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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present: HON. ZELDA JONAS**  
**Justice**

**TRIAL/IAS PART 19**

**In the Matter of the Application of**

**ALLSTATE INSURANCE COMPANY,**

**Petitioner,**

**Index No. 11714/03**

**- against -**

**To Stay the Uninsured Motorist Arbitration  
of CLARA KUNZE,**

**Respondent,**

**- and -**

**NATIONWIDE MUTUAL INSURANCE  
COMPANY, TRAVELERS INSURANCE  
COMPANY, JOSEPH McGARRIGLE,  
ADAM WALI and LIBERTY MUTUAL  
INSURANCE COMPANY,**

**Proposed Additional Respondents.**

**The following papers read on this motion:**

**Memoranda of Law.....1 - 4**

Petitioner's application for an order for a permanent stay of arbitration pursuant to CPLR §7503 [C] upon the ground that offending motor vehicle was insured at the time of the accident is granted for the reasons stated herein.


The order of Justice Mahon dated October 24, 2003 set this matter down for a hearing. Upon assignment of the hearing to this Court from the Calendar Control Part, the parties stipulated to submission of memoranda of law since the following facts are not in dispute. The respondent, Clara Kunze, was a passenger in a motor vehicle owned and operated by Robert F. Kunze and insured by the petitioner, Allstate Insurance Company, when the vehicle was struck by another motor vehicle owned by Adam Wali, insured by Nationwide Mutual Insurance Company, which was being test driven by Joseph McGarrigle, the employee/owner of Brake Care, Inc., with the permission of Mr. Wali.

Petitioner claims that Brake Care, Inc., had been insured under a policy by Travelers Insurance Company which had denied coverage for the failure to pay a premium. However, Travelers has provided documentary evidence that there was never any automobile policy issued to Joseph McGarrigle d/b/a Brake Care. The policies that were issued by Travelers Insurance Company were a garage-keepers policy, an umbrella policy, and a worker's compensation policy, which were all validly terminated prior to the date of this accident, since the premiums were not paid. Petitioner's claim that the policies were not properly terminated in accordance with the Vehicle and Traffic Law §313 is without merit since those provisions are only applicable to automobile insurance policies.

However, in regard to Nationwide Mutual Insurance Company, there is no documentary evidence that Nationwide disclaimed coverage with respect to Adam Wali, the owner of the vehicle and the insured at the time of the accident. Since Nationwide

did not issue a disclaimer against Adam Wali, the owner of the vehicle involved on the occurrence, stating that it would not defend and indemnify him, the Wali vehicle was insured on the date of the accident despite Nationwide's disclaimer of coverage against the permissive operator of the vehicle (Insurance Law §3240 [d]). Further, Nationwide's disclaimer as to the permissive operator of the vehicle upon the ground that McGarrigle's test driving of the motor vehicle constituted "the operation of an auto repair shop" or "business pursuit" as an exclusion under the Wali personal automobile policy is without merit since the law is clear that the automobile business exclusion in a personal automobile policy does not apply where the automobile is being test driven by an auto repairman, and therefore Nationwide must defend Adam Wali against any lawsuit for vicarious liability involving the instant alleged accident. (*See, Erie Insurance Group v. Nationwide Mutual Fire Insurance Company*, 190 A.D.2d 1086.)

Dated: 1/6/05

  
J.S.C.

**ENTERED**

JAN 12 2005

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**