IN THE SUPREME COURT OF OHIO

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

APPELLANT, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY'S MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION FOR RECONSIDERATION

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

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

COUNSEL FOR APPELLANT,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

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

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

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LAW AND ARGUMENT

This matter came on before the Court upon the certified question: "whether an other-owned-auto exclusion that excluded coverage 'for bodily injury' was ambiguous if the policy also contained language that provided UM coverage 'because of bodily injury' suffered."

In *Lager v. Miller-Gonzalez*, 2008 Ohio 4838; 2008 Ohio LEXIS 2585, the majority of this Court answered the certified question in the negative and held that the other-owned-auto exclusion clearly and unambiguously applied to this claim and that Nationwide's motion for summary judgment should have been granted on that basis.

Appellee has filed a motion for reconsideration of the majority's Decision of October 1, 2008.

According to the Rules of Practice of the Supreme Court of Ohio, "a motion for reconsideration shall be confined strictly to the grounds for reconsideration and shall not constitute a re-argument of the case...." S.Ct.Prac.R. XI(2)(A).

As set forth at P. 4 of the Appellee's Brief, the Appellee seeks reconsideration of this Court's decision "for the reasons discussed in the Merit Brief of Appellee...".

Appellee's attempt to reargue the issues contained in the Merit Brief and oral argument must be rejected in accordance with S.Ct.Prac.R. Xl(2)(A).

As an alternative, Appellee argues that the effect of the majority's decision would be that derivative claims are now excluded by the "for bodily injury" language contained in the other-owned-auto exclusion clause.

As noted in Appellant's Reply Brief, derivative claims are already excluded by the clear language of the policy. It must be noted that the exclusion contained in the Appellant's policy states:

> A. This coverage does not apply to anyone for bodily injury or **derivative claims**:
>
> 3. While any insured operates or occupies a motor vehicle:
>
> a) owned by;
> b) furnished to; or
> c) available for regular use of:
>
> you or a relative, but not insured for Auto Liability coverage under this policy. Policy does not apply if any insured is hit by any such motor vehicle. (Page U2 and U3 of Defendant's Exhibit CC, a certified copy of the policy.)

Appellee contends that the "or derivative claims" language is redundant as a result of the majority's decision. That may be true, now. As the law in the area of uninsured/underinsured motorist coverage has been in flux for a number of years, the policy was drafted in an attempt to cover all contingencies.

The phrase "or derivative claims" was added to the policy language because, in the past, the phrase "for bodily injury" had been held not to restrict derivative claims brought by insureds other than the injured party. *Adkins v. Republic-Franklin Ins. Co.* (1991), 76 Ohio App. 3d 611, 602 N.E.2d 756.; *Lane v. Grange Mut. Cos.* (1989), 45 Ohio St.3d 63, 65, 543 N.E.2d 488 described loss of consortium as a "non-bodily injury claim".

In *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St. 3d 70, 2006 Ohio 1926, the Court recognized that, formerly, the Supreme Court has held that R.C. 3937.18 was remedial legislation and must be construed liberally to provide coverage for persons injured by uninsured and underinsured motorists. This is no longer the case. As this Court's most recent decisions have shown, under current analysis, the legislation should be construed so as to empower the intent of the legislation. It is obviously the intent of R.C. 3937.18(J) to permit insurers to include terms and conditions which limit an insured's ability to make a claim for insurance coverage under their own policy of insurance when the injury occurs while the insured is in a vehicle they own which is not an insured vehicle under the policy of insurance under which coverage is sought.

As recognized by the majority, "To permit coverage in circumstances like those presented here would improperly allow a person who owns more than one motor vehicle [to] choose not to insure one vehicle and bear no financial risk for the decision because he will be deemed to have in effect purchased liability coverage for the vehicle **[**14]** he decided not to insure if he is struck by another uninsured motorist." At P. 31.

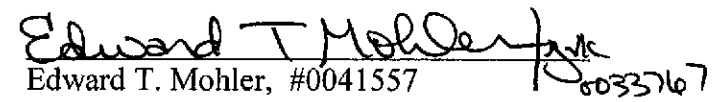
Throughout this proceeding, Appellee presented no evidence that the Lagers purchased their policy with the expectation that it would provide coverage in a situation such as this. This is not a situation in which the consumer is not getting a benefit they thought they purchased. This is a situation in which the unthinkable occurred and the Lagers are now attempting to go back and read into the policy a benefit they never thought about purchasing. This search for an ambiguity does not create an ambiguity.

In construing the policy's meaning, "the words in a policy must be given their plain and ordinary meaning, and only where a contract of insurance is ambiguous and therefore susceptible to more than one meaning, must the policy language be liberally construed in favor of the claimant who seeks coverage. Nevertheless, it is axiomatic that the general rule of liberal construction cannot be employed to create an ambiguity where there is none." *Burris v. Grange Mut. Cos.* (1989), 46 Ohio St. 3d 84, 89, 545 N.E.2d 83.

The remainder of the Appellee's Brief merely asks the Court to go back and look again at evidence and arguments already considered and rejected by the majority in this matter.

For the foregoing reasons, Nationwide respectfully submits there is no basis for this Court to reconsider its Decision, and it, therefore, urges the Court to Deny the Lagers' Motion.

Respectfully submitted,



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

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

ATTORNEYS FOR APPELLANT,
NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY

CERTIFICATE OF SERVICE

I certify that a copy of this Appellant, Nationwide Mutual Fire Insurance Company's Brief, was sent by ordinary U.S. mail to W. Randall Rock, Attorney for Appellee, Fred L. Lager, Administrator of the Estate of Sara E. Lager, Deceased, 32 N. Main Street, Suite 911, Dayton, Ohio 45402, on this 17th day of October, 2008.

Joyce V. Kimbler, #0033767
ONE OF THE ATTORNEYS FOR
APPELLANT, NATIONWIDE MUTUAL
FIRE INSURANCE COMPANY