

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

Federal Insurance Company and  
American Alternative Insurance Corporation :  
 : Case No. 09-2307  
 :  
 :  
 Plaintiffs/Appellees, :  
 :  
 v. : On Appeal from the Allen County Court of  
 : Appeals, Third Appellate District,  
 : Case Nos. 1-09-17 and 1-09-18  
 Executive Coach Luxury Travel, Inc., *et al.* :  
 :  
 Defendants, :  
 :  
 and :  
 :  
 Feroen J. Betts, *etc., et al.*, :  
 :  
 Defendant-Intervenors/Appellants. :  
 :

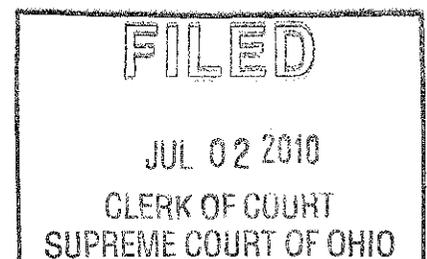
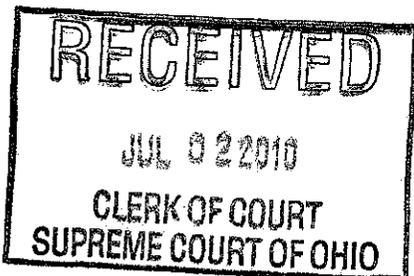
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**APPELLEE FEDERAL INSURANCE COMPANY'S MERIT BRIEF**

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## STATEMENT OF FACTS

**A. The appellants, injured in a charter bus accident caused by the bus driver's negligence, make the surprising assertion that the driver is an insured under the omnibus clause of Bluffton University's liability coverage essentially because Bluffton University's baseball coach (one of the appellants) accepted the driver selected by the charter service company.**

On March 2, 2007, Jerome Niemeyer ("Niemeyer"), driving a charter bus provided by his employer Executive Coach Luxury Travel, Inc. ("Executive"), mistook a left lane exit ramp on Interstate 75 north of Atlanta, Georgia, as just another lane of the highway. He was unable to stop the bus at the top of the exit ramp. The bus went across the highway overpass, rolled over a barrier wall, and plunged to the roadway below. He, his wife, and five Bluffton University baseball players on the bus were killed. Other Bluffton University players and coaches on the bus were injured. (Stipulation at paragraphs 14, 15, and 16).

No one has disputed that Executive and its employee, Niemeyer, were insureds under Executive's own liability insurance. Some of the coaches and players injured or killed in the accident (the appellants), though, seek additional liability coverage for Niemeyer under Bluffton University's policies.

The appellants do *not* offer any evidence that Bluffton University agreed (or had any intent) to insure Niemeyer or his employer Executive. Instead, the appellants make the surprising contention that a transportation provider, like Executive, need only ask whether its driver is "acceptable" to the customer to extend the customer's liability coverage to that driver. Here, Executive asked Bluffton University's baseball coach, James Grandey, Jr. (one of the appellants), whether Executive's employee, who had driven its charter bus on the baseball team's previous trips to Florida, was "acceptable." Coach Grandey told Executive that "Niemeyer was acceptable" (Grandey Tr. at pp.

46 and 70); and the appellants essentially assert that this is enough to make Niemeyer an insured under the omnibus clause of Bluffton University's liability coverage!

**B. The appellees, Bluffton University's umbrella and excess liability insurers, filed separate declaratory judgment actions denying that Bluffton University's liability coverage could be read to afford the charter service company's employee liability coverage under Bluffton University's policies.**

The omnibus clause of Bluffton University's liability coverage is contained in the "Who Is An Insured" section of the auto liability coverage of Bluffton University's primary policy, issued by the Hartford. The "Who Is An Insured" section of the Hartford policy is incorporated by Bluffton University's umbrella liability policy, issued by Appellee American Alternative Insurance Corporation ("AAIC"), and Bluffton University's excess liability policy, issued by Appellee Federal Insurance Company ("Federal"). Each of the appellees filed a declaratory judgment action against Niemeyer and Executive, denying that the omnibus clause of Bluffton University's policies could be read to afford Niemeyer liability coverage.

The appellees' actions were consolidated; and the appellants intervened. The Hartford agreed to be bound by whatever decision was reached in the consolidated action; and Bluffton University, originally named in AAIC's complaint for declaratory judgment, was voluntarily dismissed after it, too, agreed to be bound by whatever decision was reached in the consolidated action.

**C. The parties' contracts and the witnesses' undisputed testimony establish that Bluffton University hired Executive's charter service, *not* Executive's bus (an "auto"); and that Niemeyer was driving ("using") Executive's bus with Executive's, *not* Bluffton University's, "permission" at the time of the accident.**

Joint stipulations of fact, depositions of the key witnesses (James Grandey, Jr., Rick Stechschulte, Karen Lammers, and Marianne Tobe), and cross-motions for summary judgment were filed in the consolidated action. The parties acknowledged that the construction of Bluffton

University's insurance policies was a matter of law; and that there were no genuine issues of material fact in dispute.

1. **The omnibus clause of Bluffton University's liability coverage provides, "Anyone else while using with your [the named insured Bluffton University's] permission a covered 'auto' you [Bluffton University] own, hire, or borrow" is an "insured."**

The omnibus clause of Bluffton University's liability coverage is typical of most commercial omnibus clauses. It is contained in a standard ISO form, and provides, "Anyone else while using with your [the named insured Bluffton University's] permission a covered 'auto' you [Bluffton University] own, hire, or borrow" is an "insured."<sup>1</sup>

2. **Bluffton University hired Executive's charter service, *not* Executive's bus ("auto").**

The appellants do *not* assert that the bus driven by Niemeyer was owned or borrowed by Bluffton University. The parties agree that at the time of the accident Niemeyer was transporting the Bluffton University baseball team to games in Executive's charter bus pursuant to his employer's contract with Bluffton University.<sup>2</sup> The appellants assert that Bluffton University "hire[d]" Executive's bus when Bluffton University hired Executive's charter service; and that Bluffton University gave Niemeyer "permission" to drive ("use") the chartered bus (the "auto" Bluffton University purportedly "hire[d]") when Coach Grandey told Executive that its selection of Niemeyer was "acceptable." Bluffton University's and Executive's contract states, though, that Executive was

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<sup>1</sup> The appellants mistakenly assert in their brief that the omnibus clause at issue is unusual because "[m]ost omnibus clauses deal only with vehicles 'owned' by the named insured." (Appellants' Joint Merit Brief at p. 8). No basis is offered for the assertion, and none exists.

<sup>2</sup> Accordingly, there is no dispute that Niemeyer, while driving the Bluffton University players and coaches in Executive's charter bus to Florida, would be "[a]nyone else [someone other than Bluffton University] while using [driving] \* \* \* a covered 'auto' [a bus]." An "auto" is defined in Bluffton University's policies to include a bus; and "a covered 'auto'" is described to include "any 'auto.'"

Bluffton University's "transportation provider." The contract begins: "Thank you for choosing us for your transportation provider." (Exhibit 13 of Stechschulte Deposition, Lammers Deposition, and Tobe Deposition). The contract is explicit as to what Bluffton University is hiring. Bluffton University is hiring a "charter service," *not* a bus (an "auto"):

4. **ADDITIONAL CHARGES**: When at the request of the Chartering Party [Bluffton University], any change in service results in an increase in miles or hours to that specified on the charter service order furnished, an [ ] additional charge shall be made for all such additional service. Any change resulting in a reduction of charge will be subtracted from the estimated cost and will be refunded to the Chartering Party after completion of the trip. Tolls, highway fees, etc., will be separate and addition elements in the determination of any additional charges.

\* \* \*

6. **ARRIVAL TIME**: The time of arrival at starting point, stop-over point, destination, or return-to-point of origin cannot be guaranteed. Operators are carefully selected and have instructions to drive at all times at a speed within the limits prescribed by law and compatible with safe operation. Unusual road, traffic and weather conditions are beyond company control.

(Id. at paragraphs 4 and 6).

The president of Executive, Rick Stechschulte ("Stechschulte"), testified that Bluffton University "didn't lease the bus"; and that "[Executive] doesn't request customers to provide vehicles for [Executive's] drivers to operate." (Stechschulte Tr. at pp. 116-17, 119-20, and 134-35).

The bus Niemeyer was driving on March 2, 2007 actually was leased ("hire[d]") by Executive from Partnership Financial Services, Inc. ("PFS"). Pursuant to Executive's and PFS's lease agreement, Executive was to maintain (Lease at paragraphs 5, 6, and 7) and insure (paragraph 13)<sup>3</sup>

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<sup>3</sup>Paragraph 13 of the lease provided: "Lessee [Executive] shall maintain during the Lease Term of each Vehicle \* \* \* **Liability** insurance \* \* \* with limits of coverage as Lessor may require, but in no event less than \* \* \* \$5 million for Vehicles capable of transporting 9 or more passengers."

the bus; and Executive was *not* permitted to hire the bus out to others, e.g., Bluffton University (paragraph 19).<sup>4</sup>

Appellants mistakenly assert in their brief that “Bluffton rented motor coaches from Executive”; that “Coach Grandey contracted for a specific bus, Coach No. 2”; and that Executive was “not at liberty to use another bus.” (Appellants’ Joint Merit Brief at pp. 2 and 27). There *is no* evidence whatsoever that Bluffton University rented the bus involved in the March 2, 2007 accident, or that Bluffton University ever rented a bus or motor coach from Executive. The testimony is that Bluffton University contracted *only* charter service from Executive. Bluffton University had *no* separate contract whereby Executive loaned, rented, or leased its bus to Bluffton University; and pursuant to the charter service contract, Coach Grandey simply contracted for a bus that met Bluffton University’s needs, *i.e.*, a bus “with a DVD player” and with “enough room for 33 people.” (Grandey Tr. at pp. 44 and 75). Executive was *not* precluded from using *any* bus that satisfied Bluffton University’s needs. Indeed, Coach Grandey testified at his deposition that there were ~~were~~ *discussions* when he entered into the contract “about what specific bus was going to be used.” (Id. at p. 74). He was asked whether it made “any difference,” and he indicated that his only concern was that the bus met Bluffton University’s needs: “As long as it had enough room for 33 people.” (Id. at pp. 74-75).

It was Executive, *not* Coach Grandey or Bluffton University, who “selected” the bus that would transport Bluffton University’s players and coaches to Florida (Grandey Tr. at pp. 68, 71; Lammers Tr. at pp. 24-25 and 50; and Exhibit 13 of Stechschulte Deposition, Lammers Deposition, and Tobe Deposition under “ARRIVAL TIME”). Moreover, Executive’s written contract with

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<sup>4</sup>Paragraph 19 of the lease provides: “LESSEE [Executive] SHALL NOT \* \* \* SUBLET \* \* \* ANY OF THE VEHICLES LEASED HEREUNDER \* \* \* TO ANY PARTY WITHOUT THE WRITTEN CONSENT OF THE LESSOR [PFS].”

Bluffton University provided under "EQUIPMENT" that a "**replacement bus may be of a different type.**" (Emphasis added.) (Exhibit 13 of Stechschulte Deposition, Lammers Deposition, and Tobe Deposition).

Coach Grandey testified that Bluffton University *could have* hired vans ("autos") for the baseball team's trip to Florida. He once considered renting ("hir[ing]") vans for the Florida trip, but he and his players would then have had to drive the vans, and he opted instead to use Executive's charter service (Grandey Tr. at pp. 33 and 118), realizing that neither he nor his players would be permitted to drive Executive's charter bus:

Q. And suppose that the [Executive] driver agreed not to continue driving, would you then get behind the wheel?

A. Absolutely not.

Q. Why not?

A. Because I'm not certified to drive a charter bus.

Q. You wouldn't expect a student to get behind the wheel, would you?

A. No.

Q. Would you call Executive Coach?

A. Yes.

Q. Why would you call Executive Coach?

A. **It's their bus and their company.**

(Emphasis added.) (Id. at p. 106).

Under Bluffton University's and Executive's charter service contract, Executive would maintain possession and control of its bus:

**9. OBJECTIONABLE PERSONS:** The Company \* \* \* reserves the right to refuse to transport persons, under the influence of intoxicating liquor or drugs, or who are incapable of taking care of themselves or whose conduct is such as to be objectionable to other persons.

**10. CONDUCT OF PASSENGERS:** Passengers shall not interfere with the operator in the discharge of his duty or tamper with any apparatus or appliance on the bus.

**11. DECORATIONS:** Decorations to buses must be approved by the Company \* \* \*.

(Exhibit 13 of Stechschulte Deposition, Lammers Deposition, and Tobe Deposition at paragraphs 9, 10, and 11).

Consistent with the provisions of both Executive's and Bluffton University's service contract and Executive's and PFS's lease agreement, Executive:

- provided/selected the two operators who had driven the charter bus from Bluffton University prior to the March 2, 2007 accident: Denny Michelsen and Niemeyer;
- hired, selected, and was to pay, Denny Michelsen, Niemeyer, and Mitch Sadler (a third driver who would have driven the bus back from Florida);
- inspected, maintained, and insured the charter bus;<sup>5</sup> and
- furnished all fuel and oil for the bus.

(Grandey Tr. at pp. 37-38, 45-46, 48, 57, 65-66, 68-71, 74-78, 81, 83-84, and 94; Stechschulte Tr. at pp. 24, 33-36, 39-40, 42, 54, 59, 68, 106, 112-13, 117, and 119-20; Lammers Tr. at pp. 17, 26-28, 33, and 53-55; and Tobe Tr. at pp. 22, 26-28, 47, and 60).

**3. Executive granted Niemeyer permission to use Executive's bus.**

Although Coach Grandey told Executive "that Mr. Niemeyer was acceptable," Coach Grandey testified that it was Executive who gave Niemeyer "permission to use the bus":

- Q. If I understand the conversation you had with Marianne [Tobe], Executive Coach was proposing Mr. Niemeyer as a driver, correct?
- A. Uh-huh, yes.
- Q. Did they ever use the words that they were going to give him permission to use the bus?
- A. No.
- Q. But you understood that that's what they [Executive] were going to do?
- A. Yes.

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<sup>5</sup> At the time of the accident, Executive had its own insurance policies providing \$5 million of liability coverage on the bus. (Stechschulte Tr. at pp. 59-60; and Lammers Tr. at pp. 54-55).

Q. You said that Mr. Niemeyer was acceptable to you?

A. Yes.

(Id. at p. 70).

Executive's office assistant, Marianne Tobe, testified at her deposition that it was *Executive* who provided/selected the three drivers who were to take Bluffton University's players and coaches to and from their games in Florida: Denny Michelsen, Niemeyer, and Mitch Sadler; and that the only reason she asked Coach Grandey about Niemeyer is because Niemeyer had driven the team's charter bus in Florida the previous two years. (Tobe Tr. at pp. 26-28).

Stechschulte explained that the customer had the "right to ask for any driver they wanted" and that Executive would "try to accommodate [the customer's] request" because Executive "wanted to keep the customer happy." (Emphasis added.) (Stechschulte Tr. at pp. 72-75).

4. **Bluffton University did not and could not grant Niemeyer permission to use his employer's bus; Bluffton University could only grant or deny its own use of Executive's bus – whether Bluffton University's players would get on the bus and whether Bluffton University would continue to do business with Executive.**

Coach Grandey testified that his control was over his players, *not* over Executive's bus:

Q. Let's turn to Request for Admission No. 11, please. Would you read that?

A. Admit that as coach of Bluffton University baseball team you had the right to grant or deny Executive Coach or Jerome Niemeyer permission to use the bus involved in transporting the Bluffton University to Sarasota, Florida in March 2007.

Q. And your answer is admit, correct?

A. Yes.

Q. What's the basis for that statement?

A. If I felt that Jerry [Jerome Niemeyer] was in any way impaired or not able to drive I could stop him from driving or not – **I could tell my players not to get on the bus and then obviously not go anywhere.**

\* \* \*

Q. **And you said that you certainly could instruct your players not to get on the bus?**

A. **Correct.**

Q. And you earlier said that if the driver was incapacitated or unfit you could call Executive Coach, correct?

A. Yes.

Q. **You would not drive the bus yourself?**

A. No.

(Emphasis added.) (Id. at pp. 120-21).

The president of Executive acknowledged that Coach Grandey was only "*in charge of his own people*, giving him the authority to make sure that *his people* are safe at all times." (Emphasis added.) (Steckschulte Tr. at p. 100).

**5. Bluffton University's use of Executive's bus (and acceptance/direction of Executive's driver) was subject to the permission (accommodation) that Executive extended Bluffton University to use Executive's bus.**

Steckschulte testified that any use Bluffton University (or any Executive customer) might make of Executive's bus was always subject to Executive's exclusive control of the bus. He affirmed that customers were not permitted to drive the company's motor coaches:

Q. Customers didn't drive Executive Coach busses, did they?

A. No.

\* \* \*

Q. And it was the company's policy that the drivers were the only one who could operate the company busses, correct?

A. Under what conditions?

Q. Transporting customers.

A. Yes.

Q. Executive Coach's policy was that drivers were not authorized to allow a customer to operate a company bus, correct?

A. Yes.

\* \* \*

Q. And the seventh point down [under "Employee Rules of Conduct, Disciplinary Action"] is, "Using Company . . ." Would you read that please?

A. "Using company property without proper authorization, including permitting an unauthorized person on board a company vehicle or unauthorized person to enter company property."

Q. This, in the context of our previous discussion, would prohibit an Executive Coach driver from allowing a customer to operate the bus, correct?

A. Yeah, there would never be any customer operating the bus other than employees.

(Stechschulte Tr. at pp. 38 and 44-46).<sup>6</sup>

Customers could only “tell [Executive] what they wanted.” Whether Executive or its driver “accommodated [customers’] request” and did “what they wanted” was dependent upon how far Executive and its driver would go “to keep the customer happy.” (Id. at pp. 46, 51, and 72-75). What a customer might “want” would *not* require Executive, though, to forego its use of the bus to transport other customers. Executive and its driver would only do what they could “accommodate”:

Q. So are you saying that you wouldn’t expect your driver to call [Executive] unless it was going to be a problem with another schedule that would be interfered with?

A. I wouldn’t expect it, not if the driver knew that he didn’t have to have the bus back. If the driver knew it had to be back on a certain time, if a chartering client asked us to do something out of the normal, we usually pay attention to what they want and do what they want. Now, if it goes out of the realm of whether we can accommodate that or not and the driver needs to check back, it isn’t standard practice that they have to call [Executive Coach], they do if they think it’s going to create a problem.

(Id. at pp. 89-90).

Karen Lammers, the vice-president of Executive, testified that the customer’s use of Executive’s bus (and any acceptance/direction of Executive’s driver) was always subject to the permission Executive granted its driver and its customer to use the motor coach (“it was up to Executive Coach to accept or reject [the customer’s] request”):

Q. And you testified that within reason, there could be some deviation from the itinerary; but if it was anything substantial, you would expect the driver to call you, correct?

A. Correct, because we would have to, like additional charges [sic]. I mean, if they wanted us to run a hundred miles, 200, whatever, they would have to call us just in case we would have to have additional mileage on it.

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

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<sup>6</sup> As discussed in Appellee AAIC’s Merit Brief much of the testimony of Stechshulte upon which the appellants rely is speculation. Stechshulte’s testimony that was not speculation, though, establishes that Bluffton University’s use of Executive’s bus was always subject to Executive’s exclusive control of the bus.

A. Yes.

\* \* \*

Q. (By Mr. Travis) Now, you were asked one question about the customer not wanting a driver such as Mr. Niemeyer to continue to drive, and you said you would expect the customer to call Executive Coach, correct?

A. Yes.

Q. Why is that?

A. If they don't – you mean when the driver was on the trip?

Q. Yes.

A. And they decide they don't want?

Q. Yes.

A. Well, if he was, for some reason if he was thinking that he was feeling ill or some reasonable amount [sic] to not have him drive, he just can't say no because I would have to get another driver down there. So they would have to call the office and say, you know what, right now I really don't want Jerry Niemeyer because of these reasons to drive, but ...

Q. But you would honor the request because you want to take care of the customer, correct?

A. Yes.

Q. **But whether to take Niemeyer off the trip or not is Executive Coach's decision?**

A. Yes.

(Emphasis added.) (Lammers Tr. at pp. 97-98 and 100-01).

**D. The trial court declared that Niemeyer was not an insured under the omnibus clause of Bluffton University's liability coverage, and a unanimous court of appeals affirmed.**

The trial court "reviewed the plain and ordinary meaning of the language in the Hartford policy"; and found that "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 [Niemeyer] in this instance would provide an unreasonable interpretation of the words of the policy." (Order Granting Plaintiff American Alternative Insurance and Plaintiff Federal Insurance Company's Motions for Summary Judgment at p. 6). The court held that "[r]easonable minds could come to but one conclusion in the interpretation of [the omnibus clause], and that conclusion is adverse to [Niemeyer and his employer Executive]"; that "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.” (Id.). The trial court granted the appellees’ separate motions for summary judgment, and overruled the appellants’ joint motion because “Niemeyer’s employment and use of the Motor Coach was with [Executive’s], and NOT Bluffton University’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’s], and NOT Bluffton University’s permission. The testimony of [Bluffton University’s baseball coach] Grandey, [Executive’s president] Stechschulte and [Executive’s vice-president] Lammers’ [sic] supports the affirmation that Bluffton University’s use of the motor coach and any authority Bluffton had over the motor coach driver was always subject to the permission Executive Coach gave its driver and its customer Bluffton University to use the motor coach. Additionally, Bluffton University could not make any use of the motor coach that Executive Coach did not permit Jerome Niemeyer or Bluffton University to make of the motor coach. Any asserted “authority” a customer had to grant or deny Executive Coach’s driver a particular use of the company’s motor coach was only that granted by Executive Coach, and therefore it cannot be said that Bluffton, or an agent of Bluffton, such as Coach Grandey gave permission to Niemeyer to drive the bus.

(Id. at pp. 4-5).

Because the trial court “decided that permission was not given by Bluffton,” the trial court found it was unnecessary to decide whether Bluffton University owned, hired, or borrowed the bus. (Id. at p. 5). The trial court held, though, “that Bluffton College could not be found to have owned, hired, or borrowed the vehicle at the time of the accident” because “Bluffton College had contracted with Executive Coach for services and the bus was only incident to said contract”; and it was Executive who “selected the particular Motor Coach from [the motor coach owner/lessor] PFS to provide transportation incidental to the charter service.” (Id. at pp. 5-6).

The court of appeals unanimously affirmed the trial court’s decision:

Following the approach set forth in *Davis [v. Continental Ins. Co.]* (1995),

102 Ohio App.3d 82, 656 N.E.2d 1005], 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.

*Fed. Ins. Co. v. Exec. Coach Luxury Travel*, Allen App. Nos. 1-09-17, 1-09-18, 2009-Ohio-5910, at ¶39.

## ARGUMENT

### **Response to Appellants’ Propositions of Law Nos. 1, 2, and 3: The Omnibus Clause of a Charter Service Customer’s Policy Does Not Afford the Charter Service or Its Driver Liability Coverage for Any Bodily Injury and Wrongful Death Claims that May Be Brought against Them.**

#### **A. Summary of Arguments**

There is *no* evidence or case law before the Court that supports any of the appellants’ three propositions of law, or the appellants’ general contention that a transportation provider (e.g., a charter, limousine, or freight service) is an insured under the omnibus clause of a customer’s policies – that the transportation provider is “using with [the customer’s] permission a covered ‘auto’ [the customer] \* \* \* hire[s].”

Under Ohio law, an omnibus clause must be read reasonably, in its entirety, and in favor of the named insured; therefore, the named insured must have possession and control of the auto (1) to hire *the auto*; and (2) to grant anyone else permission to use *the auto*. Looking at the language of the clause to determine the intent of parties, the named insured has to hire *the auto*, and not merely *the service* of another, because a named insured who merely contracts for transportation service does

*not* obtain possession and control of the transportation provider's vehicle; does *not* assume responsibility or liability for the acts or omissions of the transportation provider (an independent contractor); and has *no* logical reason to extend the named insured's (the customer's) liability coverage to the transportation provider or its driver.

The appellants agree that the omnibus clause under consideration must be read reasonably, in its entirety, and in favor of the named insured (Appellants' Joint Merit Brief at p. 9); and the appellants are unable to cite a single case in which an omnibus clause of a customer's liability coverage has been read to extend liability coverage to a transportation service's driver. The appellants argue, though, that Ohio courts do *not* consider, as other courts do, "the concept of 'control'" in determining "whether a named insured 'hired' a vehicle and gave 'permission' to the driver to use it" (Id. at p. 7); and that Niemeyer is an insured under the omnibus clause of Bluffton University's liability coverage essentially because his employer asked whether he was "acceptable" to Bluffton University.

The appellants argue alternatively that if control is necessary under Ohio law for Bluffton University to "hire" Executive's bus and to grant Niemeyer "permission" to use his employer's bus, the evidence that Executive and its drivers sought to accommodate its customer's and Coach Grandey's wishes, in particular, is all the evidence the appellants need to establish Bluffton University's control of Executive's bus. Indeed, the appellants now assert for the first time that Executive "ced[ed] the final decision on who would drive the bus" – that Executive "transferred the ability to grant permission to Coach Grandey." (Appellants' Joint Merit Brief at p. 29).

The appellants do *not* cite any case that supports their conclusion that Executive's and its drivers' accommodation of Coach Grandey's wishes is evidence of Bluffton University's control of

Executive's bus, or a "transfer" of Executive's control of its bus to Bluffton University; or is any evidence whatsoever that Bluffton University "hire[d]" Executive's bus, and granted Niemeyer "permission" to use his employer's bus. The appellants only cite cases where the court determined that *no* coverage was owed the driver; the auto was actually *loaned, rented or leased* to the named insured; or the liability coverage was written broadly to afford liability coverage for *any contracted use* of a covered auto.

The appellants primarily rely upon *Westfield Ins. Co. v. Nationwide Mut. Ins. Co.* (1993), 99 Ohio App.3d 114, 650 N.E.2d 1, in support of their argument that Ohio does not require that Bluffton University have control of Executive's bus to hire the bus, or to grant Niemeyer permission to use his employer's bus. There a city school student was struck by an uninsured motorist after he got off a regional transit bus. The court did *not* address whether the city (the named insured) hired the regional transit *service* or the regional transit *bus*. The court was *not* concerned with whether the driver of the regional transit bus was an insured under the omnibus clause of the city's liability coverage. The court determined that the city's insurer owed payment of the student's bodily injury damages because *the student was an insured* under the city's *uninsured motorist coverage by operation of law*.

It does *not* follow from *Westfield Ins. Co.*, or any of the decisions the appellants cite, that the omnibus clause of Bluffton University's policies may be read under Ohio law to extend *liability coverage* to Niemeyer, *an independent contractor*. Although Appellants' Proposition of Law 1 suggests that it is significant that the bus was "used to transport students," Ohio courts do *not* determine who is an insured under a policy's *liability coverage* based on who sustained damages. A transportation provider's driver is *not* an insured under the omnibus clause of his customer's

liability coverage depending on whether his negligence causes damages to his customer/passengers or to other persons on the roadway.

Consistent with other state courts, an omnibus clause is read by Ohio courts to require that the named insured have *control* of the auto (1) to hire the auto; and (2) to grant anyone else permission to use the auto. In *Buckeye Union Cas. Co. v. Royal Indemn. Co.* (1963), 120 Ohio App. 429, 203 N.E.2d 121, and *Combs v. Black*, Franklin App. No. 05AP-1177, 2006-Ohio-2439, the courts considered whether liability coverage was owed under the omnibus clause of a business auto policy. In each case, the court held that liability coverage was *not* owed the driver of the vehicle *because the named insured did not have control of the motor vehicle to give the driver permission to use the auto.*

The appellants offer evidence showing only that Executive and its drivers sought to accommodate its customer's and Coach Grandey's wishes. The appellants do *not* offer any case law that supports a conclusion that Executive's and its drivers' accommodation of Coach Grandey, and his resulting approval of Niemeyer, and direction of Niemeyer, is evidence that Bluffton University "hire[d]" Executive's bus or that it was Bluffton University, not Executive, who granted Mr. Niemeyer "permission" to use its bus.

The trial court correctly concluded, "[Executive] at all times maintained 'possession and control' of the motor coach, including at the time of the accident." (February 25, 2009 Order at p. 5). Bluffton University could only grant or deny its *own* use of Executive's bus – whether Bluffton University's players got on the bus, and whether Bluffton University continued to do business with Executive. It is undisputed that:

- "Bluffton University could not make any use of the motor coach that [Executive] 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’s] driver a particular use of the company’s motor coach was only that granted by [Executive], 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”;
- “Bluffton had no authority to terminate Niemeyer’s use of the [motor] coach[,] nor a financial interest in the [motor] coach”;
- “Bluffton \* \* \* was exposed to no liability arising out of the use of the [motor] coach nor a right to control its use”; and
- Bluffton University did not hire the bus because Bluffton University “had contracted with [Executive] for services and the bus was only incident to said contract.”

(Id. at pp. 5-6).

Following the approach set forth in *Davis v. Continental Ins. Co.* (1995), 102 Ohio App.3d 82, 656 N.E.2d 1005, the court of appeals properly affirmed the trial court’s decision: “reasonable minds could not differ in concluding that the bus and driver were ‘hired’ by [Executive] and not Bluffton, and were operating with the ‘permission’ of [Executive] and not Bluffton within the meaning of those terms as used in the insurance contract.” *Fed. Ins. Co. v. Exec. Coach Luxury Travel*, 2009-Ohio-5910 at ¶39.

This Court, therefore, should dismiss the appellants’ appeal as improvidently allowed, or affirm the lower court decisions for all the reasons the appellees stated below, the trial court and the court of appeals set forth in their decisions, and the other courts in Ohio and across the country have held, that transportation providers (e.g., charter, limousine, or freight services) are *not* insureds under their customers’ liability coverage.

**B. Ohio law requires that an omnibus clause be reasonably read in its entirety and in favor of the contracting parties to require that the named insured have possession and control of an auto (1) to hire the auto; and (2) to grant anyone else permission**

**to use the auto.**

*Buckeye Union Cas. Co. v. Royal Indemn. Co.* (1963), 120 Ohio App. 429, 203 N.E.2d 121, and *Combs v. Black*, Franklin App. No. 05AP-1177, 2006-Ohio-2439, are the two Ohio cases that are squarely on point here. In these two cases the courts considered whether liability coverage was owed under an omnibus clause of a business auto policy. In each case, the court held that liability coverage was *not* owed the driver of the vehicle because the named insured did not have possession or control of the motor vehicle to give the driver permission to use the auto. In *Buckeye Union Cas. Co.*, the Ohio court of appeals found that:

Since it is the transfer of *possession and control* \* \* \* that raises the implication [of permission], and since [the named insured] Connell did not transfer *control or possession* of this car to [the driver] Zum, there is no factual basis for implied permission from Connell to Zum.

(Emphasis added.) *Id.* at 435. In *Combs*, the Ohio court of appeals acknowledged that:

“Mere directions as to where to load and deliver are not sufficient to create a question of fact as to *control*.” *Cincinnati Ins. Co. v. The Continental Cas. Co.* (Dec. 6, 1995), Hamilton App. C-40884, 1995 Ohio App. LEXIS 5325, citing, *Hamlin v. McAlpin Co.* (1964), 175 Ohio St. 517, 196 N.E.2d 781. Absent some degree of *control* over the vehicle, [the named insured] Tanner did not have the requisite authority from [the vehicle owner/employer] Hucle to grant [the driver] Black express or implied permission to use the vehicle.

(Emphasis added.) *Id.* at ¶18.

In *Buckeye Union Cas. Co.*, liability coverage was sought under the omnibus clause of a Royal policy issued to Jim Connell Chevrolet (“Connell”). Zum’s Auto Sales (“Zum”) owned the auto involved in the accident, and its employee was driving the car, but the plaintiff asserted that Zum’s employee was driving the car with Connell’s permission because Zum had just purchased the car from Connell. The Ohio court of appeals stated that there was “no factual basis for implied

permission from [Royal's named insured] Connell to Zum." Id. at 435. The court of appeals explained that:

If title, possession and control had passed to the vendee [Zum], it could no longer be said \* \* \* "that the person using [the car] did so with the *permission* of the named insured." The use is as of right thereafter \* \* \*.

(Emphasis sic.) Id. The court of appeals concluded, "[t]he policy of the defendant Royal Indemnity Insurance Company issued to Connell as the named insured was, therefore, not in effect as to Zum or those beyond him [Zum's employee-driver]." Id.

In *Combs*, Owners Insurance Co. ("Owners") issued a policy to Tanner Construction ("Tanner"). Tanner hired Hucle Concrete Construction ("Hucle") to do some concrete work. Wayne Black, an employee of Hucle, was hauling broken concrete away from a porch Tanner was replacing when he was involved in a motor vehicle accident. The appellants Frances and Tanita Combs suffered bodily injuries in the accident. They argued that Wayne Black (the independent contractor's employee) was insured under the omnibus clause of his customer Tanner's policy. In *Combs*, the Ohio court of appeals recognized that:

An insurance policy is a contract between the insurer and the insured. *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St.3d 107, 15 Ohio B. 261, 472 N.E.2d 1061. Therefore, we must determine the intent of the parties to the contract at the time it was entered into:

An insurance policy constitutes a contract, its terms must be given a reasonable construction, and an ambiguity which is created by giving a strained or unnatural meaning to phrases or by mere casuistry does not constitute an ambiguity requiring construction.

*Yeager v. Pacific Mut. Life Ins. Co.* (1956), 166 Ohio St. 71, 139 N.E.2d 48, paragraph two of the syllabus. Historically, courts have looked to the language of the insurance contract to determine the intent of the parties entering into the contract. "Words and phrases used in an insurance policy must be given their natural and commonly accepted meaning." *Gomolka v.*

*State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-168, 436 N.E.2d 1347. This rule was further upheld in *U.S. Fidelity & Guarantee Co. v. Lightning Rod Mut. Ins. Co.* (1997), 80 Ohio St.3d 584, 197 Ohio 311, 687 N.E.2d 717, and *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380.

Id. at ¶10. The court, therefore, rejected the appellants' argument that Hucle's employee was covered under Tanner's liability coverage:

Neither the factual circumstances of this case nor the clear and unambiguous language of the insurance contract provide coverage for Black under Tanner's policy. It is clear from the facts that Black was [the independent contractor] Hucle Concrete's employee, not [the customer] Tanner's employee. Black was not using Hucle's truck for Tanner's business at the time of the accident. Black was using Hucle's truck pursuant to his employment with Hucle and Hucle's subcontract with Tanner. Tanner had no authority to give Black permission to use [the independent contractor's] Hucle's truck. Black was simply not covered by Owners [the customer's liability insurer] at the time of the accident.

Id. at ¶20.

In this case, the trial court and court of appeals applied the very same rules of contract interpretation,<sup>7</sup> and correctly concluded that Executive "at all times had 'possession and control' of the motor coach, including at the time of the accident"; and, therefore, "Niemeyer was not using the Motor Coach with permission of Bluffton College, but rather with the permission of an Independent Contractor, Executive"; and "Bluffton College could not be found to have \* \* \* hired \* \* \* the vehicle at the time of the accident." (Order Granting Plaintiff American Alternative Insurance and Plaintiff Federal Insurance Company's Motions for Summary Judgment at pp. 5-6). As the court of appeals stated: "[R]easonable minds could not differ in concluding that the bus and driver were 'hired' by [Executive] and not Bluffton, and were operating with the 'permission' of [Executive] and

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<sup>7</sup>The trial court cited these well-established rules of contract interpretation at pp. 3-4 of its order; and the court of appeals cited them at ¶23.

not Bluffton within the meaning of those terms as used in the insurance contract.” *Fed. Ins. Co. v. Exec. Coach Luxury Travel*, 2009-Ohio-5910 at ¶39.

**C. Consistent with Ohio law, a transportation provider’s driver is not an insured under the omnibus clause of his customer’s liability coverage.**

Courts across the country, consistent with Ohio law, have rejected the notion that an “auto” only being used pursuant to a service contract with the named insured – and not in possession or control of the named insured – is “hire[d]” by, or “us[ed] with permission” of the named insured. In *United States Fid. & Guar. Co. v. Heritage Mut. Ins. Co.* (C.A.7, 2000), 230 F.3d 331, the USF&G policy contained the same omnibus clause before this Court. The policy was issued to Irving Materials, Inc. (“IMI”). IMI contracted V&S Transport to transport materials. A V&S employee, Charles Oldham, was involved in a motor vehicle accident that caused another’s death, and V&S sought liability coverage pursuant to the omnibus clause of the USF&G policy. The district court rejected the argument that at the time of the accident Oldham was “using with your [IMI’s] permission a covered ‘auto’ [IMI] \* \* \* hire[d]” and granted USF&G a summary judgment declaring that USF&G did not owe defense or indemnity in the wrongful death suit brought against V&S and Oldham. *Id.* at 333. The court of appeals affirmed the district court’s decision. Consistent with Ohio law, the court found that:

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

*Id.* The court of appeals then concluded that:

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

Id. at 335.<sup>8</sup>

In *Transport Indem. Co. v. Liberty Mut. Ins. Co.* (C.A.9, 1980), 620 F.2d 1368, 1371-72, the court observed that:

Courts have \* \* \* attempted to draw a line between mere service contracts, involving independent contractors, and “truck and driver” situations in which the insured is viewed as having contracted for the use of the automobile. It has thus been stated that “for a vehicle to constitute a hired automobile, there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use or control.” *Spro v. Hartford Ins. Co.* [(C.A.5, 1979), 594 F.2d 418, 422].

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

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

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

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<sup>8</sup> Accord *Liberty Mut. Fire Ins. Co. v. Canal Ins. Co.* (C.A.5, 1999), 177 F.3d 326; *S. Gen. Ins. Co. v. Alford* (1998), 234 Ga. App. 615, 507 S.E.2d 179; *Robert Cole Trucking Co. v. Old Republic Co.* (1985), 486 N.Y.S.2d 527, 107 A.D.2d 1055; *Pub. Serv. Mut. Ins. Co. v. White* (1949), 4 N.J. Super. 523, 68 A.2d 278.

– has been satisfied.” Id. at 1321.<sup>9</sup>

**D. The Court would have to violate Ohio’s rules of contract interpretation to conclude that Niemeyer is an “insured” under the omnibus clause of Bluffton University’s liability coverage.**

**1. The omnibus clause of Bluffton University’s liability coverage must be read reasonably.**

The Court would have to violate Ohio’s rules of contract interpretation to adopt the appellants’ interpretation of the omnibus clause of Bluffton University’s liability coverage – it is an *unreasonable* interpretation of that clause. Bluffton University has no liability exposure for the acts or omissions of an independent contractor, and, thus, has no reason to extend Bluffton University’s liability coverage to the independent contractor’s employee.

“When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶11. “A court \* \* \* is not permitted to alter a lawful contract by imputing an intent contrary to that expressed.” Id. at ¶12. In *Galatis*, this Court affirmed that:

“Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy.” *Morfoot v. Stake* (1963), 174 Ohio St. 506, 23 Ohio Op. 2d 144, 190 N.E.2d 573, paragraph one of the syllabus.

Id. at ¶14. Accord *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, at ¶8.

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<sup>9</sup> Accord *Hardware Dealers Mut. Fire Ins. Co. v. Holcomb* (W.D.Ark. 1969), 302 F.Supp. 286; *Travelers Indemn. Co. v. Nationwide Mut. Ins. Co.* (W.D.Va. 1964), 227 F.Supp. 958; *Weber v. State Farm Mut. Auto Ins. Co.* (2007), 216 Ore. App. 253, 172 P.3d 660; *Sachtjen v. Am. Family Mut. Ins. Co.* (Colo. 2002), 49 P.3d 1146; *Alabama Farm Bur. Mut. Cas. Ins. Co. v. Govt. Emp. Ins. Co.* (1970), 286 Ala. 414, 240 So.2d 664.

The appellants have asserted that Bluffton University's policies should afford liability coverage to Niemeyer because the Court would do "no injustice to the parties' intent under the policies by finding coverage here." (Intervenors' Brief in Opposition at p. 20). They argue: "The Hartford Policy clearly contemplated coverage of vehicles not owned by the University" (Appellants' Joint Merit Brief at p. 6); that "[the omnibus] clause reflects the parties' intention to broaden coverage beyond just Bluffton University employees and beyond just Bluffton University owned vehicles" (Id. at p. 8); and that "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." (Id. at p. 14).

However, Coach Grandey did *not* rent Executive's bus. Coach Grandey considered renting vans from Hertz or Avis, *which Coach Grandey, other Bluffton University employees, or students would have driven* to Florida, but ultimately he chose to hire Executive's *charter service* – to have someone else (an independent contractor) drive the team to Florida. The "hired" auto provisions of the broad form endorsement of the Hartford Policy, referenced at page 14 of Appellants' Joint Merit Brief, would apply to cover any negligent operation of a van *rented by Coach Grandey and driven by Bluffton University's employees or students* ("anyone using with [Bluffton University's] permission an 'auto' [Bluffton University] \* \* \* hire[s]"). However, Bluffton University's liability coverage does *not* extend here – where a transportation provider uses its vehicle and its employees to transport Bluffton University's baseball team.

As this Court found in *Cook v. Kozell* (1964), 176 Ohio St. 332, 336, 199 N.E.2d 566, it would defy reason to extend liability coverage here. In *Cook*, at 336, this Court explained: "It would make [the insurer] liable for \* \* \* a hazard not covered by the policy, and the [named insured] has

no interest in covering \* \* \*.”

The notion that an employee of a transportation service is afforded liability coverage under the omnibus clause of his customer’s policy has been uniformly rejected across the country because it would do an injustice to the contracting parties’ intent. In *Fireman’s Fund Ins. Co. v. Allstate Ins. Co.* (1991), 234 Cal. App.3d 1154, 1168, 286 Cal. Rptr. 146, the court found: “[T]o deem [the transportation provider] Richardson Trucking to be using its own vehicle with [the customer] Leaseway/Better Home’s permission would strain the plain meaning of the words and be contrary to the construction given similar terms in the authorities cited”; and in *Toops v. Gulf Coast Marine Inc.* (C.A.5, 1996), 72 F.3d 483, 489, the court said: “[N]o reasonable corporation would pay premiums to insure third-parties against risks for which the corporation could not be liable.”

If this Court agrees with the appellants’ interpretation of the *standard* omnibus clause of Bluffton University’s policies – and reaches a result contrary to every cited decision where the issue has been considered – this Court would embark Ohio on the same sort of misguided path the courts took several years ago as a result of the decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292, overruled by *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849 at ¶11.<sup>10</sup> The appellants might even seek liability coverage for Niemeyer from every passenger riding the bus because, in the appellants’ view, “Niemeyer was driving the bus with the permission of Bluffton

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<sup>10</sup> The omnibus clause at issue is so common that many of the cases cited here involve the identical language: “using with your permission a covered ‘auto’ you own, hire, or borrow.” See *Avalos v. Duron* (C.A.10, 2002), 37 Fed. Appx. 456, 458; *United States Fid. & Guar. Co. v. Heritage Mut. Ins. Co.* (C.A.7, 2000), 230 F.3d 331, 333; *Liberty Mut. Fire Ins. Co. v. Canal Ins. Co.* (C.A.5, 1999), 177 F.3d 326, 335; *Toops v. Gulf Coast Marine Inc.* (C.A.5, 1996), 72 F.3d 483, 486; *Fetisov v. Vigilant Ins. Co.* (July 25, 2006), N.J. Super. No. A-0828-04T2, at \*3; *Earth Tech, Inc. v. United States Fire Ins. Co.* (E.D.Va. 2006), 407 F.Supp.2d 763, 766.

University, Executive Coach, and every person riding the bus.” (Intervenors’ Brief in Opposition at p. 15).

In *Galatis*, at ¶19, this Court recognized that the *Scott-Pontzer* rationale stood “in stark contrast with decisions of the vast majority of states”; and that in *Seaco Ins. Co. v. Davis-Irish* (C.A.1, 2002), 300 F.3d 84, 87, *Scott-Pontzer* was labeled as anomalous for consciously departing from the tenet that the intent of the parties controls the interpretation of a contract. This Court in *Galatis*, at ¶20, declared: “The general intent of a motor vehicle insurance policy issued to a corporation is to insure the corporation as a legal entity against liability arising from the use of motor vehicles.” This Court stated that:

The employee in *King* acted on behalf of the corporation while operating the vehicle. This is why we found the employee to be “you.”

Id. at ¶31. This Court held: “We cannot, however, extend this coverage to an employee outside the scope of employment.” Id. at ¶32

Applying the Court’s sound reasoning in *Galatis*, Niemeyer and his employer Executive are *not* insureds under the liability coverage of Bluffton University’s policies. Niemeyer and Executive were *not* acting on behalf of Bluffton University. Executive, an independent contractor, and its employee were acting solely on behalf of Executive – “the bus was used a hundred percent in the business of Executive” (Stechschulte Tr. at p. 31) – and the appellees should not be made liable for a hazard not covered by their policies (the alleged negligence of an independent contractor). The appellees’ insured, Bluffton University, has no interest in covering a charter/transportation service and its employee for liability which the independent contractor and its employee caused through the negligent operation of its bus. Such coverage could only result in higher insurance premiums for

Bluffton University and/or loss of available coverage for its own or its employees' potential liability.

**2. The omnibus clause of Bluffton University's liability coverage must be read in its entirety.**

The appellants ask that the omnibus clause of Bluffton University's liability coverage – a provision found in most commercial auto policies – be read *not* in its entirety (*not* in context); and that the term “hire” be read as if it stood alone, rather than in the context it is used in the policy. The appellants want the Court to ignore that:

- the omnibus clause describes an insured as one who uses with the named insured's permission an “auto” (a thing) hired by the named insured, *not* one who provides transportation (a service) hired by the named insured; and
- it is undisputed that Bluffton University hired a “charter service”/“transportation provider,” *not* a bus; and thus did *not* obtain possession and control of Executive's bus.

As the trial court noted in this case: “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).” (Order Granting Plaintiff American Alternative Insurance and Plaintiff Federal Insurance Company's Motions for Summary Judgment at p. 3). Accord *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, at ¶7.

In *Holmes v. Brethren Mut. Ins. Co.* (App.D.C. 2005), 868 A.2d 155, 159, the court affirmed a summary judgment that the customer's liability coverage did not extend to a negligent transportation provider, finding that “the trial judge here correctly viewed the dictionary definition of a ‘hired auto’ adopted by *Fisher [v. Tyler (1978), 284 Md. 100, 394 A.2d 1199]* (*i.e.*, ‘one whose temporary use has been engaged [by the insured] for a fixed sum,’ *id.*) as signifying the exercise of control by the named insured over matters such as the choice of vehicle, where it is to travel, by what

routes, and for what purposes.” The court of appeals observed, “as the [trial] judge also recognized, the related policy provision governing ‘Who Is An Insured’ reinforces this meaning by limiting the covered use by persons other than the named insured to use ‘with permission’ of the latter, with the authority in the named insured that phrase implies to control the purpose and manner of use.” *Id.*

“[I]n order for one’s use and operation of an automobile to be within the meaning of the omnibus clause requiring permission of the named insured, the latter must, as a general rule, own the insured vehicle or have such an interest in it that he is entitled to the possession and control of the vehicle and in position to give such permission.” *Nationwide Mut. Ins. Co. v. Cole*, 203 Va. 337, 341, 124 W.E.2d 203. “To hire property involves the idea of passing of possession, management and control of the thing hired into the hands of the hirer.” *Giroud v. New Jersey Mfrs. Cas. Ins. Co.* (1930), 106 N.J.L. 238, 242, 148 A. 790, 791. “Courts following this logic have held that vehicles driven by independent contractors will not therefore be considered ‘hired autos’ for purposes of insurance policies.” *Earth Tech, Inc. v. United States Fire Ins. Co.* (E.D.Va. 2006), 407 F.Supp.2d 763, 772. In *American Cas. Co. of Reading, Pa. v. Denmark Foods, Inc.* (C.A.4, 1955), 224 F.2d 461, 463, for example, the transportation provider’s driver was denied coverage under his customer’s liability coverage because “[the auto] was not hired by [the customer] and was not being used by an employee of [the customer] in its business or in its behalf, but was being used by an employee of [the transportation provider] under an independent contract.”

“Courts have consistently denied coverage under a ‘hired automobile’ clause on these facts.” *Fertick v. Continental Cas. Co.* (C.A.6, 1965), 351 F.2d 108, 110. “Although [the service contract] incidentally contemplated the use of a vehicle in order for [the transportation provider] to fulfill his contractual obligations, the Agreement does not require [the transportation provider] to use any

particular vehicle and did not entitle [the customer] to operate, direct, or control \* \* \* [the transportation provider's] vehicle[ ] or driver[ ].” *Liberty Mut. Fire Ins. Co. v. Canal Ins. Co.* (C.A.5, 1999), 177 F.3d 326, 334.

**3. The omnibus clause of Bluffton University’s liability coverage must be read in Bluffton University’s favor.**

The appellants do not identify any ambiguity in the Bluffton University policies, but they urge the omnibus clause of the Bluffton University policies be construed in favor of Niemeyer (a stranger to the Bluffton University policies). The plaintiff in *Cook v. Kozell* (1964), 176 Ohio St. 332, 336, 199 N.E.2d 566, made the same argument. This Court rejected the argument, noting that “[t]here are two weaknesses in this argument”:

First, the plaintiff is not a party to this contract of insurance and, therefore, not in a position to urge, as one of the parties, that the contract be construed strictly against the other party. Second, the construction urged by the plaintiff would be a disadvantage to both parties to the contract.

Id. This Court found that:

This could only result in higher insurance premiums for the Euclid Ford Company. An insured gets the coverage he pays for, and, if the coverage is to be increased beyond that which he needs or for which the policy provides, the premiums will necessarily be increased.

Id.

Here a judgment in the appellants’ favor would potentially harm Bluffton University. Bluffton University’s liability coverage could be exhausted by judgments obtained against, or settlements made by, Niemeyer and his employer, Executive. Bluffton University’s policies provide that the insurers will pay no more than the policy’s stated limit “regardless of the number of \* \* \* insureds.” Large judgments against Niemeyer, based upon Niemeyer’s negligent operation of his

employer's (Executive's) bus on March 2, 2007, could exhaust the aggregate limits of Bluffton University's policies and leave Bluffton University with little or no coverage for any judgments that might be rendered against Bluffton University in other suits arising out of other incidents. The Hartford Policy, the AAIC Policy, and the Federal Policy each states that the insurer will pay no more than the policy's stated aggregate limit "regardless of the number of \* \* \* insureds." (See Form CA 00 01 10 01 of the Hartford Policy at Page 5 of 11; Form CU1000B (04/95) of the AAIC Policy at 5 of 26; and Form 07-02-0909 (Rev. 5-05) of the Federal Policy at p. 4 of 16).

**E. The appellants do not offer a single case that supports their assertion that Niemeyer is an insured under the omnibus clause of Bluffton University's liability coverage.**

The appellants do not cite a single case in which an omnibus clause of a customer's liability coverage has been read to describe a transportation provider as an insured. Instead, the appellants argue that Ohio courts do *not* consider, as other courts do, "the concept of 'control,'" in determining "whether a named insured 'hired' a vehicle and gave 'permission' to the driver to use it" (Appellants' Joint Merit Brief at p. 7); and that Niemeyer is an insured under the omnibus clause of Bluffton University's liability coverage essentially because his employer asked whether he was "acceptable" to Bluffton University. The appellants assert, "[*Westfield Ins. Co. v. Nationwide Mut. Ins. Co.* (1993), 99 Ohio App.3d 114, 650 N.E.2d 1] is squarely on point here"; and that *Pawtucket Mut. Ins. Co. v. Hartford Ins. Co.* (2001), 147 N.H. 369, 787 A.2d 870; *Kettner v. Wausau Ins. Cos.* (1997), 210 Wis.2d 499, 568 N.W.2d 321; *Reuter v. Murphy* (2000), 240 Wis.2d 110, 622 N.W.2d 464; *Davis v. Continental Ins. Co.* (1995), 102 Ohio App.3d 82, 656 N.E.2d 1005; and *Travelers Indemn. Co. v. Swearingen* (1985), 169 Cal. App.3d 779, 214 Cal.Rptr. 383, are in accord. The appellants say that "*Westfield* controls the 'hire' inquiry in Ohio"; and that this Court should not

“distinguish *Westfield* on the grounds that it did not involve an omnibus clause” because the facts in *Westfield* are “fortuitously similar to those present in the instant action.” (Appellants’ Merit Brief at pp. 12-13).

*Westfield Ins. Co.* is *not* “squarely on point here” and is *not* controlling or persuasive precedent that Niemeyer is an insured under the omnibus clause of Bluffton University’s liability coverage. The Court *should* distinguish *Westfield Ins. Co.* because an omnibus clause was *not* under consideration in that case. Liability coverage was *not even at issue* in *Westfield Ins. Co.*

In *Westfield Ins. Co.* the Montgomery County Court of Appeals found that Daniel Fish, a city of West Carrollton student, was an insured owed *uninsured motorists coverage by operation of law* under a Nationwide policy issued to the city because the Nationwide policy defined covered “autos” to include “‘autos’ you [the city] lease, hire, rent, or borrow,” and Daniel Fish was struck by an uninsured motorist when he exited a regional transit bus that the city had “hired” to transport Fish to and from school. The court found that the regional transit authority bus was hired by the city through the purchase of tokens that the city provided to Fish’s parents pursuant to a city program. The Montgomery County Court of Appeals found: “The word ‘hire’ generally means ‘to get the services of a person *or* the use of a thing in return for payment’”; and considered it important that West Carrollton was statutorily responsible for providing transportation to the insured student. (Emphasis added.) *Id.* at 199, citing Webster’s World Dictionary (1986) 665. However, the court was *not* concerned with: whether the city hired the regional transit’s service *or* the regional transit’s bus; whether the city *intended its liability coverage to extend to the driver of the regional transit bus*; or even whether the city intended Daniel Fish to have uninsured motorist coverage under its policy. An omnibus clause was *not* at issue. Whether the bus driver was an insured under the city’s liability

coverage was *not* at issue. The intent of the insured was *not* even at issue! Therefore, the usual Ohio rules of contract interpretation were *not* applicable.

None of the other decisions cited by the appellants hold that a transportation service company's driver is an insured under the omnibus clause of its customer's policy; and liability coverage should not be extended here to the independent contractor Niemeyer because his negligence caused injury to Bluffton University's students. Although Appellants' Proposition of Law 1 suggests that it is significant that the bus was "used to transport students," Ohio does *not* determine who is an insured under a policy's *liability coverage* based on who sustained damages. A transportation provider's driver is *not* an insured under the omnibus clause of his customer's liability coverage whether his negligence causes damages to his customer/passengers or to other persons on the roadway.

In none of the above decisions cited by the appellants does a court consider and apply the terms "permission" and "hire" in the context of an omnibus clause; distinguish between the hiring of *transportation service* and the hiring of *an auto*; and decide that a transportation service driver is an insured under the omnibus clause of his customer's policy. In none of the decisions cited by the appellants does the court have reason to consider and reject the wealth of case law that a transportation service driver is *not* an insured under the omnibus clause of his customer's policy. In none of the above cases cited by the appellants is the reasoning or holding of these cases criticized, questioned, or even considered.

In *Pawtucket Mut. Ins. Co. v. Hartford Ins. Co.*, 147 N.H. at 372, the court found, "it is clear that [the named insured] NENSCO, via [its employee] Buckman, contracted and paid for the temporary use of the rental vehicle. \* \* \* In this case, NENSCO was operating through Buckman."

In *Kettner v. Wausau Ins. Cos.*, 210 Wis.2d at \*4, and *Reuter v. Murphy*, 240 Wis.2d at ¶15, the insurer's liability coverage was written broadly to apply to *any contracted use* of covered autos. "Item Four, 'Liability Insurance Schedule For Hired or Borrowed Covered Autos' calculate[d] a premium of \$1,008 for 'hired or borrowed' autos, calculated based upon 'cost of hire'"; and "'Cost of hire' [was] defined to mean the total amount you incur for hire of 'autos,' *including charges for services performed by a school bus contractor.*" (Emphasis added.) *Kettner*, at \*4.

In *Travelers Indem. Co. v. Swearinger*, 169 Cal. App.3d at 784, the issue was whether a student (Tonya Gallion) transporting a visiting student (Sonja Swearinger) in the Gallion's family automobile was covered under the school district's policy because the school district had arranged for such transportation. The trial court held that only the school district (the named insured, Fall River) was insured under the insurance policy Travelers issued to Fall River. In reversing, the California court of appeals stated: "Tonya Gallion comes within [the omnibus clause] if the Gallion automobile was *borrowed* by Fall River from the Gallions for its use in ferrying of visiting students to and from Fall River High School" (emphasis added); and found that "[t]he parties advance differing meanings of 'borrow'":

The Swearingers focus on the vehicle's use in the service of Fall River. They claim that 'borrow' encompasses the use of a third party's vehicle by the third party in the service of the borrower. Travelers focuses on the dominion and control of the vehicle and implies that one cannot borrow another's vehicle unless the lender gives physical possession of the vehicle.

Id. at 783-84.

The appellants do *not* (could *not*) argue that Bluffton University *borrowed* PFS's motor coach from Executive to transport Bluffton University's baseball team to Florida or that Niemeyer was in the business of Bluffton University when he operated Executive's bus. The undisputed

evidence in this case is that Executive contracted for a fee to provide Bluffton University transportation service and that Niemeyer (Executive's employee) was in the business of Executive (driving for Executive) at the time of the accident.

In *Travelers Indem. Co.* the California court of appeals was *not* presented with the issue of whether Fall River "hire[d]" a transportation service provider; whether Tonya Gallion had "permission" from the named insured Fall River to use the Gallion vehicle; or whether Tonya Gallion was an employee in the service of Fall River. The court simply found that Fall River *borrowed* the Gallion vehicle; recognizing that "[t]he parties tender no issue of whether Tonya Gallion had permission from Fall River to use the Gallion's car on Fall River's mission independent of the issue of borrowing"; and that whether Tonya Gallion was an employee of Fall River was "a matter at issue in the principal litigation." *Id.* at fn. 1, 3.

In subsequent cases where *Travelers Indem. Co.* was offered in support of a contention that an auto was "borrowed" or "hired," although the named insured actually contracted for services, *Travelers Indem. Co.* was distinguished or simply rejected as unpersuasive.

In *City of Los Angeles v. Allianz Ins. Co.* (2004), 125 Cal. App.4th 287, 22 Cal. Rptr.3d 716, the court distinguished *Travelers Indem. Co.* and held that the shipper ("the City") did *not* exercise the requisite dominion and control over another's truck to qualify as a borrower under the terms of the policy:

[T]he City's control over the loading process did not negate [the independent contractor] MSM's dominion and control over the vehicle. \* \* \* In short, while the indicia of dominion and control over a vehicle may vary with the circumstances, none of the indicia are sufficient to establish that the City borrowed MSM's truck. MSM had possession and custody of the truck; MSM was responsible for positioning the truck under the loading chutes and for expediting the loading process; and the truck was at all times being used

to accomplish MSM's business purposes.

Id. at 294.

*Travelers Indem. Co.* was also distinguished in *Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991), 234 Cal. App.3d 1154, 286 Cal. Rptr. 146. The trial court declared that "to deem Richardson Trucking to be using its own vehicle with Leaseway/BetterHome's permission would strain the plain meaning of the words and be contrary to the construction given similar terms in the authorities cited." Id. at 155. The court of appeals agreed and concluded the policy language and intent of the parties demonstrate Richardson Trucking was not an additional insured under the Allstate and Northbrook policies. The court of appeals explained that "it was never Leaseway's intent to cover subhaulers, such as Richardson Trucking, which provided their own insurance." Id. at 156. The court of appeals noted that *Travelers Indem. Co.* did not involve a carrier which contracted with truckers for the transport of goods; "[n]or is there evidence the \* \* \* school district ever considered the question of whether coverage extended to the vehicle owners or drivers later involved in the coverage dispute." Id. Also, the court of appeals stated that "we would not expect the [named insured] carrier to grant the owner permission to use the owner's own covered auto." Id.

In *Harleysville Lake States Ins. Co. v. Hostetler* (Feb. 13, 2006), N.D.Ind. No. 3:04-CV-306RM; *Schroeder v. Bd. of Supervisors of Louisiana State Univ.* (La. 1991), 591 So.2d 342, and *Davis v. Continental Ins. Co.*, the courts rejected *Travelers Indem. Co.* as unpersuasive on the issue of whether an operator or passenger was using a covered "auto" with the permission of the named insured and, therefore, an insured under the policy's omnibus clause. In *Harleysville Lake States Ins. Co. v. Hostetler*, at\*20, the court concluded that a vehicle is "hired" only when the parties enter into a separate agreement by which the vehicle is hired to the named insured for his exclusive use and

control, and explained: “To hold otherwise would ignore the distinction between hiring a person’s services and hiring the vehicle used to complete those services.”

In *Schroeder*, at 347, the court found that:

The evidence adduced in support of the summary judgment does not establish beyond genuine dispute that LSU acquired or exercised possession, dominion, control or even the right to direct the use of the vehicle in question while the students were using it to purchase ice for the school activities. In fact, on the present record, a reasonable inference in favor of the non-moving party must be drawn that LSU never had any control over the automobile, even though it may have benefitted from its use by the students. Consequently, the movers failed to demonstrate that they were entitled to a judgment as a matter of law, and the motion for summary judgment was erroneously granted.

Most recently in *American Intl. Underwriters Ins. Co. v. American Guarantee and Liability Ins. Co.* (2010), 181 Cal. App. 4<sup>th</sup> 616, 105 Cal. Rptr. 3d 64, the court declined to follow *Travelers Indem. Co. v. Swearinger*, and instead adopted the sound reasoning set forth in *City of Los Angeles*, supra, *Fireman’s Fund Ins. Co.*, supra, and *Schroeder*, supra. After discussing each of these cases, the court of appeals directed the trial court to vacate its summary judgment and to enter a summary judgment in favor of the customer’s liability insurer. The court of appeals stated that:

- “In our view, the *Swearinger* decision is based on an inadequate definition of ‘borrow,’ and thus misdirected the trial court here in its application of the related term ‘hired auto.’”
- “Further, the *Swearinger* opinion selectively illustrates ‘hire’ with the taxicab scenario, without recognizing the more common situation in which one hires -- rents -- a vehicle for his or own use by taking temporary possession of the vehicle in exchange for money. The inductive inference that a hiring necessarily ‘excludes physical possession altogether when remuneration is involved’ is contrary to logic and the reality of everyday transactions involving vehicles.”
- “Moreover, we believe that the *Swearinger* court inadequately distinguished the facts in *King* and mischaracterized the [California] Supreme Court’s holding in that case .... Missing from [the *Swearinger* court’s] account of *King* is the Supreme Court’s emphasis

on the absence of evidence ‘that [the named insured] Martin exercised the requisite dominion and control over the truck and trailer to be a ‘borrower’ under the terms of policy.’”

- “We therefore decline to adopt the the *Swearinger* view of ‘borrow’ and the related term ‘hire.’ As explained [in *Schroeder*, *supra*], ... ‘The majority of other courts ... have also concluded that the term “borrow” connotes more than merely receiving some benefit from another’s use of a third person’s vehicle. They have determined that borrowing a car requires possession reflecting dominion and control over the vehicle.’”

*American Intl. Underwriters Ins. Co.*, *supra* at 629-30.

The appellants have noted that in *Travelers Indem. Co.* the California court of appeals stated:

Borrow has a venerable usage in which it is distinguished from hire only by the absence of remuneration. (See 2 *Blackstone’s Commentaries* 453.) “Hire” is used in a sense which excludes physical possession altogether when remuneration is involved. We say, for example, that one hires a taxicab, even though the taxicab owner drives it. This usage is found in insurance policies. A “hired automobile” is there defined as one used under contract in behalf of, or loaned to, the named insured.

*Id.* at 785-86. The appellants have cited the above dicta and similar dicta in *Davis v. Continental Ins. Co.*, 102 Ohio App.3d at 87 (“‘hire’ does not involve physical possession of the vehicle hired”) in support of their argument that Bluffton University did not have to control of Executive’s bus to hire the bus or to grant anyone else (Niemeyer) permission to use Executive’s bus. (Appellants’ Joint Merit Brief at pp. 12-13).

The dicta in *Travelers Indem. Co.* and in *Davis* does *not* sustain the appellants’ argument, though, that Niemeyer is an insured under the omnibus clause of Bluffton University’s liability coverage because regardless of whether *the hiring of property* requires control of the property, here is it undisputed that Bluffton University hired transportation service, not property (the bus). Coach Grandey – one of the appellants – acknowledged at his deposition that a situation where Bluffton University rents or leases a vehicle (from Hertz or Avis, for example) for its employee to drive is

different from the present situation where Bluffton University contracts a transportation provider *and* its driver. (Grandey Tr. at p. 120). Executive maintained through Niemeyer *possession and control* of Executive's bus; its bus was being operated *in the business of Executive*, not in the business of Bluffton University; Bluffton University was *not* responsible/liable for the acts or omissions of Executive (an independent contractor) or its driver Niemeyer; and Bluffton University had *no* reason to obtain liability coverage for Niemeyer.

The bus was being operated by Niemeyer *with the permission of Executive*, not with the permission of Bluffton University, because “[t]he permission, within the contemplation of an omnibus clause, is in the nature of revocable license, and it implies the right to refuse, and does not extend to relationships in which the donor of permission does not have the authority to terminate the license.” *Alabama Farm Bur. Mut. Cas. Ins. Co. v. Govt. Emp. Ins. Co.* (1970), 286 Ala. 414, 414, 240 So.2d 664. “One who has no financial interest in an automobile and who is exposed to no liability arising out of its use and who has no right to control its use cannot give permission, expressed or implied, under an omnibus clause of a liability policy; and in such case the omnibus clause does not afford coverage because the donor does not have the right or power to grant or refuse such permission.” *Id.*

In *Davis*, the court considered whether a policy Continental issued the Diocese of Columbus afforded *underinsured motorists coverage by operation of law* to the Diocese's students and its volunteer driver (a parent of one of the students) injured on a field trip where a vehicle was borrowed. The court concluded 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 *sic.*) *Id.* at 87, quoting *Schroeder v. Bd. of Supervisors*

of *Louisiana State Univ.*, 591 So.2d at 346. The students were in a car owned and operated by the parent of one of the students. The court did *not* consider whether the parent was entitled to liability coverage under the Diocese's policy. No assertion was made in *Davis* that the parent was an insured under the Diocese's liability coverage. Liability coverage was *not* at issue in *Davis*. However, the trial court in *Davis* "examined the liability portions of the policy and extended underinsured motorist coverage to all who were insured under the liability provisions of the policy"; considered the omnibus clause of the Diocese's policy; and determined that those riding in the volunteer-parent's car were using a car *borrowed* by the Diocese. *Id.* at 86. The trial court found that the Diocese *borrowed* the parent's car and that the policy afforded *underinsured motorists coverage by operation of law* because physical possession of the property was not a necessary predicate to *borrowing*; and that the Diocese had control during the field trip over the destination of the parent's automobile.

The court of appeals *reversed* the trial court's decision because it found that "the critical issue [was] whether the Diocese 'you,' the named insured] exercised dominion or substantial control over [the parent's] vehicle." The court of appeals found: "While the trial court's opinion allude[d] to the control the Diocese exercised" – that the Diocese had control during the field trip over the destination of the parent's automobile – "the trial court's opinion [was] stated in only the most general terms"; "[m]oreover, the stipulated facts directly address[ed] neither the issue of control nor the particular facts on which the trial court relied to find the degree of control noted in its opinion." *Id.* at 88. The court of appeals concluded: "Given the foregoing, we reverse the trial court's determination that the Diocese *borrowed* [the parent's] car for purposes of the field trip." (Emphasis added.) *Id.*

Here, there is no issue of *borrowing*; and undisputed evidence has been presented “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.” (Order Granting Plaintiff American Alternative Insurance and Plaintiff Federal Insurance Company’s Motions for Summary Judgment at pp. 4-5).

Because the trial court “decided that permission was not given by Bluffton,” the trial court found it was unnecessary to decide whether Bluffton University owned, hired, or borrowed the bus. (Id. at p. 5). Even so, the trial court held that Bluffton University did *not* hire the bus at issue because “Bluffton College had contracted with Executive Coach for services and the bus was only incident to said contract”; and it was Executive who “selected the particular Motor Coach from [the motor coach owner/lessor] PFS to provide transportation incidental to the charter service.” (Id. at pp. 5-6).

The court of appeals, therefore, appropriately affirmed the trial court’s decision:

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.

*Fed. Ins. Co. v. Exec. Coach Luxury Travel*, 2009-Ohio-5910 at ¶39.

**F. The evidence offered by the appellants does not sustain their claims that Bluffton University hired Executive’s bus and that Bluffton University, rather than Executive, granted Niemeyer permission to use the bus. Neither Coach Grandey’s presence on Executive’s bus nor Executive’s and its driver’s desire to “accommodate” Coach Grandey’s wishes gave Bluffton University possession or control of Executive’s bus.**

The appellants argue that if Ohio law requires that Bluffton University have control of the Executive's bus, Bluffton University had "sufficient control over the bus" (Appellants' Joint Merit Brief at p. 20) because "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." (Id. at p. 18). The appellants assert that "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" (Id. at p. 18); and that the cases cited by the appellees are "distinguishable from the hauling cases cited by the insurers because here, the named insured was actually *in* the vehicle and *directing* its travel." (Emphasis sic.) (Id. at pp. 19-20).

Most of the cases that the appellants offer in support of their contention that Bluffton University had "sufficient" control of Executive's bus to hire it and grant Executive's driver permission to use Executive's bus, though, are cases in which the court held a transportation service provider's driver was *not* entitled to liability coverage under his customer's policy;<sup>11</sup> and the other

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<sup>11</sup> See, *United States Fid. & Guar. Co. v. Heritage Mut. Ins. Co.* (C.A.7, 2000), 230 F.3d 331, 335 ("Although, because of the fact-specific nature of the inquiry, the cases do not answer our question for us, they reinforce our independent conclusion that the truck Oldham was driving was not a hired vehicle; rather, V&S was an independent contractor."); *Holmes v. Brethren Mut. Ins. Co.* (App.D.C. 2005), 868 A.2d 155, 159 ("In reality, [the named insured] Bingo World did not hire [the owner] Harris' van but rather his service of finding and transporting customers (it does not matter that Bingo World would forward him the names of players who had inquired about transportation), paying him only if and to the extent he appeared at the door with them."); *Earth Tech, Inc. v. United States Fire Ins. Co.* (E.D.Va. 2006), 407 F.Supp.2d 763, 772 ("[T]he tractor-trailer at issue here is not a 'hired-auto' but an auto separately owned and operated by [the named insured] Capitol's subcontractor, FCI. The terms of the contract between Capitol and FCI establish that the tractor-trailer was not specifically 'hired' by Capitol, but was simply the means by which FCI was performing the transportation services required by the contract."); *Occidental Fire & Cas. Co. of North Carolina v. Westport Ins. Corp.* (Sept. 10, 2004), E.D.Pa. No. 02-8923, at \*30 ("The minor amount of control exerted over the driver is insufficient to support a finding that B.K. 'hired' the

cases that the appellants cite are:

- (1) court decisions where the auto was *loaned, rented or leased* to the named insured: *Caston v. Buckeye Union Ins. Co.* (1982), 8 Ohio App.3d 309, 310, 456 N.E.2d 1270; *Kresse v. Home Ins. Co.* (C.A.8, 1985), 765 F.2d 753, 756; and *State Farm Mut. Auto. Ins. Co. v. Mackecknie* (C.A.8, 1940), 114 F.2d 728, 734 ; or
- (2) court decisions where the liability coverage was written broadly to afford liability coverage for *any contracted use* of a covered auto: *Kettner v. Wausau Ins. Cos.* (1997), 210 Wis.2d 499, 568 N.W.2d 321, at \*4; *Caston v. Buckeye Union Ins. Co.*, 8 Ohio App.3d at 310; *Fratis v. Fireman's Fund Am. Ins. Cos.* (1976), 56 Cal.App.3d 339, 343, 128 Cal.Rptr. 391; *Russom v. Ins. Co. of N. Am.* (C.A.6, 1970), 421 F.2d 985, 993; and *Bituminous Cas. Corp. v. Travelers Ins. Co.* (D.Minn. 1954), 122 F.Supp. 197, 202-03.<sup>12</sup>

None of the evidence the appellants offer of Bluffton University's "control over both Niemeyer and the Executive Coach bus" rests on anything in the parties' written contract, or demonstrates that Bluffton University had any more "control" than any customer might have over

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tractor, as opposed to the transportation services of F.O.T."); *Avalos v. Duron* (C.A.10, 2002), 37 Fed. Appx. 456, 461 ("[W]e conclude that [the named insured] did not 'hire' EDT's tractor. More specifically, Citywide did not procure, engage or purchase the temporary use of EDT's tractor. \* \* \* Citywide engaged EDT to perform a service, i.e. 'the transportation of the commodities' from one location to another. \* \* \* Thus, the EDT tractor was not 'hired' by Citywide (and, in turn, EDT did not need or receive 'permission' from Citywide to use the tractor)"); *Casino Air Charter, Inc. v. Sierra Pacific Power Co.* (1979), 95 Nev. 507, 511, 596 P.2d 496 ("In the instant case, there was no hiring of an aircraft. Instead, [the named insured] Sierra contracted for transportation services of an airplane and a qualified pilot. Sierra neither designated a particular aircraft nor took any part in the preparation of the flight plan"); and *Combs v. Black*, 2006-Ohio-2439 at ¶18.

<sup>12</sup> In *American Intl. Underwriters Ins. Co. v. American Guarantee and Liability Ins. Co.* (2010), 181 Cal. App. 4<sup>th</sup> 616, 105 Cal. Rptr. 3d 64, the court found that *Fratis*, and other decisions like it, did *not* compel a conclusion that an independent contractor was an insured under the omnibus clause of a customer's liability coverage. The court stated that:

In each case the reviewing court had before it a policy provision expressly defining "hired automobile" as a nonowned automobile "used under contract in behalf of [or "under contract with"] ... the named insured .... [Citations omitted.] Here, by contrast, the [customer's] policy contains no such broad definition. "We may not .. rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid." [Citation omitted.] Accordingly, we decline AIU's invitation to "read into" the Trucker policy a meaning drawn from contract provisions that are not before us.

an independent contractor it hires to provide charter/transportation service. The appellants do not cite, and cannot cite, any language in their charter/transportation service contract that transferred Executive's possession, management, and control of the bus to Bluffton University. As Executive's president testified: "[T]he bus was used a hundred percent in the business of Executive Coach." (Stechschulte Tr. at p. 29).

The appellants mistakenly assert that "Coach Grandey contracted for a specific bus, Coach No. 2"; and that Executive Coach was "not at liberty to use another bus." (Appellants' Joint Merit Brief at p. 27). On the contrary, Coach Grandey simply contracted for a bus that met Bluffton University's needs, *i.e.* a bus "with a DVD player" and with "enough room for 33 people." (Grandey Tr. at p. 74). There is *no* evidence that Executive Coach was precluded from using any bus that satisfied its customer's needs.

The appellants state that "Bluffton selected and paid for Niemeyer as a driver" (Appellants' Joint Merit Brief at p. 26), but it was Executive who hired, certified, employed, and paid the drivers who operated the motor coach. (Stipulations at paragraph 15; Grandey Tr. at p. 70; Stechschulte Tr. at pp. 33-36, 39-40, 42, and 117; and Lammers Tr. at pp. 17 and 26-28). Bluffton University did *not* select Jerome Niemeyer or anyone else who drove the bus. Bluffton University simply approved Executive's selection of Niemeyer, one of three operators Executive selected to drive the bus. (Grandey Tr. at p. 45).<sup>13</sup> Executive Coach assigned Denny Michelson and Mitch Sadler to drive certain legs of the charter; and Executive Coach did not seek Bluffton University's approval of their

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<sup>13</sup> In *Occidental Fire & Cas. Co. of North Carolina v. Westport Ins. Corp.*, at \*30, a case cited by the appellants, the court noted that "the ability to refuse certain drivers" did *not* establish control of the vehicle (or that a vehicle, rather than a transportation service, was hired).

selection. (Lammers Tr. at pp. 41-43; and Grandey Tr. at p. 46).

Bluffton University paid for the drivers' meals and lodging and could, at its option, pay Executive's drivers an additional amount as a *gratuity*. However, Bluffton University was *not* required to pay the drivers any amount, including any gratuity. (Stechschulte Tr. at pp. 116-17, 119-20, and 134-15).

The appellants contend that "Coach Grandey gave permission for Mr. Niemeyer's wife to accompany the team on the trip," but the appellants acknowledge that this was pursuant to Executive's "company policy that if there is room, an extra person may go along on the trip if the customer grants permission." (Appellants' Joint Merit Brief at p. 26). Further, the written contract provided under "OBJECTIONABLE PERSONS" that Executive "reserves the right to refuse to transport" some persons. (Exhibit 13 of Stechschulte Deposition, Lammers Deposition, and Tobe Deposition).

The appellants suggest that "Bluffton was in complete control of the bus's route and movement throughout the course of the trip"; and that "if the coach wanted to take a side trip, he could do so at his whim." (Appellants' Joint Merit Brief at pp. 19 and 27). They state that "Coach Grandey, Bluffton employee, was seated in the front row of the bus, and directed the bus's movements." In truth, Coach Grandey was asleep at the time of the accident. (Grandey Tr. at p. 97). As other examples of Coach Grandey's "control" over the bus, the appellants offer that "Coach Grandey \* \* \* had the authority to prevent Mr. Niemeyer from driving the bus if he thought Mr. Niemeyer was driving the bus in an unsafe manner, or if Mr. Niemeyer was incapable because of lack of sleep or other impairment"; and that "[a]pproximately one-half hour after the bus had left Bluffton on the trip at issue, it was discovered that the motor coach's DVD player did not work"; and

“[u]pon this discovery, Coach Grandey exercised Bluffton’s control over the bus by ordering the driver to return to Bluffton.” (Id.). The bus did *not* return to Bluffton University, though, until the driver called his employer Executive (Id. at p. 87); and Coach Grandey acknowledged that his interest was “the result, namely timely and safe transportation.” (Id. at p. 113). He admitted he could *not* have dismissed Niemeyer, and that neither he nor one of his players could have driven the bus; and that the use Bluffton University could make of the bus was always subject to the scope of permission Bluffton University received from Executive to use the motor coach. (Id. at pp. 71, 77-78, and 106).

Coach Grandey offered the following explanation of the permission *Executive gave Bluffton University* to use Executive’s bus:

Q. And suppose that the driver agreed not to continue driving, would you then get behind the wheel?

A. Absolutely not.

\* \* \*

Q. Would you call Executive Coach?

A. Yes.

Q. Why would you call Executive Coach?

A. **It’s their bus and their company.**

(Emphasis added.) (Id. at p. 106). He explained that what opposing counsel would purport to be his (or Bluffton University’s) right to grant or deny Jerome Niemeyer permission to use the bus was in fact only Coach Grandey’s (or Bluffton University’s) right to grant or deny *Bluffton University’s* own use of the bus: “If I felt the Jerry [Jerome Niemeyer] was in any way impaired or not able to drive I could stop him from driving or not – I could tell my players not to get on the bus and then obviously not go anywhere.” (Id. at pp. 120-21).

The president of Executive testified that any authority that an Executive customer had over

an Executive's driver or bus was always subject to Executive's exclusive control of the bus. Customers could only "tell [Executive] what they wanted." Whether Executive or its driver "accommodated [customers'] request" and did "what they wanted" was dependent upon how far Executive and its driver would go "to keep the customer happy." (Stechschulte Tr. at pp. 46, 51, and 72-75). What a customer might "want" would not require Executive to forego its use of the bus to transport other customers. Executive and its driver would only do what they could "accommodate." (Id. at pp. 89-90). Any asserted "authority" a customer had to grant or deny Executive Coach's driver a particular use of the company's bus was only that granted by Executive. Karen Lammers testified that the customer's authority over Executive's driver was always subject to the permission Executive granted its driver and its customer to use the bus ("it was up to Executive Coach to accept or reject [the customer's] request"). (Lammers Tr. at pp. 97-98 and 100-01).

Under facts analogous to those here, summary judgment has been affirmed in favor of the insurance company:

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

See *United States Fire Ins. Co. v. Ali* (S.D.Fla. 2002), 198 F.Supp.2d 1313, 1322, affirmed (C.A.11, 2003), 61 Fed. Appx. 669.

The appellees have analogized this action with cases involving the hauling of goods or commodities by an independent contractor from point A to point B because they *are* analogous and there are more reported cases addressing the hauling of goods or commodities than the transporting of passengers. However, the appellees have cited as well numerous cases where passengers were

transported pursuant to a charter/transportation service contract; and in every one of those cases, the court *denied* that the transportation service's driver was an insured under the customer's liability coverage.

In *Casino Air Charter, Inc. v. Sierra Pacific Power Co.*, 95 Nev. at 511, the Nevada Supreme Court rejected the argument that the customer's policy described the charter service as an insured. Sierra Pacific Power Co. ("Sierra") had arranged a charter flight with Casino Air Charter. The plane crashed, killing the pilot and the passenger. The passenger's estate sued Casino Air Charter; and Casino Air Charter sought coverage under the customer Sierra's liability policy, asserting that Sierra had "hired" the airplane. The court rejected the argument.

In *Loper v. Dufrene* (C.A.5, 2004), 84 Fed. Appx. 454, 456, the court stated: "There is, of course, a substantial difference between contracting to perform services and merely leasing a vehicle." The court found: "In short, the evidence at trial showed conclusively not that [the named insured] leased the vehicle in question, but that it contracted with CDI for a number of services among which included the transportation of employees." *Id.*

In *Phillips v. Ent. Transp. Serv. Co.* (Miss.App. 2008), 988 So.2d 418, at ¶20, the court concluded that:

In this case, [the named insured] NTC did not 'hire' the 'auto' that was involved in the accident. NTC did, however, 'hire' the 'services' of Enterprise, which incidentally included the use of the automobile that was involved in the accident. \* \* \* Enterprise owned its own fleet of cars, hired its own drivers, provided its own insurance, and controlled all operations of its business.

In *Fetisov v. Vigilant Ins. Co.* (July 25, 2006), N.J. Super. No. A-0828-04T2, at \*3, the court stated: "Because only [the limousine service] Gambino's was in a position to grant initial permission to [its driver] Gnida and because Gambino's was not a named insured, the coverage that plaintiffs

seek is not available to them.” Id. at \*4. The court explained: “Whether the team members could to an extent control the conduct of Gnida (an employee of independent contractor, Gambino’s) once he commenced the ‘use’ of the vehicle is irrelevant for purposes of coverage.” Id.

In *Holmes v. Brethren Mut. Ins. Co.*, 868 A.2d at 159, the court found: “In reality, [the named insured] Bingo World did not hire [owner] Harris’ van but rather his service of finding and transporting customers \* \* \*.”

The presence of Coach Grandey and his players on the bus and his direction of Niemeyer did *not* constitute possession and control over the bus and is not evidence that Bluffton University did anything more here than hire a charter/transportation service. The above deposition testimony of Coach Grandey and both owners and officers of Executive Coach confirm that:

- Bluffton University’s use of the bus and any authority Bluffton University had over the bus was always subject to the permission Executive gave its driver and its customer Bluffton University to use Executive’s bus;
- Bluffton University could not make any use of the bus that Executive did not permit Niemeyer (Executive’s employee-driver) or Bluffton University (Executive’s customer) to make of the bus; and
- Bluffton University’s only real control was the control Bluffton University had, or could exercise, over its own players and coaches (whether they would board and continue to utilize Executive’s transportation services).

**G. The Court may dismiss this appeal as improvidently allowed because the lower courts decided this case in keeping with established law.**

The appellants persuaded this Court to exercise its discretionary jurisdiction, asserting that this case presented a “yet unresolved question.” (Memorandum in Support of Jurisdiction at p. 1). The appellants asked this Court to exercise its discretionary jurisdiction because a clearer “understanding of insurance protection in the charter-bus context” was required; that “[t]he Court

of Appeals decision impacts the charter-bus industry, as well as the thousands of passengers and institutions that choose to use charter bus”; that “[t]he 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” – “[t]he Court of Appeals introduced the concept of ‘control,’ which is not found in the insurance policy”; and that “the accident itself” made this a case of great general interest. (Id. at pp. 2-3).

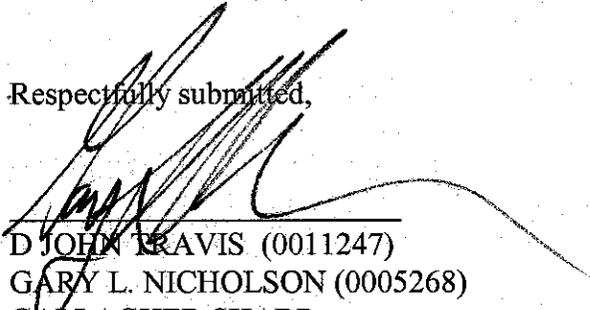
The Appellants’ Joint Merit Brief sustains none of the appellants’ contentions. The lower courts decided this case in keeping with established law; and this is *not* a case of public or great general interest. Therefore, this Court may dismiss the appeal as improvidently allowed.

#### **CONCLUSION**

The appellants urge the Court to violate Ohio’s rules of contract construction; to construe the omnibus clause against the named insured (Bluffton University) and in favor of a stranger to the contract (Niemeyer); and to apply an unreasonable interpretation of the omnibus clause. The appellants ask the Court to construe Niemeyer (an employee/driver of a charter service) to be an insured under the omnibus clause of Bluffton University’s (his customer’s) policy although Bluffton University has no liability exposure and no reason to obtain liability coverage for Niemeyer’s (an independent contractor’s) negligence. The appellants do *not* offer any evidence that Bluffton University agreed or intended to insure Jerome Niemeyer; or a single case in which the appellants’ interpretation of a standard omnibus clause has been adopted. The appellees, on the other hand, have presented the Court with undisputed evidence that Executive (Niemeyer’s employer) maintained possession and control of its charter bus; and that Bluffton University’s use of Executive’s bus (and acceptance/direction of Executive’s driver) was subject to the permission (accommodation)

Executive extended Bluffton University to use Executive's bus. The appellees have cited the Court numerous cases from Ohio and other states, involving analogous facts, in which the appellants' unreasonable interpretation of the standard omnibus clause in Bluffton University's policies has been rejected. The Court, therefore, should dismiss the appellants' appeal as improvidently allowed, or affirm the lower court decisions that Niemeyer is *not* entitled to liability coverage under Bluffton University's policies.

Respectfully submitted,



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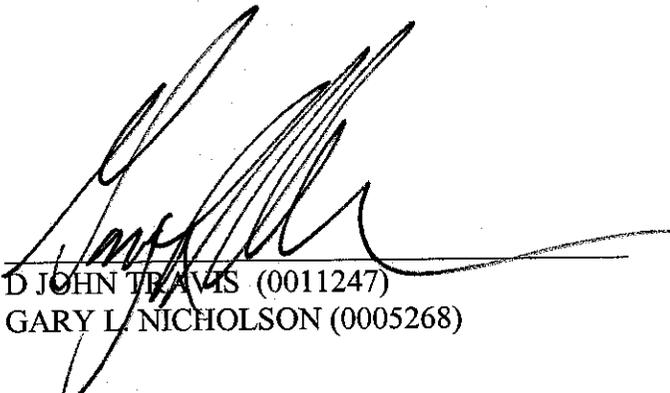
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