ORIGINAL

IN THE SUPREME COURT OF OHIO

09-2307

Federal Insurance Company, American Alternative Insurance Corp.,	:	
Plaintiffs/Appellees,	:	On Appeal from the Allen County Court of Appeals, Third Appellate District
vs.	:	Court of Appeals Case Nos. 1-09-17 & 1-09-18
Executive Coach Luxury Travel, Inc., *et al.*,	:	
Defendants,	:	
and	:	
Feroen J. Betts, etc., *et al.*,	:	
Defendant-Intervenors/ Appellants.	:	

JOINT MEMORANDUM IN SUPPORT OF JURISDICTION
OF DEFENDANT-INTERVENORS/APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS iii

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE AND FACTS 4

1. **Factual Background** 4

2. **Insurance Policies at Issue** 6

3. **Procedural History** 7

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 8

Proposition of Law 1: When a named insured engages the services of a charter bus company to transport its students in exchange for payment, the bus used to transport the students is "hire[d]" by the named insured, as that term is used in the named insured's automobile-liability-insurance policy. 8

Proposition of Law 2: When a named insured charters a bus from a third party, and the third party grants the named insured the ability to approve or reject a specific driver, the approved driver is using the chartered bus with the "permission" of the named insured, as that term is used in the named insured's automobile-liability-insurance policy. 12

Proposition of Law 3: When a named insured charters a bus from a third party, the driver provided by the third party is using the bus with the "permission" of the named insured, as that term is used in the named insured's automobile-liability-insurance policy, unless the named insured subsequently revokes that permission. 12

CONCLUSION 15

PROOF OF SERVICE 17

APPENDIX 18

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

This case presents the Court with a critical, yet unresolved question: where an institution charters a bus, is the bus driver an "insured" under the omnibus clause of the institution's commercial-automobile-insurance policies?

On the morning of March 2, 2007, a charter bus carrying the Bluffton University ("Bluffton") baseball team crashed when the bus driver apparently mistook an exit ramp off of Interstate 75 in Atlanta, Georgia for the roadway. The bus flipped off an overpass onto the roadway below. Five Bluffton University baseball players, the bus driver (Jerome Niemeyer), and his wife were killed. Twenty-eight other members of the baseball team and University staff were injured.

The instant action seeks to clarify coverage for this accident under Bluffton University's insurance policies. Under these policies, an "insured" is defined as, *inter alia*, "anyone else while using with your [Bluffton's] *permission* a covered 'auto' you [Bluffton] own, *hire* or borrow...." (Emphasis added.) At issue here is whether Bluffton "hired" the bus and gave "permission" to the bus driver to drive the team during the trip.

The terms "hire" and "permission" are undefined in Bluffton's business auto coverage form, and this Court has not considered the meaning of these terms in the context presented here. Clear direction from this Court is needed so these terms, commonly found in policy language using standardized ISO forms, are consistently interpreted by courts in Ohio.

The need for a clear understanding of insurance protection in the charter-bus context is evident. More than 630 million passengers in the United States annually use buses like the one involved in this accident.[1] The charter-bus industry generates in excess of $2.4 billion of yearly

[1] Jonathan Riskind, *The Bluffton bus tragedy: What good will come from it*, COLS. DISPATCH, July 9, 2008, at A1.

revenue.[2] In 2002, Ohio was listed as the eighth largest state, in terms of revenue, for charter-bus use with 41 charter establishments and industry revenue topping $63.7 million.[3] Groups of all kinds hire charter buses for travel within Ohio as well as interstate travel. Ohio alone has 124 public and private colleges and universities,[4] just one sector of the public that utilize the charter-bus industry.

The Court of Appeals decision impacts the charter-bus industry, as well as the thousands of passengers and institutions that choose to use charter buses. Unfortunately, the potential for great harm inherent with charter buses, barreling down the interstate loaded with passengers, became a reality in this tragedy. Sorting out insurance coverage for such huge risks is important to everyone.

This Court has dealt with policy provisions identifying "who is an insured" in the past and understands the far-reaching impact and unintended consequences which can result. This Court sought to clarify such situation with its ruling in *Galatis*.[5] The Court of Appeals decision in this case abandoned the core principles articulated in *Galatis* by ignoring the plain and ordinary meaning of the terms "hire" and "permission." This Court is aware of the resulting unfairness when insurance contracts are interpreted in such a way as to not reflect the intention of the parties as expressed by unambiguous policy language.

The Court of Appeals improperly conflated the concepts of "hire" and "permission," and developed a new test found nowhere in Ohio law and nowhere in the insurance policy. The Court of Appeals introduced the concept of "control," which is not found in the insurance policy, to determine whether a named insured "hired" a vehicle and gave "permission" to the driver to use it.

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[2] U.S. Census Bureau, 2007 Economic Census.

[3] U.S. Census Bureau, *Geographic Distribution -- Charter bus industry: 2002*, available at http://www.census.gov/econ/industry/ec02geo/g485510.htm.

[4] Ohio Board of Regents, *The Performance Report for Ohio's Colleges and Universities*, 2006, p.1, available at http://regents.ohio.gov/perfrpt/2006/Performance_Report_2006_final.pdf.

[5] *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216.

Upon determining that the charter-bus company and the chartering party each had "substantial control," the Court of Appeals undertook to determine which party had the "more substantial control." The Court of Appeals determined that since the charter-bus company had "predominate [sic] control and authority," Bluffton did not "hire" the bus and did not grant "permission" to the bus driver to drive the bus. This determination was made even though the bus company granted Bluffton the ability to approve or reject the bus driver in question. If Bluffton had not approved the driver, he would not have been used on the trip.

By adding a requirement of "predominate [sic] control" to the University's insurance policy, the Court of Appeals ignored this Court's instructions in prior cases such as *Galatis*, *Alexander*,[6] and *Gulla*.[7] It altered a lawful contract by imputing an intent contrary to that expressed by the language of the contract. A court is not permitted to act in such a manner.

Finally, in addition to the scope of the legal issues involved, the accident itself makes this a case of great general interest. The accident drew immediate national media attention and promptly fueled public debate on bus safety and roadway engineering. The story exerted a powerful grip on many Americans beyond the Bluffton campus. Outpourings of support and sympathy came from all over the country. Airlines flew friends and family back and forth between Ohio and Atlanta for free. Major League Baseball donated to Bluffton's memorial fund, and professional teams donated all kinds of baseball equipment. One suspects the idea of a group of young men from the heart of the country facing sudden adversity and unexpected loss, together, as a team, struck a nerve with many people. Certainly, this Court is the appropriate forum to deal with insurance-coverage issues arising from an accident which generated such public and great general interest.

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[6] *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241.
[7] *Gulla v. Reynolds* (1949), 151 Ohio St. 147.

The instant action is a case of public or great general interest. Accordingly, this Court should accept jurisdiction of this case to clarify the law with regard to the terms at issue, review the erroneous standard adopted by the Third District Court of Appeals, and provide guidance to Ohio insurers, insureds, and their counsel.

STATEMENT OF THE CASE AND FACTS

1. Factual Background

In the early morning hours of March 2, 2007, a bus carrying players and coaches of Bluffton's baseball team was traveling to a baseball game in Florida. The bus carrying the players was owned by Partnership Financial Services, Inc. and leased from Partnership by Executive Coach Luxury Travel, Inc. ("Executive Coach"). At all times relevant herein, the motor coach was operated by Jerome Niemeyer, now deceased, an employee of Executive Coach. As a result of the negligence of Mr. Niemeyer and others, the bus was involved in a serious crash in northwestern Atlanta, Fulton County, Georgia. Five Bluffton players, Jerome Niemeyer, and his wife were killed in the accident, and numerous other players and coaches were injured.

The Bluffton baseball coach, James Grandey, made the arrangements to charter the bus using a written contract provided by Executive Coach. Several proposed contracts were presented to Coach Grandey over a period of several months before the final agreement was reached on or about November 16, 2006. These preliminary contracts reflect that Coach Grandey negotiated the rental charge until a final acceptable flat-fee was agreed upon. The written agreement reflects a departure date of Thursday, March 1, 2007, with a return date of March 10, 2007. Coach Grandey signed the contract on behalf of Bluffton.

Coach Grandey considered flying the team to Florida or having players drive separate cars, but ultimately decided to charter an Executive Coach bus. Coach Grandey had used Executive

Coach in the past for spring trips, and was satisfied with the company. In fact, Jerome Niemeyer had driven the Bluffton baseball team on prior trips in 2005 and 2006.

The company policy of Executive Coach, as it relates to chartered-bus trips, is that the "client is in charge." This means that during the trip, Coach Grandey would be able to tell the driver when to stop and where to go. The driver was expected to take orders from Coach Grandey.

Coach Grandey exercised a considerable amount of control over Niemeyer and the bus. For instance, although not set forth in the written agreement, Coach Grandey required the coach to be equipped with a DVD player. Approximately one-half hour after the bus left Bluffton on the trip at issue here, it was discovered that the motor coach's DVD player did not work. Upon this discovery, Coach Grandey ordered the driver to return to Bluffton. The DVD player was fixed and the bus set off a second time, approximately one hour later than scheduled.

Coach Grandey presented a detailed trip itinerary as part of the contract-negotiation process, but had the power to deviate from that itinerary in whatever way he wished, as long as no Federal or state regulations would be violated. For example, if the coach wanted to take a side trip to a shopping mall or a museum, he could do so. If the trip involved substantial mileage, there may be an extra charge but there was no question it was within the coach's power to authorize such trips. Coach Grandey also had the authority to prevent Mr. Niemeyer from driving the bus if he thought Mr. Niemeyer was driving in an unsafe manner, or if Mr. Niemeyer was incapable because of lack of sleep or some other impairment.

Executive Coach asked for and received Coach Grandey's permission to use Mr. Niemeyer on this trip. If Coach Grandey had not approved Mr. Niemeyer for the trip, he would not have been the driver for the trip. Executive Coach has a company policy that an extra person may go along on the trip if there is room. Mrs. Niemeyer had accompanied the team on a prior trip and was

along for this trip. According to Executive Coach's policy, Mrs. Niemeyer could only accompany her husband with Bluffton's approval.

2. Insurance Policies at Issue

The policies at issue in the instant action were all purchased by Bluffton to cover liabilities arising from, *inter alia*, the use of an auto. At the time of the accident, Bluffton held three relevant policies of insurance: (1) a commercial automobile policy issued by Hartford Fire Insurance Company ("Hartford") with liability limits of $1 million ($1,000,000) (the "Hartford Policy"); (2) a commercial umbrella policy issued by Plaintiff/Appellee American Alternative Insurance Corporation ("AAIC") with liability limits of $5 million ($5,000,000) (the "AAIC Policy"); and (3) an excess follow-form policy issued by Plaintiff/Appellee Federal Insurance Company ("Federal") with liability limits of $15 million ($15,000,000) (the "Federal Policy"). It is undisputed that the accident occurred during the policy period of the Hartford, AAIC, and Federal policies.

The AAIC and Federal policies "follow form"; thus, the key operative language is found in the Hartford Policy. The Defendant-Intervenors/Appellants sought the trial court's declaration that Jerome Niemeyer, the driver of the motor coach, is an insured under the definition found in the Hartford Policy, and thus is an insured under the AAIC and Federal Policies as well. Section II.A.1 of the Hartford Policy defines who is an "insured:"

> 1. Who Is An Insured
>
> The following are "insureds":
>
> a. You for any covered "auto".[8]
>
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow ***.

[8] "You" is defined in the policy as the Named Insured. The Named Insured is Bluffton University.

The Hartford Policy clearly contemplated coverage of vehicles not owned by Bluffton. In fact, page 8 (of 11) of the policy specifically states "[f]or any covered auto you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance."

3. Procedural History

The instant action originated as two separate declaratory-judgment actions brought by the Plaintiffs/Appellees in the Allen County Court of Common Pleas. These actions were filed by Federal and AAIC on January 29, 2008,[9] against Defendants Executive Coach and Paul Niemeyer, Executor of the Estate of Jerome Niemeyer, deceased.[10] Federal and AAIC sought declarations that their respective insurance policies do not provide coverage for the March 2, 2007, crash. The Federal and AAIC cases were subsequently consolidated.

The Defendant-Intervenors/Appellants are players, coaches, and the estates of deceased players who suffered injuries in the crash. The Defendant-Intervenors/Appellants were granted leave by the trial court to intervene in the underlying cases, and filed Answers and Counterclaims for declaratory judgment against Federal and AAIC. The Defendant-Intervenors/Appellants seek a declaration that the Federal and AAIC polices provide coverage.

Federal, AAIC, and the Defendant-Intervenors/Appellants each filed motions for summary judgment in the trial court. On February 25, 2009, the Court issued an Order granting summary judgment in favor of Plaintiffs/Appellees Federal and AAIC.[11] Specifically, the Court held that Jerome Niemeyer was not an insured under the Hartford Policy, and thus was not an insured under the Federal and AAIC policies as well.

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[9] Hartford is not a party to this litigation, even though it is the language of the Hartford Policy that is at issue. Through its counsel, Hartford advised the trial court that it would simply agree be bound by the court's decision.

[10] Bluffton University was named as a defendant by AAIC but not by Federal, and was dismissed shortly thereafter.

[11] A copy of the trial court's Order is adjoined to this Memorandum.

The Defendant-Intervenors/Appellants appealed this decision to the Third District Court of Appeals, which again consolidated the two actions. On November 9, 2009, after full briefing and oral argument, the Third District issued its Opinion, in which it affirmed the trial court.[12] The Third District held, as did the trial court, that Jerome Niemeyer was not an insured under the policies at issue. It is from this decision that the Defendant-Intervenors/Appellants seek relief.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law 1: When a named insured engages the services of a charter bus company to transport its students in exchange for payment, the bus used to transport the students is "hire[d]" by the named insured, as that term is used in the named insured's automobile-liability-insurance policy.

The first element in determining "who is an insured" under the Hartford Policy is the requirement that the "covered 'auto'" (*i.e.*, the motor coach) be "hire[d]" by the named insured (*i.e.*, Bluffton).

The term "hire" is not specifically defined in the Hartford Policy, and thus must be given its commonly accepted meaning. *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-68; *see also Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241, paragraph two of the syllabus. Webster's Dictionary defines "hire" as "to get the services of a person or the use of a thing in return for payment," while the Merriam Webster's Collegiate Dictionary defines "hire" as "payment for the temporary use of something."

This definition of "hire" has been expressly adopted by Ohio courts when construing insurance-policy language. The issue currently before the Court (*i.e.*, whether Bluffton "hired" the Executive Coach bus) is not an issue of first impression in Ohio's lower courts. Indeed, the framework for deciding this issue, as well as the ultimate conclusion to be reached, was fully

[12] Copies of the Third District's Opinion and Judgment Entries are adjoined to this Memorandum.

detailed in a published Court of Appeals decision: *Westfield Ins. Co. v. Nationwide Mut. Ins. Co.* (1993), 99 Ohio App.3d 114.

In *Westfield*, a child was struck by a car as he exited a Regional Transit Authority ("RTA") bus on his way home from school. RTA bus tokens were purchased by the West Carrollton School District and provided to the child's parents to be used for his transportation to and from school. At the time of the accident, West Carrollton had an automobile-liability-insurance policy with Nationwide. In determining whether coverage existed, the Court had to determine whether the RTA bus was "hired" by the school district under the terms of the Nationwide policy. Id. at 119.

As in the instant action, the term "hire" was not defined in the Nationwide policy. Thus, the Court looked to the common meaning of the word "hire," *i.e.*, "to get the services of a person or the use of a thing in return for payment." Id., quoting WEBSTER'S WORLD DICTIONARY (1986), p. 665. Relying on this definition of "hire," the Second District Court of Appeals held that the RTA bus was "hired" by West Carrollton. Specifically, the court held:

> In the present case, West Carrollton engaged the services of RTA to transport [the student] to [school] through the issuance of purchase orders for RTA bus tokens which were given directly to [his] mother for [his] use. Accordingly, since West Carrollton obtained the use of the RTA bus for [the student] in return for payment, we agree that no genuine issue of fact remains as to whether [he] occupied an auto "hired" by the insured, West Carrollton.

Id. The *Westfield* holding is clear: where an educational institution "engages the services" of a bus company to transport its students in exchange for payment, the bus used to transport the students is "hired" by the educational institution under Ohio insurance law. Id.

Westfield is squarely on point. But the Third District completely ignored the *Westfield* decision -- in fact, it is not mentioned in the opinion of either the Court of Appeals or the trial court. Further, while the Third District opinion briefly cited a definition of "hire," it promptly ignored this definition. Instead, the court chose to improperly conflate the concepts of "hire" and

"permission" into a singular inquiry, and invented a novel "predominate [sic] control" test. But the concepts of "hire" and "permission" present two separate inquiries, and *Westfield* controls the "hire" inquiry in Ohio.

The Plaintiffs/Appellees will ask the Court to ignore *Westfield*. They will argue that the Court should apply foreign decisions which impose a requirement of physical possession or control in order to "hire" a vehicle. But under Ohio law, the Court is bound to apply the ordinary meaning of the term "hire" which, based on the definitions cited above, does not require possession or control. Judicial imposition of a "control" requirement would wrongfully rewrite the policy at issue. *Cincinnati Ins. Co. v. Phillips* (1990), 52 Ohio St.3d 162, 166 (Brown, concurring) (the Court "should not judicially rewrite the language of insurance policies to protect the insurer. To do so violates deeply ingrained principles of contract and insurance law").

At least one Ohio court has indicated that physical possession is not required to "hire" an auto. *Davis v. Continental Ins. Co.* (1995), 102 Ohio App.3d 82, 87 ("Typically, *'hire' does not involve physical possession of the vehicle hired, but* rather suggests remuneration for the use of it). Further, multiple foreign jurisdictions have determined that the term "hire" does not require an element of control. See *Pawtucket Mut. Ins. Co. v. Hartford Ins. Co.* (N.H. 2001), 147 N.H. 369, 787 A.2d 870 ("the common definition of "hire" does not require an element of control, and we decline to add this additional restrictive requirement to the policy."); *Kettner v. Conradt* (Wis. App. Apr. 29, 1997), 210 Wis.2d 499, 1997 Wisc. App. LEXIS 457 (a bus contracted by the school district to transport its students was "hired by the school district"); *Reuter v. Murphy* (Wis. App. 2000), 240 Wis.2d 110, 622 N.W.2d 464 (where a school district hired Murphy to transport students in her personal car, there was "no doubt that Murphy's car *** was a 'hired' vehicle within the plain meaning of the *** policy").

Finally, should the Court decide to abandon *Westfield* and adopt a "control" requirement, Bluffton, through its employee Coach Grandey, possessed the requisite amount of control. "Generally speaking, the insured will be deemed to have exercised sufficient control if it had significant authority over such matters as the choice of the vehicle, where it was to travel, by what routes, and for what purposes." (Citation omitted). *Earth Tech, Inc. v. United States Fire Ins. Co.* (E.D.Va. 2006), 407 F. Supp.2d 763, 772. Indeed, the factors to consider when determining whether or not the named insured had control over a vehicle are "the extent to which [the named insured] controlled the driver, the vehicle or the route taken by the driver with the vehicle." *Occidental Fore & Cas. Co. v. Westport Ins. Corp.* (E.D.Pa. Sept. 10, 2004), No. 02-8923, 2004 U.S. Dist. LEXIS 18471, at *21-*22, citing *Avalos v. Duron* (C.A.10 2002), 37 Fed. Appx. 456, 461.

Coach Grandey possessed and exercised a considerable amount of control over both Niemeyer and the Executive Coach bus, including considerable control over the vehicle, the choice of driver, the destination, and the routes of travel, among other things. Thus, even if the Court decides to apply foreign decisions which impose a "control" requirement, Bluffton exercised sufficient control over the bus.

The Court need not address the issue of control, given that Ohio law imposes no such requirement. But in the event that the Court chooses to depart from existing Ohio law and impose an additional, restrictive "control" requirement in the Hartford Policy, the only reasonable conclusion can be that Bluffton exercised sufficient control over the bus. Bluffton exercised significant authority over "the vehicle, where it was to travel, by what routes, and for what purposes." (Citation omitted.) *Earth Tech, Inc.*, 407 F. Supp.2d at 772. Accordingly, Bluffton "hired" the Executive Coach bus.

<u>Proposition of Law 2</u>: When a named insured charters a bus from a third party, and the third party grants the named insured the ability to approve or reject a specific driver, the approved driver is using the chartered bus with the "permission" of the named insured, as that term is used in the named insured's automobile-liability-insurance policy.

<u>Proposition of Law 3</u>: When a named insured charters a bus from a third party, the driver provided by the third party is using the bus with the "permission" of the named insured, as that term is used in the named insured's automobile-liability-insurance policy, unless the named insured subsequently revokes that permission.

The second issue presented for review is whether Jerome Niemeyer was using the Executive Coach bus with Bluffton's "permission."

It cannot be reasonably disputed that Bluffton granted Niemeyer permission to drive the bus on the Florida trip. As noted above, Executive Coach asked for and received Coach Grandey's permission for Mr. Niemeyer to drive on this trip. If Coach Grandey had not approved Mr. Niemeyer for the trip, he would not have been the driver for the trip. According to the owner of the bus company, Niemeyer "got the authority from Bluffton University's Coach Grandey to drive the coach." Coach Grandey was authorized by Bluffton to enter into the contract with Executive Coach, and to otherwise act on behalf of the University.

In *Caston v. Buckeye Union Ins. Co.* (1982), 8 Ohio App.3d 309, students of the Borromeo Seminary took part in an overnight field trip. Due to the unavailability of bus drivers, the person in charge of the trip (Father Amos) solicited student volunteers to use their family cars to transport students. A student volunteered and used his mother's car on the trip. After arriving at their destination (a cottage to spend the night), the student asked Father Amos for permission to take his mother's car to "get a hamburger," and Father Amos said yes. On the way to the hamburger place, the car was involved in a motor-vehicle accident.

The plaintiff (a passenger in the student's car) sought coverage under the "hired automobile" coverage of the school's policy. The policy defined an "insured" as, *inter alia*, "any

other person while using a *** HIRED AUTOMOBILE with the permission of the NAMED INSURED ***." Id. at 310. On appeal, the Eleventh District Court of Appeals held that it was "beyond doubt" that the student was driving with the permission of the school. Id.

The facts in *Caston* are analogous to the facts in the instant case. The named insured (Bluffton/Borromeo) gave permission to an individual (Niemeyer/the student driver) to use a vehicle owned by a third party (Executive Coach/the student's mother). The school and its representative (like Bluffton and Coach Grandey) did not own the vehicle but had the authority to grant permission to the driver to use the vehicle. This permission was sufficient to provide coverage to the driver under the school's insurance policy.

This sentiment was echoed by the California Court of Appeals in *Fratis v. Fireman's Fund American Ins. Cos.* (Cal. App. 1976), 56 Cal.App.3d 339. In *Fratis*, McClatchy Newspapers hired the decedent to solicit newspaper subscriptions using his own automobile in return for a mileage allowance. The court held that the automobile was a hired auto under McClatchy's commercial automobile policy, which provided coverage to "any person while using an owned automobile or a hired automobile *** provided the actual use of the automobile is by the named assured or with his permission." Id. at 342.

McClatchy's insurer argued, as did the insurers here, that McClatchy could not give the decedent permission to drive his own car. The *Fratis* court rejected this argument, holding that "the [policy] language in question plainly refers to actual consent, not some theoretical concept." Id. at 343, quoting *Osborne v. Security Ins. Co.* (Cal. App. 1957), 155 Cal.App.2d 201, 208, 318 P.2d 94. The decedent "had McClatchy's consent to use his vehicle to solicit subscriptions for McClatchy. He was thus driving with the latter's permission." Id. In the instant action, as in *Fratis*, the driver (Niemeyer) had the named insured's (Bluffton's) consent to use the vehicle, and thus his use was permissive.

As with the term "hire," "permission" is not defined in the Hartford Policy, and therefore must be given its common, ordinary meaning. *Gomolka*, 70 Ohio St.2d at 167-68. As the *Fratis* court recognized, when permission is used in this context, it refers to "actual consent." (Citation omitted) *Fratis*, 56 Cal.App.3d at 343. The Third District acknowledged this when it stated the "ordinary definition[] and common understanding[] of the word[] 'permission' *** seem[s] to include the concepts of mere 'agreement,' 'consent' or even 'acquiescence' to a matter ***." Third District Opinion, p.13. But after acknowledging the common meaning, the Third District refused to apply this definition, holding that the term "permission" "in any legal context commonly refer[s] to the requirement of having 'authority to grant the permission' and/or exert a 'substantial control' over the matter or thing hired as well." Id.

"A policy of insurance is a contract and like any other contract is to be given a reasonable construction in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed." *Dealers Dairy Products Co. v. Royal Ins. Co.* (1960), 170 Ohio St. 336, paragraph 1 of the syllabus. Thus, the Third District's refusal to apply the commonly understood meaning of "permission" is in direct contravention of established Ohio insurance law. Based on the ordinary meaning of "permission," Jerome Niemeyer was using the bus with Coach Grandey's (and thus Bluffton's) permission, and the accident occurred while Niemeyer was using the bus within the scope of that permission. *See, e.g., Gulla v. Reynolds* (1949), 151 Ohio St. 147, paragraph 1 of the syllabus ("[S]uch permission relates to the use to which the automobile is being put by such third person at the time of the accident"). Thus, Niemeyer was a permissive user under subsection II.A.1(b) of the Hartford Policy.

In the court below, the insurers relied on foreign cases and argued that only one with "possession and control" of the vehicle has the authority to grant the permission to use it. The Third District adopted this sentiment, and supplemented it with a novel "predominate [sic] control"

test. The Court should refuse to adopt such a test. However, as discussed above, Bluffton possessed and exercised a degree of control sufficient to meet this requirement.

More importantly though, Executive Coach specifically granted Bluffton the ability to approve or reject Jerome Niemeyer as a driver, a fact which was noted by the Court of Appeals. While this appears to be an issue of first impression, the fact that the charter-bus company ceded the choice of driver to the customer should be dispositive on the issue of whether the chosen driver is using the bus with the customer's "permission." While Bluffton did not exercise complete control over all aspects of the Executive Coach bus, it did exercise control over the choice of the bus's driver, Jerome Niemeyer, because Executive Coach transferred this control to Bluffton. If Coach Grandey chose to permit Jerome Niemeyer to drive the bus, and never revoked his ability to drive the bus, how can Mr. Niemeyer's use of the bus *not* be permissive? This is an issue deserving of clarification by this Court.

Finally, the Third District noted that a "predominate [sic] control" approach "necessarily implies a weighing of evidentiary facts," and as such, remand to the trial court ordinarily "would be appropriate here." Third District Opinion, p.16. In spite of this, however, the Third District stated it "believe[d]" the trial court had already conducted such an analysis, the result of which was a finding that Executive Coach's authority was predominant, and thus the driver was operating with the permission of Executive Coach and not Bluffton. If this Court chooses to impose the Third District's "predominate [sic] control" approach, the Defendant-Intervenors/Appellants are at a minimum entitled to have a jury conduct the evidence-weighing exercise.

CONCLUSION

The instant action is a case of public or great general interest. Accordingly, the Defendant-Intervenors/Appellants urge this Court to accept jurisdiction in this case, reverse the Third District, and provide guidance to Ohio insurers, insureds, and their counsel regarding these critical issues.

Respectfully submitted,

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APPENDIX

Opinion of the Allen County Court of Appeals, Case Nos. 1-09-17 and 1-09-18 (Nov. 9, 2009).

Judgment Entry of the Allen County Court of Appeals, Case No. 1-09-17 (Nov. 9, 2009).

Judgment Entry of the Allen County Court of Appeals, Case No. 1-09-18 (Nov. 9, 2009).

Order of the Allen County Court of Common Pleas (Feb. 25, 2009).

COURT OF APPEALS
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IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

FEDERAL INSURANCE COMPANY,

PLAINITFF-APPELLEE,

CASE NO. 1-09-17

v.

EXECUTIVE COACH LUXURY TRAVEL, ET AL.,

DEFENDANTS-APPELLEES,
-and-

FEROEN J. BETTS, ETC., ET AL.,

OPINION

DEFENDANTS-INTERVENORS,
APPELLANTS.

AMERICAN ALTERNATIVE
INSURANCE CORPORATION,

PLAINITFF-APPELLEE,

CASE NO. 1-09-18

v.

EXECUTIVE COACH LUXURY TRAVEL, ET AL.,

DEFENDANTS-APPELLEES,
-and-

OPINION

FEROEN J. BETTS, ETC., ET AL.,

DEFENDANTS-APPELLANTS.

Appeal from Allen County Common Pleas Court
Trial Court Nos. CV-2008-143 and CV 2008-156

Judgments Affirmed

Date of Decision: November 9, 2009

APPEARANCES:

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D. John Travis for Appellee, Federal Insurance Company

Christine M. Bollinger for Appellee, Executive Coach Luxury Travel

John Smalley for Appellees Adkins, Holp, Grandey and Miller

David W. Stuckey for Appellee Arend

Stephen V. Freeze for Appellee Hartford Fire Insurance Co.

Michael Borer for Appellee Niemeyer

James E. Yavorcik for Appellee Berta

Douglas Desjardins for Appellee, Bluffton University

SHAW, J.

{¶1} Defendant/Intervenors-Appellants Feroen J. Betts, Etc., et al. ("Intervenors") appeal from the February 25, 2009 Judgment Entry of the Court of Common Pleas, Allen County, Ohio, granting summary judgment in favor of Plaintiffs-Appellees Federal Insurance Company ("Federal") and American Alternative Insurance Corporation ("American") and denying the Intervenors' motion for summary judgment.

{¶2} This matter arises out of a bus crash occurring on March 2, 2007. Bluffton University's ("Bluffton") baseball team had been scheduled to play a series of games in Sarasota, Florida. Bluffton hired Executive Coach Luxury Travel, Inc. ("Executive Coach") to provide coach bus transportation for the players from Bluffton, Ohio, to the games in Sarasota, Florida.

{¶3} On March 2, 2007, the bus carrying the Bluffton baseball team was involved in a crash in Atlanta, Georgia. Five baseball players, bus driver Jerome Niemeyer ("Niemeyer"), and Niemeyer's wife were killed in the accident. Numerous other occupants of the bus were injured in the crash.

{¶4} At the time of the bus crash, Bluffton had insurance policies with three companies. First, there was a policy issued to Bluffton by Hartford Fire Insurance Company ("Hartford"). This policy (number 33 UUN UK8593) was a special multi-flex policy, with a commercial automobile coverage part with a

liability limit of $1 million. Second, Bluffton had a policy issued by American, a commercial umbrella policy numbered 60A2UB00024331, with a liability limit of $5 million. Finally, Bluffton was covered by a policy issued by Federal. The Federal policy was a commercial excess follow-form policy, numbered 7983-94-78, with a liability limit of $15 million.

{¶5} The terms of both the Federal and American policies state that they will not apply unless the terms of the underlying insurance apply. The Federal policy lists the American policy as the underlying insurance. The American policy refers back to the Hartford policy as the underlying insurance.

{¶6} On January 29, 2008, Federal and American filed separate complaints for declaratory judgment against Executive Coach and Niemeyer. Federal requested that "the Court declare that [Federal] does not owe Executive Coach and the Estate of Jerome A. Niemeyer excess liability insurance as to any bodily injury or wrongful death claim or suit arising out of the Motor Coach Accident." Specifically, Federal argued that Executive Coach and Niemeyer did not qualify as "insureds" under the policy

{¶7} Originally, these two actions were filed separately with the American action assigned case no. CV-2008-0156, and the action filed by Federal assigned case no. CV-2008-0143. However, these two actions were ultimately consolidated on February 28, 2008.

{¶8} In February, Intervenors filed motions to intervene in both cases. Also filed at the time of the motions to intervene were an answer and counterclaim. The trial court granted the motions to intervene on February 19, 2008. Several other Intervenors also joined the suit after the original motion.

{¶9} On March 17, 2008, Federal replied to the counterclaim of Intervenors. On March 26, 2008, American also replied to the counterclaim of Intervenors.

{¶10} On August 6, 2008, Federal amended its complaint. Intervenors filed an answer to Federal's amended complaint on September 9, 2008.

{¶11} In October of 2008, Feroen Betts ("Betts") mailed a subpoena to Hartford requesting the underwriting file for the policy at issue in this case, as well as the complete claims file for the claim at issue in this case. On November 14, 2008, Hartford filed a motion to quash the subpoena. On December 1, 2008, Intervenors filed a memorandum opposing Hartford's motion to quash. On December 1, 2008, the trial court issued an order quashing Betts' subpoena.

{¶12} On December 19, 2008, American filed a motion for summary judgment arguing that no genuine issue of material fact existed as to whether Executive Coach or Niemeyer were "insureds" under Bluffton's policy with American. Federal filed a similar motion on December 19, 2008.

{¶13} Also on December 19, 2008, Intervenors filed a motion for summary judgment arguing that Mr. Niemeyer was an insured. It also appears that on December 19, 2008 a Joint Stipulation of Facts was filed with the consent of all of the parties to this case.

{¶14} On January 30, 2009, Intervenors filed a motion in opposition to the motions for summary judgment filed by American and Federal. Also on January 30, 2009, American filed a motion in opposition to Intervenors motion for summary judgment.

{¶15} On February 17, 2009, Intervenors filed a reply brief in support of their motion for summary judgment. On February 17, 2009, American and Federal filed reply briefs in support of their own motions for summary judgment.

{¶16} On February 25, 2009, the trial court entered an order granting summary judgment in favor of American and Federal and denying the Intervenors' motion for summary judgment.

{¶17} Intervenors now appeal asserting three assignments of error.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN DETERMINING, AS A MATTER OF LAW, THAT AT THE TIME OF THE MARCH 2, 2007 CRASH, JEROME NIEMEYER WAS NOT OPERATING THE EXECUTIVE COACH BUS WITH THE "PERMISSION" OF BLUFFTON UNIVERSITY.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN DETERMINING, AS A MATTER OF LAW, THAT THE BUS OPERATED BY

JEROME NIEMEYER WAS NOT "HIRED" BY BLUFFTON UNIVERSITY AS THAT TERM IS USED IN THE HARTFORD POLICY.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT QUASHED THE DEFENDANT-INTERVENORS/ APPELLANTS' SUBPOENA SEEKING HARTFORD'S UNDERWRITING FILE AND CLAIMS FILE.

{¶18} For ease of discussion, we elect to address Intervenors' first two assignments of error together. In these assignments of error, Intervenors argue that the trial court erred by rendering unduly restrictive interpretations of certain terms in the policies, which led to its grant of summary judgment in favor of American and Federal. Specifically, Intervenors argue that the trial court erred in finding that Niemeyer was not operating the coach "with the permission of Bluffton," and that neither Niemeyer nor the charter bus were "hired by Bluffton" under the plain and ordinary meaning of those terms within the Hartford policy.

{¶19} An appellate court reviews a grant of summary judgment independently, and without any deference to the trial court. *Conley-Slowinski v. Superior Spinning & Stamping Co.* (1998), 128 Ohio App.3d 360, 363, 714 N.E.2d 991. The standard of review for a grant of summary judgment is de novo. *Hasenfratz v. Warnement,* 3rd Dist. No. 1-06-03, 2006-Ohio-2797, citing *Lorain Nat'l. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 572 N.E.2d 198.

{¶20} A grant of summary judgment will be affirmed only when the requirements of Civ.R. 56(C) are met. This requires the moving party to establish: (1) that there are no genuine issues of material fact, (2) that the moving party is entitled to judgment as a matter of law, and (3) that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party, said party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); see *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 653 N.E.2d 1196, 1995-Ohio-286, paragraph three of the syllabus. Additionally, Civ.R. 56(C) mandates that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact 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.

{¶21} The party moving for summary judgment bears the initial burden of identifying the basis for its motion in order to allow the opposing party a "meaningful opportunity to respond." *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 116, 526 N.E.2d 798. The moving party also bears the burden of demonstrating the absence of a genuine issue of material fact as to an essential element of the case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264, 1996-Ohio-107. Once the moving party demonstrates that he is entitled to summary judgment, the burden shifts to the non-moving party to produce evidence

on any issue which that party bears the burden of production at trial. See Civ.R. 56(E).

{¶22} In ruling on a summary judgment motion, a court is not permitted to weigh evidence or choose among reasonable inferences, rather, the court must evaluate evidence, taking all permissible inferences and resolving questions of credibility in favor of the non-moving party. *Jacobs v. Racevskis* (1995), 105 Ohio App.3d 1, 7, 663 N.E.2d 653.

{¶23} "[A]n insurance policy is a contract between the insurer and the insured." *McDaniel v. Rollins,* 3d Dist. No. 1-04-82, 2005-Ohio-3079, at ¶ 31, citing *Wilson v. Smith,* 9th Dist. No. 22193, 2005-Ohio-337, at ¶ 9. The court must interpret the language in the insurance policy under its plain and ordinary meaning. *Id.* at ¶32, citing *Wilson,* 2005-Ohio-337, at ¶ 9. When the contract is clear and unambiguous, the court "may look no further than the four corners of the insurance policy to find the intent of the parties." *Id.* An ambiguity exists "only when a provision in a policy is susceptible of more than one reasonable interpretation." *Hacker v. Dickman,* 75 Ohio St.3d 118, 119-120, 661 N.E.2d 1005, 1996-Ohio-98.

{¶24} In the present case, under the policy issued by Hartford, an "insured" is defined, in pertinent part, as follows:

The following are "insureds":

a. You for any covered "auto".

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except. . .

{¶25} As previously stated, the court must interpret the language in the insurance policy under its plain and ordinary meaning. See *McDaniel,* 2005-Ohio-3079. This Court has previously stated the application of this rule in the following manner:

> *** * * [I]n order for an insurer to defeat coverage through a clause in the insurance contract, it must demonstrate that the clause in the policy is capable of the construction it seeks to give it, and that such construction is the only one that can be fairly placed upon the language.**

Bosserman Aviation Equip., Inc. v. U.S. Liability Ins. Co., 3rd Dist. No. 5-09-05, 2009-Ohio-2526, at ¶11, citing *Andersen v. Highland House Co.,* 93 Ohio St.3d 547, 549, 757 N.E.2d 329, 2001-Ohio-1607.

{¶26} The insurance policy in this case does not specifically define the terms "permission" or "hire." The evidence establishes that Bluffton arranged, contracted and paid for the charter of the bus and driver with Executive Coach. As part of the agreement, Bluffton specifically requested a certain bus because of its access to a working DVD player. Bluffton subsequently approved and agreed to the proposal and contract for the charter presented by Executive Coach, and eventually approved the specific driver to be assigned for each portion of the trip. From the discussions that occurred between Bluffton and Executive Coach, it

appears that Bluffton could have refused any of the proposed drivers, if they did not meet with their approval.

{¶27} Under the terms of the agreement, Bluffton Coach Grandey clearly had some authority to direct the specific activities of the bus and driver, particularly with regard to rest stops and/or meals along the way. Although it might involve an extra charge, the coach also appeared to have input as to the route, stops, or any sight-seeing detours, etc. the bus and driver might make. In fact, within the first hour of the trip, the bus was directed by Coach Grandey to return to Bluffton for the repair of the DVD player which was discovered not to be working.

{¶28} American and Federal argue that none of these considerations are determinative because within the context of an insurance contract, the terms "permission" and "hire" implicitly require a substantial, if not exclusive degree of authority and control over the bus and driver by the "permitting" or "hiring" party, which Bluffton University did not have in this case. Therefore, even though Bluffton may have had some authority and discretionary control or direction over the bus and its driver pursuant to the charter arrangement, and even though Bluffton may have "negotiated for," "consented to" or "agreed to" certain terms of the charter arrangement, the mere consent or agreement that is inherent for both parties in any contractual arrangement did not rise to the level of substantial or

exclusive authority and control over the bus and driver sufficient to constitute a grant of "permission" or the "hire" of the bus and driver by Bluffton.

{¶29} The trial court adopted the construction of American and Federal, specifically finding as follows:

> **[T]his Court is persuaded by the logic that Jerome Niemeyer's employment and use of the Motor Coach was with Executive Coaches, and NOT Bluffton University's permission. The testimony of Grandey, Stechschulte and Lammers' supports the affirmation that Bluffton University's use of the motor coach and any authority Bluffton had over the motor coach driver was always subject to the permission Executive Coach gave its driver and its customer Bluffton University to use the motor coach. Additionally, Bluffton University could not make any use of the motor coach that Executive Coach did not permit Jerome Niemeyer or Bluffton University to make of the motor coach. Any asserted "authority" a customer had to grant or deny Executive Coach's driver a particular use of the company's motor coach was only that granted by Executive Coach, and therefore, it cannot be said that Bluffton, or an agent of Bluffton, such as Coach Grandey gave permission to Niemeyer to drive the bus.**
>
> **Executive coach at all times maintained "possession and control" of the motor coach, including at the time of the accident. Additionally Bluffton had no authority to terminate Niemeyer's use of the coach nor a financial interest in the coach. Bluffton also was exposed to no liability arising out of the use of the coach nor a right to control its use.**
>
> **For these reasons, this Court finds that Jerome Niemeyer was not using the Motor Coach with permission of Bluffton College, but rather with permission of an independent Contract, Executive Coach.**

(internal citations omitted).

{¶30} While ordinary definitions and common understandings of the words "permission" and "hire" seem to include the concepts of mere "agreement," "consent" or even "acquiescence" to a matter, it is also clear that definitions of these terms in any legal context commonly refer to the requirement of having the "authority to grant the permission" and/or exert a "substantial control" over the matter or thing hired as well.

{¶31} For example, "permission" is often defined as follows:

> **1. The act of permitting. 2. A license or liberty to do something: authorization. *** 3. Conduct that justifies others in believing that the possessor of property is willing to have them enter if they want to do so.**

BLACK'S LAW DICTIONARY (8th Ed.2004), at 1176 (definitions of express and implied permissions omitted). "Permission" is also defined as "the act of permitting," "formal consent," or "authorization." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002), at 1693.

{¶32} And, "hire" is defined as follows:

> **1. To engage the labor or services of another for wages or other payment. 2. To procure the temporary use of property, usu. at a set price. 3. To grant the temporary use of services.**

BLACK'S LAW DICTIONARY (8th Ed.2004), at 748. "Hire" is also defined as "engaging the temporary use of something for a fixed sum." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002), at 1072.

{¶33} We have found no Ohio case specifically excluding the concepts of mere acquiescence or consent from the definition of "permission" or "hire" in the context of an insurance contract. Nor have we found any Ohio case specifically limiting the terms "permission" and "hire" in an insurance contract to those who have *exclusive* control or authority over the thing permitted or hired. However, there are cases in Ohio which suggest that where there is *shared control and/or direction* over a hired or borrowed vehicle the issue of which party had the more *substantial control* may be relevant as a factual matter to be weighed by the trier of fact in determining an issue of "permission" with regard to coverage in an insurance policy.

{¶34} Of these, we find the decision of the Tenth District Court of Appeals in *Davis v. Continental Insurance Company* (1995), 102 Ohio App.3d 82, 656 N.E.2d 1005, to be instructive to the case before us. In *Davis*, the court of appeals was asked to determine whether a borrowed vehicle was being driven with permission. In *Davis*, Davis loaned her vehicle for use during a school trip. On the way to the trip destination, and while carrying students, Davis was involved in a car accident. Davis and her passengers subsequently sought coverage under the school's auto insurance policy. The *Davis* Court was faced with a definition of "insureds" that included "anyone else while using with your permission a covered

'auto' you own, hire or borrow," a definition identical to the one in the present case. *Davis*, 102 Ohio App.3d at 86.

{¶35} In determining the appropriate definition of "borrow," the *Davis* Court made the following observation:

> **[T]o require that a policyholder actually have physical possession of a vehicle in order to have borrowed it is unduly restrictive. In that instance, by controlling every detail of the vehicle's use, a policyholder can in effect accomplish what physical possession would allow, but at the same time avoid the responsibility of insuring the vehicle under its policy. Indeed, the term "borrow" is next to the term "hire" in the policy. Typically, "hire" does not involve physical possession of the vehicle hired, but rather suggests remuneration for the use of it. While "borrow" differs from "hire" in that borrowing typically involves no remuneration for use of the article borrowed, we see no reason to require that "borrow" include physical possession, when "hire" does not. See *Travelers Indemn. Co. v. Swearinger* (1985), 169 Cal.App.3d 779, 214 Cal.Rptr. 383.**
>
> **Rather, we adopt the definition set forth in *Schroeder* that "borrow" means "not only that one receives the benefit of the borrowed object's use, but also that the borrower receives temporary possession, dominion, *or* control of the use of the thing." (Emphasis added.) *Schroeder, supra,* 591 So.2d at 346. As a result, "some element of substantial control is generally understood to be included within the prevailing meaning of the act of borrowing * * *." *Id.***

Davis, 102 Ohio App.3d at 87.

{¶36} In disposing of the case, the *Davis* Court determined that the issue was whether the school exercised dominion or substantial control over the car and remanded the case to the trial court to make such a determination. We believe the

Davis decision represents a reasonable approach to the issue before us as to whether the bus and driver were "hired" by Bluffton and acting with the "permission" of Bluffton within the meaning of the insurance contract in this case. In essence, that approach is for the trial court to evaluate the evidence as to the operational authority and control of both parties in executing the charter contract and construe the terms "permission" and "hire" in favor of the party who seems to have had the predominate authority to grant "permission" to execute the charter contract, operate the bus, or otherwise exert directional "control" over the bus and driver.

{¶37} As their approach necessarily implies a weighing of evidentiary facts, the *Davis* court in essence, determined there were genuine issues of material fact on this question and remanded the matter for the trial court to make that determination - or to at least review the existing facts according to the newly announced criteria. Ordinarily, the same course would be appropriate here.

However, we believe the trial court in this case has already conducted the comparative analysis, as recommended in *Davis*, and adopted by this court, albeit somewhat in-artfully, in the quoted portion of the court's decision set forth earlier. Specifically, in reviewing the trial court's decision, we believe it is apparent that the court considered the evidence as to the relative authority and control of both Bluffton and Executive Coach in determining whether the bus and driver were

"hired" by Bluffton or Executive Coach and whether the bus and driver were operating with the "permission" of Bluffton or Executive Coach within the context of the insurance contract. Accordingly, we do not believe it is necessary to remand this case to the trial court for that purpose.

{¶38} In essence, the trial court determined that based on a review of the record in this case, reasonable minds could not differ in finding that the operation of the bus and driver was neither "hired" by Bluffton, nor with the "permission" of Bluffton within the meaning of those terms in the insurance contract. The trial court's decision reflects that this determination was based on the trial court's assessment that Executive Coach and not Bluffton, had predominate authority and control over the bus and driver under the charter contract.

{¶39} Following the approach set forth in *Davis*, our independent review of the record in this case leads us to concur with the decision of the trial court. In sum, we have determined that reasonable minds could not differ in concluding that Executive Coach and not Bluffton had predominate authority and control over the bus and driver under the charter contract in this case and that as a result, reasonable minds could not differ in concluding that the bus and driver were "hired" by Executive Coach and not Bluffton, and were operating with the "permission" of Executive Coach and not Bluffton within the meaning of those

terms as used in the insurance contract. For these reasons, the first and second assignments of error are overruled.

{¶40} In their third assignment of error, Intervenors argue that the trial court erred in quashing the subpoena seeking Hartford's underwriting file and claims file.

{¶41} A trial court has broad discretion to regulate discovery proceedings. *Hahn v. Satullo*, 156 Ohio App.3d 412, 431, 806 N.E.2d 567, 2004-Ohio-1057, citing *Van-Am. Ins. Co. v. Schiappa* (1999), 132 Ohio App.3d 325, 330, 724 N.E.2d 1232. Absent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues. *Van-Am. Ins. Co.*, 132 Ohio App.3d at 330. An abuse of discretion constitutes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

{¶42} In its December 1, 2008, order quashing Betts' subpoena, the trial court found as follows:

> **The Court would note that this is a Declaratory judgment Action concerning the interpretation of the specific language contained in contract(s) of insurance. Further it is noted that this is not what is contained in an underwriting file.**

> **The Court would further note that Hartford is not a party to the Declaratory Judgment Action and Betts is a non-insured under the Hartford Policy.**
>
> **It is elementary and provided by Ohio Civil Rule 26(B) that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."**
>
> **Further, the Court finds that the attorney-client privilege and work product doctrine protect Hartford's claims file from the subpoena issued by Betts.**

{¶43} In the present case, we are mindful that the action commenced is a declaratory judgment action, in which the parties are requesting that the trial court interpret the contract. As previously stated, a court must interpret the language in the insurance policy under its plain and ordinary meaning. *McDaniel,* 2005-Ohio-3079, at ¶32, citing *Wilson,* 2005-Ohio-337, at ¶ 9. When the contract is clear and unambiguous, the court "may look no further than the four corners of the insurance policy to find the intent of the parties." *Id.* An ambiguity exists "only when a provision in a policy is susceptible of more than one reasonable interpretation." *Hacker*, 75 Ohio St.3d at 119-120.

{¶44} In the present case, it has not been demonstrated thus far that the underwriting and claims file were relevant to the issues in the present action. Accordingly, we find that the trial court did not abuse its discretion when it quashed the Invervenors' subpoena of Hartford's underwriting file and its claims file. Intervenors' third assignment of error is overruled.

{¶45} Based on the foregoing, the February 25, 2009 Judgment of the Court of Common Pleas, Allen County, Ohio, granting summary judgment in favor of Plaintiffs-Appellees Federal and American, and denying the Intervenors' motion for summary judgment is affirmed. The December 1, 2008 order of the trial court quashing Intervenors' subpoenas is also affirmed.

Judgment Affirmed

PRESTON, P.J. and ROGERS, J., concur.

/jlr

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IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

FEDERAL INSURANCE COMPANY,

PLAINITFF-APPELLEE,

CASE NO. 1-09-17

v.

EXECUTIVE COACH LUXURY TRAVEL, ET AL.,

DEFENDANTS-APPELLEES,
-and-

FEROEN J. BETTS, ETC., ET AL.,

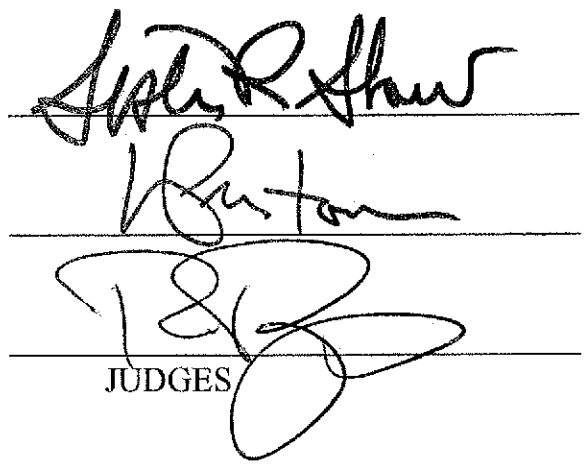
J U D G M E N T
E N T R Y

DEFENDANTS-INTERVENORS,
APPELLANTS.

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellants for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by

App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.



JUDGES

DATED: November 9, 2009

/jlr

COURT OF APPEALS
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IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

PLAINITFF-APPELLEE,

CASE NO. 1-09-18

v.

EXECUTIVE COACH LUXURY TRAVEL, ET AL.,

DEFENDANTS-APPELLEES,
-and-

FEROEN J. BETTS, ETC., ET AL.,

JUDGMENT ENTRY

DEFENDANTS-INTERVENORS, APPELLANTS.

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellants for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by

App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

JUDGES

DATED: November 9, 2009

/jlr

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GINA C. STALEY-BURLEY
CLERK OF COURTS
ALLEN COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

FEDERAL INSURANCE COMPANY and AMERICAN ALTERNATIVE INSURANCE CORPORATION	Consolidated Case No. CV-2008-0143
Plaintiffs,	Judge Richard K. Warren
v.	
EXECUTIVE COACH LUXURY, et. al.	
Defendants,	**ORDER GRANTING PLAINTIFF AMERICAN ALTERNATIVE INSURANCE AND PLAINTIFF FEDERAL INSURANCE COMPANY'S MOTIONS FOR SUMMARY JUDGMENT**
and	
FERON J. BETTS, etc., et. al.	
Defendant-Interveners.	

This matter is before the Court on Plaintiff American Alternative Insurance Corporation's Motion for Summary Judgment, Plaintiff Federal Insurance Company's Motion for Summary Judgment, Defendant-Intervenors' Joint Motion for Summary Judgment and Opposition to Plaintiffs' Motions, and Plaintiffs' individual responses to Defendant-Interveners' Motion. All pending documents,

CW09 1853

evidence and affidavits have been timely submitted and as such this Court will issue judgment.

Facts

On March 2, 2007, players and coaches of the Bluffton University baseball team sustained bodily injuries in a motor coach accident in Atlanta Georgia.

At the time of the motor coach accident, the players and coaches of Bluffton University Baseball team were being transported to a Florida baseball tournament in a motor coach owned by Partnership Financial Services but leased to defendant Executive Coach Luxury Travel, Inc. ("Executive Coach"). Executive Coach in turn contracted to provide Bluffton University's baseball team charter service to and from the Florida tournament. Executive Coach likewise employed Jerome Niemeyer to drive the motor coach.

As a result of the aforesaid tragic accident, five Bluffton baseball players, Jerome Niemeyer and his wife, were killed and other bus occupants were injured. Numerous suits for bodily injury and wrongful death have been brought against Executive Coach and the Estate of Jerome Niemeyer.

At the time of the accident, Defendant Bluffton University held three relevant policies of insurance: 1) a commercial automobile policy issued by Hartford with liability limits of $1 million; 2) a commercial umbrella policy issued by AAIC with liability limits of $5 million and 3) an excess follow-form policy issued by Federal with liability limits of $15 million. The Hartford Policy is identified as the underlying insurance by the AAIC policy and therefore the AAIC policy is subject to the same terms, conditions, agreements and definitions as

CN09 1804

Hartford. Additionally The Federal Policy lists the AAIC policy as controlling underlying insurance, subject to the same terms, conditions, agreements, exclusions, and definitions. Therefore, the AAIC and Federal policy applies if the Hartford policy applies.

Issue:

This dispute centers around the interpretation of who is an insured person as mentioned in "the omnibus clause" of the Hartford Policy. For a third party, such as Niemeyer to be considered an "insured" under Section II.A.1.b of the Underlying Hartford policy, two requirements must be met. First, the third-party must use the covered "auto" with the named insured's permission; and 2) the covered "auto" must be one the named insured owns, hires, or borrows.

The Court is guided by *Cincinnati Insurance Company v. CPS Holdings, Inc.*, (2007), 115 Ohio St. 3d 306 in the interpretation of an insurance policy, which include the following principles:

> (1) "An insurance policy is a contract whose interpretation is a matter of law." *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St. 3d 186, 2006 Ohio 2180.
>
> (2) "When confronted with an issue of contractual interpretation, the role of the court is to give effect to the intent of the parties to the agreement." *Hamilton Ins. Serv. Inc. v. Nationwide Ins. Co.*, 86 Ohio St. 3d 270 (1999).
>
> (3) The court is to examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med Life Ins.*, 31 Ohio St. 3d 130 (1987).

CN09 1855

(4) The court is to look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241 (1978).

(5) "When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Id.*

(6) As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Gulf Ins. Co. v. Burns Motor Inc.*, 22 Sw.3d 417 (Tex 2000).

(7) Ambiguity in an insurance contract is construed against the insurer and in favor of the insured. *King v. Nationwide Ins. Co.*, 35 Ohio St.2d 208 (1988). However, this rule will not be applied so as to provide an unreasonable interpretation of the words of the policy. *Morfoot v Stake*, 17 Ohio St. 506 (1963).

The Named Insured's Permission

First this Court must determine whether Jerome Niemeyer was using the Motor Coach with Bluffton's permission. Evidence of the contract between Executive Coach and Bluffton to provide charter services has been submitted and this Court is persuaded by the logic that Jerome Niemeyer's employment and use of the Motor Coach was with Executive Coaches, and NOT Bluffton University's permission. The testimony of Grandey, Stechschulte and Lammers' supports the affirmation that Bluffton University's use of the motor coach and any

CV091856

authority Bluffton had over the motor coach driver was always subject to the permission Executive Coach gave its driver and its customer Bluffton University to use the motor coach. Additionally, Bluffton University could not make any use of the motor coach that Executive Coach did not permit Jerome Niemeyer or Bluffton University to make of the motor coach. Any asserted "authority" a customer had to grant or deny Executive Coach's driver a particular use of the company's motor coach was only that granted by Executive Coach, and therefore it cannot be said that Bluffton, or an agent of Bluffton, such as Coach Grandey gave permission to Niemeyer to drive the bus.

Executive coach at all times maintained "possession and control" of the motor coach, including at the time of the accident. Additionally Bluffton had no authority to terminate Niemeyer's use of the coach nor a financial interest in the coach. Bluffton also was exposed to no liability arising out of the use of the coach nor a right to control its use. *See Buckeye Union Cas. Co. v. Royal Indemnity Co*, 120 Ohio App. 429, 203 N.E.2d 121.

For these reasons, this Court finds that Jerome Niemeyer was not using the Motor Coach with permission of Bluffton College, but rather with permission of an Independent Contractor, Executive Coach.

Owns, Hires or Borrows

Because this Court has decided that permission was not given by Bluffton it is not necessary to approach this issue. However, this Court, had it decided otherwise above, would have held and does hold that Bluffton College had contracted with Executive Coach for services and the bus was only incident to

CV09 1857

said contract. Bluffton therefore hired Executive Coach to provide charter service. Subsequently, Executive Coach selected the particular Motor Coach from PFS to provide transportation incidental to the charter service. Accordingly, Bluffton College could not be found to have owned, hired, or borrowed the vehicle at the time of the accident.

Conclusion

The Court has reviewed the plain and ordinary meaning of the language in the Hartford policy; the language is clear; the policy contract is unambiguous in that a definite legal meaning can be given and any ambiguity construed in favor of the purported insured in this instance would provide an unreasonable interpretation of the words of the policy.

Upon careful consideration of applicable case law, pleadings, briefs, depositions, contracts and policies in question, and other relevant and admissible materials this Court finds that Summary Judgment in favor of Plaintiffs Federal Insurance Company and American Alternative Insurance Corporation is warranted. Reasonable minds could come to but one conclusion in the interpretation of the policy at issue, and that conclusion is adverse to the Defendants in this action. Additionally, no genuine issues of material fact remain as to whether Jerome Niemeyer was an "insured" under the Omnibus Clause of the policy between AAIC and Bluffton or Federal and Bluffton.

This Court finds and declares that Jerome Niemeyer was not an insured motorist under the Hartford Insurance Policy at the time of the accident. Because he was not insured by Hartford, he was also not insured by AIC or Federal.

Cb9 1858

WHEREFORE Plaintiffs' motions for summary judgment are GRANTED and Defendant-Interveners' motion is DENIED. This is a final appealable order.

IT IS SO ORDERED.

JUDGE RICHARD K. WARREN

RKW/hac
Dated: 2/25/09
CC:

CV09 1859