

IN THE SUPREME COURT OF OHIO

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellee,

vs.

LINDA F. GUERARD, et al.,

Appellant

08-1105

ON APPEAL FROM THE HOLMES  
COURT OF APPEALS, FIFTH  
APPELLATE DISTRICT COURT OF  
APPEAL COURT OF APPEALS  
CASE NO. 07-COA-010

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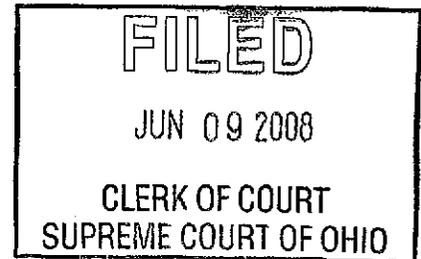
MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT THOMAS L.  
MASON, EXECUTOR OF THE ESTATE OF JAMES IVAN BRADY PARKER-GUERARD

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JAMES IVAN BRADY PARKER-GUERARD

**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....

STATEMENT OF THE CASE AND FACTS.....

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....

Proposition of Law: An accident arising out of the “ownership, maintenance, and use” of a motor vehicle is a broad term which includes any accident involving a motor vehicle unless the vehicle is unrelated to the accident.....

CONCLUSION.....

APPENDIX

Judgment Entry of the Holmes County Court of Appeals, (April 25, 2008)

Opinion of the Holmes County Court of Appeals, ( April 25, 2008)

PROOF OF SERVICE.....

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST

Accidents in general and coverage therefor have become a major issue in the courts of Ohio. This case is of great public or general interest because the Court of Appeals has essentially incorrectly ruled that the terms "ownership, maintenance, and use" only covers operation of the vehicle, which is contrary to all of the decisions in Ohio's higher courts, particularly Sanderson v. Ohio Edison Co. (1994) 69 OhioSt.3d 582, holding that when a ten-year-old child, as a result of his parent's negligence, started a vehicle and caused it to strike another vehicle, such constituted ownership, maintenance, or use.

This Court has consistently held that, in order for an accident to not be arising out of the ownership, maintenance, and use of vehicle, there must be some intervening actor, such as "road rage" or carjacking.

## STATEMENT OF THE CASE AND FACTS

The Appellant filed a Wrongful Death suit against Linda Guerard on the basis of her failure to ultimately supervise her child, who had died while playing on a car in front of his home while his mother was on a couch in the house.

Appellee filed a Motion for Summary Judgment on the ground that the accident which resulted in the child's death did not arise out of the ownership, maintenance, use, loading, or unloading of the vehicle.

The trial court granted the Motion for Summary Judgment without reason. The Court of Appeals affirmed the trial court, although it must be said that the court did not conduct an analysis of the case law and did not cite any case law in support of its Opinion.

On Thursday, August 28, 2003, the decedent, James Ivan Brady Parker Guerard, died of asphyxiation when his head became stuck in a car window and he lost his grip on the outside of the vehicle. Linda Guerard is his mother. She was on a couch in the living room and claimed that she thought her husband, who is not the child's father, was watching the child when the child went outside to play. The husband stated that he was going to watch the child, but had to get dressed first, which took him five or six minutes because "he had to find his pants."

On the date of death, Mrs. Guerard had left the window down on the van about halfway open so that it would not get hot in the vehicle.

The child could not be seen through the front window of the house because it was "dirty", according to Mr. Guerard.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No.1:** An accident arising out of the “ownership, maintenance, and use” of a motor vehicle is a broad term which includes any accident involving a motor vehicle unless the vehicle is unrelated to the accident.

Ohio Rule of Civil Procedure 56 (C) provides that Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary Judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the Motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party’s favor.

The mere question of whether or not the accident arose out of the ownership, maintenance, use, loading, or unloading of the vehicle is in itself a question of fact which precludes Summary Judgment.

The Appellee had cited three Ohio Supreme Court cases for its position, all of which clearly do not apply. Two of the cases are “road rage” cases where an intervening actor shot the claimant with a gun. In the third, an intervening actor raped the claimant. In the fourth case cited by the Appellee, the Court of Appeals ruled that an injury from an auger attached to the vehicle did not arise from ownership, use or maintenance.

A casual relation or connection must exist between the accident or injury and the ownership, maintenance, or use of the vehicle, and the presence or absence of such a relation or

connection determines whether the insurer becomes liable upon its policy. Nationwide Ins. Co. V Auto Owners Mut. Ins. Co., 37 Ohio App.3d 199, 525 N. E.2d 508 (10<sup>th</sup> Dist. Franklin County 1987).

“Arising out of the use” is a general, catch-all term including all proper uses of a vehicle. Am.Jur.2d, Automobile Insurance §161. The term is broader than the word “operate”. Moss v. Travelers Ins. Co., 9 Ohio Misc. 71, 37 Ohio Op.2d 348, 38 Ohio Op.2d 112, 221 N.E.2d 607 (C.P. 1965).

Under some circumstances, whether the injuries arose out of the operation, use, or maintenance of a vehicle is a question of fact. Bakos v. Insura Prop. & Cas. Ins., 125 Ohio App. 3d 548, 709 N.E.2d 175 (8<sup>th</sup> Dist. Cuyahoga County 1997). In that case, the court held that whether the injuries an insured driver sustained when his passenger pushed him out of his moving vehicle into the roadway where he was struck by an oncoming vehicle arose out of the operation, use or maintenance of his vehicle was a question of fact, precluding summary judgment in the insured’s action for declaratory judgment.

The words “arising out of” the ownership, maintenance, or use of a motor vehicle, as used in an automobile liability insurance policy, are not words of narrow and specific limitations, but are broad, general, and comprehensive terms effecting broad coverage. United States Fire Ins. Co. V. Ganz (ND Cal) 623 F. Supp. 337, aff’d (CA9 Cal) 818 F.2d 712.

The term “arising out of the use” is a general catch all term including all proper uses of a vehicle, since the ambiguity of the term calls for strict construction against the parties who drew the contract. Travelers Ins. Co. V. Aetna Casualty & Surety Co. (Tenn) 491 S.W.2d 363.

The term “arising out of” is of much broader significance than the words “caused by”. Red Ball Motor Freight, Inc. v. Employers Mut. Liability Ins. Co. (CA5 Tex) 189 F.2d 374.

The ownership, maintenance, or use of the vehicle need not be the direct, proximate cause

of the injury in the strict legal sense for there to be coverage under automobile liability insurance. Novak v. Government Employees Ins. Co. (Fla App D4) 424 So.2d 178.

The phrase "arising out of the use" affords coverage for injuries where the insured vehicle bears almost any causal relation to the accident at issue, however minimal. Interinsurance Exchange v. Flores (2<sup>nd</sup> Dist.) 45 Cal.App.4th 661.

Whether there is a casual connection between the use of the vehicle and the accident does not depend on the frequency with which the use occurs, the type of use, or whether the vehicle is in motion or stationary. Rather, it depends on whether physical contact or involvement with the vehicle or its attachments causally contributed to the accident. Heringlake v. State Farm Fire & Casualty Co., 74 Wash. App. 179, 872 P. 2d 539.

In Heritage Mut. Ins. Co. V. State Farm Mut. Auto Ins. Co., (Fla App. D1) 657 So.2d 925, the court held that injuries sustained by a child as the result of horseplay on a van used to transport church members to and from various events, were sufficiently causally related to the use of the van to be within liability insurance coverage for such vehicle.

Ohio has traditionally given a liberal interpretation to insurance coverage. Ambiguities within a policy are always resolved in favor of the insured. Bobier v. Natl. Cas. Co. (1944), 143 OhioSt. 215, 28 OhioOp. 138, 54 N.E.2d 798.

In Nationwide Insurance Company v. Auto-Owners Mutual Insurance Company (1987), 37 Ohio App. 3d 199, the Court of Appeals for Franklin County held that an injury arose out of the use of a vehicle where a hunter was unloading his gun before putting it in the vehicle and accidentally shot his hunting partner. The Court stated, "The vehicle contributed in some fashion toward producing the injury and was more than simply the place in which the injury occurred."

The Ohio Supreme Court, in Sanderson v. Ohio Edison Co. (1994), 69 OhioSt.3d 582,

held that when a ten-year-old child , as a result of his parent's negligence, started a vehicle and caused it to hit and injure another person, such accident arose out of the use of the vehicle.

Where a 3-year-old child who ran across a street from behind a parked automobile was struck by an approaching vehicle, the court in Baudin v. Traders & General Ins. Co. (1967, La. App.) 201 50.2d 379, held that the accident was "arising out of the use" of the parked automobile.

In Progressive Insurance Company v. Zurich Ins. (2001), 288 A.D.2d 879, the New York Supreme Court held that, in a wrongful death suit against a grandfather whose granddaughter was killed while crossing the street after leaving the grandfather's car, the accident arose from the grandfather's use of the car and from his negligent supervision.

In conclusion, the Appellant submits that the accident in this case did, in fact, arise out of the ownership, maintenance, or use of the vehicle. At the very least, it cannot be said that, as a factual or legal matter, Appellee is entitled to Summary Judgment

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



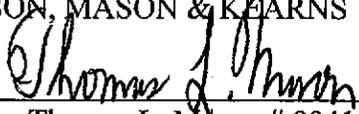
Thomas L. Mason

COUNSEL FOR APPELLANT  
THOMAS L. MASON,  
EXECUTOR OF THE ESTATE OF  
JAMES IVAN BRADY PARKER-  
GUERARD

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel of the Appellee, Kirk E. Roman, 50 South Main Street, Suite 502, Akron, Ohio 44308, Fred M. Oxley, Counsel for Linda Guerard, Post Office Box 220, Ashland, Ohio 44805, and Thomas R. Gilman, counsel for Linda Guerard, 133 South Market Street, Loudonville, Ohio 44842 this 6<sup>th</sup> day of June, 2008.

MASON, MASON & KEARNS

BY:   
Thomas L. Mason # 0041663

COUNSEL FOR APPELLANT

COURT OF APPEALS  
HOLMES COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

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5TH DISTRICT APPEALS COURT  
HOLMES COUNTY  
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NATIONWIDE MUTUAL  
INSURANCE COMPANY

Plaintiff-Appellee

-vs-

LINDA F. GUERARD, ET AL.

Defendants-Appellants

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 07CA010

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Case No. 06CV007

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

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*Farmer, P.J.*

{¶1} On August 28, 2003, James Ivan Guerard, age 4, went outside and became stuck in a window of a vehicle parked in his driveway. The child died as a result of his injuries.

{¶2} The vehicle was owned by the child's great grandmother, Louella Pyers. At the time of the accident, the vehicle was insured under a policy issued by appellee, Nationwide Insurance Company. On January 19, 2006, appellee filed a declaratory judgment action against Linda Guerard, the child's mother, and appellant, Thomas L. Mason, Administrator of the Estate of James Ivan Brady Parker-Guerard, Deceased, for a determination as to whether Ms. Guerard was entitled to automobile liability insurance coverage under the policy. On February 1, 2007, appellee filed a motion for summary judgment. By order filed March 28, 2007, the trial court granted said motion.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING SUMMARY JUDGMENT ON THE ISSUE OF WHETHER OR NOT A CHILD'S DEATH FROM AN AUTOMOBILE AROSE OUT OF THE OWNERSHIP, MAINTENANCE, USE, LOADING, OR UNLOADING OF THE VEHICLE."

I

{¶5} Appellant claims the trial court erred in finding no coverage under the Nationwide policy for the accident sub judice. Specifically, appellant claims the child's

death arose out of the ownership, maintenance, use, loading, or unloading of the motor vehicle. We disagree.

{¶6} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶7} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶8} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶9} This matter arose out of a declaratory judgment complaint seeking a "declaration of the rights, status and other legal obligations between the parties." Judgment was granted pursuant to a summary judgment motion. There were basically no contested or disputed facts; the matter for review involved an interpretation of the insurance contract.

{¶10} The uncontested facts and those construed most favorably to appellant were as follows:

{¶11} 1) The vehicle in question was insured by appellee.

{¶12} 2) The vehicle's owner, Ms. Pyers, gave Ms. Guerard permission to use the vehicle. L. Guerard depo. at 18-19.

{¶13} 3) The vehicle was parked in a private driveway. L. Guerard depo. at 33-35; J. Guerard depo. at 33.

{¶14} 4) The child wandered out into the yard unsupervised by either parent/stepparent. J. Guerard depo. at 22. The child was discovered with his head stuck in the window of the vehicle with his feet dangling off the ground. J. Guerard depo. at 13-14. The child's body was outside the vehicle with his head inside the vehicle. J. Guerard depo. at 13-14.

{¶15} 5) The vehicle was not running, being used or occupied, being loaded or unloaded, and the keys were not in the ignition. L. Guerard depo. at 30, 33-34; J. Guerard depo. at 33.

{¶16} The Nationwide policy, attached to the complaint as Exhibit2, provided the following under Auto Liability:

{¶17} **"PROPERTY DAMAGE AND BODILY INJURY LIABILITY COVERAGE**

{¶18} "1. We will pay for damages for which **you** are legally liable as a result of an accident arising out of the:

{¶19} "a. ownership;

{¶20} "b. maintenance or use; or

{¶21} "c. loading or unloading;

{¶22} "of **your auto**. A relative also has this protection. So does any person or organization who is liable for the use of **your auto** while used with **your permission**."

{¶23} Appellee argues the facts place the incident outside the coverage of the policy. The question is whether an unsupervised child who is injured while either playing on or attempting to enter the vehicle fits within the policy language.

{¶24} Appellee argues the cause of the child's injury/death was broken by the intervention of an event unrelated to the use of the vehicle. *Kish v. Central National Insurance Group of Omaha* (1981), 67 Ohio St.2d 41.

{¶25} Automobiles are instrumentalities only when they are operating. A stationary, unattended vehicle, that somehow became a playground for the child, does not constitute "ownership, maintenance or use, or loading or unloading." Playing in and around the vehicle was not an event related to the use of the vehicle.

{¶26} Upon review, we concur with the trial court's decision to grant summary judgment to appellee.

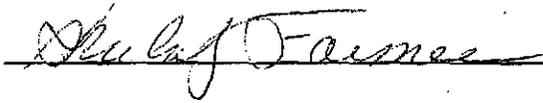
{¶27} The sole assignment of error is denied.

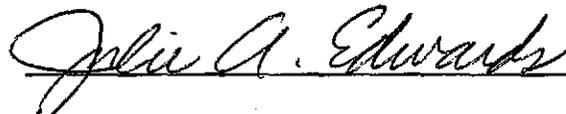
{¶28} The judgment of the Court of Common Pleas of Holmes County, Ohio is hereby affirmed.

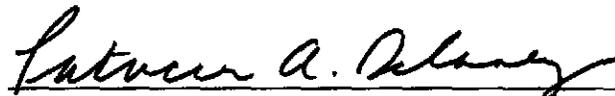
By Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

  
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JUDGES

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