

IN THE SUPREME COURT OF OHIO

Federal Insurance Company,  
American Alternative Insurance Corp.,

Plaintiffs/Appellees,

vs.

Executive Coach Luxury Travel, Inc., et al.

Defendants,

and

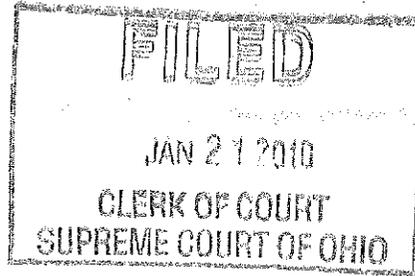
Feroen J. Betts, etc., et al.,

Defendant-Intervenors/  
Appellants.

Case No. 2009-2307

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

Court of Appeals  
Case Nos. 1-09-17 & 1-09-18



**APPELLEE AMERICAN ALTERNATIVE INSURANCE COMPANY'S  
MEMORANDUM IN OPPOSITION TO APPELLANTS' JOINT MOTION IN SUPPORT  
OF JURISDICTION**

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# **I. EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A MATTER OF PUBLIC OR GREAT GENERAL INTEREST**

## **A. General Background**

This case is an insurance coverage dispute concerning the interpretation of certain umbrella and excess insurance policies that Appellee American Alternative Insurance Corporation (“AAIC”) and its co-appellee, Federal Insurance Company (“Federal”), issued to Bluffton University (“Bluffton”). Specifically, the dispute turns on the interpretation of an omnibus clause (“Omnibus Clause”) contained in a primary policy that The Hartford Fire Insurance Company (“Hartford”) issued to Bluffton, to which AAIC and Federal’s policies follow form. Subject to several exceptions, this Omnibus Clause extends insured status to “[a]nyone else while using with your [i.e., Bluffton’s] permission a covered ‘auto’ you [i.e., Bluffton] own, hire or borrow.”

AAIC and Federal initiated declaratory judgment actions in the Court of Common Pleas, Allen County, Ohio against Executive Coach Luxury Travel, Inc. (“Executive Coach”), and the estate of Executive Coach’s employee/driver, Jerome Niemeyer. Specifically, AAIC and Federal sought a determination that the Omnibus Clause did not extend insured status to either Executive Coach or Mr. Niemeyer for purposes of a motor-vehicle accident that transpired in Atlanta, Georgia on March 2, 2007, while Mr. Niemeyer transported Bluffton’s baseball players and coaches in a bus leased, maintained, and operated by Executive Coach. These declaratory judgment actions were later consolidated. Thereafter, various passengers involved in the accident (or their estates) (collectively, the “Appellants”) intervened, arguing that the Omnibus Clause encompassed Mr. Niemeyer, and that he was therefore an additional insured under Bluffton’s insurance policies for his own alleged negligence in connection with the accident.

AAIC, Federal and the Appellants developed a stipulation of facts, which were submitted to the Trial Court, and the parties filed their respective cross-motions for summary judgment. Concluding that the dispute presented no issue of material fact, the Trial Court held that Mr. Niemeyer was not an additional insured under the Omnibus Clause and granted summary judgment in favor of AAIC and Federal. In this regard, the Trial Court concluded that Mr. Niemeyer's employment and use of the bus was with Executive Coach's permission, and not Bluffton's permission. Given that determination, the Trial Court found it unnecessary to decide whether Bluffton had owned, hired, or borrowed Executive Coach's bus. Nevertheless, the Trial Court observed that Bluffton could not be found to have owned, hired, or borrowed the bus at the time of the accident because Bluffton had contracted with Executive Coach for its transportation services, and it was Executive Coach that selected the bus incident to that services contract.

The Appellants appealed the Trial Court's determination to the Court of Appeals, Third Appellate District, Allen County. Affirming the Trial Court's grant of summary judgment in favor of AAIC and Federal, a unanimous Court of Appeals concluded that, in a legal context, the words "permission" and "hire" referred to the requirement of having "authority to grant permission" and/or exert "substantial control" over the matter or thing hired. Based on its own independent review of the record, the Court of Appeals concurred with the decision of the Trial Court and held that reasonable minds could not differ in concluding that the bus and Mr. Niemeyer were "hired" by Executive Coach, not Bluffton, and were operating with the "permission" of Executive Coach, and not Bluffton, for purposes of the Omnibus Clause.

#### **B. Summary of Opposition**

The Appellants now seek to have this Court exercise its jurisdiction over this dispute in a last ditch effort to appropriate Bluffton's insurance coverage for the alleged liabilities of Executive Coach and its bus driver. However, there is no compelling reason for this Court to

accept jurisdiction of this case. Indeed, a review of the Appellants' Joint Memorandum in Support of Jurisdiction confirms that the Appellants' appeal to this Court is meritless for three reasons.

First, this case does not involve a matter in which Ohio's citizens have a legal interest. It is an insurance coverage dispute that presents a question of the application of insurance policy language to Appellants' particular set of factual circumstances. Appellants concede as much when they argue that the "instant action seeks to clarify coverage for [the accident] under Bluffton University's insurance policies." Its outcome is of importance only to the parties to the dispute.

Second, while the Appellants contend that the lower courts imputed an intent contrary to that expressed by the language in Bluffton's insurance policies, it is undisputed that the Appellants are not parties to those insurance contracts. Ohio law is clear that Appellants are therefore in no position to argue how Bluffton's insurance policies – and the Omnibus Clause, in particular – should be construed. This is particularly true where the construction urged would be detrimental to the parties to the contracts, since it would deny Bluffton, the purchaser of the insurance contracts, insurance coverage for its own liabilities.

Third, despite Appellants' best efforts to characterize the dispute as one involving unanswered issues of law, the issues Appellants advance in this case are already the subject of Ohio precedent. As AAIC and Federal have expressed in their previous court filings, Ohio courts have addressed coverage issues presented by omnibus clauses such as those contained in Bluffton's insurance policies. Indeed, both the Trial Court and the Court of Appeals considered this precedent in rejecting the Appellants' coverage arguments. Given the existence of this authority, there is no need for this Court to exercise jurisdiction over this dispute.

In summary, the Appellants do not articulate a sufficient basis to invoke this Court's discretionary jurisdiction. Consequently, for all these reasons, this Court should decline jurisdiction of this appeal.

## **II. ARGUMENTS IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW**

Rather than attempt to persuade this Court that it should exercise its discretionary jurisdiction over this dispute, Appellants effectively presume such jurisdiction will be exercised. Accordingly, they spend much of their Joint Memorandum in Support of Jurisdiction ("Jt. Mem.") presenting coverage arguments virtually identical to those presented to, and rejected by, the Trial Court and the Court of Appeals, predicated on an inaccurate factual record.

AAIC has squarely addressed the Appellants' coverage arguments and factual inaccuracies in its filings before the lower courts. AAIC is also aware that its co-appellee, Federal, intends to submit an opposition to the Appellants' memorandum that refutes the Appellants' recitation of the factual record of this dispute. Consequently, rather than engage in repetitious filings, AAIC incorporates herein the arguments presented by Federal in its opposition to the Appellants' propositions of law and supplements those arguments by further emphasizing why this appeal does not satisfy this Court's jurisdictional threshold.

This Court is protective of its jurisdiction. Consequently, when a party seeking to invoke this Court's jurisdiction postures its case in such a way to mislead the Court into exercising its jurisdiction, "a duty rests on opposing counsel to reveal [that] in their reply." *Williamson v. Rubich* (1960), 171 Ohio St. 253, 255, 168 N.E.2d 876, 877 (quoting *Furness, Withy & Co., Ltd. v. Yang-Tsze Ins. Ass'n.* (1917), 242 U.S. 430, 37 S.Ct. 141). The Appellants engage in exactly that type of misdirection when they urge this Court to exercise its discretionary jurisdiction. AAIC therefore takes this opportunity to explain why no compelling reason exists for this Court to hear this dispute.

**A. Counter-Proposition of Law No. 1: An Insurance Dispute that Is of Importance Merely to the Litigants, and Does Not Present an Issue of Immediate Public Significance, Is Not a Case of Public or General Interest**

The Trial Court considered the coverage issues presented by this case and granted summary judgment in favor of AAIC and Federal. Dissatisfied with the result, the Appellants then appealed the Trial Court's determination to the Court of Appeals. A unanimous Court of Appeals affirmed the Trial Court's determination in a carefully considered opinion. In their latest attempt to create viability for this dispute, the Appellants now seek this Court's appellate review of the coverage issues presented by this case. Given the nature of this dispute, they are not entitled to appellate review.

Section 3, Article IV of the Ohio Constitution, provides that judgments of the Courts of Appeals of this state shall serve as the final adjudication of all cases, subject to certain, very limited exceptions. One such exception is where a particular case involves an issue of public or great general interest. In that instance, this Court may direct the Court of Appeals to certify its record and review the judgment of the Court of Appeals. Ohio Const. Art IV, § 2(B)(2)(e).

Ohio law is clear that, where a party contends its case is one of public or great general interest, "*the sole issue for determination ... is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties.*" *Williamson*, 171 Ohio St. at 254 (emphasis in original). Where it is evident the question presented by the cause is of importance merely to the litigants and does not present an issue of immediate public significance, this Court will decline to exercise its jurisdiction. *Id.* at 255.

Appellants endeavor to convince this Court that this appeal involves a matter of great general or public interest in two ways. First, they represent to this Court that it involves matters germane to the charter bus industry. Second, they contend that, because the underlying accident

involving the Appellants received media attention, this dispute is a matter of great general or public interest. This Court should not entertain the Appellants' efforts to misdirect this Court.

The Appellants assert that there is a need for "a clear understanding of insurance protection in the charter-bus context" and that this case presents an issue that potentially impacts thousands of passengers and institutions that choose to use charter buses. (Jt. Mem., pp. 1-2.) To the contrary, a review of the record confirms that the only connection this case has to the charter bus industry is that, by happenstance, Bluffton's baseball team chose to travel by bus during the year in question rather than carpool, as they had done in the past.

This case is properly viewed as an insurance coverage dispute concerning the interpretation of the Omnibus Clause. As such, it presents a question of the application of that insurance policy language to Appellants' particular set of factual circumstances. Significantly, the circumstances presented by this dispute will likely never be repeated. Those facts include a local transportation service provider, which has since been sold, with a small bus fleet, and a transportation services contract whose terms were cut and pasted together. This case simply does not involve a question regarding the application of legal principles to a matter of public or great general interest.

Perhaps sensing that their efforts to characterize this dispute as one impacting the charter bus industry is misguided, the Appellants contend that this case is one of public or great general interest because the underlying accident from which the dispute emanates received media attention. To be sure, the underlying accident was tragic. However, the tragic nature of a motor vehicle accident that took place in Georgia does not transform this insurance coverage dispute into a case of general or public interest. The Appellants evidence a fundamental

misunderstanding concerning the type of interest necessary to invoke the Court's jurisdiction by suggesting that it does.

The interest necessary to invoke this Court's jurisdiction is not one of curiosity or empathy. If it was, an already overworked judiciary would be even more so. Rather, the interest necessary for jurisdictional purposes is a legal interest. "Public interest" means "more than a mere curiosity; it means something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected.'" *State ex rel. Ross v. Guion* (1959), 161 N.E.2d 800, 803 (quoting *State ex rel. Freeling v. Lyon* (1917), 63 Okl. 285, 165 P. 419, 420).

This case does not present an issue in which the citizens of Ohio have a pecuniary interest, nor does it present an issue in which the legal rights and liabilities of Ohio citizens are affected. Quite the contrary, it is readily apparent from a review of the record that the interest in this case extends no further than the Appellants. In truth, Appellants seek appellate review of this case for their own personal reasons. They wish to supplement any settlement recovery they have obtained in connection with the underlying accident with Bluffton's insurance proceeds. It is precisely because this case presents questions of interest primarily to the parties, and not to the public, that it is not appropriate for this Court's review.

**B. Counter-Proposition of Law No. 2: One Who Is Not a Party to a Contract of Insurance Is Not in a Position to Urge that the Contract Be Construed Strictly Against One Who Is a Party to the Contract**

In urging this Court to exercise its discretionary jurisdiction, the Appellants assert that the Court of Appeals did not interpret the Omnibus Clause in such a way as to "reflect the intention of the parties as expressed by unambiguous policy language." (Jt. Mem., p. 2.) This is ironic, however, because Appellants are neither parties to AAIC and Federal's policies, nor the purchasers of those policies.

It is Bluffton that purchased its insurance policies from, and is in contractual privity with, AAIC and Federal. The Appellants are strangers to the AAIC and Federal policies and, as such, are in no position “to urge, as one of the parties, that the contract be construed strictly against the other party.” *Cook v. Kozell*, (1964), 176 Ohio St. 332, 336, 199 N.E.2d 566, 569.

Nor are the Appellants’ coverage arguments entitled to any deference. *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 228, 797 N.E.2d 1256, 1268-1269 (“Whether someone is insured under an insurance policy should not be interpreted in favor of one who was not a party to the contract”). This is particularly true where the construction proposed extends insurance coverage to absurd lengths beyond that contemplated by the parties, or expands coverage beyond a policyholder’s needs in such a way as to increase the policyholder’s premiums. *Cook*, 176 Ohio St. at 336.

The coverage argument the Appellants advance purports to appropriate, at Bluffton’s expense, the liability insurance coverage Bluffton purchased for its own liabilities. Under the Appellants’ coverage theory, a taxi cab driver who negligently causes a multi-car accident while transporting a family to the airport, or a sleep-deprived limousine driver who crashes his vehicle while transporting a bride and groom to their wedding reception, would be additional insureds under their passengers’ auto liability policies and have additional insurance funds for their own negligence – all at their passengers’ expense. Fortunately, as strangers to the insurance policies, the Appellants’ coverage theory is entitled to no credence (and is contrary to Ohio law, in any event).

The Appellants are simply in no position to argue how the Omnibus Clause should be construed in the context of this dispute. Therefore, for this additional reason, this Court should decline to exercise its discretionary jurisdiction over this case.

**C. Counter-Proposition of Law No. 3: A Court Does Not Commit Reversible Error When It Applies Legal Precedent for Guidance as to the Legal Meaning of an Insurance Policy's Terms**

In seeking to invoke this Court's jurisdiction, Appellants argue that this case presents "unresolved questions" that require the Court's clear direction to ensure that the terms "hire" and "permission" are consistently interpreted by Ohio courts. However, this dispute involves the interpretation of an automobile policy's omnibus clause. And despite Appellants' assertions to the contrary, Ohio courts have addressed on prior occasions the coverage issues that omnibus clauses present.

In order to "hire" an auto, or to grant another "permission" for its use, Ohio law requires that the named insured have control of the vehicle. *Buckeye Union Cas. Co. v. Royal Indem. Ins. Co.* (1963), 120 Ohio App. 429, 435, 203 N.E.2d 121, 125 (for purposes of omnibus clause, third party does not use vehicle with named insured's "permission" unless named insured had "possession and control" over vehicle); *Combs v. Black* (2006), 2006-Ohio-2439, ¶ 18, 2006 WL 1351510 (named insured could not give permission for third party's employee to operate third party's vehicle "[a]bsent some degree of control over the vehicle"); *Davis v. Continental Ins. Co.* (1995), 102 Ohio App.3d 82, 87, 656 N.E.2d 1005, 1008 (embracing a construction of an omnibus clause that required the named insured to have "some element of substantial control" over vehicle in question).

In concluding that Executive Coach at all times maintained "possession and control" of the bus, the Trial Court was guided by the *Buckeye* decision. Likewise, the Court of Appeals indicated that it had considered several Ohio cases in addressing the coverage issues before it. Of those decisions, it found the *Davis* decision to be instructive, and concluded that it represented "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.” And in considering the *Davis* decision, the Court of Appeals reached the same conclusion the Trial Court had: Mr. Niemeyer was not an additional insured under Bluffton’s insurance policies by operation of the Omnibus Clause

While the Appellants would have this Court believe that the Trial Court and a unanimous Court of Appeals were left to their own devices in attempting to address the coverage issues presented in this case, a review of the record confirms both the Trial Court and the Court of Appeals viewed this issue from the perspective required by Ohio law when they both concluded that Mr. Niemeyer was not an additional insured under Bluffton’s insurance policies by operation of the Omnibus Clause. Those courts found that the undisputed facts plainly demonstrate that Bluffton was incapable of giving Mr. Niemeyer permission to drive the bus, and that Mr. Niemeyer used the bus by virtue of his own right to possess and control the bus through his employment with Executive Coach, rather than through Bluffton’s permission.

In short, the “clear direction” the Appellants contend this Court must provide lower courts in addressing coverage issues presented by an automobile policy’s omnibus clause already exists in Ohio precedent. Therefore, for this final reason, there is no need for this Court to exercise its discretionary jurisdiction over this dispute.

### **III. CONCLUSION**

There is no compelling reason for this Court to accept jurisdiction of this case. The sole issue for this Court’s determination is whether this case presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties. It does not, for all the reasons discussed above.

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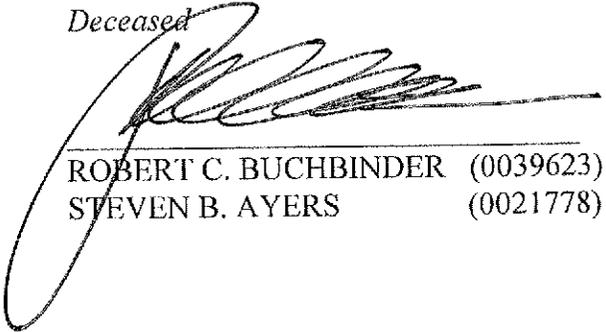
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