent behind the choice of this language has been interpreted as providing uninsured and underinsured motorist coverage for wrongful death. *Wood v. Shepard* (1988), 38 Ohio St. 3d 86, 89-90, 526 N.E. 2d 1089. Likewise, the phrase "for bodily injury" has been subject to interpretative analysis as well within the insurance law context. In *Kraut v. Cleveland Ry. Co.* (1936), 132 Ohio St. 125, 7 O.O. 226 5 N.E. 2d 324 this Court held that action brought by husband for loss of services and expenses for care of wife "growing out of her bodily injury is not one "for bodily injury," and therefore, two year statute of limitations for bodily injury did not apply. *Id.* at 125, Syllabus of the Court. In *Dean v. Angelas* (1970), 24 Ohio St. 2d 99, 53 O.O. 2d 282, 264 N.E. 2d 911, this Court held that wife's action for consortium and medical expenses incurred by reason of husband's bodily injury were not subject to statutes of limitations applicable for bodily injury to husband. *Id.* at 99-100. In *Corpman v. Boyer* (1960), 171 Ohio St. 233, this Court held that consortium claims of husband for consequential damages is not one for malpractice

⁵ The statutory language cited is contained in both versions of R.C. 3937.18(A)(1) as amended by AMENDED Substitute H.B. 261, effective September 3, 1997, and AMENDED Substitute S.B. 267, effective September 21, 2000.

and therefore, not subject to one year statute of limitation "for malpractice." *Id.* Syllabus. "(B)y no stretch of the imagination can plaintiff's cause of action be 'for malpractice'." *Id.* at 237. In *Koler v. St. Joseph Hospital* (1982), 69 Ohio St. 2d 477, defendant-appellant's argued that damages sought by decedent's representative "because of the death" of decedent was subject to one year statute of limitations for medical malpractice and not two year statute of limitations for wrongful death. *Id.* at 480. This Court held two year statute for wrongful death applied. *Id.* See also *Klema v. St. Elizabeth's Hospital* (1960), 170 Ohio St. 519.

The Appellant, Nationwide Mutual, has directed this Court to the case of *Tomlinson v. Skolnik* (1989), 44 Ohio St. 3d 11, 540 N.E. 2d 716 overruled on other grounds by *Schaefer v. Allstate Ins. Co.* (1966), 76 Ohio St. 3d 553, 668 N.E. 2d 913, in support of its proposition that "damages for bodily injury" means the same as damages "because of" bodily injury.⁶ *Tomlinson* is distinguishable in many respects and does not stand for the proposition argued by this Appellant. Unlike the coverage provision in the case *sub judice* the coverage provision in *Tomlinson* provided coverage in pertinent part, "for bodily injury . . . damage." *Id.* at 13. Although the opinion in *Tomlinson* did not specifically state that the aforesaid coverage provision included coverage for wrongful death and consortium damages such conclusion is implicit from the decision. The very fact that the court addressed the limitation of liability provision in an effort to determine whether consortium claims could be limited to the "each person" limitation under the policy supplies the answer. If the court was of the opinion that the word "for" in the coverage provision did not cover such claims it simply would have said so and would not have engaged in any further inquiry regarding the monetary limits of coverage.

⁶ Merit Brief of Appellant at 5.

Although the policy before the court in *Tomlinson* was a liability policy it can readily be assumed that the coverage providing "for bodily injury . . . damages" must provide coverage, not only for bodily injury, but also damages for wrongful death and derivative claims as well. Although *Tomlinson* did not involve claims for wrongful death it did involve consortium claims which incidentally are claims, as the court determined, "arising out of or because of bodily injury." *Id.* at 14-15. After determining that consortium claims are not bodily injury claims, or as Justice Brown points out in his dissent, "not for bodily injury," *Id.* at 16, the court reasoned that "when read in context, 'due to' 'for' and 'resulting from' are all synonyms for 'because of' or 'arising out of.'" *Id.* at 15. (Emphasis added.)

The coverage provision and the limitation of liability clause in *Tomlinson* both used the word "for," and therefore, effectively and precisely tracked the coverage which was extended and that which was limited. *Tomlinson* simply does not stand for the proposition that "for" always means "because of" although the court held that it did in the context of the policy in that case. Appellee would agree that if the phrase "for bodily injury" was employed in the coverage provision in the instant action instead of the phrase "because of bodily injury" the facts would of course be different and it is likely that this case would not have traveled so far. *Tomlinson* is not without benefit in that it does provide an effective analysis and supports the argument of the distinction this Court has historically made between claims "for bodily injury" and claims "because of bodily injury." In view of the foregoing, Justice Brown's concurring opinion in *Cincinnati Ins. Co. v. Phillips* (1990), 52 Ohio St. 3d 162 is not as "arbitrarily reasoned" as Appellant suggests, when he states, "(c)laims for wrongful death (and loss of

consortium) are not claims 'for bodily injury' although they may be claims arising out of bodily injury." *Id.* at 166. In his concurring opinion, Justice Brown suggested:

- (1) that wrongful death claimants do have separate claims under R.C. 2125.02(A)(1);
- (2) that under R.C. 3937.18 an insurance carrier may apply a single limit to separate claims arising out of a single bodily injury provided the policy limitation tracks the corresponding limitation on liability coverage; but
- (3) that insurance companies have the burden of stating policy limitations clearly and unambiguously. *Id.* at 167.

In *State Farm Auto. Ins. Co. v. Rose* (1991), 61 Ohio St. 3d 528, this Court recognized in its decision the merits of the concurring opinion of Justice Brown in *Cincinnati* and held that policy limitations must track the corresponding limitation on liability coverage and must be unambiguously stated. *State Farm Auto. Ins. Co. v. Rose* (1991), 61 Ohio St. 3d 528, syllabus. This Court has properly recognized the distinctions between claims which "arise out of" and "because of bodily injury" and claims "for bodily injury." In fact, such distinctions must be made given the variety of claims and causes of action, which are available to persons injured and the different remedies which can apply to each. In recognition of these distinctions, this Court has, through its decisions, stressed the importance of distinguishing clearly and unambiguously the coverage which is being provided and the coverage which is being excluded. As the author of the insurance policy, Appellant, Nationwide Mutual, has chosen, by its own words, to extend coverage "because of bodily injury" and to exclude coverage only "for bodily injury" in the other owned auto exclusion. For the reasons previously stated, the words and phrases are susceptible of more than one meaning

and Appellant has simply failed to unambiguously track the coverage which it claims it intended and the coverage which it now desires to take away.

If this Court were to assume *arguendo* that the word "for" as used in the coverage exclusion means "because of", as Appellant suggests, then what would be the intent and purpose of the additional language, "or derivative", or "or derivative claims"? If the phrase "because of" were inserted into the exclusion in place of the word "for" the clause would read:

- A. This coverage does not apply to anyone because of **bodily injury** or derivative claims.

The exclusion provision separates the phrase "bodily injury" and derivative with the word "or." The word "or" is "a function word indicating an alternative between different or unlike things," Pizza v. Sunset Fireworks Co., Inc. (1986), 25 Ohio St. 3d 1, 4-5, 25 OBR 1, 494 N.E. 2nd 1115. "That is, the policy's use of the disjunctive 'or' indicates that the two phrases were not intended to have the same meaning..." Ohio Govt. Risk Mgmt. Plan v. Harrison (2007), 115 Ohio St. 3d 241, 247, 2007-Ohio-4948. Thus, the phrase "because of bodily injury" in the above example would have to be interpreted to mean only wrongful death, survivorship, and bodily injury claims if the Court were to give meaning to the balance of the phrase, "or derivative claims." In Tomlinson, it was expressed that, "(a) claim for loss of consortium is a derivative action, deriving from a spouse's claim for bodily injury." Tomlinson (1989), 44 Ohio St. 3d 11, 14. Tomlinson also expressed that such claims are "because of bodily injury." Id at 15. In addition, this Court has held that actions for wrongful death are independent causes of action and are not derivative claims. Thompson v. Wing (1994), 70 Ohio St. 3d 176,

183. In view of the foregoing, the phrase would have to be read as, "(t)his coverage does not apply to anyone because of bodily injury or because of bodily injury. Or it could read, "(t)his coverage does not apply to anyone because of bodily injury." Thereby deleting the words "or derivative claims" entirely. In either case, the words "or derivative claims" are surplusage and have no meaning. In order to give all of the words contained in the first sentence of this exclusion clause meaning, the clause must be read as "for bodily injury," which is interpreted as meaning only the exclusion of bodily injury suffered by Sara E. Lager and any survivorship claims which might have been available to her personal representative for any conscious pain and suffering she experienced prior to her death. The exclusion would also exclude any derivative claims as well. Given the differing choice of words and phrases employed by the Appellant in the coverage provisions of the policy, as compared to the exclusion clause, and considering the common and ordinary meanings attached to those words, such an interpretation is reasonable. "In construing a written instrument, effect should be given to all of its words, if this can be done by any reasonable interpretation." Wadsworth Coal Co. v. Silver Creek Mining & Ry. Co. (1884), 40 Ohio St. 559, paragraph one of the syllabus.

Appellant has not been consistent with its choice of words throughout the policy. In the same coverage exclusion, Nationwide Mutual employs the phrase "arising out of **bodily injury**" in paragraph (B)(2). Clearly Appellant's choice of words in this section of the very same exclusion provision was intended to exclude coverage because of bodily injury, and therefore, any and all causes of action claimed by an insured because of bodily injury sustained by any person not insured. According to Appellant "arising out

of" has the same meaning as "because of."⁷ If so, then, in any and all sections of the policy where the words "for," "because of," or "arising out of," are found, they should be interpreted as having the same meaning. That is, of course, if the Appellant's logic is to remain consistent. If the phrase "for bodily Injury" in the other owned auto exclusion means "because of" or "arising out of" bodily injury, it would have been a simple matter to utilize the "arising out of" phrase in place of the phrase actually used just a few short paragraphs prior. This is, of course, if the intent of appellant was in fact to exclude claims arising out of bodily injury in the other owned auto exclusion. This same reasoning was discussed by this Court recently in Ohio Govt. Risk Mgt. Plan, 115 Ohio St. 3d 241, 247-248.

In the Medical Payments section of the policy, the Coverage Agreement reads in pertinent part:

We will pay usual, customary and reasonable charges:

1. for expenses incurred for: (emphasis added)
 - b) funeral costs;due to accidental **bodily injury** suffered by **you** or a **relative while occupying your auto**.⁸

The policy defines "Usual, Customary and Reasonable Charges" in pertinent part as:

2. "USUAL, CUSTOMARY AND REASONABLE CHARGES" means charges for services or supplies covered under this policy, which are:
 - a) usual and customary in the place where provided; and
 - b) not more than what would have been charged if the injured person had no insurance; and⁹

7. Merit Brief of Appellant, p.5

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

Clearly the coverage does not include "expenses incurred" because of "funeral costs, such as interest on credit cards used to pay for funeral expenses, although it would cover the usual, customary and reasonable charges for the funeral itself.

Additional evidence of Appellant's inconsistent choice of language can be found in the Limits and Conditions of Payment provisions of the Uninsured Motorists Coverage. Those provisions read in pertinent part:

1. The limit shown:
 - a) for **bodily injury** for any one person applies to one person's **bodily injury**, including death, and includes all claims resulting from or arising out of that one person's **bodily injury**, including death. Any and all claims, including but not limited to any claim for loss of consortium or injury to the relationship arising from this **bodily injury**, including death, shall be included in this limit. This per person policy limit shall be enforceable regardless of the number of **insureds**, claims made, vehicles or premiums shown in the Declarations or policy, or vehicles involved in the accident.
 - b) for **bodily injury** for each occurrence is, subject to the per person limit described in paragraph a) above, the total limit of **our liability** for all covered damages when two or more persons sustain **bodily injury**, including death, as a result of one occurrence. Any and all claims, including any claim for loss of consortium or injury to the relationship arising from this **bodily injury**, including death, shall be included in this limit. The per occurrence policy limit shall be enforceable regardless of the number of **insureds**, claims made, vehicles or premiums shown in the Declarations or policy, or vehicles involved in the accident.
3. The limits of this coverage will be reduced by any amounts available for payment by or on behalf of any liable parties for all claims, including claims for **bodily injury**, loss of consortium, injury to the relationship, and any and all other claims.
4. Damages payable, if less than the limits of this coverage, will be reduced by any amounts available for payment by or on behalf of any liable parties for all claims, including claims for **bodily injury**, loss of consortium, injury to the relations, and any and all other

claims.¹⁰

The aforesaid limitation provision specifically delineates "any claim for loss of consortium or injury to the relationship arising from this bodily injury, including death..."

"(T)his" referring to "for **bodily injury**."¹¹

Paragraph b) of the limitation provision states, "any and all claims, including any claim for loss of consortium or injury to the relationship arising from this bodily injury, including death..."¹² Again, "this" referring to "for **bodily injury**."

Paragraphs 3 and 4 of the limitation provision again refer to "for **bodily injury**" and then go on to add "for loss of consortium, injury to the relationship, and any and all other claims."

It is clear from the foregoing that Appellant clearly has demonstrated in other sections of this insurance policy, and even more specifically within the UM/UIM section, that it is very knowledgeable of the words and phrases which define the claims of consortium, wrongful death, and, in fact, the all inclusive, "any and all other claims." What is even more instructive is that appellant includes the words and phrases describing consortium, wrongful death, injury to the relationship and any and all other claims, in addition to, and in the same paragraphs as the phrase "for bodily injury." If "for bodily injury" in this context is also meant to mean, "because of" then the limitation clauses are replete with surplusage.

If, in fact, the phrase "for bodily injury" is to be interpreted in the context of the other owned auto exclusion as meaning "because of," and therefore, meant to encompass claims for wrongful death, it is, at the very least, difficult to understand why

10. Page U4 of Defendant's Exhibit CC, a certified copy of the policy (emphasis added).

11. Page U4 of Defendant's Exhibit CC, paragraph a) a certified copy of the policy (emphasis added).

12. Id at paragraph b).

it would not have chosen to simply use the phrase "for bodily injury" exclusively throughout the limitation provisions. What is even more curious is why the more expansive and more inclusive language was not employed in the other owned auto exclusion, if, in fact, the intent was to actually exclude claims sounding in wrongful death.

To accept Appellant's proposition of law upon the limited evidence and explanation offered in support of the same, would unreasonably limit the inquiry and ignore the inconsistent phraseology used in the balance of the insurance contract. As stated by this Court:

insurance contracts may not be read in so circumscribed a fashion. One may not regard only the right hand which giveth, if the left hand also taketh away. The intention of the parties must be derived instead from the instrument as a whole, and not from the detached or isolated parts thereof. Gomolka (1982), 70 Ohio St. 2d 166, 172.

It is at least interesting, if not instructive, to note that appellant's position regarding the coverage provision of the policy and its interpretation seems to have changed. In the Trial Court, appellant conceded that "Sara E. Lager's permanent address, residence or domicile as of January 26, 2003 was her parent's home." After conceding this issue, and by definition, conceding her status as a covered person under the policy, argued that Fred L. and Cathy R. Lager still could not recover because they were not involved in the motor vehicle accident. Appellant argued further that they did not sustain bodily injuries themselves, and that the insurance policy required that the person making the claim must be the one who sustained the bodily injury¹³ Although appellants did not state specifically why they interpreted the policy in this manner, it could certainly be implied that their position at that time was that the phrase "because

¹³ Id at p.3-4.

of bodily injury" was limited in definition to cover claims only for an insured who actually sustained the bodily injury. In other words, Fred L. and Cathy R. Lager were permitted to bring claims for their own bodily injuries, but not "because of bodily injury" of their relative, Sara E. Lager. It would at least appear, therefore, that appellant now argues, or at least concedes, that Fred L. and Cathy R. Lager may bring claims because of the bodily injuries of their daughter sounding in wrongful death, but are excluded by the other owned auto exclusion. It would certainly seem, therefore, that while their argument in the trial court was that "because of" means "for bodily injury," the argument now is that "for" means "because of bodily injury." This apparent change of position is relevant only to point out that the Appellant itself may have once held a different intent as to what the policy language means than it now holds, or at least argues today.

A vast majority of our district courts of appeals have examined the issue now before this Court. In Hall v. Nationwide Mut. Fire Ins. Co., No. 05AP-305, Court of Appeals of Ohio, Tenth Appellate Dist. Franklin County, 2005 Ohio 4572, 2005 Ohio App. LEXIS 4132, September 1, 2005, Rendered Discretionary appeal not allowed by Hall v. Nationwide Mut. Fire Ins. Co. 2006 Ohio 179, 2006 Ohio LEXIS 88 (Ohio, Jan. 25, 2006), the court examined the very same issue with the exact same policy language, and with the exact same insurance company as in the case *sub judice*. In that case, the court agreed with the trial court 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. Id. Like the Appellee herein, the Plaintiff in Hall had brought a wrongful death action for the death of a child who was operating a motor vehicle not insured under the policy. Id.

The court in Hall found the language contained in the policy to be ambiguous and construed the ambiguity against Nationwide Mutual and in favor of the insured. For the same reasons stated by the court in Hall the language contained in the policy before this Court is ambiguous and must be construed against Appellant, Nationwide Mutual.

The court in Hall also held that the attempt by Nationwide Mutual Fire Ins. Co. to exclude compensation for derivative claims under the other owned auto exclusion did not exclude wrongful death claims. Id.

Other jurisdictions have also held the other owned auto exclusion excluding bodily injury damages does not exclude damages for wrongful death. See, Kotlarczyk v. State Farm Mut. Auto. Inc. Co., Lucas App. No. L-03-11-3, 2004-Ohio-3447; Aldrich v. Pacific Indemn. Co., 2004-Ohio-1546, Seventh Dist. Ct. of App., Columbiana Co. Decided march 26, 2004; Adams v. Grider, 2004-Ohio-535 Third Dist. Ct. of App., Mercer Co. Decided February 9, 2004; Gaines v. State Farm Mutual Auto Ins. Co., Tenth Dist. Ct. of App. No. 01-AP-947(2002)-Ohio-2087, Decided April 30, 2002; Estate of Monnig v. Progressive Ins. Co., 2004-Ohio-2028, Fourth Dist. Ct. of app. Decided April 15, 2004; Brunn v. Motorist Mut. Ins. Co., 2006-Ohio-33, Fifth Dist. Ct. of App. Decided January 5, 2006; Dickerson v. State Farm Mut. Auto Ins. Co., 2003-Ohio-6704, Third Appellate Dist. Ct. Decided December 15, 2003; Roberts v. Wausau Business Ins. Co. 149 Ohio App. 3d 612; and American Modern Home Ins. Co. v. Safeco Ins. Co. of Illinois, 2007-Ohio-6247 Eleventh Dist. Ct. of App. Decided November 21, 2007.

Appellate cites this Court to Touhy 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 support of its proposition of law.

The court in Touhy found no ambiguity in construing the insurance coverage provision and the other owned auto exclusion provision contained in the insurance policy before the court.

We acknowledge that the insurance policy at issue includes 'because of bodily injury' in the coverage section and 'for bodily injury' in the policy's 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.' Touhy, 2007-Ohio-3597, Page 11.

Touhy does not stand for the rule of law that the phrases "because of bodily injury" and "for bodily injury" are never ambiguous.

In fact, it is clear from the Opinion in Touhy that the court's ruling was limited to a factual examination of the insurance provisions employed in the insurance policy before the court. It is only in the context of those provisions, and the language employed, that the court found no ambiguity.

While the Appellee does not agree with the holding in Touhy, and especially the rationale in support of the same, the Appellee does understand how the court could have arrived at the result and the reasoning which could have supported the conclusions attained. In spite of the holding and rationale, however, any application of Touhy to the facts and issues which pertain here is difficult to discern.

The definition of bodily injury contained within the insurance policy before the court in Touhy stated:

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

Touhy at p. 9 (emphasis added)

Touhy involved claims for wrongful death brought by a mother and father for the wrongful death of their son. Id. at 5. The other owned auto exclusion contained the "for bodily injury" language as that phrase is contained in the policy of the Appellees' in the instant action. It is here where the similarities end. The other owned auto exclusion before the court in Touhy can easily be read as follows, and in pertinent part:

We do not provide Uninsured Motorist Coverage... for required care sustained by an **insured**

It could also read:

We do not provide Uninsured Motorist Coverage... for loss of services sustained by an insured

In fact, it could be interpreted as death resulting from "loss of services" or from "required care."

Although the later example seems somewhat nonsensical, in that, inclusion of the "loss of services" and "required care" language seems somewhat misplaced in the context of the bodily injury definition. In any event, it is easy to see from the language of the competing insurance clauses in Touhy how the court could have interpreted the provisions without a finding of ambiguity.

The wrongful death statute specifically permits damages for "loss of services" and loss of "care" within its provision. Section (B) of R.C. 2125.01 states:

- (B) Compensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:
 - (2) Loss of services of the decedent;
 - (3) Loss of society of the decedent, including loss of companionship, consortium, care, assistance,

attention, protection, advice, guidance, counsel,
instruction training and education suffered by
...parents, or next of kin.

What is more instructive is that the coverage provision in Touhy as well as the other owned auto exclusion specifically named the "insured" instead of providing coverage in the disjunctive for "you" or a "relative" as in the policy in the case before this court. The coverage provision in Touhy stated in pertinent part:

We will pay compensatory damages which an
"insured" is legally entitled to recover...because of
bodily injury:

1. sustained by an "insured"

As previously discussed, the exclusion clause excluded "for bodily injury" sustained by "an insured."

It does not express or identify any particular insured, just an insured. Nor does it provide alternatives in the disjunctive as in "you or a relative" as in the present case before this Court, which not only identifies the individuals, but provides alternatives for recovering for another's loss as in:

We will pay compensatory damages that "you"... are
legally entitled to recover... because of bodily injury
suffered by a relative.... (Page U1 of Defendant's
Exhibit CC, a certified copy of the policy).

In Touhy for example, the exclusion could read:

"We do not provide uninsured motorist coverage... for
required care sustained by an insured."

The "insured" would or could mean the decedent in Touhy, his mother and father, or all of them. Therefore, the clause could be interpreted to mean his parents, who were also insured. As parents, they could be precluded for their damages, not only for

consortium, but for wrongful death as well. In addition, the legal representative of the decedent could be precluded from maintaining a survivorship claim on behalf of the decedent, had he survived, and the decedent, had he survived, would also be precluded for bodily injury claims because he occupied an other owned motor vehicle at times relevant. These results could prevail even though the son was the motor vehicle's only occupant.

In addition to the foregoing, the exclusion in Touhy contained the words "death resulting therefrom". Therefrom is defined as "from this"; "from that; and "from it." Webster's New World Dictionary of the American Language, College Edition (1966) page 1512.

When the word "therefrom" is added to the definition of bodily injury, it takes on an added dimension, a dimension which is not included in the Lager bodily injury definition. By way of example, the definition of bodily injury in Touhy might read:

"loss of services and death resulting "from that"

The word "from" is defined as, "caused by" or "because of." Webster's New World Dictionary of the American Language, College Edition (1966) page 582.

As previously discussed, the claims for Fred L. Lager and Cathy R. Lager are not affected by the language in the other owned auto exclusion pertaining to the exclusion of derivative claims because the claims of Fred L. Lager and Cathy R. Lager are for wrongful death, which is not affected by "derivative" exclusions. "Derivative" or rather "derivative claims" are not wrongful death claims. The policy in Touhy is less specific and is amenable to more flexibility in its interpretation when it describes "loss of services" and "required care." Terms which might easily have application in both the

consortium and wrongful death context, and which appellant suggests it probably did. In that, the court found no ambiguity, it is easy to see why the other owned auto exclusion was triggered.

What Appellant, Nationwide Mutual, may have intended and what they actually provided to Fred L. Lager and Cathy R. Lager in coverage are, and can be, two different things. Put another way, what they now say they intended, and what they in fact did, are two different things.

This case involves an exclusion from coverage. The presumption is in favor of coverage. That presumption has not been effectively rebutted in this case. It is simply not enough to find and point out one possible definition and interpretation of the word "for" and suggest that the definition pertains here. This is especially so when such a proposed definition would be inconsistent with the word's proposed intended meaning in other but similar parts of the policy. Simply stated, the coverage provision is certain and broad in the coverage provided, yet the exclusion of that coverage is not clear and its meaning is not as certain.

It can easily be said that the intent of the policy is to provide coverage to Fred L. Lager and Cathy R. Lager in the event that their resident relative, an adult under the age of twenty-five (25), experienced an untimely and unfortunate death while pursuing her college education far from their home. It could certainly be contemplated by the parties, when they entered into this contract, that it, in fact, would be likely that a person of that age group and living temporarily away, would own their own vehicle. The language of the policy itself contemplates that scenario. Such a proposition would not be absurd.

It is an age old conclusion that the purpose behind the uninsured/underinsured insurance law of this State is to protect persons not vehicles. (Citations omitted). In fact, R.C. 3937.18 says so. It can also be seen that the policy in this case was designed to accomplish that objective. The Appellant, Nationwide Mutual, extracted a premium from Fred L. Lager and Cathy R. Lager for this type of coverage for just this type of circumstance. They should honor that agreement.

CONCLUSION

Appellee, Fred L. Lager, Administrator of the Estate of Sara E. Lager, deceased, respectfully requests that this Honorable Court affirm the Decision and Judgment Entry of the Court of Appeals of Ohio, Sixth Appellate District, filed and journalized in the above referenced matter on August 10, 2007, for the reasons decided by said Court therein, and for a decision consistent with the Proposition of Law advanced by this Appellee that the language contained in the motor vehicle policy of insurance issued and delivered by Appellant, Nationwide Mutual Fire Insurance Company to Fred L. Lager and Cathy R. Lager should be made available to the parents of the decedent to compensate them for the injuries and damages they have sustained as a direct and proximate result of the wrongful death of Sara E. Lager, deceased. Appellee specifically requests that this Court find and otherwise decide that the coverage provisions contained in the aforesaid policy of uninsured/underinsured insurance extending coverage "because of bodily injury" is ambiguous when considered with

language contained in the other owned auto exclusion clause of the policy, which attempts to exclude coverage "for bodily injury."

In the alternative, Appellee respectfully requests this Court to dismiss both appeals now pending in this cause.

Respectfully submitted



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellee's Merit Brief was sent by facsimile and ordinary U.S. mail to Edward T. Mohler, one of the Attorneys for Appellant, Nationwide Mutual Fire Insurance Company, 420 Madison Avenue, Suite 650, Toledo, OH 43604, Facsimile No. (419) 242-7783, and Joyce V. Kimbler, one of the Attorneys for Appellant, Nationwide Mutual Fire Insurance Company, 50 South Main Street, Suite 502, Akron, OH 44308, Facsimile No. (330) 253-8875, on this 3rd day of April, 2008.



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ESTATE OF SARA E. LAGER,
DECEASED

APPENDIX

2125.01 Civil action for wrongful death

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such

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administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. No action for the wrongful death of a person may be maintained against the owner or lessee of the real property upon which the death occurred if the cause of the death was the violent unprovoked act of a party other than the owner, lessee, or a person under the control of the owner or lessee, unless the acts or omissions of the owner, lessee, or person under the control of the owner or lessee constitute gross negligence.

When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance of such cause of action. (2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97¹; 1981 H 332, eff. 2-5-82; 1953 H 1; GC 10509-166)

¹ See Notes of Decisions and Opinions, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

2125.02 Proceedings; damages allowable; limitation of actions; statute of repose for product liability claims; abandonment of deceased child; definitions

(A)(1) Except as provided in this division, a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. A parent who abandoned a minor child who is the decedent shall not receive a benefit in a civil action for wrongful death brought under this division.

(2) The jury, or the court if the civil action for wrongful death is not tried to a jury, may award damages authorized by division (B) of this section, as it determines are proportioned to the injury and loss resulting to the beneficiaries described in division (A)(1) of this section by reason of the wrongful death and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. In its verdict, the jury or court shall set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death.

(3)(a) The date of the decedent's death fixes, subject to division (A)(3)(b)(iii) of this section, the status of all beneficiaries of the civil action for wrongful death for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after the decedent's death is a beneficiary of the action.

(b)(i) In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

(ii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence of the cost of an annuity in connection with an issue of recoverable future damages. If that evidence is presented, then, in addition to the factors described in division (A)(3)(b)(i) of this section and, if applicable, division (A)(3)(b)(iii) of this section, the jury or court may consider that evidence in determining the future damages suffered by reason of the wrongful death. If that evidence is presented, the present value in dollars of an annuity is its cost.

(iii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence that the surviving spouse of the decedent is remarried. If that evidence is presented, then, in addition to the factors described in divisions (A)(3)(b)(i) and (ii) of this section, the jury or court may consider that evidence in determining the damages suffered by the surviving spouse by reason of the wrongful death.

(B) Compensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:

- (1) Loss of support from the reasonably expected earning capacity of the decedent;
- (2) Loss of services of the decedent;
- (3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;
- (4) Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;
- (5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent.

(C) A personal representative appointed in this state, with the consent of the court making the appointment and at any time before or after the commencement of a civil action for wrongful death, may settle with the defendant the amount to be paid.

(D) (1) Except as provided in division (D)(2) of this section, a civil action for wrongful death shall be commenced within two years after the decedent's death.

(2)(a) Except as otherwise provided in divisions (D)(2)(b), (c), (d), (e), (f), and (g) of this section or in section 2125.04 of the Revised Code, no cause of action for wrongful death involving a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

(b) Division (D)(2)(a) of this section does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

(c) Division (D)(2)(a) of this section does not bar a civil action for wrongful death involving a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the decedent's death, has not expired in accordance with the terms of that warranty.

(d) If the decedent's death occurs during the ten-year period described in division (D)(2)(a) of this section but less than two years prior to the expiration of that period, a civil action for wrongful death involving a product liability claim may be commenced within two years after the decedent's death.

(e) If the decedent's death occurs during the ten-year period described in division (D)(2)(a) of this section and the claimant cannot commence an action during that

(122nd General Assembly)
(Amended Substitute House Bill Number 261)

AN ACT

EFFECTIVE SEPTEMBER 3, 1997

To amend sections 3937.18 and 4509.101 and to enact section 4509.105 of the Revised Code to permit occupational driving privileges for first-time violators of the Financial Responsibility Law; and to modify Ohio's Uninsured and Underinsured Motorists Law by limiting the insured's right to recover when the owner or operator of the uninsured motor vehicle has an immunity, by requiring independent corroborative evidence to recover for injuries caused by an unidentified motorist, and by making other modifications to the scope of and coverage under the Uninsured and Underinsured Motorists Law.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 3937.18 and 4509.101 be amended and section 4509.105 of the Revised Code be enacted to read as follows:

Sec. 3937.18. (A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are OFFERED to persons insured under the policy for loss due to bodily injury or death suffered by such INSUREDS:

(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury, SICKNESS, or DISEASE, INCLUDING death under provisions approved by the superintendent of insurance, for the protection of INSUREDS thereunder who are legally entitled to recover damages from owners or operators of uninsured vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

For purposes of division (A)(1) of this section, AN INSURED is legally entitled to recover damages if THE INSURED is able to prove the elements of THE INSURED'S claim that are necessary to recover damages from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity, UNDER CHAPTER 2744 OF THE REVISED CODE OR A

“(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in

this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

“(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and

shall provide protection for bodily injury, sickness, or disease, including death under provisions approved by the superintendent of insurance, for the protection of insureds thereunder who are legally entitled to recover from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.