

IN THE SUPREME COURT OF OHIO

Federal Insurance Company,  
American Alternative Insurance Corp.,

: Case No. 2009-2307

Appellees,

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

vs.

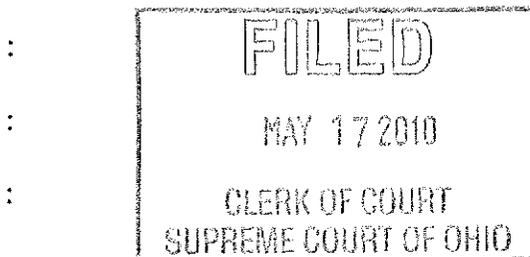
Executive Coach Luxury Travel, Inc., *et al.*,

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

Defendants,

and

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



Appellants.

---

APPELLANTS' JOINT MERIT BRIEF

---

Steven R. Smith (0031778)  
(COUNSEL OF RECORD)  
Steven P. Collier (0031113)  
Janine T. Avila (0055853)  
Adam S. Nightingale (0079095)  
Connelly, Jackson & Collier LLP  
405 Madison Avenue, Suite 1600  
Toledo, Ohio 43604  
Email: [ssmith@cjc-law.com](mailto:ssmith@cjc-law.com)  
*Counsel for Appellant Feroen J. Betts,  
Administrator of the Estate of David J. Betts,  
Deceased*

D. John Travis (0011247)  
(COUNSEL OF RECORD)  
Gallagher Sharp  
Sixth Floor – Bulkley Building  
1501 Euclid Avenue  
Cleveland, Ohio 44115  
Email: [jtravis@gallaghersharp.com](mailto:jtravis@gallaghersharp.com)  
*Counsel for Appellee Federal Insurance  
Company*

James E. Yavorcik (0021546)  
(COUNSEL OF RECORD)  
Cubbon & Associates, Co., L.P.A.  
500 Inns of Court Building  
405 North Huron  
P.O. Box 387  
Toledo, Ohio 43697-0387  
Email: [jy@cubbon.com](mailto:jy@cubbon.com)  
*Counsel for Appellant Timothy E. Berta*

Steven B. Ayers (0021778)  
(COUNSEL OF RECORD)  
Robert C. Buchbinder (0039623)  
Crabbe Brown & James LLP  
500 South Front Street, Suite 1200  
Columbus, Ohio 43215  
Email: [sayers@cbjlawyers.com](mailto:sayers@cbjlawyers.com)  
*Counsel for Appellee American Alternative  
Insurance Corporation*

David W. Stuckey (0016902)  
(COUNSEL OF RECORD)  
Robison, Curphey & O'Connell  
Four Seagate, Ninth Floor  
Toledo, Ohio 43604  
Email: [dstuckey@rcolaw.com](mailto:dstuckey@rcolaw.com)  
*Counsel for Appellant Caroline Arend,  
Administrator of the Estate of Zachary H.  
Arend, Deceased*

Daniel I. Graham, Jr.  
Bates & Carey LLP  
191 North Wacker Drive  
Chicago, Illinois 60606  
Email: [dgraham@batescarey.com](mailto:dgraham@batescarey.com)  
*Counsel for Appellee American Alternative  
Insurance Corporation*

John Smalley (0029540)  
(COUNSEL OF RECORD)  
Dyer, Garofalo, Mann & Schultz  
131 N. Ludlow St.  
Dayton, Ohio 45402  
Email: [jsmalley@dgmslaw.com](mailto:jsmalley@dgmslaw.com)  
*Counsel for Appellants Kim Askins and  
Jeffrey E. Holp, Co-Administrators of the  
Estate of Cody E. Holp, Deceased, James  
Grandey, and Todd Miller*

Douglas P. Desjardins (0061899)  
(COUNSEL OF RECORD)  
Transportation Injury Law Group, pllc  
1717 N Street, NW, Suite 300  
Washington, DC 20036  
Email: [dpd@transportinjurylaw.com](mailto:dpd@transportinjurylaw.com)  
*Counsel for Appellant Geneva Ann Williams,  
individually, and as the Administrator of the  
Estate of Tyler Williams, Deceased*

---

TABLE OF CONTENTS

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

STATEMENT OF FACTS ..... 1

    1.    **Background** ..... 1

    2.    **Insurance Policies at Issue**..... 4

    3.    **Procedural History**..... 6

ARGUMENT ..... 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

        1.    **Ohio law applies to the instant action.** .....9

        2.    **Bluffton “hired” the Executive Coach bus as that term is defined in Ohio.** .....10

        3.    **The definition of “hire” does not require an element of control.** .....15

        4.    **If the Court chooses to impose a “control” requirement, the unique facts of this case demonstrate Bluffton exercised sufficient control over the Executive Coach bus.**.....17

**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.** .....21

**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.** .....21

1.	At the time of the March 2, 2007 crash, Jerome Niemeyer was operating the bus with Bluffton's permission.....	21
2.	This Court is bound to apply the commonly accepted meaning of the term "permission." .....	24
3.	Even if the Court chooses to impose an additional restrictive "control" requirement, Bluffton possessed and exercised sufficient control over the bus at the time of the March 2, 2007 crash.....	26
4.	The exercise of "control" is not the only means of acquiring the authority to grant permission to use a vehicle.....	28
	<b><u>CONCLUSION</u></b> .....	30
	<b><u>PROOF OF SERVICE</u></b> .....	31
	<b><u>APPENDIX</u></b> .....	32

## TABLE OF AUTHORITIES

### Cases

<i>Alexander v. Buckeye Pipeline Co.</i> (1978), 53 Ohio St.2d 241 .....	9
<i>Avalos v. Duron</i> (C.A.10 2002), 37 Fed. Appx. 456 .....	18
<i>Bituminous Casualty Corp. v. Travelers Ins. Co.</i> (D.Minn. 1954), 122 F. Supp. 197 .....	19
<i>Casino Air Charter v. Sierra Pac. Power Co.</i> (Nev. 1979), 95 Nev. 507 .....	18
<i>Caston v. Buckeye Union Ins. Co.</i> (1982), 8 Ohio App.3d 309 .....	22, 23
<i>Cincinnati Ins. Co. v. Phillips</i> (1990), 52 Ohio St.3d 162 .....	13
<i>Combs v. Black</i> , 10th Dist. No. 05AP-1177, 2006-Ohio-2439.....	26
<i>Davis v. Continental Ins. Co.</i> (1995), 102 Ohio App.3d 82 .....	10, 12, 13
<i>Dealers Dairy Products Co. v. Royal Ins. Co.</i> (1960), 170 Ohio St. 336.....	9, 25
<i>Earth Tech, Inc. v. United States Fire Ins. Co.</i> (E.D.Va. 2006), 407 F. Supp. 2d 763 .....	17, 20
<i>Fed. Ins. Co. v. Exec. Coach Luxury Travel</i> , 3d Dist Nos. 1-09-17 & 1-09-18, 2009-Ohio-5910.....	passim
<i>Fratris v. Fireman's Fund American Ins. Cos.</i> (Cal. App. 1976), 56 Cal. App. 3d 339 .....	23, 25
<i>Gomolka v. State Auto. Mut. Ins. Co.</i> (1982), 70 Ohio St.2d 166.....	passim
<i>Gulla v. Reynolds</i> (1949), 151 Ohio St. 147 .....	24
<i>Holmes v. Brethren Mut. Ins. Co.</i> (D.C. 2005), 868 A.2d 155 .....	17
<i>Kelly v. Med. Life Ins. Co.</i> (1987), 31 Ohio St.3d 130 .....	9
<i>Kettner v. Conradt</i> (Wis. App. Apr. 29, 1997), 210 Wis.2d 499, 1997 Wisc. App. LEXIS 457 .....	15, 16, 18
<i>Kresse v. Home Ins. Co.</i> (C.A.8 1985), 765 F.2d 753 .....	19

<i>Lynch v. Lilak</i> , 6th Dist. No. E-08-024, 2008-Ohio-5808 .....	21, 25
<i>Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm</i> , 73 Ohio St.3d 107.....	10
<i>Niemeyer v. W. Reserve Mut. Cas. Co.</i> , 3d Dist. No. 12-09-03, 2010-Ohio-1710 .....	14
<i>Occidental Fire &amp; Cas. Co. v. Westport Ins. Corp.</i> (E.D.Pa. Sept. 10, 2004), No. 02-8923, 2004 U.S. Dist. LEXIS 18471 .....	18
<i>Osborne v. Security Ins. Co.</i> (Cal. App. 1957), 155 Cal.App.2d 201, 318 P.2d 94.....	23
<i>Pawtucket Mut. Ins. Co. v. Hartford Ins. Co.</i> (N.H. 2001), 147 N.H. 369, 787 A.2d 870.....	15, 17
<i>Reuter v. Murphy</i> (Wis. App. 2000), 240 Wis.2d 110, 622 N.W.2d 464 .....	16, 19
<i>Russom v. Ins. Co. of N. America</i> (C.A.6 1970), 421 F.2d 985 .....	19
<i>Sherock v. Ohio Mun. League Jt. Self-Ins. Pool</i> , 11th Dist. No 2003-T-0022, 2004-Ohio-1515 .....	10
<i>State Farm Mut. Auto. Ins. Co. v. Mackechnie</i> (C.A.8 1940), 114 F.2d 728.....	24
<i>Travelers Indem. Co. v. Swearinger</i> (1985), 169 Cal.App.3d 779, 214 Cal.Rptr. 383.....	13
<i>United States Fid. &amp; Guar. Co. v. Heritage Mut. Ins. Co.</i> (C.A.7 2000), 230 F.3d 331 .....	17
<i>Westfield Ins. Co. v. Galatis</i> (2003), 100 Ohio St.3d 216.....	9
<i>Westfield Ins. Co. v. Nationwide Mut. Ins. Co.</i> (1993), 99 Ohio App.3d 114 .....	10, 11

**Other Authorities**

MERRIAM WEBSTER’S COLLEGIATE DICTIONARY .....	10, 21
WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY .....	15, 21
WEBSTER’S WORLD DICTIONARY.....	11

## STATEMENT OF FACTS

### 1. Background

In the early morning hours of March 2, 2007, a bus<sup>1</sup> carrying players and coaches of Bluffton University's ("Bluffton's") baseball team was traveling to a baseball game in Florida. (T.D.68, Joint Stipulation of Facts, ¶¶14-15).<sup>2</sup> The bus carrying the players was owned by Partnership Financial Services, Inc. ("Partnership") and leased from Partnership by Executive Coach Luxury Travel, Inc. ("Executive Coach"). *Id.* at ¶15. At all times relevant herein, the motor coach was operated by Jerome Niemeyer, now deceased, an employee of Executive Coach. *Id.*

Mr. Niemeyer apparently mistook an exit ramp off of Interstate 75 in northwestern Atlanta, Fulton County, Georgia for the roadway. The bus flipped off of an overpass on to the roadway below. As a result of the negligence of Mr. Niemeyer and others, five Bluffton players, Mr. Niemeyer, and his wife were killed in the accident, and numerous other players and coaches were injured. *Id.* at ¶16.

The Bluffton baseball coach, James Grandey, made the arrangements to charter the bus. (T.D.66, Deposition of James Grandey, p. 30-31). The arrangements were made using a written contract provided by Executive Coach. (T.D.66.4, Deposition of Marianne Tobe, Ex. 13, 14A; T.D.68, Joint Stip., ¶13). 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,

---

<sup>1</sup> The terms "bus," "coach," and "motor coach" will be used interchangeably in this brief.

<sup>2</sup> References to "T.D." refer to the numbered docket of the trial court, Allen County Common Pleas Case No. CV-2008-0143. This trial court docket was adjoined to the appellate record for Allen County Court of Appeals Case No. 01-09-017, and submitted by the Allen County Clerk of Courts.

2006. (*Id.* at 30-31; T.D.66.3, Deposition of Karen Lammers, Ex. 13, 14). These preliminary contracts reflect that Coach Grandey negotiated the rental charge until a final acceptable flat-fee was agreed upon. (T.D.66.3, Lammers Depo., p. 67). The written agreement reflects a departure date of Thursday, March 1, 2007, with a return date of March 10, 2007. *Id.* at Ex. 13. Coach Grandey signed the contract on behalf of Bluffton University. (T.D.66, Grandey Depo., p. 101; Grandey Discovery,<sup>3</sup> Req. for Admission No. 2).

Coach Grandey considered flying the team to Florida or having players drive separate cars, but ultimately decided to charter an Executive Coach bus. (T.D.66, Grandey Depo., p. 33). Coach Grandey had used Executive Coach in the past for spring trips, and was satisfied with the company. *Id.* at 31. In fact, Jerome Niemeyer had driven the Bluffton baseball team on prior trips in 2005 and 2006. *Id.* at 37-39. On other occasions, Bluffton rented motor coaches from Executive Coach to transport its football team. *Id.* at 32. In fact, Bluffton used Executive Coach “pretty much exclusively.” *Id.*

Coach Grandey exercised a considerable amount of control over Niemeyer and the motor coach. For instance, although not set forth in the written agreement, Coach Grandey required the coach to be equipped with a DVD player. (T.D.66, Grandey Depo., pp. 48, 87). Approximately one-half hour after the bus had left Bluffton on the trip at issue here, it was discovered that the motor coach’s DVD player did not work. *Id.* at 87. Upon this discovery, Coach Grandey

---

<sup>3</sup> “Grandey Discovery” refers to *Defendant-Intervenor James Grandey’s Responses to Defendant-Intervenor Timothy E. Berta’s Requests for Admission and Interrogatories Propounded To Defendant-Intervenor James Grandey*. A copy of this discovery was attached to Defendant-Intervenors’ *Joint Motion for Summary Judgment*, T.D.69, at Exhibit 1.

ordered the driver<sup>4</sup> to return to Bluffton. *Id.* The DVD player was fixed and the bus set off a second time, approximately one hour later than scheduled. *Id.* at 88.

The company policy of Executive Coach, as it relates to chartered-bus trips, is that the “client is in charge.” (T.D.66.3, Lammers Depo., pp. 59-62). This means that during the trip, Coach Grandey would be able to tell the driver when to stop and where to go. (*Id.*; T.D.66.2, Deposition of Rick Stechschulte, pp. 85-91). The driver was expected to take orders from Coach Grandey. *Id.*

Coach Grandey presented a detailed trip itinerary as part of the contract-negotiation process. (T.D.66, Grandey Depo., Ex. 2). But Coach Grandey could, and did, deviate from that itinerary in whatever way he wished, as long as no Federal or state regulations would be violated. (T.D.66.2, Stechschulte Depo., p. 119; T.D.66, Grandey Depo., pp. 102, 108-09). 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. (T.D.66.2, Stechschulte Depo., p. 87). 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 of driving because of lack of sleep or some other impairment. (T.D.66.2, Stechschulte Depo, pp. 129-30, T.D.66.3, Lammers Depo., pp. 80-82; T.D.66, Grandey Depo., p. 121).

Executive Coach asked for and received Coach Grandey’s permission to use Mr. Niemeyer on this trip. (T.D.66, Grandey Depo., p. 45; T.D.69, Grandey Discovery, Req. for

---

<sup>4</sup> Denny Michelsen was the driver from Bluffton to Adairsville, Georgia just north of Atlanta. Jerome Niemeyer took over driving the bus in Adairsville, Georgia shortly before the accident. Mr. Niemeyer was to be the driver throughout the time in Florida and would drive the return trip as far as Adairsville. (T.D.66.4, Tobe Depo., pp. 26-28).

Adm. No. 4 and Interrogatory No. 5). If Coach Grandey had not approved Mr. Niemeyer for the trip, he would not have been the driver for the trip. (T.D.66.4, Tobe Depo., p. 60; T.D.66.2, Stechschulte Depo., p. 92). Also, Coach Grandey gave permission for Mrs. Niemeyer to accompany the team on the trip. (T.D.66.3, Lammers Depo., p. 63.) 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. (T.D.66, Grandey Depo., pp. 95-96). According to Executive Coach's policy, Mrs. Niemeyer could only accompany her husband with Bluffton's approval. (T.D.66.3, Lammers Depo., p. 63).

## **2. Insurance Policies at Issue**

This action concerns insurance coverage for the March 2, 2007 crash described above. The policies at issue were all purchased by Bluffton University 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 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 Federal Insurance Company ("Federal") with liability limits of \$15 million (\$15,000,000) (the "Federal Policy").<sup>5</sup> It is undisputed that the accident occurred during the policy period of the Hartford, AAIC, and Federal policies. (T.D.68, Joint Stip., ¶14).

The Hartford Policy is identified as the underlying insurance by the AAIC Policy. (T.D.68, Joint Stip., ¶7). The AAIC Policy's Coverage A is subject to the same terms,

---

<sup>5</sup> The AAIC, Federal, and Hartford policies are adjoined to the Joint Stipulation of Facts, T.D.68, at Exhibits A, B, and C, respectively.

conditions, agreements, exclusions, and definitions as the “underlying insurance” except as otherwise provided in the AAIC Policy. *Id.* at ¶6. Coverage A of the AAIC Policy will apply if the Hartford Policy applies. *Id.* The Federal Policy lists the AAIC Policy as controlling underlying insurance. *Id.* at ¶9. The Federal Policy is subject to the same terms, conditions, agreements, exclusions, and definitions as its “controlling underlying insurance” (*i.e.*, the AAIC Policy) except as otherwise provided in the Federal Policy. *Id.* at ¶8. Therefore, the Federal Policy applies if the AAIC Policy applies.

This appeal centers upon an interpretation of the Hartford Policy. The AAIC and Federal policies “follow form”; thus, the key operative language is found in the Hartford Policy. Appellants contend 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”.<sup>6</sup>
- b. Anyone else while using with your permission a covered “auto” you own, hire or borrow except:
  - (1) The owner or anyone else from whom you hire or borrow a covered “auto”.\*\*\*

---

<sup>6</sup> “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 the University. 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.”

The primary issue before the Court is whether Mr. Niemeyer satisfies the definition of an “insured.” To satisfy this definition, it must therefore be shown that:

1. Mr. Niemeyer was using a covered auto which was “hired” by Bluffton; and
2. Mr. Niemeyer was using a covered auto with Bluffton’s “permission.”

Mr. Niemeyer satisfies both of these requirements, and thus is an insured under the Hartford Policy.

### **3. Procedural History**

The case originated as two separate declaratory-judgment actions brought by Appellees Federal and AAIC in the Allen County Court of Common Pleas.<sup>7</sup> These declaratory-judgment actions were filed on January 29, 2008 against Executive Coach and Paul Niemeyer, Executor of the Estate of Jerome Niemeyer, deceased.<sup>8</sup> 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 by the trial court.

Appellants are players, coaches, and the estates of deceased players who suffered injuries in the crash. Appellants were granted leave by the trial court to intervene as defendants in the underlying cases, and filed Answers and Counterclaims for declaratory judgment against Federal

---

<sup>7</sup> Hartford did not file a declaratory-judgment action and is not a party to this matter, but has agreed to be bound by the court’s decision.

<sup>8</sup> Bluffton University was named as a defendant by AAIC but not by Federal, and was dismissed shortly thereafter.

and AAIC. The Appellants sought a declaration that the Federal and AAIC policies provide coverage.

Federal, AAIC, and the 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 Federal and AAIC.<sup>9</sup> 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. Appellants appealed this decision to the Allen County Court of Appeals, which affirmed the trial court in a decision dated November 9, 2009.<sup>10</sup>

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. 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.

---

<sup>9</sup> The trial court’s summary-judgment order can be found at T.D.79, and is also adjoined to this brief at Appendix P30-P36 pursuant to S.Ct. Prac. R. 6.2(B)(5)(d).

<sup>10</sup> The opinion of the Allen County Court of Appeals is adjoined to this brief at Appendix P6-P25 pursuant to S.Ct. Prac. R. 6.2(B)(5)(c). It can also be found at *Fed. Ins. Co. v. Exec. Coach Luxury Travel*, 3d Dist Nos. 1-09-17 & 1-09-18, 2009-Ohio-5910.

Appellants now seek relief from the Court of Appeals's determination, and the Court has agreed to accept the appeal.<sup>11</sup>

### ARGUMENT

**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 instant action involves an interpretation of the "who is an insured" section of the Hartford Policy. The policy contains an omnibus clause which allows for coverage of additional persons as insured besides just Bluffton University or its employees.

Most omnibus clauses deal only with vehicles "owned" by the named insured; in fact, R.C. 4509.51(B) requires that in an owner's policy of insurance, liability coverage must apply to the named insured and *any other person* who uses the insured vehicle with the owner's permission.

Here, the omnibus clause in the Hartford Policy is not limited to vehicles owned by Bluffton. It extends coverage to any other person using a "covered auto" (with Bluffton University's permission) that the university owns, borrows, or "hires." Accordingly, this clause reflects the parties' intention to broaden liability coverage beyond just Bluffton University employees and beyond just Bluffton University owned vehicles.

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 "hired" by the named insured (*i.e.*, Bluffton). The trial court held, without substantial analysis or explanation, that Bluffton did

---

<sup>11</sup> The Court of Appeals also considered a third issue: whether the trial court abused its discretion by quashing a subpoena Appellants propounded upon Hartford which sought discovery of Hartford's underwriting file and claims file. That issue was not appealed to this Court.

not hire the Executive Coach bus. But based on Ohio precedent and the ordinary definition of the word “hire,” it is abundantly clear Bluffton “hired” the bus driven by Jerome Niemeyer here.

**1. Ohio law applies to the instant action.**

Resolution of the instant action requires the Court to interpret the provisions of an insurance policy; thus, the Court must apply Ohio law as it relates to policy construction. There can be no question that Ohio law applies in this case. The policyholder, Bluffton University, is located in Ohio. Mr. Niemeyer was an Ohio resident, and Executive Coach is an Ohio corporation with its principal place of business in Ottawa, Ohio. The charter agreement by which Coach Grandey hired the bus for the spring trip was executed in Ohio.

“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 one of the syllabus. Insurance policies are contracts, and as such, the construction of insurance policies is a matter of law. *See Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. The Court must “examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy.” *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 219 (citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus). Ohio law requires that where not specifically defined, words and phrases in insurance policies should be given their commonly accepted meaning. *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-68; *see also Alexander*, 53 Ohio St.2d 241, paragraph two of the syllabus.

To find the commonly accepted meaning of terms found in insurance policies, Ohio courts customarily look to the dictionary definition. See *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 109 (looking to the dictionary definition of “employee”); *Davis v. Continental Ins. Co.* (1995), 102 Ohio App.3d 82, 86 (looking to the dictionary definition of “borrow”); *Sherock v. Ohio Mun. League Jt. Self-Ins. Pool*, 11th Dist. No 2003-T-0022, 2004-Ohio-1515 (looking to the dictionary definition of “hire”); *Westfield Ins. Co. v. Nationwide Mut. Ins. Co.* (1993), 99 Ohio App.3d 114, 119 (same).

In their briefs below, Federal and AAIC asked the court to overlook substantive Ohio case law defining relevant terms in the policies at issue. Instead, they asked the Court, without explanation, to focus its analysis on foreign case law and foreign policy interpretations. This Court should apply the relevant, appropriate Ohio law, and find coverage under the Hartford, AAIC, and Federal policies.

**2. Bluffton “hired” the Executive Coach bus as that term is defined in Ohio.**

The term “hire” is not specifically defined in the Hartford Policy, and thus must be given their commonly accepted meaning. *Gomolka*, 70 Ohio St.2d at 167-68. Webster’s Dictionary defines “hire” as “to get the services of a person or the use of a thing in return for payment.” The Merriam Webster’s Collegiate Dictionary defines “hire” as “payment for the temporary use of something.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th Ed.), p. 549. This dictionary also identifies “charter” as a synonym for the word “hire.” *Id.* “Charter” applies to the “hiring or letting of a vehicle usually for exclusive use (charter a bus to go to the game).” *Id.*

This definition of “hire” has been expressly adopted by Ohio case law 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. Indeed, the framework for

deciding this issue, as well as the ultimate conclusion to be reached, was fully 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.

The term “hire” was not defined in the Nationwide policy, so the Court looked to the word’s “natural and commonly accepted meaning.” *Id.*, citing *Gomolka*, 70 Ohio St.2d at 167-68. The Court thus looked to the dictionary definition 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. West Carrollton engaged the RTA to transport students to school, just as Bluffton engaged Executive Coach to transport its baseball team to Florida. West Carrollton obtained the use of the RTA bus in return for payment, and here Bluffton obtained the use of the Executive Coach bus in exchange for payment. Thus, Bluffton hired the Executive Coach bus.

The Third District completely ignored the *Westfield* decision -- in fact, it is not mentioned in the opinion of either the Allen County Court of Appeals or the trial court. Further, while the Third District opinion briefly cited definitions of “hire,” it did not follow either definition. Instead, the court chose to improperly combine 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.

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.

In *Davis v. Continental Ins. Co.* (1995), 102 Ohio App.3d 82, the Tenth District Court of Appeals discussed the definition of “hire” in the context of a insurance policy which, like the Hartford Policy, provided coverage to “[a]nyone else while using with your permission a covered ‘auto’ you own, hire or borrow \*\*\*.” *Id.* at 86. In determining whether a vehicle was “borrowed” or “hired,” the court noted:

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.

(Emphasis added.) *Id.* at 87, citing *Travelers Indem. Co. v. Swearinger* (1985), 169 Cal.App.3d 779, 214 Cal.Rptr. 383. This makes sense; “[w]e say, for example, that one hires a taxicab, even though the taxicab owner drives it.” *Swearinger*, 169 Cal.App.3d at 785 (“[h]ire’ is used in a sense which excludes physical possession altogether when remuneration is involved”).

The insurers may attempt to distinguish *Westfield* on the grounds that it did not involve an omnibus clause. But this is irrelevant: *Westfield*’s importance lies in the court’s determination of the commonly accepted meaning of the word “hire.” In construing the omnibus clause here, the Court must apply the commonly accepted meaning of the word “hire” because it is not defined in the Hartford Policy. *Westfield* provides us with that meaning. *Westfield* further provides us with an application of that meaning to facts fortuitously similar to those present in the instant action.

In the trial court, Federal and AAIC asked the Court to look past the clear pronouncement in *Westfield* and rely on foreign cases. But Ohio has already spoken on this issue, and the *Westfield* and *Davis* holdings are clear. The *Westfield* and *Davis* courts could have followed these foreign decisions. But they chose not to. Hartford could have drafted a more restrictive definition of the term “hire.” But it chose not to. To judicially impose 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”).

Finally, it should be noted that the Third District Court of Appeals recently issued an opinion which factually conflicts with its decision in the instant action. In a related case, in

which coverage for the March 2, 2007 crash was sought under Mr. Niemeyer's personal-umbrella policy, the Third District held that the Executive Coach bus was a rented vehicle:

[I]t is clear that the meaning of "livery conveyance" denotes a vehicle which has been hired or rented for temporary use from a livery, (*i.e.*, a business that rents vehicles). *Such rental vehicles would include a charter bus, as in this case.*

(Emphasis added.) *Niemeyer v. W. Reserve Mut. Cas. Co.*, 3d Dist. No. 12-09-03, 2010-Ohio-1710, ¶23. Thus, the Third District held that the bus driven by Mr. Niemeyer was rented from Executive Coach. This ruling is important, because the "Commercial Automobile Broad Form Endorsement" to the Hartford Policy specifically addresses rented vehicles:

**Autos Rented By Employees**

Any "auto" hired or rented by your "employee" on your behalf and at your direction will be considered an "auto" you hire.

(T.D.68, Joint Stip., Exhibit C, "Commercial Automobile Broad Form Endorsement," p.1).

It cannot be reasonably disputed that Coach Grandey was acting in the course and scope of his employment with Bluffton. It is also undisputed that the Executive Coach bus is an "auto" under the Hartford Policy, as that term is defined as "a land motor vehicle." (T.D.68, Joint Stip., Exhibit C, Section V.B., p. 9 of 11). Accordingly, the Executive Coach bus is a "hired" auto under the broad-form endorsement to the Hartford Policy because it was rented by Coach Grandey on Bluffton's behalf.

The *Westfield* and *Davis* decisions are unambiguous. Based on the commonly accepted definition of "hire" as determined by Ohio courts to interpret insurance policies, Bluffton "hired" the Executive Coach bus.

**3. The definition of “hire” does not require an element of control.**

In the courts below, Appellees suggested that a consensus of foreign decisions impose an additional “control” requirement in determining whether a named insured has “hired” an auto. This is simply not the case. Multiple foreign jurisdictions have determined that the term “hire” does not require an element of control. Thus, if the Court is inclined to look to foreign case law to determine whether Bluffton “hired” the Executive Coach bus, the Court is not compelled to read a requirement of “control” into the policy.

In *Pawtucket Mut. Ins. Co. v. Hartford Ins. Co.* (N.H. 2001), 147 N.H. 369, 787 A.2d 870, the primary issue in dispute was whether a rental car was a “hired” auto under a policy of insurance issued by Hartford. The New Hampshire Supreme Court looked to the dictionary definition of “hire,” finding that “[t]he word ‘hire,’ in common usage, is defined as ‘to engage the temporary use of for a fixed sum.’” *Id.* at 372, quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 1961), p. 1072. More importantly, the Court specifically held that the named insured was not required to exert control over the vehicle:

[T]he common definition of “hire” *does not require an element of control*, and we decline to add this additional restrictive requirement to the policy.”

(Emphasis added.) *Id.* at 373. Thus, the New Hampshire Supreme Court expressly declined to add an additional, restrictive “control” requirement to the Hartford Policy.

A Wisconsin court encountered facts analogous to the instant action and *Westfield* in *Kettner v. Conradt* (Wis. App. Apr. 29, 1997), 210 Wis.2d 499, 1997 Wis. App. LEXIS 457. In *Kettner*, the Shiocton School District contracted with Eugene Conradt to provide transportation services to the district’s students using a bus he owned. In the course of transporting Shiocton students, Conradt’s bus was involved in a collision with a motorcycle. The motorcycle driver

sued and sought coverage under the school district's commercial auto insurance policy, which contained an omnibus clause identical to the Hartford Policy here. *Id.* at \*4-\*5.

The trial court determined Conrardt was an independent contractor, and that contention was not challenged on appeal. *Id.* at \*3. The court of appeals held that even though Conrardt was an independent contractor, he was still an insured under the omnibus clause of the school district's insurance policy. *Id.* at \*6. The court held Conrardt's bus was a "hired" auto: it was "hired by the school district to transport school district children at the time of the accident." *Id.* at \*6-\*7. The *Kettner* court did not impose a "control" requirement, even though it addressed policy language identical to the language in dispute here.

The *Kettner* ruling was affirmed in another applicable Wisconsin case: *Reuter v. Murphy* (Wis. App. 2000), 240 Wis.2d 110, 622 N.W.2d 464. In *Reuter*, the Southwestern Wisconsin Community School District hired Theresa Murphy to transport students to and from school using her own vehicle. Murphy's vehicle was involved in an accident while she was transporting a student home from school, and the student (Reuter) suffered injuries. Reuter sought coverage under the omnibus clause of the school district's insurance policy, which again was identical to the policy language at issue here. *Id.* at 119.

As in *Kettner*, the *Reuter* court held that Murphy was an independent contractor of the school district. The court also held that it had "no doubt that Murphy's car – like Conrardt's bus in *Kettner* – was a 'hired' vehicle within the plain meaning of the \*\*\* policy." *Id.* Again, *Reuter* interpreted an identical omnibus clause, yet did not impose a "control" requirement.

The *Pawtucket*, *Kettner*, and *Reuter* decisions comport with Ohio's interpretation of the term "hire" as it is used in insurance policies. To the extent the Court is inclined to look to other jurisdictions for guidance, the Court should apply these decisions and hold that for the purposes

of the “Who is an Insured?” clause in the Hartford Policy, Bluffton was not required to exert control over the Executive Coach bus.

**4. If the Court chooses to impose a “control” requirement, the unique facts of this case demonstrate Bluffton exercised sufficient control over the Executive Coach bus.**

As discussed above, Ohio has refused to adopt a “control” requirement, and other jurisdictions have declined to add such an “additional restrictive requirement to the policy.” *Pawtucket Mut. Ins. Co.*, 147 N.H. at 373. But should the Court be inclined to abandon Ohio precedent and adopt a “control” requirement, the Court must still find in favor of coverage based on the particular facts currently before the Court.

Foreign decisions discussing the amount of control required are of limited help to the Court because of the “fact-specific nature of the inquiry” and the fact that the cases “seem to come down firmly on both sides of the issue.” *United States Fid. & Guar. Co. v. Heritage Mut. Ins. Co.* (C.A.7 2000), 230 F.3d 331, 334. “[I]n construing the ‘hired auto’ provision” of insurance policies, some courts “require the exercise of, or the right to exercise, *at least some control* over an automobile by the named insured before concluding that the vehicle was covered by the policy.” (Emphasis in original.) *Holmes v. Brethren Mut. Ins. Co.* (D.C. 2005), 868 A.2d 155, 159.

“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.” *Earth Tech, Inc. v. United States Fire Ins. Co.* (E.D.Va. 2006), 407 F. Supp. 2d 763, 772, citing *Holmes*, 868 A.2d at 159. 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 Fire & 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.

In the courts below, both insurers cited *Casino Air Charter v. Sierra Pac. Power Co.* (Nev. 1979), 95 Nev. 507 for the proposition that hiring a charter service does not constitute the “hiring” of a vehicle. *Casino Air* involved the chartering of an airplane, which subsequently crashed. The Supreme Court of Nevada held that the named insured (Sierra) did not “hire” the aircraft; rather, Sierra merely contracted for transportation services. *Id.* at 511. Consistent with the cases cited above, the court held that the aircraft was not “hired” because Sierra “neither designated a particular aircraft nor took any part in the preparation of the flight plan.” *Id.* But here, Coach Grandey was in complete control of the bus’s route and movement throughout the course of the trip.

As will be discussed more fully below, Bluffton (through its employee, 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.

In addition to a “control” requirement, the insurers may contend that a vehicle operated by an independent contractor cannot be a hired auto under the insurance policy of the party hiring the independent contractor. Again, this is contrary to established Ohio law, most notably *Westfield*. Further, there is a wealth of foreign case law holding that an independent contractor’s vehicle can in fact be a “hired” auto in this situation. See *Kettner*, 210 Wis.2d 499 (vehicle

operated by independent contractor was “hired” under the omnibus clause of the school district policy); *Reuter*, 240 Wis.2d 110 (same); *Kresse v. Home Ins. Co.* (C.A.8 1985), 765 F.2d 753 (a truck operated by an independent hauling contractor could be a “hired” auto under a county’s insurance policy); *Fratis*, 56 Cal. App. 3d 339 (vehicle owned and operated by an independent contractor was insured under a newspaper company’s hired auto coverage); *Russom v. Ins. Co. of N. America* (C.A.6 1970), 421 F.2d 985 (vehicle operated by an independent hauler was a “hired automobile” despite the fact it was owned by an independent contractor); *Bituminous Casualty Corp. v. Travelers Ins. Co.* (D.Minn. 1954), 122 F. Supp. 197 (vehicle operated by an independent hauler was a hired auto under a quarry company’s policy). Thus, the fact that Executive Coach could be considered an independent contractor does not preclude a finding that the motor coach was an auto hired by Bluffton.

Throughout the lower-court proceedings, the insurers attempted to analogize the instant action with cases involving the mere hauling of goods or commodities by an independent contractor from “point A to point B.” In those cases, the named insured was only concerned with the result, and thus had limited control over the vehicle involved. But here the Executive Coach bus was not hauling goods; it was *hauling the named insured*, as personified by its employees and students. Coach Grandey, Bluffton’s employee, was seated in the front row of the bus, and directed the bus’s movements. (T.D.66, Grandey Depo., p. 90). Thus, the instant action is further distinguishable from the hauling cases cited by the insurers because here, the named insured was actually *in* the vehicle and *directing* its travel. Accordingly, the Court should not treat this case like the garden-variety hauling case.

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 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.

**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.**

**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.**

The second issue presented for review is whether Jerome Niemeyer was using the Executive Coach bus with Bluffton’s “permission.” Under the commonly understood meaning of this term, Mr. Niemeyer was operating the Executive Coach bus with Bluffton’s permission.

**1. At the time of the March 2, 2007 crash, Jerome Niemeyer was operating the bus with Bluffton’s permission.**

It cannot be reasonably disputed that Bluffton granted Niemeyer permission to drive the bus on the Florida trip.

As a preliminary matter, this Court must ascertain the commonly accepted definition of “permission” to be applied to the Hartford Policy. *Gomolka*, 70 Ohio St. 2d at 167-68.

“Permission is defined as ‘1: the act of permitting 2: formal consent: authorization,’” while “[p]ermit means, ‘1: to consent to, expressly or formally; 2: to give leave: authorize 3: to make possible: \* \* \* to give an opportunity.’” *Lynch v. Lilak*, 6th Dist. No. E-08-024, 2008-Ohio-5808, ¶13, quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10 Ed. 1996) 866, 10.

Further, the court of appeals noted “permission” is defined as “‘the act of permitting,’ ‘formal consent,’ [and] ‘authorization.’” *Fed. Ins. Co. v. Exec. Coach Luxury Travel*, 3d Dist Nos. 1-09-17 & 1-09-18, 2009-Ohio-5910, ¶31 (adjoined at Appx. P18), quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002), at 1693. The court of appeals acknowledged that the above definitions constitute the commonly accepted meaning of “permission”: “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 \*\*\*.” (Appx. P18, *Fed. Ins. Co.*, 2009-Ohio-5910, ¶30). Further, “courts have used the words ‘permission’ and ‘acquiescence’ interchangeably \*\*\*.” *Lynch*, 2008-Ohio-5808, ¶13.

Executive Coach asked for and received Coach Grandey’s permission for Mr. Niemeyer to drive on this trip. (T.D.66, Grandey Depo., p. 45; T.D.69, Grandey Discovery, Req. for Adm. No. 4 and Interrogatory No. 5). If Coach Grandey had not approved Mr. Niemeyer for the trip, he would not have been the driver for the trip. (T.D.66.4, Tobe Depo., p. 60; T.D.66.2, Stechschulte Depo., p. 92). Niemeyer “got the authority from Bluffton University’s Coach Grandey to drive the coach.” (T.D.66.2, Stechschulte Depo., p. 116). Coach Grandey was authorized by Bluffton to enter into the contract with Executive Coach, and to otherwise act on behalf of the university.<sup>12</sup> (T.D.66, Grandey Depo., Ex. 4, Answers to Interrogatories 1 & 2).

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

---

<sup>12</sup> For purposes of analyzing the issues presented by the instant action, it cannot be disputed that Bluffton University can only act through its authorized representative, Coach Grandey.

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 third party’s vehicle (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 do 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 the accident occurred while Niemeyer was operating under 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”). Accordingly, his use was permissive.

Finally, the Court should consider the only case cited by the parties below involving a chartered bus: *State Farm Mut. Auto. Ins. Co. v. Mackechnie* (C.A.8 1940), 114 F.2d 728. Coincidentally, that case involved college students on a school-sponsored field trip. In *Mackechnie*, the Midland College Choir hired a bus (with a driver) to transport the choir on a concert tour. Even though the Midland College Choir was the named insured under the policy, and even though it did not own the bus or employ the driver, the court found that the school gave permission to the driver to use the bus. *Id.* at 734. The owner of the bus chose the driver and paid him, but the college choir (the named insured) was the party which had the right of control and the power to grant permission to use the bus. The college choir was described by the court as a “virtual lessee” because it paid the owner on a per mile basis for the use of the bus. *Id.* Right of control and power to grant permission were obvious to the court because the student members of the choir were present on the bus when it was being driven by the owner's employee. *Id.* Accordingly, Bluffton University, as the named insured, just like the Midland College Choir, was the proper party to give permission to Mr. Niemeyer to drive the bus.

**2. This Court is bound to apply the commonly accepted meaning of the term “permission.”**

As noted above, the court of appeals acknowledged that the ordinary definition of the term “permission” encompasses the concepts of mere consent, agreement, and acquiescence to a matter. (Appx. P18, *Fed. Ins. Co.*, 2009-Ohio-5910, ¶30). Thus, based on Ohio's well-settled

rules of policy construction, the Court must apply this definition when interpreting the Hartford Policy. *Gomolka*, 70 Ohio St. 2d at 167-68.

The court of appeals, without explanation, strayed from this long-standing rule and held that “in any legal context,” the term “permission” should be assigned a different meaning:

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.

(Appx. P18, *Fed. Ins. Co.*, 2009-Ohio-5910, ¶30). It is unclear what the court of appeals meant by use of the phrase “legal context.” But in the “legal context” of the instant action, *i.e.*, the interpretation of an insurance policy, the Court is specifically bound to apply the common, ordinary meaning of the term “permission.” Further, other courts (in presumably “legal contexts”) have applied the definition of “permission” offered by Appellants. *See Lynch*, 2008-Ohio-5808, ¶13; *Fratis*, 56 Cal. App. 3d at 343 (“the [policy] language in question plainly refers to actual consent”). Finally, the record contains no evidence that the parties intended to ascribe a special, or non-ordinary, meaning to the word “permission.”

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. Accordingly, this Court should refuse to apply the definition of “permission” proposed by the court of appeals, and instead use the commonly accepted meaning.

**3. Even if the Court chooses to impose an additional restrictive “control” requirement, Bluffton possessed and exercised sufficient control over the bus at the time of the March 2, 2007 crash.**

In the courts below, Federal and AAIC argued that only one with “control” of the vehicle has the authority to grant the permission to use it. While the trial court did not cite to any of these cases, it seemed to adopt this notion of “control.” The court of appeals went further, expressly adopting a “control” requirement, and holding that where there is shared control over a vehicle, the party with the more substantial control over the vehicle is the only party who can grant permission. But this is not the law in Ohio.

The Court should apply Ohio law, and should not impose a restrictive “control” requirement where none exists in the Hartford Policy. However, if the Court chooses to impose such a requirement, Appellants must prevail because they had “some degree of control over the vehicle.” *Combs v. Black*, 10th Dist. No. 05AP-1177, 2006-Ohio-2439, at ¶18.

First of all, Bluffton approved and paid for Niemeyer as a driver. Specifically, Executive Coach asked for and received Coach Grandey’s permission to use Mr. Niemeyer on this trip. (T.D.66, Grandey Depo., p. 45; T.D.69, Grandey Discovery, Req. for Adm. No. 4 and Interrogatory No. 5). If Coach Grandey had not approved Mr. Niemeyer for the trip, he would not have been the driver for the trip. (T.D.66.4, Tobe Depo., p. 60; T.D.66.2, Stechschulte Depo., p. 92). The contract between Executive Coach and Bluffton also called for Bluffton to pay a portion of Mr. Niemeyer’s compensation via meals and lodging, with the possibility of gratuity. (T.D.66, Grandey Depo., Ex. 1).

Also, Coach Grandey gave permission for Mr. Niemeyer’s wife to accompany the team on the trip. (T.D.66.3, Lammers Depo., p. 63.) Executive Coach has a company policy that if there is room, an extra person may go along on the trip if the customer grants permission. Mrs.

Niemeyer had accompanied the team on a prior trip and was along for this trip. (T.D.66, Grandey Depo., pp. 95-96). According to Executive Coach's policy, Mrs. Niemeyer could go along only if Bluffton approved. (T.D.66.3, Lammers Depo., p. 63).

Coach Grandey contracted for a specific bus, Coach No. 2, and ensured that Bluffton hired a motor coach with a DVD player. (T.D.66, Grandey Depo., pp. 48, 87, and Ex. 1). Executive Coach was thus not at liberty to use another bus.

Bluffton was in complete control of the bus's route and movement throughout the course of the trip. Coach Grandey presented a detailed trip itinerary as part of the contract-negotiation process. (T.D.66, Grandey Depo., Ex. 2). But Coach Grandey could, and did, deviate from that itinerary in whatever way he wished, as long as it would not violate any Federal or state regulations. (T.D.66.2, Stechschulte Depo., p. 119; T.D.66, Grandey Depo., pp. 102, 108-09). For example, if the coach wanted to take a side trip, he could do so at his whim. If the trip involved substantial mileage, there may have been an extra charge, but there was no question it was within the coach's power to authorize such trips. (T.D.66.2, Stechschulte Depo., p. 87).

During the trip, Coach Grandey was able to tell the driver when and where to go. (T.D.66.3, Lammers Depo., pp. 59-62; T.D.66.2, Stechschulte Depo., pp. 85-91). The driver was expected to take orders from Coach Grandey. *Id.* Further, Coach Grandey had the authority to direct Niemeyer when and where to stop the bus, and to control the duration of the stop. (T.D.66, Grandey Depo., p. 102).

Bluffton had control of the bus for the week, and no one else could use the bus without Bluffton's permission (T.D.66.3, Lammers Depo., pp. 60-61). Coach Grandey had the authority to control Niemeyer – for example, if Niemeyer wanted to stop and pick up a friend, Coach Grandey had the power to forbid it. *Id.* at 72. 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. (T.D.66.2, Stechschulte Depo, pp. 129-30, T.D.66.3, Lammers Depo., pp. 80-82; T.D.66, Grandey Depo., p. 121).

Bluffton not only possessed the right to control Niemeyer and the bus, it definitively exercised this control. An excellent example of the extent of Coach Grandey's control occurred within the first half-hour of the trip. Coach Grandey required that the coach come equipped with a DVD player. (T.D.66, Grandey Depo., pp. 48, 87). Approximately one-half hour after the bus had left Bluffton on the trip at issue here, it was discovered that the motor coach's DVD player did not work. *Id.* at 87. Upon this discovery, Coach Grandey exercised Bluffton's control over the bus by ordering the driver to return to Bluffton. *Id.* The DVD player was fixed and the bus set off a second time, approximately one hour later than scheduled. *Id.* at 88.

Bluffton (by its employee, Coach Grandey) exercised considerable control over, *inter alia*, the vehicle, the choice of driver, the destination, and the routes of travel. Therefore, if the Court chooses to apply the cases cited by the insurers, the only reasonable conclusion is that Bluffton exercised sufficient control over the bus to give rise to the authority to grant permission to use it.

**4. The exercise of "control" is not the only means of acquiring the authority to grant permission to use a vehicle.**

The Appellees and the Court of Appeals glossed over one very important fact: Executive Coach specifically granted Bluffton the ability to approve or reject Jerome Niemeyer as a driver. 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."

The cases which espouse adoption of a “control” requirement are based on a fundamental premise: in order to grant permission to use a vehicle, one must have the *authority* to grant such permission. Under the “control” theory, when one reaches a threshold level of control over a vehicle, one is then vested with the ability to grant permission to use that vehicle. As noted above, Appellants contend Bluffton reached this threshold level of control.

The satisfaction of a “control” requirement is one way to obtain the authority to grant permission. But it is not the *only* way to obtain such authority. While this appears to be an issue of first impression, the authority to grant permission can be delegated by the person in control of this decision. Here, the ability to grant permission was transferred from Executive Coach to Bluffton University.

Assuming, as the Appellees argue, that Executive Coach had predominant control over the bus, Executive Coach expressly transferred to Bluffton the ability to accept or reject Mr. Niemeyer as a driver. In the court below, Appellees characterize this as a “moot point” because Coach Grandey merely “acquiesced” to Executive Coach’s choice of driver. But this understates the facts: if Coach Grandey had not approved Mr. Niemeyer for the trip, he would not have been permitted to drive. (T.D.66.4, Tobe Depo., p. 60; T.D.66.2, Stechschulte Depo., p. 92).

There are many ways to obtain the authority necessary to grant permission. The vehicle owner certainly has such authority. The insurers argue that a certain degree of control over the vehicle gives rise to this authority. But these are not the only ways to obtain the authority to grant permission. Where a party delegates or transfers its authority to a third party, as Executive Coach did to Bluffton here, the receiving party is vested with the authority to grant permission to use the subject vehicle. By ceding the final decision on who would drive the bus, Executive Coach transferred the ability to grant permission to Coach Grandey.

CONCLUSION

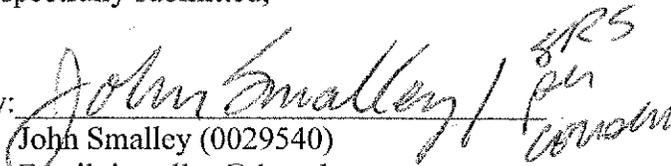
For the reasons stated above, the Court should reverse the opinion of the court of appeals.

Respectfully submitted,

By: 

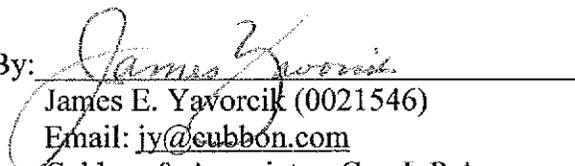
Steven R. Smith (0031778)  
Email: [ssmith@cjc-law.com](mailto:ssmith@cjc-law.com)  
Steven P. Collier (0031113)  
Email: [scollier@cjc-law.com](mailto:scollier@cjc-law.com)  
Janine T. Avila (0055853)  
Email: [javila@cjc-law.com](mailto:javila@cjc-law.com)  
Adam S. Nightingale (0079095)  
Email: [anightingale@cjc-law.com](mailto:anightingale@cjc-law.com)  
Connelly, Jackson & Collier LLP  
405 Madison Avenue, Suite 1600  
Toledo, Ohio 43604

*Counsel for Appellant Feroen J. Betts,  
Administrator of the Estate of David J. Betts,  
Deceased*

By:  <sup>ERS</sup>  
per consent

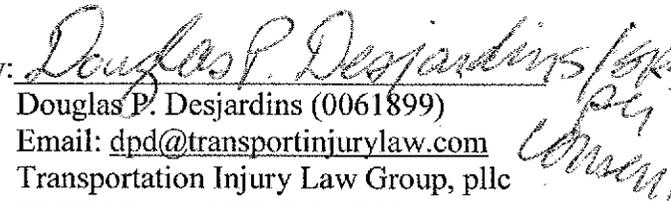
John Smalley (0029540)  
Email: [jsmalley@dgmslaw.com](mailto:jsmalley@dgmslaw.com)  
Dyer, Garofalo, Mann & Schultz  
131 N. Ludlow St.  
Dayton, Ohio 45402

*Counsel for Appellants Kim Askins and  
Jeffrey E. Holp, Co-Administrators of the  
Estate of Cody E. Holp, Deceased, James  
Grandey, and Todd Miller*

By: 

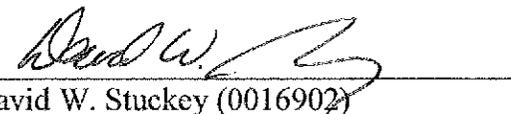
James E. Yavorcik (0021546)  
Email: [jy@cubbon.com](mailto:jy@cubbon.com)  
Cubbon & Associates, Co., L.P.A.  
500 Inns of Court Building  
405 North Huron  
P.O. Box 387  
Toledo, Ohio 43697-0387

*Counsel for Appellant Timothy E. Berta*

By:  <sup>ERS</sup>  
per consent

Douglas P. Desjardins (0061899)  
Email: [dpd@transportinjurylaw.com](mailto:dpd@transportinjurylaw.com)  
Transportation Injury Law Group, pllc  
1717 N Street, NW, Suite 300  
Washington, DC 20036

*Counsel for Appellant Geneva Ann  
Williams, individually, and as the  
Administrator of the Estate of Tyler  
Williams, Deceased*

By: 

David W. Stuckey (0016902)  
Email: [dstuckey@rcolaw.com](mailto:dstuckey@rcolaw.com)  
Robison, Curphey & O'Connell  
Four Seagate, Ninth Floor  
Toledo, Ohio 43604

*Counsel for Appellant Caroline Arend,  
Administrator of the Estate of Zachary H.  
Arend, Deceased*

**PROOF OF SERVICE**

On May 17<sup>th</sup>, 2010, a copy of the foregoing was sent by U.S. Mail to:

Steven B. Ayers,  
[sayers@cbjlawyers.com](mailto:sayers@cbjlawyers.com)  
Robert C. Buchbinder  
[rbuchbinder@cbjlawyers.com](mailto:rbuchbinder@cbjlawyers.com)  
Crabbe Brown & James LLP  
500 South Front Street, Suite 1200  
Columbus, Ohio 43215

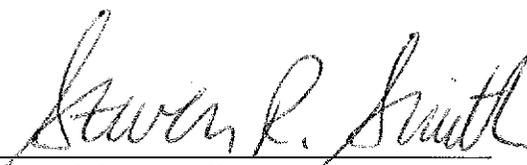
*Counsel for American Alternative Insurance Corporation*

Daniel I. Graham, Jr.  
[dgraham@batescarey.com](mailto:dgraham@batescarey.com)  
Bates & Carey LLP  
191 North Wacker Drive  
Chicago, Illinois 60606

*Counsel for American Alternative Insurance Corporation*

D. John Travis  
[jtravis@gallaghersharp.com](mailto:jtravis@gallaghersharp.com)  
Gary Nicholson  
[gnicholson@gallaghersharp.com](mailto:gnicholson@gallaghersharp.com)  
Gallagher Sharp  
Sixth Floor – Bulkley Building  
1501 Euclid Avenue  
Cleveland, Ohio 44115

*Counsel for Federal Insurance Company*

By:   
Counsel for Appellants

APPENDIX

Page:

- P1-P5 Notice of Appeal (December 23, 2009).
- P6-P25 Opinion of the Allen County Court of Appeals, Case Nos. 1-09-17 and 1-09-18 (November 9, 2009).
- P26-P27 Judgment Entry of the Allen County Court of Appeals, Case No. 1-09-17 (November 9, 2009).
- P28-P29 Judgment Entry of the Allen County Court of Appeals, Case No. 1-09-18 (November 9, 2009).
- P30-P36 Order of the Allen County Court of Common Pleas (February 25, 2009).

IN THE SUPREME COURT OF OHIO

09-2307

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.

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

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

---

JOINT NOTICE OF APPEAL OF DEFENDANT-INTERVENORS/APPELLANTS

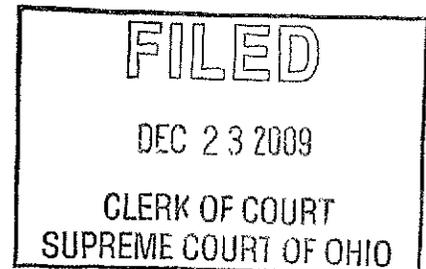
---

Steven R. Smith (0031778)  
(COUNSEL OF RECORD)  
Steven P. Collier (0031113)  
Janine T. Avila (0055853)  
Connelly, Jackson & Collier LLP  
405 Madison Avenue, Suite 1600  
Toledo, Ohio 43604  
Email: [ssmith@cjc-law.com](mailto:ssmith@cjc-law.com)  
*Counsel for Defendant-Intervenor/Appellant  
Feroen J. Betts, Administrator of the Estate of  
David J. Betts, Deceased*

James E. Yavorcik (0021546)  
(COUNSEL OF RECORD)  
Cubbon & Associates, Co., L.P.A.  
500 Inns of Court Building  
405 North Huron  
P.O. Box 387  
Toledo, Ohio 43697-0387  
Email: [jy@cubbon.com](mailto:jy@cubbon.com)  
*Counsel for Defendant-Intervenor/Appellant  
Timothy E. Berta*

D. John Travis  
Gallagher Sharp  
Sixth Floor – Bulkley Building  
1501 Euclid Avenue  
Cleveland, Ohio 44115  
Email: [jtravis@gallaghersharp.com](mailto:jtravis@gallaghersharp.com)  
*Counsel for Plaintiff/Appellee  
Federal Insurance Company*

Steven B. Ayers  
Robert C. Buchbinder  
Crabbe Brown & James LLP  
500 South Front Street, Suite 1200  
Columbus, Ohio 43215  
Email: [sayers@cbjlawyers.com](mailto:sayers@cbjlawyers.com)  
*Counsel for Plaintiff/Appellee  
American Alternative Insurance Corporation*



David W. Stuckey (0016902)  
(COUNSEL OF RECORD)  
Robison, Curphey & O'Connell  
Four Seagate, Ninth Floor  
Toledo, Ohio 43604  
Email: [dstuckey@rcolaw.com](mailto:dstuckey@rcolaw.com)  
*Counsel for Defendant-Intervenor/Appellant  
Caroline Arend, Administrator of the Estate of  
Zachary H. Arend, Deceased*

Daniel I. Graham, Jr.  
Bates & Carey LLP  
191 North Wacker Drive  
Chicago, Illinois 60606  
Email: [dgraham@batescarey.com](mailto:dgraham@batescarey.com)  
*Counsel for Plaintiff/Appellee  
American Alternative Insurance Corporation*

John Smalley (0029540)  
(COUNSEL OF RECORD)  
Dyer, Garofalo, Mann & Schultz  
131 N. Ludlow St.  
Dayton, Ohio 45402  
Email: [jsmalley@dgmslaw.com](mailto:jsmalley@dgmslaw.com)  
*Counsel for Defendant-Intervenors/Appellants  
Kim Askins and Jeffrey E. Holp, Co-  
Administrators of the Estate of Cody E. Holp,  
Deceased, James Grandey, and Todd Miller*

Douglas P. Desjardins (0061899)  
(COUNSEL OF RECORD)  
Transportation Injury Law Group, pllc  
1717 N Street, NW, Suite 300  
Washington, DC 20036  
Email: [dpd@transportinjurylaw.com](mailto:dpd@transportinjurylaw.com)  
*Counsel for Defendant-Intervenor/Appellant  
Geneva Ann Williams, individually, and as the  
Administrator of the Estate of Tyler Williams,  
Deceased*

---

JOINT NOTICE OF APPEAL OF DEFENDANT-  
INTERVENORS/APPELLANTS

Defendant-Intervenors/Appellants Feroen J. Betts, Administrator of the Estate of David J. Betts, deceased; Caroline Arend, Administrator of the Estate of Zachary H. Arend, deceased; Kim Askins and Jeffrey E. Holp, Co-Administrators of the Estate of Cody E. Holp, deceased; James Grandey; Todd Miller; Timothy E. Berta; and Geneva Ann Williams, individually, and as the Administrator of the Estate of Tyler Williams, deceased, hereby give notice of appeal to the Supreme Court of Ohio from the judgment entries of the Allen County Court of Appeals, Third Appellate District, entered in Court of Appeals case Nos. 1-09-17 and 1-09-18 (consolidated in case No. 1-09-17) on November 9, 2009.

This is a case of public or great general interest.

Respectfully submitted,

By: Steven R. Smith

Steven R. Smith (0031778)

Email: [ssmith@cjc-law.com](mailto:ssmith@cjc-law.com)

Steven P. Collier (0031113)

Email: [scollier@cjc-law.com](mailto:scollier@cjc-law.com)

Janine T. Avila (0055853)

Email: [javila@cjc-law.com](mailto:javila@cjc-law.com)

Connelly, Jackson & Collier LLP

405 Madison Avenue, Suite 1600

Toledo, Ohio 43604

*Counsel for Defendant-Intervenor/Appellant  
Feroen J. Betts, Administrator of the Estate of  
David J. Betts, Deceased*

By: John Smalley / *SR5*  
*per consent*

John Smalley (0029540)

Email: [jsmalley@dgmsslaw.com](mailto:jsmalley@dgmsslaw.com)

Dyer, Garofalo, Mann & Schultz

131 N. Ludlow St.

Dayton, Ohio 45402

*Counsel for Defendant-Intervenors/  
Appellants Kim Askins and Jeffrey E.  
Holp, Co-Administrators of the Estate of  
Cody E. Holp, Deceased, James  
Grandey, and Todd Miller*

By: James E. Yavorcik  
James E. Yavorcik (0021546)  
Email: [jy@cubbon.com](mailto:jy@cubbon.com)  
Cubbon & Associates, Co., L.P.A.  
500 Inns of Court Building  
405 North Huron  
P.O. Box 387  
Toledo, Ohio 43697-0387

*Counsel for Defendant-Intervenor/Appellant  
Timothy E. Berta*

By: Douglas P. Desjardins  
Douglas P. Desjardins (0061899)  
Email: [dpd@transportinjurylaw.com](mailto:dpd@transportinjurylaw.com)  
Transportation Injury Law Group, pllc  
1717 N Street, NW, Suite 300  
Washington, DC 20036

*Counsel for Defendant-Intervenor/  
Appellant Geneva Ann Williams,  
individually, and as the Administrator of  
the Estate of Tyler Williams, Deceased*

By: David W. Stuckey / SRS  
David W. Stuckey (0016902)  
Email: [dstuckey@rcolaw.com](mailto:dstuckey@rcolaw.com)  
Robison, Curphey & O'Connell  
Four Seagate, Ninth Floor  
Toledo, Ohio 43604

*Counsel for Defendant-Intervenor/Appellant  
Caroline Arend, Administrator of the Estate of  
Zachary H. Arend, Deceased*

PROOF OF SERVICE

On December 22, 2009, a copy of the foregoing was sent by U.S. Mail to:

Steven B. Ayers,  
[sayers@cbjlawyers.com](mailto:sayers@cbjlawyers.com)  
Robert C. Buchbinder  
[rbuchbinder@cbjlawyers.com](mailto:rbuchbinder@cbjlawyers.com)  
Crabbe Brown & James LLP  
500 South Front Street, Suite 1200  
Columbus, Ohio 43215

*Counsel for American Alternative Insurance Corporation*

Daniel I. Graham, Jr.  
[dgraham@batescarey.com](mailto:dgraham@batescarey.com)  
Bates & Carey LLP  
191 North Wacker Drive  
Chicago, Illinois 60606

*Counsel for American Alternative Insurance Corporation*

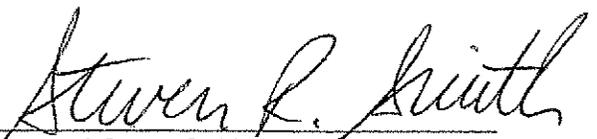
Michael Borer  
[mboreratty@bright.net](mailto:mboreratty@bright.net)  
125 West Main Street  
P.O Box 327  
Ottawa Ohio 45875  
*Counsel for Paul Niemeyer, Administrator of the Estate of Jerome Niemeyer, deceased*

D. John Travis  
[jtravis@gallaghersharp.com](mailto:jtravis@gallaghersharp.com)  
Gary Nicholson  
[gnicholson@gallaghersharp.com](mailto:gnicholson@gallaghersharp.com)  
Gallagher Sharp  
Sixth Floor – Bulkley Building  
1501 Euclid Avenue  
Cleveland, Ohio 44115

*Counsel for Federal Insurance Company*

Christine M. Bollinger  
[cb@hjlaw.biz](mailto:cb@hjlaw.biz)  
Hunt & Johnson, LLC  
400 W. North Street  
Lima, Ohio 45801

*Counsel for Executive Coach Luxury Travel, Inc.*

By:   
Counsel for Defendant-Intervenor/  
Appellant Feroen J. Betts, Administrator  
of the Estate of David J. Betts, Deceased

COURT OF APPEALS

09 NOV -9 PM 12:59

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

---

---

FEDERAL INSURANCE COMPANY,

PLAINTIFF-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,

PLAINTIFF-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:

*Janine T. Avila* for Appellant, Feroen J. Betts

*Steven B. Ayers and Daniel I. Graham, Jr.* for Appellees, American  
Alternative Insurance Corporation

*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

Case No. 1-09-17, 18

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 Intervenor’s first two assignments of error together. In these assignments of error, Intervenor argues 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, Intervenor argues 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.*, 3<sup>rd</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 Intervenor’s subpoena of Hartford’s underwriting file and its claims file. Intervenor’s third assignment of error is overruled.

Case No. 1-09-17, 18

{¶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

COURT OF APPEALS

09 NOV -9 PM 12:59

CLERK OF COURT  
COURT OF APPEALS  
100 S. HIGHWAY 100  
COLUMBUS, OHIO 43260

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

---

FEDERAL INSURANCE COMPANY,

PLAINTIFF-APPELLEE,

CASE NO. 1-09-17

v.

EXECUTIVE COACH LUXURY TRAVEL, ET AL.,

DEFENDANTS-APPELLEES,

-and-

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

JUDGMENT  
ENTRY

DEFENDANTS-INTERVENORS,  
APPELLANTS.

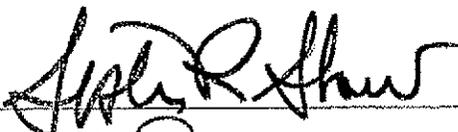
---

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

Case No. 1-09-17

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

09 NOV -9 PM 12:59

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

---

AMERICAN ALTERNATIVE  
INSURANCE CORPORATION,

PLAINTIFF-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.

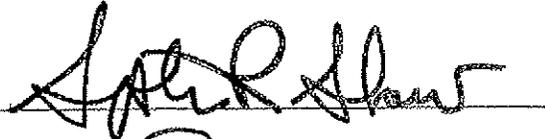
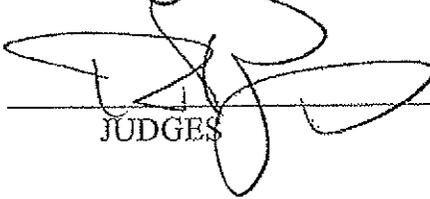
---

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

Case No. 1-09-18

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

COMMON PLEAS COURT  
FILED

2009 FEB 25 PM 2:35

GIMS 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	:	Consolidated Case No. CV-2008-0143
INSURANCE CORPORATION	:	
	:	
Plaintiffs,	:	Judge Richard K. Warren
	:	
v.	:	
	:	
EXECUTIVE COACH LUXURY, et. al.	:	
	:	
Defendants,	:	ORDER GRANTING
	:	PLAINTIFF AMERICAN
	:	ALTERNATIVE
	:	INSURANCE AND
and	:	PLAINTIFF FEDERAL
	:	INSURANCE COMPANY'S
FERON J. BETTS, etc., et. al.	:	MOTIONS FOR SUMMARY
	:	JUDGMENT
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-Interveners' Joint Motion for Summary Judgment and Opposition to Plaintiffs' Motions, and Plaintiffs' individual responses to Defendant-Interveners' Motion. All pending documents,

2009

2009 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

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).

(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

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.

Owms, 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

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.

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: