

ORIGINAL

09-2307

IN THE SUPREME COURT OF OHIO

Federal Insurance Company and
American Alternative Insurance Corporation

Plaintiffs/Appellees,

v.

Executive Coach Luxury Travel, Inc., *et al.*

Defendants,

and

Feroen J. Betts, *etc., et al.*,

Defendant-Intervenors/Appellants.

: On Appeal from the Allen County Court of
Appeals, Third Appellate District

: Court of Appeals

: Case Nos. 1-09-17 and 1-09-18

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MEMORANDUM IN OPPOSITION OF JURISDICTION
OF PLAINTIFF-APPELLEE FEDERAL INSURANCE COMPANY

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**EXPLANATION OF WHY THIS CASE IS NOT OF
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The only question this case presented was decided without any difficulty by the Allen County Court of Common Pleas. Its decision was affirmed by an unanimous court of appeals (again without any difficulty), and there is no reason whatsoever for this Court to hear the intervenors' discretionary appeal, and review the trial court decision yet again. The intervenors have not offered a single case in which liability coverage was afforded under the circumstance that the intervenors argue coverage should be extended. In every case cited in which an argument like the intervenors' was made, the court reached the same result the trial court and court of appeals did here. In each decision the court found that the transportation provider was not entitled to liability coverage pursuant to the omnibus clause of its customer's insurance policy.

The intervenors ask that the Supreme Court of Ohio consider whether three insurance policies issued to Bluffton University afford Executive Coach Luxury Travel, Inc. ("Executive Coach"), a charter service, liability coverage for a motor coach accident in Atlanta, Georgia on March 2, 2007. The intervenors are some of the individuals who were injured in the March 2, 2007 accident. They assert that this case presents a "yet unresolved question" (Intervenors' Explanation of Why This Case Is of Public or Great General Interest at p. 1), but in fact the lower courts decided the solitary question presented by the Bluffton University insurers' consolidated declaratory judgment actions in keeping with sound and established law.

The Allen County Court of Common Pleas recognized that "[t]his dispute centers around the interpretation of who is an insured person as mentioned in 'the omnibus clause' of the Hartford Policy

[the Bluffton University auto policy]”; that the resolution of the dispute involved the consideration of only “two requirements”; and that there was *no* genuine issue of material fact:

For a third party, such as Niemeyer [the Executive Coach driver] to be considered an “Insured” under Section II.A.b [the omnibus clause] 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.

(Order Granting Plaintiff American Alternative Insurance and Plaintiff Federal Insurance Company’s Motions for Summary Judgment at p. 3).

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 [*sic*], and NOT Bluffton University’s permission. The testimony of [Bluffton University’s baseball coach] Grandey, [Executive Coach’s president] Stechschulte and [Executive Coach’s vice-president] Lammers’ [*sic*] 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.

(*Id.* at pp. 4-5).

Because the trial court “decided that permission was not given by Bluffton,” the trial court found it unnecessary to decide whether Bluffton University owned, hired, or borrowed the motor coach. (*Id.* at p. 5). The trial court would hold, though, “that Bluffton College could not be found to have owned, hired, or borrowed the vehicle at the time of the accident” because “Bluffton College had contracted with Executive Coach for services and the bus was only incident to said contract”; and

it was Executive Coach who “selected the particular Motor Coach from [the motor coach owner/lessor] PFS to provide transportation incidental to the charter service.” (*Id.* at pp. 5-6).

Unanimously affirming the trial court’s order, the appellate court declared that:

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 “authority to grant permission” and/or exert a “substantial control” over the matter or thing hired as well.

(Court of Appeals’ Opinion at ¶30). The court of appeals said that:

Following the approach set forth in *Davis [v. Continental Insurance Co.* (Franklin Cty. 1995), 102 Ohio App.3d 82], 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 [*sic*] 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.

(*Id.* at ¶39).

There is *no* indication whatsoever that “the Court of Appeals ignored this Court’s instructions in prior cases” or “imput[ed] an intent contrary to that expressed by the language of the contract.”

(Intervenors’ Explanation of Why This Case Is of Public or Great General Interest at p. 3). The court of appeals recognized that:

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.

(*Id.* at ¶23).

Finally, a clearer “understanding of insurance protection in the charter-bus context” simply is not required; and “the accident itself” does *not* make this a case of great general interest. (Intervenors’ Explanation of Why This Case Is of Public or Great General Interest at pp. 2-3). Federal Motor Carrier Safety Regulations establish that “[n]o motor carrier shall operate a motor vehicle transporting passengers until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in §387.33 of this subpart [\$5,000,000.00 for any vehicle with a seating capacity of 16 passengers or more].” See §387.31(a). The stated purpose of these regulations “is to create additional incentives to motor carriers to maintain and operate their motor vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility” – “financial reserves (*e.g.* insurance policies or surety bonds) sufficient to satisfy liability amounts”¹ – “for motor vehicles operated on public highways.” See §387.1. Executive Coach complied with §387.31(a). Executive Coach had insurance policies in effect on March 2, 2007 sufficient to satisfy bodily injury liability of \$5,000,000.00 when its motor coach transporting the Bluffton University baseball team crashed in Atlanta, Georgia. Executive Coach’s insurers have paid their policy limits to the players and staff of the Bluffton University baseball team killed or injured in the accident.

This is *not* a case of public or great general interest because the insurance policies that the intervenors contend afford Executive Coach liability coverage were *not* issued to the motor carrier. They were issued to Bluffton University, and the court of appeals decision does *not* impact “the charter-bus industry” or “the thousands of passengers and institutions that choose to use charter buses.” (Intervenors’ Explanation of Why This Case Is of Public or Great General Interest at p. 2).

¹ See §387.29 setting forth the definition of “financial responsibility”.

It is acknowledged, “The accident drew immediate national media attention and promptly fueled debate on bus safety and roadway engineering.” (*Id.* at p. 3). However, no one has -- or reasonably can -- suggest that “bus safety” or “roadway engineering” will improve if liability coverage is extended to a charter-bus company with which the customer (in this case, a university) contracts.

RESPONSE TO INTERVENORS’ PROPOSITION OF LAW

The Omnibus Clause of a Charter Service Customer’s Policy Does Not Afford the Charter Service or Its Driver Liability Coverage for Any Bodily Injury and Wrongful Death Claims that May Be Brought against Them.

Ohio case law, the parties’ written contracts, and the witnesses’ testimony in this case do not support any of the intervenors’ three propositions of law, or the intervenors’ general contention that Executive Coach’s driver, Jerome Niemeyer, is an insured under the omnibus clause of the Bluffton University policies – that he was “using with your [Bluffton University’s] permission a covered ‘auto’ you [Bluffton University] ... hire[d]” at the time of the accident.

Ohio courts have declared that in order to “hire” an auto, or to grant “permission” to use the auto, the named insured must have control of the auto. Here, the court of appeals recognized that *Davis v. Continental Ins. Co.* (Franklin Cty. 1995), 102 Ohio App.3d 82, “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.” (Court of Appeals’ Opinion at p. 16).² In *Davis*, the issue was whether the vehicle was “borrowed”;

² *Buckeye Union Cas. Co. v. Royal Indemnity Co.* (Trumbull Cty. 1963), 120 Ohio App. 429, cited at page 5 of the Order Granting Plaintiff American Alternative Insurance and Plaintiff Federal Insurance Company’s Motions for Summary Judgment, and *Combs v. Black* (Franklin App.), 2006 Ohio 2439, are two other Ohio cases squarely on point. In these two cases the courts considered whether liability coverage was owed under the standard omnibus clause of a business auto policy. In each case, the court held that liability coverage was *not* owed the driver of the vehicle *because the named insured did not have possession or control of the motor vehicle to give the driver permission*

however, the *Davis* court recognized that “borrow” only differs from “hire” in that “borrowing typically involves no remuneration for use of the article borrowed”; and that whether a vehicle is “hired” or “borrowed”, “some element of substantial control is generally understood to be included.” (*Id.* at p. 15, quoting *Davis, supra* at 87).

The court of appeals affirmed the trial court’s summary judgment in this case because “it is apparent that the court considered the evidence as to the relative authority and control of both Bluffton and 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.” (*Id.* at pp. 16-17).

The trial court found, “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 [*sic*], and NOT Bluffton University’s permission.” (Order Granting Plaintiff American Alternative Insurance and Plaintiff Federal Insurance Company’s Motions for Summary Judgment at p. 4). The provisions of Executive Coach’s contract with Bluffton University show that Executive Coach contracted to provide Bluffton University with charter service and that Executive Coach did *not* relinquish its possession, management, or control of the motor coach to Bluffton University.³ The charter service

to use the auto.

³ Consistent with the provisions of the motor coach owner PFS’s and Executive Coach’s lease agreement, Executive Coach did *not* assign, sublet, or transfer any interest in the motor coach to Bluffton University. Executive Coach and Bluffton University did *not* enter into a separate contract whereby Bluffton University hired the vehicle itself. The lease between PFS and Executive Coach prohibited Executive Coach from “assign[ing], sublet[ing], ... or transfer[ing] any interest in ... [the motor coach] ... to any party without the written consent of Lessor [PFS].”

contract between Executive Coach and Bluffton University begins, “Thank you for choosing us for your transportation provider.” Under “ADDITIONAL CHARGES,” Bluffton University is identified as “the Chartering Party” and told that “[w]hen at the request of the Chartering Party, any change in service results in an increase in miles or hours to that specified on the charter service order furnished, an[] additional charge shall be made for all such additional service.” Under “ARRIVAL TIME,” the charter service contract states that operators are “selected” by, and have received “instructions” from the charter service.⁴ Under “EQUIPMENT,” it is set forth that a “replacement bus may be of a different type.” It is stated that the equipment (the motor coach) is “furnished by the Company [Executive Coach]” and “inspected by its maintenance guidelines before being assigned” by Executive Coach “to the charter *service*.”⁵ Finally, under “CONDUCT OF PASSENGERS,” it is stated,

⁴ The intervenors argue that Bluffton University selected and paid for the motor coach driver, but in reality it was Executive Coach, not Bluffton University, that hired, certified, employed, and paid all the drivers who operated the motor coach. Bluffton University did *not* select Jerome Niemeyer or anyone else who operated the motor coach. Bluffton University simply approved Executive Coach’s selection of Jerome Niemeyer, one of three operators Executive Coach selected to drive the motor coach. In *Occidental Fire & Cas. Co. of North Carolina v. Westport, Ins. Co.* (September 10, 2004), United States District Court for the Eastern Division of Pennsylvania, Case No. 02-8923, unreported (2004 U.S. Dist. LEXIS 18471 at *30), the court noted that “the ability to refuse certain drivers” did *not* establish control of the vehicle (or that a vehicle, rather than a transportation service, was hired). Further, Executive Coach assigned Denny Michelson and Mitch Sadler to drive the other legs of the trip to Florida and Executive Coach did not seek Bluffton University’s approval of their selection. Bluffton University paid for the driver’s meals and lodging; and, could at its option, pay Executive Coach’s drivers an additional amount as a *gratuity*. However, Bluffton University was *not* required to pay the driver anything, including a gratuity.

⁵ The intervenors have asserted that Coach Grandey contracted for a specific bus, Coach No. 2; and that Executive Coach was not at liberty to use another bus. However, in fact Coach Grandey simply contracted for a motor coach that met Bluffton University’s needs. Coach Grandey testified in deposition that there were *not* any discussions when he entered into the contract about what specific bus was going to be used. He indicated that his only concern was that the bus met Bluffton University’s needs.

“Passengers shall not interfere with the operator in the discharge of his duty or tamper with any apparatus or appliance on the bus”; and under “DECORATIONS,” the contract provides that decorations to buses must be approved by Executive Coach.

The trial court found that:

The testimony of [Bluffton University’s baseball coach] Grandey, [Executive Coach’s president] Stechsulte and [Executive Coach’s vice-president] Lammers’ [*sic*] 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.

(Order Granting Plaintiff American Alternative Insurance and Plaintiff Federal Insurance Company’s Motions for Summary Judgment at pp. 4-5).

Coach Grandey testified that it was Executive Coach who gave Jerome Niemeyer permission to operate the motor coach:

- Q. Did they [Executive Coach] ever use the words that they were going to give him permission to use the bus?
A. No.
Q. But you understood that that’s what they were going to do?
A. Yes.

Coach Grandey stated that he would not have discharged Mr. Niemeyer and that neither he nor any of his players could have driven the motor coach; and Coach Grandey recognized that the use Bluffton University could make of the bus was always subject to the scope of permission Bluffton University received from Executive Coach to use the motor coach. He explained that what opposing

counsel would purport to be his (or Bluffton University's) right to grant or deny Jerome Niemeyer permission to use the motor coach was in fact only Coach Grandey's (or Bluffton University's) right to grant or deny *Bluffton University's* own use of the motor coach – his right to “tell my players not to get on the bus and then obviously not go anywhere.”

Coach Grandey acknowledged in his deposition that a situation where Bluffton University hires a vehicle (from Hertz or Avis, for example) for a university employee to drive is quite different from the situation involved here, where Bluffton University hired a charter service and driver. Had Bluffton University hired a motor coach *for Coach Grandey (or another Bluffton University employee)* to drive to Florida, the “hired” auto provision of the omnibus clause would have applied to cover the *employee of Bluffton University* (a permissive user of an “auto” [Bluffton University] ... hire[d]). Here, though, Bluffton University did *not* hire a motor coach for Coach Grandey (or another employee of Bluffton University) to drive the baseball team to Florida. Instead, Bluffton University hired a charter service (an independent contractor) to take the baseball team to Florida; and it was an employee of the independent contractor (Jerome Niemeyer), not an employee of Bluffton University, who was driving Bluffton University's players and coaches when the accident occurred; and it is Niemeyer's (*an independent contractor's*) *negligence* that is alleged to have caused the March 2, 2007 accident.⁶

⁶ In this suit, the intervenors do *not* seek liability coverage *for Bluffton University – or its employees*. Neither of the two consolidated cases involves whether the Bluffton University policies afford liability coverage for any suit against Bluffton University. Indeed, there is no dispute that the policies issued to Bluffton University cover any claims brought against Bluffton University as a result of the March 2, 2007 accident.

The president of Executive Coach testified that Bluffton University “didn’t lease the bus”; that Bluffton University was not required to pay the driver any amount, including any gratuity; and that “Executive Coach doesn’t request customers to provide the vehicles for Executive Coach’s drivers to operate.” He testified that any authority that an Executive Coach customer had over an Executive Coach’s driver or motor coach was always subject to Executive Coach’s exclusive control of the motor coach. He affirmed that customers were not permitted to drive the company’s motor coaches; and that customers could only “tell [Executive Coach] what they wanted.” Whether Executive Coach or its driver “accommodated [a customer’s] request” and did “what they wanted” was dependent upon how far Executive Coach and its driver would go “to keep the customer happy.” Although a customer might “want” something, Executive Coach and its driver would only do what they could “accommodate.” 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.⁷ As explained by the president of Executive Coach, the only other “authority” a customer had to grant or deny a particular use of the motor coach once again was only the customer’s “authority” to *deny the customer’s own use* of the motor coach:

- Q. Explain how it is that the customer has the authority to take the driver out of service.
- A. It’s their trip, it’s their responsibility for his own people, so he is in charge of his own people, giving him the authority to make sure that his people are safe at all times.

⁷ The intervenors, for example, contend that Coach Grandey gave permission for Mr. Niemeier’s wife to accompany the team on the trip, but the intervenors have acknowledged that this was according to *Executive Coach’s* company policy that if there is room, an extra person may go along on the trip if the customer accedes.

The vice-president of Executive Coach also affirmed that the customer's authority over Executive Coach's driver was always subject to the permission Executive Coach granted its driver and its customer to use the motor coach:

Q. So the customer would make the request but it was up to Executive Coach to accept or reject that request?

A. Yes.

Following the approach set forth in *Davis*, the court of appeals in this case concluded that "our independent review of the record in this case leads us to concur with the decision of the trial court." (Court of Appeals' Opinion at p. 17). The appellate court "determined that reasonable minds could not differ in concluding that Executive Coach and not Bluffton had predominate [*sic*] 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." (*Id.*).⁸

Courts have long applied the same sound reasoning the lower courts employed in this case. Courts have consistently rejected the notion that an "auto" owned or leased by others, and only being used in the service of the named insured, is "hire[d]" by, or "us[ed] with ... permission" of the named

⁸ The intervenors have not cited any Ohio case where liability coverage was sought for the driver of a charter service, but the reasoning of the *Davis*, *Buckeye Union*, and *Combs* decisions is in accord with *Casino Air Charter, Inc. v. Sierra Pacific Power Co.* (1979), 95 Nev. 507, 596 P.2d 496. That case is the only reported decision found in which a charter service made the contention that the intervenors make here. There the Nevada Supreme Court rejected the argument that the customer's policy described the charter service as an insured.

insured.⁹ In *United States Fidelity & Guaranty Co. v. Heritage Mut. Ins. Co.* (7th Cir. 2000), 230 F.3d 331, the USF&G policy contained the same omnibus clause in the Bluffton University policies. The USF&G policy was issued to Irving Materials, Inc. (“IMI”). IMI contracted with V&S Transport to transport materials. A V&S employee, Charles Oldham, was involved in a motor vehicle accident that caused another’s death, and V&S sought liability coverage pursuant to the omnibus clause of the USF&G policy. The district court rejected the argument that at the time of the accident Oldham was “using with your [IMI’s] permission a covered ‘auto’ [IMI] ... hire[d]” and granted USF&G summary judgment, declaring that USF&G did not owe defense or indemnity in a wrongful death suit brought against V&S and Oldham. The court of appeals affirmed the district court’s decision. Consistent with Ohio law, the court found that:

The USF&G policy does not define what “hire” means, but that is not required. * * * [T]he failure to define a term does not render it ambiguous. *American Family Life Assurance Co. v. Russell*, 700 N.E.2d 1174 (Ind. App. 1998). It does, however, mean that we must look to the ordinary meaning of the word as it applied to the facts of the case. Even were we to find the word ambiguous, we need not construe its meaning in favor of Heritage because it has never paid “a penny’s premium to the insurer.” *Harden v. Monroe Guar. Ins. Co.*, 626 N.E.2d 814 n.2 (Ind. App. 1993).

Id. at 333. The court of appeals then concluded that:

⁹ See, e.g., *American Cas. Co. of Reading, Pa. v. Denmark Foods, Inc.* (4th Cir. 1955), 224 F.2d 461, 463 (“The car was not hired by [the named insured] Denmark and was not being used at the time of the accident by an employee of Denmark in its business or in its behalf, but was being used by an employee of Phillips under an independent contract; and hence the hired automobile clause had no bearing on the case.”); *Fertick v. Continental Cas. Co.* (6th Cir. 1965), 351 F.2d 108, 110 (“[T]he truck was not hired by the insured and was not being used at the time of the accident by an employee of the insured in its business or in its behalf, but rather it was being used in behalf of the contractor.”); and *Giroud v. New Jersey Mfrs. ’ Cas. Inc. Co.* (1930), 106 N.J.L. 238, 241, 148 A. 790 (“To hire property involves the idea of passing of the possession, management and control of the thing hired into the hands of the hirer. No such thing happened here”).

[T]he truck Oldham was driving was not a hired vehicle, rather, V&S was an independent contractor. V&S maintained its trucks and provided gas for them. It paid the drivers for the amount of material they hauled and paid for their benefits.

Id. at 335.¹⁰

In *Transport Indem. Co. v. Liberty Mut. Ins. Co.* (9th Cir. 1980), 620 F.2d 1368, 1371-72,

the court observed that:

Courts have ... attempted to draw a line between mere service contracts, involving independent contractors, and “truck and driver” situations in which the insured is viewed as having contracted for the use of the automobile. It has thus been stated that “for a vehicle to constitute a hired automobile, there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use or control.”

In *United States Fire Ins. Co. v. Ali* (S.D. Fla. 2002), 198 F. Supp.2d 1313, 1322, *aff’d*, 61 Fed. Appx. 669 (11th Cir. 2003), the court concluded that “no reasonable trier of fact could find that [the driver] Mr. Ben Ali qualifies as an omnibus insured under U.S. Fire’s umbrella policy.” The court held that:

[The named insured] exercised no control over Mr. Ben Ali’s truck beyond the control necessary to complete the debris removal. It could not, for example, put another driver into Mr. Ben Ali’s truck. It could not require Mr. Ben Ali to forego other work he chose to use his truck for, and did not pay for Mr. Ben Ali’s gas or maintenance of his truck.

Id. at 1318. The court added that “[e]ven assuming, *arguendo* that Mr. Ben Ali’s truck was to be considered a ‘hired vehicle,’ there is nothing in the record to suggest that the other policy requirement

¹⁰ Accord, *Liberty Mut. Fire Ins. Co. v. Canal Ins. Co.* (5th Cir. 1999), 117 F.3d 326; *Southern General Ins. Co. v. Alford* (1998), 234 Ga. App. 615, 507 S.E.2d 179; *Robert Cole Trucking Co. v. Old Republic Co.* (1985), 486 N.Y.S. 2d 527; and *Public Service Mut. Ins. Co. v. White* (1949), 4 N.J. Super. 523, 68 A.2d 278.

– that [the named insured] Central Florida gave permission for the use of Mr. Ali’s truck – has been satisfied.” *Id.*¹¹

The presence of the named insured/customer (or an employee) in the motor vehicle and any limited direction the insured/customer may offer does *not* constitute possession or control over the motor vehicle. Every cited case in which passengers were transported pursuant to a charter/transportation service contract, the court *denied* that the transportation service and its employee/operator were insureds under the passengers’ liability coverage.¹²

The intervenors in this case urged the trial court and appellate court to violate Ohio’s rules of contract construction; to construe an omnibus clause against the contracting parties and in favor of the intervenors (all strangers to the insurance contracts); and to apply an unreasonable

¹¹ Accord, *Hardware Dealers Mut. Fire Ins. Co. v. Holcomb* (W.D. Ark. 1969), 302 Supp. 286; *Travelers Indem. Co. v. Nationwide Mut. Ins. Co.* (W.D. Va. 1964), 227 F. Supp. 958; *Weber v. State Farm Mut. Ins. Co. v. Safeco Ins. Co. of Oregon* (2007), 216 Ore. App. 253, 172 P.3d 660; *Sachtjen v. American Family Mut. Ins. Co.* (Colo. 2002), 49 P.3d 1146; and *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Government Employees Ins. Co.* (1970), 286 Ala. 414, 240 So.2d 664.

¹² See, *Loper v. Dufrene* (5th Cir. 2004), 84 Fed. Appx. 454, 456 (“In short, the evidence at trial showed conclusively not that [the named insured] leased the vehicle in question, but that it contracted with CDI for a number of services among which included the transportation of employees.”); *Phillips v. Enterprise Transportation Service Co.* (Miss. App. 2008), 988 So.2d 418 at P20 (“In this case, [the named insured] NTC did not ‘hire’ the ‘auto’ that was involved in the accident. NTC did, however, ‘hire’ the ‘services’ of Enterprise, which incidentally included the use of the automobile that was involved in the accident.”); *Fetisov v. Vigilant Ins. Co.* (July 25, 2006), Superior Court of New Jersey, Appellate Division, unreported (2006 N.J. Super. Unpub. LEXIS 1757 at *11-12) (“Because only [the limousine service] Gambino’s was in a position to grant initial permission to [its driver] Gnida and because Gambino’s was not a named insured, the coverage that plaintiffs seek is not available to them.”); *Holmes v. Brethren Mut. Ins. Co.* (D.C. App. 2005), 868 A.2d 155, 159 (“In reality, [the named insured] Bingo World did not hire [the owner] Harris’ van but rather his service of finding and transporting customers”); and *Casino Air Charter, Inc. supra.*

interpretation of the omnibus clause.¹³ This Court has stated that a third party is in no position to urge that the policyholder's contract be strictly construed against the insurer.¹⁴ Here, the construction of Bluffton University's insurance contracts urged by the intervenors is a construction of the contracts which would be detrimental to both parties to the contracts. The liability coverage that the Bluffton University policies afford Bluffton University as to its *own* alleged liability could be exhausted and made unavailable to Bluffton University if its liability coverage were extended beyond Bluffton University's needs to cover the alleged liability of a charter service and its driver.

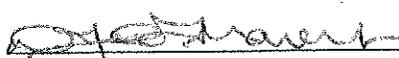
CONCLUSION

For all the above reasons, the Supreme Court of Ohio should decline jurisdiction of the intervenors' discretionary appeal of the trial court's summary judgment declaring that the Bluffton University insurers do *not* owe Executive Coach or the Niemeyer Estate liability coverage in any suit arising out of the motor coach accident.

¹³ In *Toops v. Gulf Coast Marine Inc.* (5th Cir. 1996), 72 F.3d 483, 489, the court recognized that "no reasonable corporation would pay premiums to insure third parties against risks for which the corporation could not be liable."

¹⁴ In *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003 Ohio 5849 at P 14, the Court stated: "This rings especially true where expanding coverage beyond a policyholder's needs will increase the policyholder's premiums." Accord, *Cook v. Kozell* (1964), 176 Ohio St.332, 336, 199 N.E.2d 566, 569 (rejecting the argument that an omnibus clause in an insurance policy should be strictly construed against the insurer to afford the plaintiff liability coverage).

Respectfully submitted,



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