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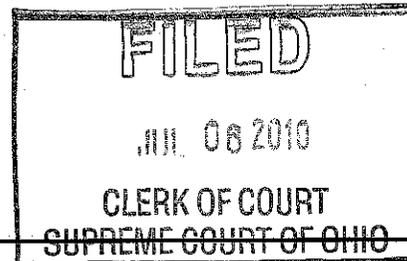
IN THE SUPREME COURT OF OHIO

Federal Insurance Company,  
American Alternative Insurance  
Corporation  
Appellees,  
vs.  
Executive Coach Luxury Travel, Inc.,  
*et al.*  
Defendants,  
and  
Feroen J. Betts, etc., *et al.*  
Appellants.

Case No. 2009-2307

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

Court of Appeals Case Nos: 1-09-17 & 01-09-18



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APPELLEE AMERICAN ALTERNATIVE INSURANCE CORPORATION'S  
MERIT BRIEF

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## **I. STATEMENT OF THE CASE AND FACTS**

### **A. Statement of the Case**

This case is an insurance coverage dispute concerning the interpretation of certain umbrella and excess insurance policies that Appellee American Alternative Insurance Corporation (“AAIC”) and its co-appellee, Federal Insurance Company (“Federal”), issued to Bluffton University (“Bluffton”). But it is not a dispute between AAIC, Federal and their mutual insured, Bluffton. Rather, the present appeal is brought by strangers to Bluffton’s insurance policies, who seek to appropriate Bluffton’s liability insurance coverage for the allegedly negligent acts of others, without any regard to the consequence of their actions on Bluffton. That consequence is the loss of the policy limits of insurance, which Bluffton purchased to protect itself from the financial consequences of its own negligence, not the negligence of a stranger.

Specifically, the dispute turns on the interpretation of an omnibus clause (“Omnibus Clause”) contained in a primary auto liability policy issued by The Hartford Fire Insurance Company (“Hartford”) to Bluffton, to which the AAIC and Federal policies follow form. Subject to several exceptions, this Omnibus Clause extends insured status to “[a]nyone else while using with your [*i.e.*, Bluffton’s] permission a covered ‘auto’ you [*i.e.*, Bluffton] own, hire or borrow.” Therefore, for a third-party to be an “insured” under the Omnibus Clause, the following requirements must be satisfied: (1) the third-party must use the covered “auto” with Bluffton’s permission; and (2) the covered “auto” must be one that Bluffton owns, hires, or borrows.

AAIC and Federal initiated declaratory judgment actions in the Court of Common Pleas, Allen County, Ohio against Executive Coach Luxury Travel, Inc. (“Executive Coach”), and the estate of Executive Coach’s employee/driver, Jerome Niemeyer. Specifically, AAIC and Federal sought a determination that the Omnibus Clause did not extend insured status to either Executive

Coach or Mr. Niemeyer for purposes of a motor-vehicle accident (the “Accident”) that occurred in Atlanta, Georgia on March 2, 2007, while Mr. Niemeyer transported Bluffton’s baseball players and coaches in a bus leased, maintained, and operated by Executive Coach (the “Bus”). These declaratory judgment actions were later consolidated. Thereafter, various passengers involved in the Accident (or their estates) (collectively, the “Appellants”) intervened, arguing that the Omnibus Clause encompassed Mr. Niemeyer, and that he was therefore an additional insured under Bluffton’s insurance policies for his own, not Bluffton’s, alleged negligence in connection with the Accident.

AAIC, Federal, and the Appellants developed a stipulation of facts which was submitted to the Trial Court, and the parties filed their respective cross-motions for summary judgment. Concluding that the dispute presented no issue of material fact, the Court of Common Pleas (the “Trial Court”) held that Mr. Niemeyer was not an additional insured under the Omnibus Clause and granted summary judgment in favor of AAIC and Federal. (Order, Pg. 35.)<sup>1</sup> Observing that Bluffton’s use of the Bus was always subject to the permission Executive Coach had given Mr. Niemeyer, the Trial Court concluded that, for purposes of the Omnibus Clause, it could not be said that Mr. Niemeyer was using the Bus as Bluffton’s permissive user. (*Id.*, Pg. 34.) Rather, because Executive Coach maintained possession and control of the vehicle, Mr. Niemeyer operated the Bus with the permission of Executive Coach. (*Id.*)

The Trial Court also concluded that the Bus was not a vehicle Bluffton had “hired.” (*Id.*, Pgs. 34-35.) Instead, it found the Bus to be incidental to the transportation services agreement that Bluffton entered into with Executive Coach, in that Executive Coach had selected the Bus as the means by which it would provide its transportation services for Bluffton. (*Id.*) Accordingly,

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<sup>1</sup> Appellants attach a copy of the Trial Court’s February 25, 2009 Order at Pgs. 30-36 of the Appendix of their Joint Merit Brief.

the Trial Court concluded that the Omnibus Clause did not extend insured status to Mr. Niemeyer under the insurance policies issued by AAIC and Federal to Bluffton. (*Id.*, Pg. 35.) The Trial Court emphasized that to construe the Omnibus Clause in the manner proposed by Appellants would “provide an unreasonable interpretation of the words of the policy.” (*Id.*)

The Appellants appealed the Trial Court’s determination to the Court of Appeals, Third Appellate District, Allen County (the “Appellate Court”).<sup>2</sup> A unanimous Appellate Court affirmed the Trial Court’s determination and concluded that, in a legal context, the words “permission” and “hire” referred to the requirement of having “authority to grant permission” and/or exert “substantial control” over the matter or thing hired. (Opinion, Pg. 18.) Based on its own independent review of the record, the Appellate Court concurred with the decision of the Trial Court and held that “reasonable minds could not differ” in concluding that: (1) the Bus and Mr. Niemeyer were “hired” by Executive Coach, not Bluffton; and (2) Mr. Niemeyer was operating the Bus with the “permission” of Executive Coach, and not Bluffton, for purposes of the Omnibus Clause. (*Id.*, Pgs. 22-23.)

The Appellants have sought this Court’s review in another attempt to appropriate Bluffton’s insurance coverage for the alleged liabilities of Executive Coach and its employee.

**B. Statement of Facts – Setting the Record Straight**

Appellants misrepresent the record in several material respects in order to convince this Court that the Omnibus Clause’s threshold requirements are satisfied and that Mr. Niemeyer, therefore, is an additional insured under Bluffton’s policies. AAIC takes the opportunity to correct Appellants’ factual misstatements.

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<sup>2</sup> Appellants attach a copy of the Appellate Court’s November 9, 2009 Opinion at Pgs. 6-25 of the Appendix of their Joint Merit Brief.

**1. Bluffton Contracted with Executive Coach for Its Transportation Services, Not a Bus Rental**

Appellants characterize the money Bluffton paid to Executive Coach to transport its players and coaches as a “rental” fee. Appellants’ Joint Merit Brief (“Brief”), Pg. 2. However, under the terms of its lease with Partnership Financial Services, Inc. (“PFS”), Executive Coach could not “rent” the Bus to Bluffton. The lease expressly prohibited Executive Coach from assigning, subletting, encumbering, or transferring any interest in the Bus to any third party without Partnership’s written consent. (Appdx. Pg. 3, ¶19; Supp. Pg. 3 at 21-22<sup>3</sup>.)

The undisputed facts demonstrate that Bluffton contracted with Executive Coach to provide transportation services to Bluffton. (Appdx. Pg. 8; Supp. Pgs. 9 at 96, 22 at 78.) The Bus was incidental to this arrangement. As such, the money Bluffton paid constituted a fee for Executive Coach’s transportation services rather than rent.

**2. Coach Grandey Did Not Contract with Executive Coach for a Specific Bus**

Despite Appellants’ representations to the contrary, James B. Grandey, Jr., the head coach of Bluffton’s baseball team, did not choose a specific bus to transport Bluffton’s players and coaches, as Coach Grandey’s undisputed deposition testimony confirms:

Q. Were there any discussions when you entered into the contract about what specific bus was going to be used?

A. No.

(Supp. Pgs. 21 at 74, 23 at 81-82.) It was, instead, *Executive Coach* that designated the bus (Coach No. 2) to be used for Bluffton’s trip. (Supp. Pgs. 3 at 21-22, 31 at 23-24.)

Appellants further state as “fact” that Coach Grandey “required” the bus to have a DVD player. Brief, Pg. 2. To the contrary, Executive Coach had already designated a bus with a DVD

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<sup>3</sup> AAIC uses the designation “at” to reference specific pages of deposition transcripts contained in the Supplement.

player by the time Coach Grandey raised the issue with Executive Coach. As Coach Grandey testified:

I just asked if there was a DVD player on the bus *and she said yes and I said that's great.*

(Supp. Pg. 16 at 48.)

**3. While Executive Coach Attempted to Accommodate Client Requests as a Courtesy, It Was Ultimately Up to Executive Coach to Accept the Request**

Appellants represent as “fact” that Executive Coach’s “company policy” was that the “client is in charge,” citing the deposition testimony of Karen Lammers, Executive Coach’s former vice-president, in support. Brief, Pg. 3. In this regard, Appellants contend that, if Coach Grandey had not approved Mr. Niemeyer for the trip, he would not have been the driver. Brief, Pg. 4. However, Appellants’ assertion misstates Ms. Lammers’ testimony and overstates the reality of the relationship between Executive Coach and Bluffton.

Ms. Lammers did not state that it is “company policy” that the “client is in charge.” On the contrary, Ms. Lammers explained that, while the customer could make a request, it was ultimately up to Executive Coach to accept the request. (Supp. Pg. 10 at 98.) A perfect example of the reality of Executive Coach and Bluffton’s business relationship occurred on Bluffton’s 2006 trip to Florida. On the 2006 trip, it was Coach Grandey who had initiated a conversation with Executive Coach about a specific driver. (Supp. Pg. 14 at 38-39.) Coach Grandey testified that he had requested a specific driver. (*Id.*) Executive Coach responded that the driver was unavailable and suggested a different driver. Coach Grandey agreed to Executive Coach’s choice of driver. (*Id.*)

**4. Coach Grandey Did Not Present a Detailed Trip Itinerary to Executive Coach as Part of the Contract Negotiation Process**

According to Appellants, Coach Grandey “presented a detailed trip itinerary as part of the contract-negotiation process.” Brief, Pg. 3. This misstates the facts in two ways. First, Coach Grandey faxed the itinerary to Executive Coach in February 2007, months after he had executed the transportation agreement. (Supp. Pg. 18 at 53-54.) Second, neither Bluffton nor Executive Coach considered the itinerary part of the transportation agreement. (*Id.* at 54, where Grandey testified “I believe it [the itinerary] is not a part of the contract”; Supp. Pg. 33 at 59, where Tobe, the Executive Coach employee with whom Coach Grandey negotiated the transportation agreement, testified she considered the itinerary separate from the contract.)

**5. Executive Coach Did Not Ask Coach Grandey for “Permission” to Use Mr. Niemeyer on the Trip**

Appellants next assert that Executive Coach asked for and received Coach Grandey’s “permission” to use Mr. Niemeyer on the trip. Brief, Pg. 3. However, Coach Grandey did not unequivocally admit that Executive Coach sought his permission for Mr. Niemeyer to drive Executive Coach’s Bus. On the contrary, Coach Grandey responded as follows to an interrogatory served on him:

Executive Coach asked if it would be alright to have Jerome Niemeyer drive the bus. With regard to the trip in 2007, I told Executive Coach that Mr. Niemeyer was OK.

(Supp. Pgs. 37-38.) Coach Grandey later described this exchange in his deposition when he testified that “Executive Coach had called me and ask[ed] hey, is Jerry okay to be your driver, and I said Jerry is okay.” (Supp. Pg. 16 at 45) This testimony confirms that: (1) it was Executive Coach that selected Mr. Niemeyer to drive the trip; and (2) Coach Grandey assented to Executive Coach’s choice of driver. *See also* Transportation Agreement (Appdx. Pg. 9, ¶6:

“Operators are carefully selected [by Executive Coach] and have instructions to drive at all times at a speed within the limits prescribed by law and compatible with safe operation.”)

**6. The Deposition Testimony of Rick Stechschulte Is Immaterial and Should Be Disregarded**

Appellants rely on the testimony of Rick Stechschulte as evidentiary support of Bluffton’s understanding of its rights under its agreement with Executive Coach. However, during the time period in question, Executive Coach was operated and controlled by Ms. Lammers, Mr. Stechschulte’s ex-wife, pursuant to court order. (Supp. Pg. 35 at 17.) By Mr. Stechschulte’s own admission, he “absolutely did not know anything that was going on with [Executive Coach] during the period of that accident.” (*Id.* at 18.) Consequently, Mr. Stechschulte’s testimony concerning Bluffton’s understanding of its rights under its agreement with Executive Coach is immaterial and irrelevant.

**C. AAIC’s Statement of Facts**

Having addressed Appellants’ factual misstatements, AAIC submits the following statement to accurately reflect the relevant and undisputed facts of record:

**1. Bluffton Contracted with Executive Coach for Its Transportation Services**

In the fall of 2006, Executive Coach contracted with Coach Grandey to transport the players and coaches of Bluffton’s baseball team to a series of baseball games to be played in Sarasota, Florida in March 2007 (the “Transportation Agreement”). (Appdx. Pg. 10; Supp. Pg. 15 at 43.) Coach Grandey’s main interest in contracting with Executive Coach was for its timely and safe transportation services. (Supp. Pg. 29 at 113.)

**2. Executive Coach Assigned the Bus and Drivers in Order to Provide Bluffton Its Transportation Services**

Executive Coach assigned to the trip a 2000 Van Hool T2145 Intercity Coach, which Executive Coach identified as “Coach 2” (the “Bus”). (Supp. Pg. 3 at 24.) Executive Coach leased the Bus from its owner, PFS. (*Id.*; Appdx. Pg. 13, ¶15.) The lease prohibited Executive Coach from subletting the Bus without the written consent of PFS, and required Executive Coach to maintain during the lease term of the Bus liability insurance with limits of coverage as Executive Coach required, but in no event less than \$5 million for vehicles capable of transporting nine or more passengers. (Appdx. Pgs. 2-3.)

Affixed to the Bus’ side were Executive Coach’s telephone number, name, and the number assigned to Executive Coach by the Public Utilities Commission. (Supp. Pg. 4 at 37.) The Bus was one of several in Executive Coach’s fleet equipped with a DVD player. (*Id.*, Pg. 32 at 47-48.) Executive Coach stored the Bus and the rest of its fleet at its complex in a warehouse to which only its drivers and office employees had access. (*Id.*, Pg. 4 at 38-39.) Executive Coach fueled its fleet, maintained it, insured it, and implemented any needed repairs. (*Id.*, Pg. 7 at 53-55.)

Executive Coach employed several drivers, among them, Mr. Niemeyer. (*Id.*, Pg. 2 at 17.) Executive Coach’s drivers were expected to contact Executive Coach in the event of any substantial deviation from a trip’s itinerary requested by a customer. It was up to Executive Coach whether to permit the deviation. (*Id.*, Pgs. 9 at 96-11 at 101.) Likewise, to the extent a client believed a driver was unsafe, Executive Coach expected that the client would contact Executive Coach so that Executive Coach could arrange for another driver. (*Id.*, Pg. 8 at 80.)

Mr. Niemeyer was one of three drivers Executive Coach had assigned to the trip. (*Id.*, Pgs. 4 at 40, 5 at 43.) The first driver, Denny Michelson, arrived at Bluffton the evening of

March 1, 2007 and drove the Bus the first leg of the trip to Adairsville, Georgia. (*Id.*, Pgs. 14 at 37-38, 23 at 84.)

### **3. The Accident**

Consistent with the drivers' schedule Executive Coach had prepared (*Id.*, Pg. 4 at 40), Mr. Niemeier took over the driving of the Bus in Adairsville, Georgia, early March 2, 2007. (*Id.*, Pgs. 25 at 90, 26 at 96.) Later that same morning, while Coach Grandey and others slept (*Id.*, Pg. 27 at 97), the Bus was involved in the Accident. (Appdx. Pg. 13, ¶14) Several people were injured or killed in the Accident, including Mr. Niemeier. (*Id.*, ¶16.) Passengers involved in the Accident (or their estates) have since pursued legal action against Executive Coach and/or the Niemeier Estate in order to hold them liable for injuries and/or death sustained in the Accident. (*Id.*, ¶17.) Among these claimants is Coach Grandey. (Supp. Pg. 13 at 27-28.)

### **4. The Bluffton Insurance Policies**

#### **a) The AAIC Policy**

At the time of the Accident, Bluffton was insured under certain insurance policies. AAIC issued to Bluffton a Commercial Umbrella Policy No. 60A2UB000243301, effective December 15, 2006 to December 15, 2007 ("the AAIC Policy"). (Appdx. Pg. 10, ¶1; Appdx. Pgs. 16-23.) Coverage A of the AAIC Policy provides Excess Following Form Liability Over Underlying Claims Made or Occurrence Coverage. (Appdx. Pg. 11, ¶4; Appdx. Pg. 22.) Coverage A is subject to the same terms, conditions, agreements, exclusions and definitions as the "Underlying Insurance" except as otherwise provided in the AAIC Policy; provided, however, that in no event will Coverage A's insurance apply unless the "Underlying Insurance" applies (or would apply but for the exhaustion of its applicable "Limit of Liability"). (Appdx. Pg. 11, ¶6; Appdx. Pg. 22.) For purposes of automobile liability coverage, the applicable

“Underlying Insurance” for the AAIC Policy is the primary insurance policy Hartford issued to Bluffton. (Appdx. Pg. 12, ¶7; Appdx. Pg. 19.)

**b) The Omnibus Clause in the Hartford Policy**

Hartford issued to Bluffton a Special Multi-Flex Policy No. 33 UUN UK8593, effective December 15, 2006 to December 15, 2007 (“the Hartford Policy”). (Appdx. Pg. 11, ¶3; Appdx. Pgs. 24-35.) Section II.A. (Liability Coverage) of the Hartford Policy’s Business Auto Coverage Form (CA 00 01 10 01) states that Hartford will pay all sums an “insured” legally must pay as damages because of “bodily injury” or “property damage” to which its insurance applies, caused by an “accident” and resulting from the ownership, maintenance or use of a covered “auto.” (Appdx. Pg. 12, ¶10; Appdx. Pg. 34.) Item Two of the Declarations of the Hartford Policy’s coverage part indicates that, for purposes of the auto liability coverage, covered “auto” encompasses “any ‘auto.’” (Appdx. Pg. 12, ¶11; Appdx. Pgs. 29, 33.)

Section II.A.1. of the Business Auto Coverage Form states that, subject to several exceptions, insured status extends to “[a]nyone else while using with your [*i.e.*, Bluffton’s] permission a covered ‘auto’ you [*i.e.*, Bluffton] own, hire or borrow.” (Appdx. Pg. 12, ¶12; Appdx. Pg. 34.) The Hartford Policy also extends additional insured status to “[a]nyone liable for the conduct of an insured described [in paragraphs II.A.1.a. and II.A.1.b. of the Hartford Policy’s business auto liability coverage part] but only to the extent of that liability.” (*Id.*; Appdx. Pg. 35.)

In this case, the Trial Court and a unanimous Appellate Court properly found that Mr. Niemeyer was not an “insured” under Bluffton’s insurance policies by operation of the Omnibus Clause.

## II. LAW AND ARGUMENT

### A. **Because this Case Presents Questions of Interest Primarily to the Parties, It is Not Appropriate for this Court's Jurisdiction and Should Be Dismissed**

Section 3(B)(3) of Article IV of the Ohio Constitution provides that judgments of the Courts of Appeals shall serve as the final adjudication of all cases, subject to certain, very limited exceptions – among them, where a particular case involves an issue of public or great general interest. Ohio Const. Art IV, § 2(B)(2)(e). Where a party contends its case is one of public or great general interest, “*the sole issue for determination ... is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties.*” *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254.

In seeking to invoke this Court's discretionary jurisdiction, Appellants represented that the present case presented questions of public interest involving matters germane to the charter bus industry. Recognizing the limitations of this Court's jurisdiction, AAIC and its co-appellee, Federal, emphasized that the present case was not one of public or general interest, but was instead an insurance coverage dispute whose outcome was of importance primarily to the litigants. In this regard, AAIC explained that the case presented a question of the application of Omnibus Clause to Appellants' particular set of factual circumstances. As such, AAIC emphasized that the case did not involve a question regarding the application of legal principles to a matter of public or great general interest.

Although Appellants led this Court to believe this matter is one of public or general interest, it is apparent from Appellants' Brief that this Court has been misled. The Brief makes no mention of how a finding in Appellants' favor would benefit the Ohio populace. Nor does it speak to issues concerning the charter bus industry. Instead, the Brief confirms that the present

case is an insurance coverage dispute that turns on “the unique facts of this case,” as Appellants concede. Brief, Pg. 17.

In short, Appellants’ Brief demonstrates that this case does not present an issue in which the citizens of Ohio have a pecuniary interest, nor does it present an issue in which the legal rights and liabilities of Ohio citizens are affected. Because the present case presents questions of interest primarily to the parties, and not to the public, this case does not warrant the exercise of this Court’s discretionary jurisdiction. Under similar circumstances, this Court has dismissed cases, *sua sponte*, as having been improvidently allowed, even after full merit briefing and oral argument. *See, e.g., State v. Urbin* (2003), 100 Ohio St.3d 1207, 1210; *Ohio State University, College of Social and Behavioral Sciences v. Ohio Civil Rights Commission* (1991), 57 Ohio St.3d 615, 616. As in the *Ohio State University* case, any opinion this Court “would issue would be nothing more than an application of. . .settled law. . .to the specific facts of this case.” *Ohio State University*, 57 Ohio St.3d at 616. Consequently, this Court should dismiss this appeal as improvidently allowed.

**B. The Case in Perspective: What the Appellants Are Asking this Court to Do**

Should this Court, nevertheless, choose to exercise its discretionary jurisdiction over this dispute, it should reject the construction of the Omnibus Clause advanced by Appellants, as the lower courts did, because a finding in Appellants’ favor would enable strangers to a liability policy to unreasonably stretch the scope of coverage, at the policyholder’s expense, in violation of well-settled Ohio insurance law.

Executive Coach was a transportation service provider. Consequently, pursuant to Federal Motor Carrier Safety Regulations, Executive Coach could not operate a motor vehicle transporting passengers unless it first obtained and had in effect the minimum levels of financial responsibility as set forth in §387.33 of this subpart [\$5,000,000.00 for any vehicle with a seating

capacity of 16 passengers or more].” See 49 CFR §387.31(a) (2008). Executive Coach complied with §387.31(a), and at the time of the Accident, had in place insurance policies sufficient to satisfy liability limits of \$5,000,000.00. (Supp. Pg. 7 at 54-55.) Nevertheless, Appellants now seek to appropriate Bluffton’s insurance and utilize that insurance in connection with the alleged negligent acts not of Bluffton, but of Executive Coach and Mr. Niemeyer.

What Appellants are effectively asking this Court to find is that a customer, who has merely paid for transportation services, has thereby made the transportation service provider and its driver/employee additional insureds under the customer’s own liability policy for the driver/employee’s negligence. Imagine the effect of Appellants’ coverage theory if it was applied under the following scenarios:

- An attorney on her way to an out-of-state deposition hails a taxi cab and asks the driver to take her to the airport. While en route, the driver loses control of the taxi due to his own negligence, causing a traffic accident that seriously injures numerous people.
- A bride and groom, eager to get to their wedding reception, climb into their waiting limousine, unaware the chauffeur has been working a double shift throughout the night. The chauffeur falls asleep as the limousine enters the banquet hall’s parking lot, causing the limousine to crash through a plate glass window.
- A church contracts with a bus company to transport its members downtown to attend a play. The bus company’s driver becomes distracted and rear-ends several cars stopped at a traffic light.

Under Appellants’ coverage theory, the taxi company, limousine company, bus company, and their respective drivers would have nothing to fear from lawsuits arising from their own negligence because they could count on their customer’s liability insurance to supplement their own coverage, all at their customer’s expense. Meanwhile, the customer’s limits of insurance for its own liabilities are depleted, leaving the customer exposed and vulnerable in connection with any claims brought against it for the customer’s own negligent acts. These scenarios are not

“scare tactics” that can be easily dismissed. They are, instead, entirely foreseeable extensions of Appellants’ coverage theory.

Of course, Appellants (who are strangers to Bluffton’s insurance policies) fail to appreciate the ramifications of their coverage arguments. After all, it is not their insurance limits that are at issue in this dispute. Nor is it Appellants who will be left potentially uninsured for any future liability claims that could be brought against them. Rather, it is Bluffton who will suffer the effects of Appellants’ coverage theory. It is Bluffton whose limits of liability insurance will be depleted, and who will face increased insurance premiums. That may not be a concern to the Appellants, but it certainly was recognized as a concern by this Court in *Cook v. Kozell* (1964), 176 Ohio St. 332, 336 (rejecting third-party’s invitation to construe insurance policy’s terms in such a way as to expand coverage and therefore necessarily increase policyholder’s premium).

Appellants, who are neither insurance companies nor transportation service providers, similarly ignore the effect their coverage theories would have on the insurance and transportation service industry. Insurers would have virtually no way to gauge a policyholder’s risk or assess its premium if a policyholder unwittingly introduces a new risk to the liability policy every time one of its employees climbs into a taxi cab. Policyholder premiums would undoubtedly skyrocket to encompass this increased exposure. The impact that Appellants’ coverage theory would have on the transportation industry would, likewise, be a chilling one. After all, what policyholder would want to insure a third party for that third party’s own negligence, leaving itself vulnerable and exposed for its own liabilities? That is not what a policyholder pays insurance premiums for.

Fortunately, Appellants, as strangers to Bluffton's insurance policies, have no standing to argue how Bluffton's insurance policies should be construed. And their coverage theory is contrary to Ohio law, in any event. An omnibus clause contained in a passenger's auto-liability policy does not extend insured status to the transportation service provider's employee/driver under the passenger's policy.

1. **Response to Proposition of Law No. 1: A Policyholder that Contracts with a Charter Bus Company for Its Transportation Services Does Not "Hire" the Bus for Purposes of the Omnibus Clause because the Bus Is Incidental to the Services Contract.**

For a third-party to be an "insured," the Omnibus Clause requires that the covered "auto" be one that the policyholder owns, hires, or borrows. Both the Trial Court and Appellate Court held that reasonable minds could not differ in concluding that Bluffton did not "hire" Executive Coach's Bus, and that Mr. Niemeyer, therefore, was not an insured under the Omnibus Clause. That determination was correct and supported by Ohio law, as well as the law of other jurisdictions, and should be affirmed.

For purposes of an omnibus clause, courts have distinguished between a "hired" auto (the user of which may qualify as an additional insured) and an auto incidental to a transportation services contract (the user of which will not qualify as an additional insured). *United States Fid. & Guar. Co. v. Heritage Mut. Ins. Co.* (7th Cir. 2000), 230 F.3d 331, 334. Why the distinction? It protects the policyholder. As Appellants' own authority recognizes, "the distinction between a hired auto and a company hired to perform transportation services must be drawn, lest a 'hired auto' clause be construed to cover every auto involved, however tangentially, in the provision of a service." *Earth Tech, Inc. v. United States Fire Ins. Co.* (E.D. Va. 2006), 407 F. Supp.2d 763, 771. This distinction protects the policyholder and ensures that a party that "never paid a penny's premium" towards the policyholder's policy, *Heritage Mut.*, 230 F.3d at 333, does not

receive a windfall of coverage at the policyholder's expense. *See generally Cook*, 176 Ohio St. at 336 (rejecting third-party's invitation to construe insurance policy's terms in such a way as to make insurer liable for damages for which its policyholder is not liable).

Courts generally assess whether a vehicle is "hired" or incidental to a service contract by the level of control that the policyholder exercises over the vehicle in question. *Heritage Mut.*, 230 F.3d at 333-334; *Combs v. Black* (2006), 10th Dist. No. 05 AP-1177, 2006-Ohio-2439, ¶18 (Appdx. Pg. 38) (emphasizing policyholder's control over vehicle necessary to implicate omnibus clause). *See also Buckeye Union Cas. Co. v. Royal Indem. Ins. Co.* (1963), 120 Ohio App. 429, 435 (in order to trigger omnibus clause, policyholder must have "possession and control" over vehicle utilized by third party).

In evaluating whether the policyholder "controls" a particular vehicle for purposes of an omnibus clause, a court considers several factors, among them, whether the policyholder maintains the vehicle, provides fuel for it, pays its driver, and directs the vehicle's routes. To the extent the policyholder does so, a court will find the vehicle to be a "hired" vehicle for purposes of the omnibus clause. *See Toops v. Gulf Coast Marine Inc.* (5th Cir. 1996), 72 F.3d 483, 487. However, where the policyholder does not furnish the vehicle's gas or oil, does not otherwise maintain the vehicle, does not select the vehicle's driver or route, and is "interested only in the results" of the vehicle transporting something from Point A to Point B, a court will find the vehicle incidental to a service contract, and thus not a "hired" vehicle for purposes of the omnibus clause. *Toops*, 72 F.3d at 487-488.

Bluffton did not "hire" Executive Coach's Bus for purposes of the Omnibus Clause because it did not have the requisite control over it. The undisputed facts evidence that Bluffton contracted with Executive Coach for its transportation services. The fact that Executive Coach

provided transportation services is implicit in its business name, Executive Coach *Luxury Travel*, Inc. (compare with Hertz® Car Rental). Moreover, the contract between Bluffton and Executive Coach itself characterizes Executive Coach as a transportation provider. (Appdx. Pg. 8 - “Thank you for choosing us for your transportation provider. Our goal is for you to have a safe and rememberable [sic] trip.”) Bluffton did not maintain, repair, or house the Bus (Supp. Pg. 21 at 75-76), provide its fuel and oil (*Id.*), employ the Bus drivers (*Id.*, Pg. 14 at 40), or investigate the drivers’ driving records. (*Id.*, Pg. 20 at 69.) The Bus was the instrumentality used by Executive Coach to provide its transportation services and was, therefore, incidental to Executive Coach’s Transportation Agreement. Accordingly, the Bus was not a “hired” auto, and Mr. Niemeyer is not an insured by operation of the Omnibus Clause.

Despite these considerations, or perhaps because of them, Appellants argue that control should not be a factor in determining whether Bluffton hired Executive Coach’s Bus. To that end, Appellants offer definitions of “hire” contained in certain dictionaries, and argue that Ohio insurance law requires that the terms in the Omnibus Clause should be given their “commonly accepted” meaning. Brief, Pg. 9.

Appellants’ recitation of Ohio insurance law is incomplete in two significant respects, however. First, Ohio law will not afford policy terms a meaning that leads to an unreasonable result. Second, those who are strangers to an insurance policy (as Appellants are in this instance) are in no position to argue how a policy’s provisions should be construed. Indeed, as this Court recognized:

“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*’ ... Likewise, where ‘the plaintiff is not a party to [the] contract of insurance ... [the plaintiff] is not in a position to urge, as one of the parties, that the contract be construed strictly against the other party.’ ... *This rings especially*

- *true where expanding coverage beyond a policyholder's needs will in-crease the policyholder's premiums.*"

*Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 220 (internal citations omitted, emphasis added).

The Appellants have not paid one dime of premium towards Bluffton's policies. And yet they argue how Bluffton's insurance policies should be construed, without regard for the consequences of what they are asking this Court to do. They are not in a position to urge such an expansive construction of coverage. Moreover, both the Trial Court and the Appellate Court recognized that Appellants' construction of the Omnibus Clause – that Bluffton purchased an auto liability policy to insure Executive Coach, and its employee-driver, for their own negligence – is a patently unreasonable result. *Toops*, 72 F.3d at 489 (“[N]o reasonable corporation would pay premiums to insure third-parties against risks for which the corporation could not be liable”). Therefore, Appellants' coverage arguments should be rejected. The authority upon which Appellants rely does not lead to a contrary conclusion.

To convince this Court that Bluffton “hired” Executive Coach's Bus, Appellants cite three Ohio decisions: *Westfield Ins. Co. v. Nationwide Mut. Ins. Co.* (1993), 99 Ohio App.3d 114; *Niemeyer v. Western Reserve Mut. Cas. Co.*, 3d Dist. No. 12-09-03, 2010-Ohio-1710; and *Davis v. Continental Ins. Co.* (1995), 102 Ohio App.3d 82. However, the decisions do not support Appellants' arguments.

According to Appellants, *Westfield* stands for the proposition that, where an educational institution engages the services of a bus company to transport its students in exchange for payment, the bus used to transport the students is “hired” by the educational institution under Ohio insurance law. And yet nowhere does the *Westfield* court purport to make so broad a pronouncement as that suggested by Appellants.

Furthermore, the *Westfield* decision did not involve the construction of an omnibus clause, and liability coverage was not at issue. The decision addressed, among other issues, whether a particular vehicle was an auto that the policyholder had “lease[d], hire[d], rent[ed], or borrow[ed],” and therefore a covered auto for purposes of the policyholder’s uninsured motorists coverage. Appellants characterize the lower courts as ignoring *Westfield*. In truth, they recognized that *Westfield* did not control the coverage issues before this Court.

The Appellants also cherry-pick certain “sound bites” from the *Niemeyer* decision to advance their argument that Bluffton “hired” Executive Coach’s Bus. While the coverage dispute at issue in the *Niemeyer* decision emanated from the Accident, it does not speak to this insurance coverage dispute. The *Niemeyer* court was asked to construe the scope of Mr. Niemeyer’s personal automobile liability policies. Specifically, the court evaluated whether a provision that precluded coverage “for liability arising out of the ownership or operation of an ‘auto’ while it is being used as a public or livery conveyance” encompassed Executive Coach’s Bus. *Niemeyer*, 2010-Ohio-1710 at ¶12. The court concluded that it did, and that Mr. Niemeyer’s personal insurance policies were not applicable to the claims against Mr. Niemeyer emanating from the Accident. As the Appellants were parties to the *Niemeyer* coverage dispute, they are already aware that Bluffton’s insurance policies were not at issue before the *Niemeyer* court, and the *Niemeyer* court was not called upon to construe an omnibus clause.

In short, neither *Westfield* nor *Niemeyer* addresses whether a transportation service provider’s employee/driver is an insured under the omnibus clause of a customer’s policy, as this Court is being asked to do. Consequently, *Westfield* and *Niemeyer* do not even relate to, let alone control, the coverage issues this matter presents

Of the three Ohio decisions cited by Appellants, only the *Davis* decision involved the construction of an omnibus clause. Significantly, however, the *Davis* court construed the omnibus clause to evaluate the scope of the subject policy's underinsured motorists coverage, because the policy before it extended underinsured motorist coverage to all who were insured under the liability provisions of the policy. The *Davis* court offered no "holding" with respect to what constituted a "hiring" for purposes of an omnibus clause, and did not evaluate the scope of the policyholder's *liability* coverage. Instead, it addressed issues concerning the "borrowing" of an auto. *Davis*, 102 Ohio App.3d at 87. Nevertheless, the Appellate Court in this matter found the *Davis* decision instructive to the coverage issues this dispute presents and relied on it in holding in favor of *AAIC and Federal*.

The fact that the Appellate Court would rely on *Davis* to find in favor of *AAIC and Federal* is not surprising, because the *Davis* decision undercuts Appellants' coverage arguments in two significant ways. First, the *Davis* court was unwilling to blindly apply the dictionary definitions of the term "borrow," as it was urged to do, because they would result in an inequitable outcome. *Id.* Second, the *Davis* court embraced a definition of "borrow" that included "some element of *substantial control*." *Id.* (emphasis added). *See also Combs*, 2006-Ohio-2439 at ¶18, (emphasizing policyholder's control over vehicle necessary to implicate omnibus clause); *Buckeye*, 120 Ohio App. at 435 (in order to trigger omnibus clause, policyholder must have "possession and control" over vehicle utilized by third party).

Perhaps sensing the weaknesses in their reliance on the *Westfield*, *Niemeyer*, and *Davis* decisions, Appellants look to several foreign decisions to argue that, for purposes of the omnibus clause, "hire" does not require an element of control. However, their reliance is misplaced.

For example, in asserting that “hire” does not require an element of physical possession or control, the Appellants quote from a California appellate court decision: “We say, for example, that one hires a taxicab, even though the taxicab owner drives it.” *Travelers Indem. Co. v. Swearinger* (Cal. Ct. App. 1985), 214 Cal.Rptr. 383, 386. While Appellants find this comment significant, the *Swearinger* court was not called upon to construe the term “hire” in the omnibus clause that was before it. Rather, the issue before the *Swearinger* court was the construction of the term “borrow.” The court’s observation regarding the term “hire” was, therefore, *dictum*.

Further, while the Appellants contend that the court’s conclusion that the terms “borrow” and “hire” do not require an element of physical possession or control “makes sense,” Brief, Pg. 13, several courts disagree, among them most recently *Swearinger*’s own sister court.<sup>4</sup> See, e.g., *American Int’l. Underwriters Ins. Co. v. American Guar. and Liab. Ins. Co.* (Cal. Ct. App. 2010), *review denied* (Apr. 14, 2010) 105 Cal.Rptr.3d 64.

Significantly, the *American* court declined to adopt the *Swearinger* court’s view of “hire” in the context of an omnibus clause for several reasons. As a threshold matter, the *American* court believed the *Swearinger* court’s decision could not be reconciled with California insurance law which, like Ohio law, requires that policy terms be construed reasonably, rather than in an unreasonable and strained fashion. *Id.* at 73-74. The *American* court also expressed concerns that the *Swearinger* court mischaracterized California Supreme Court precedent. *Id.* at 74. Moreover, the *American* court believed that the *Swearinger* court’s use of taxicabs to illustrate the concept of “hire” did not reflect the “more common situation” in which an individual “hires”

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<sup>4</sup> The fact that Appellants would refer to the “hiring” of a taxi cab to support their argument concerning the Omnibus Clause confirms that the scenarios and corresponding concerns that AAIC presents in Section II.B. of this Brief are justified.

a vehicle for his or her own use by taking temporary possession of the vehicle in exchange for money. *Id.* Declining to adopt the *Swearinger* court's view of "hire," the *American* court observed:

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.

*Id.*

The Appellants' reliance on a New Hampshire case is equally misplaced, given the decision's factual distinctions. *See, e.g., Pawtucket Mut. Ins. Co. v. Hartford Ins. Co.* (N.H. 2001), 787 A.2d 870. In *Pawtucket*, the corporate policyholder was found to have "hired" a rental vehicle because its employee rented the vehicle with the policyholder's corporate credit card *and operated it*. In making its determination, the court observed: "A corporate entity can only operate through individuals." *Id.* at 873. Here, the Bus was driven by Executive Coach's employee; Bluffton was only interested in the transportation services Executive Coach had contracted to provide. (Supp. Pg. 29.)

The Wisconsin decisions cited by Appellants do not speak to whether "hire" requires an element of control. In *Kettner v. Conradt* (Wis. Ct. App. 1997), 1997 WL 205733, a school bus was found to be a "hired" vehicle for purposes of the policyholder school district's insurance policy such that an independent bus contractor was an additional insured. In making its determination, however, the court observed that the premium under the school district's policy was calculated based upon a "cost of hire," which expressly contemplated "charges for services performed by a school bus contractor." *Id.* at \*2. The result is therefore not surprising. The court in *Reuter v. Murphy* (Wis. Ct. App. 2000), 622 N.W.2d 464, relying on the *Kettner* decision, concluded with little analysis that a policyholder school district had "hired" a car driven by a person to transport children to school.

The lower courts fully appreciated what the undisputed facts make abundantly clear: Bluffton did not “hire” the Bus from Executive Coach. All Bluffton wanted from Executive Coach was to take its baseball team from Point A to Point B safely, as Coach Grandey’s testimony confirms:

Q. Was that your main interest in contracting with Executive Coach, you wanted them to transport the team at the appropriate times?

A. Yes.

Q. Is it fair to say that you were interested in the result, namely timely and safe transportation?

A. Yes.

(Supp. Pg. 29 at 113-114.)

Bluffton did not “hire” the Bus from Executive Coach. Instead, Bluffton contracted for Executive Coach’s transportation services. The Bus, which was the vehicle chosen by Executive Coach to provide Bluffton its transportation services, was incidental to the Transportation Agreement between Executive Coach and Bluffton. Because Bluffton did not “hire” Executive Coach’s Bus, Mr. Niemeyer is not an insured under the Omnibus Clause. Consequently, the determinations of the Trial Court and Appellate Court should be affirmed.

2. **Response to Proposition of Law No. 2: A Policyholder that Acquiesces to a Transportation Provider’s Choice of Driver Does Not Give the Driver “Permission” to Operate the Vehicle, for Purposes of the Omnibus Clause**
3. **Response to Proposition of Law No. 3: A Driver Who Operates a Transportation Provider’s Vehicle in the Course and Scope of His Employment Does Not Operate the Vehicle with the Policyholder’s Permission, for Purposes of the Omnibus Clause.**

To qualify as an additional insured under the Omnibus Clause, Mr. Niemeyer would also have had to use the Bus with Bluffton’s permission. Here, too, the Trial Court and Appellate Court concluded that reasonable minds could not differ that Mr. Niemeyer operated the Bus with

Executive Coach's permission, not Bluffton's. Accordingly, for this additional reason, Mr. Niemeyer was not an insured under the Omnibus Clause.

In order for one's operation of an automobile to be with the policyholder's "permission" for purposes of an omnibus clause, Ohio law requires that the policyholder must 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 a position to give such permission. *Buckeye*, 120 Ohio App. at 435 (for purposes of omnibus clause, third party does not use vehicle with policyholder's "permission" unless policyholder had "possession and control" over vehicle); *Combs*, 2006-Ohio-2439, ¶18 (policyholder could not give permission for third party's employee to operate third party's vehicle "[a]bsent some degree of control over the vehicle").

Likewise, states outside of Ohio require that, before the policyholder can give the permission necessary to implicate an omnibus clause, the policyholder must own the particular vehicle or have such an interest in it that it is entitled to the possession and control of the vehicle. *Hardware Dealers Mut. Fire Ins. Co. v. Holcomb* (W.D. Ark. 1969), 302 F. Supp. 286, 291 (quoting 7 AM.JUR.2D, *Automobile Insurance*, § 115, Pg. 428). In contrast, where a driver (such as Mr. Niemeyer) is using a vehicle by virtue of his own right to possess and control it, rather than by virtue of the policyholder's (Bluffton's) permission, that driver is generally not considered to be a permissive driver within the meaning of an omnibus clause. *Sachtjen v. American Family Mut. Ins. Co.* (Colo. 2002)(*en banc*), 49 P.3d 1146, 1148; *Fetisov v. Vigilant Ins. Co.* (N.J. Super. Ct. App. Div. 2006), 2006 WL 2051116 at \*4 (affirming trial court's finding of no coverage for limousine company or its driver on appeal, court observed omnibus clause became effective only if policyholder team hockey owner granted initial permission for driver to use limousine in the first instance).

The lower courts correctly found that Bluffton did not have the type of interest in the Bus necessary for Bluffton to give Mr. Niemeyer permission to operate it. In the present case, Executive Coach was the only entity with possession and control of the vehicle sufficient to give a third-party permission to operate the Bus. As Coach Grandey succinctly (and correctly) observed: “It’s [Executive Coach’s] bus...” (Supp. Pg. 28 at 106.)<sup>5</sup> See also *American Int’l.*, 105 Cal.Rptr.3d at 71 (finding it “unreasonable” to infer that omnibus clause contained in customer’s policy contemplated customer granting permission to transportation service provider to use transportation service provider’s own vehicles in providing its services).

Executive Coach leased the Bus from PFS and operated it within its lease right. (Supp. Pg. 3 at 21.) This lease prohibited Executive Coach from assigning, subletting, encumbering, or transferring any interest in the Bus to any third party without Partnership’s consent. (Appdx. Pg. 3.) Executive Coach selected Mr. Niemeyer to drive the trip and provided him the keys to the Bus. (Appdx. Pg. 13, ¶15; Supp. Pgs. 6 at 49-50, 20-21 at 69-73.) Mr. Niemeyer drove that Bus because Executive Coach employed him to do so, not because Bluffton put him in the driver’s seat. Mr. Niemeyer, therefore, used the Bus by virtue of his own right as Executive Coach’s employee to possess and control it; he did not operate the Bus as Bluffton’s “permissive user.”

To convince this Court that Bluffton had sufficient interest in Executive Coach’s Bus to give Mr. Niemeyer permission to operate it, Appellants rely on three decisions: *Caston v. Buckeye Union Ins. Co.* (1982), 8 Ohio App.3d 309); *Fratis v. Fireman’s Fund American Ins. Cos.* (Cal. Ct. App. 1976), 128 Cal.Rptr. 391; and *State Farm Mut. Auto. Ins. Co. v. Mackechnie*

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<sup>5</sup> Tellingly, even the Appellants acknowledge Executive Coach’s interest in the Bus when they refer to it as the “Executive Coach bus” in their brief. See, e.g., Brief, Pg. 21.

(8th Cir. 1940), 114 F.2d 728. However, not one of these decisions supports a finding that Mr. Niemeyer operated the Bus as Bluffton's permissive driver.

Appellants' efforts to analogize the present case to the factual circumstances presented in the *Caston* decision is misdirected. *Caston* did not involve a transportation services contract. In *Caston*, a high school student took part in an overnight field trip to a cottage coordinated by the policyholder school. Because the school's regular bus drivers were not available, the school asked for volunteers from the student body who could use their family cars to drive students to the outing. One family entrusted their vehicle to the school by loaning it to the school. After arriving at the cottage, a student asked one of the chaperones if he could use his family's car to get a hamburger. The chaperone "granted permission." *Caston*, 8 Ohio App.3d at 310. On the way to the restaurant, the car was involved in a head-on collision.

According to Appellants, the facts presented in *Caston* are analogous to the present dispute. In this regard, Appellants contend that Bluffton is effectively the policyholder school, and Niemeyer is the student driver. But the analogy is a labored one.

In making its coverage determination, the *Caston* court observed: "that the student driving the vehicle did so with permission is beyond doubt." *Id.* It engaged in no analysis, but its conclusion is hardly surprising. After all, the family in *Caston* had entrusted their vehicle and their high school son to the policyholder's care. In contrast, Mr. Niemeyer was not a high school student who borrowed his family car to take his classmates on a field trip. Instead, Mr. Niemeyer was an Executive Coach employee who drove Executive Coach's Bus pursuant to Executive Coach's instructions. Moreover, Executive Coach did not entrust its Bus to Bluffton, as the family had entrusted their vehicle to the school in *Caston*. To the contrary, Executive Coach maintained its control over the Bus *through Mr. Niemeyer and the other drivers who*

*Executive Coach assigned to the trip.* Appellants' efforts to analogize the present case to the *Caston* decision do not hold water.

Appellants' reliance on the *Fratis* decision is, likewise, misplaced. *Fratis* did not involve a transportation services contract. In *Fratis*, "[t]he only issue raised" before the California court was whether a third-party became an additional insured under the policyholder newspaper's policy as the driver of a "hired automobile." *Fratis*, 128 Cal.Rptr. at 391. The policy at issue broadly defined the term "hired automobile," in part, as one used under contract on behalf of the named insured. *Id.* Because the third-party was working under a commission contract as a subscription solicitor for the policyholder, the court concluded the third-party's vehicle satisfied the definition of "hired automobile" in the policyholder's policy. *Id.*

While Appellants cite the *Fratis* decision to suggest that, under California law, a policyholder need not have control over a vehicle before it can "permit" another to use the vehicle, the court rendered no such holding. Even if it had, that view would conflict with Ohio law. *See, e.g., Combs*, 2006-Ohio-2439, ¶18; *Buckeye*, 120 Ohio App. at 435. Moreover, it is worth noting that even the *Fratis* court's own California sister courts have rejected the *Fratis* court's theory that a policyholder can give a third-party permission to use that third-party's own vehicle. *See, e.g., Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (Cal. Ct. App. 1991), 286 Cal.Rptr. 146, 155 (concluding it would "strain the plain meaning" of the omnibus clause to suggest third-party was using its own vehicle with policyholder's permission); *American Int'l.*, 105 Cal.Rptr.3d at 71 (finding it "unreasonable" that customer could grant permission to transportation service provider to use transportation service provider's own vehicles for purposes of omnibus clause). Therefore, *Fratis* is of no persuasive authority in this case.

In their discussion of *Fratis*, Appellants also cite to *Gulla v. Reynolds* (1949), 151 Ohio St. 147, to suggest that “permission” to use the automobile should be determined by the use to which the automobile is being put at the time of the accident. However, even that consideration does not impact this analysis, because Mr. Niemeyer was driving the Bus incident to his employment with Executive Coach.

Appellants also fail to appreciate the factual considerations that distinguish the *Mackechnie* decision from the present case. In *Mackechnie* (which involved the application of Nebraska law), the court concluded that the policyholder choir had the capacity to grant another permission to drive the vehicle because the policyholder’s director purchased the vehicle “for the specific purpose of transporting and conveying” the choir on concert tours, and the choir was therefore a “virtual lessee” of the vehicle (the court also concluded that the director was, in reality, the policyholder). 114 F.2d at 734. However, unlike the policyholder in *Mackechnie*, Bluffton did not purchase Executive Coach’s Bus, and Bluffton was not its “virtual lessee.”

After arguing at length that Ohio law does not require that the policyholder have “possession and control” over a vehicle in order to give a third party “permission” for its use for purposes of the Omnibus Clause, Appellants backtrack from their initial argument, change their theory, and cite *Combs* for the proposition that Ohio law requires only that the policyholder have *de minimis* control over a vehicle before it can grant a third party permission to use that vehicle. Brief, Pg. 26. However, *Combs* said no such thing. On the contrary, it implicitly rejected such an argument.

In *Combs*, the policyholder had contracted with a subcontractor to perform concrete work on its projects. While performing that work, the subcontractor’s employee injured the claimant while operating the subcontractor’s truck. The claimant later argued that the subcontractor’s

employee was an additional insured under the policyholder's policy by operation of an omnibus clause. The *Combs* court rejected the argument, observing that "[c]learly, the parties to the [policyholder's insurance policy] did not intend for coverage under their policy to extend so far." *Id.*, 2006-Ohio-2439, ¶15. (Appdx. Pg. 38.)

The *Combs* court dismissed the notion that the policyholder had given the subcontractor's employee permission to operate the subcontractor's truck, for several reasons. First, it observed that the policyholder did not own the vehicle. *Id.*, ¶16. Second, the court rejected the notion that the policyholder had "controlled" the vehicle by instructing the subcontractor's employee to pick up a load of gravel and deliver it to the job site. *Id.*, ¶18. Indeed, the court emphasized that "[m]ere directions as to where to load and deliver are not sufficient to create a question of fact as to control." *Id.* Third, the court observed that the employee was employed by the subcontractor, not the policyholder. The subcontractor's employee was using the truck pursuant to his employment with the subcontractor and pursuant to the subcontractor's subcontract with the policyholder. *Id.*, ¶19. In light of these factors, and notwithstanding the policyholder's *de minimis* control over the subcontractor's truck, the *Combs* court concluded the policyholder had no authority to give the employee permission to use the subcontractor's truck and that the employee was, therefore, not an additional insured under the policyholder's omnibus clause. *Id.*, ¶20.

Perhaps realizing that *Combs* does not support the *de minimis* control argument they attempt to advance, Appellants next argue that, even if the policyholder must have "possession and control" over a vehicle before it can permit another to use it for purposes of the Omnibus Clause (and Ohio law requires that it does, as discussed above), the "facts" of this case

demonstrate that Bluffton had such possession and control over the Bus. However, Appellants' purported facts are not supported by the record.

As the undisputed evidence demonstrates, and despite Appellants' assertion to the contrary, Coach Grandey *did not* contract for a specific bus. (Supp. Pgs. 21 at 74, 23 at 81-82.) It was, instead, *Executive Coach* that designated the Bus for Bluffton's trip. (Supp. Pgs. 3 at 24, 31 at 23-24.) Nor did Coach Grandey select "a motor coach with a DVD player." Brief, Pg. 12. On the contrary, Coach Grandey's own testimony confirms that the bus Executive Coach had assigned to Bluffton's trip already had a DVD player on board. (Supp. Pg. 16 at 47-48.)

Bluffton also did not select or pay for Mr. Niemeyer as a driver. Brief, Pg. 12. Rather, Executive Coach selected Mr. Niemeyer for the trip. (Supp. Pg. 16 at 46-47.) Mr. Niemeyer was not an employee of Bluffton. (*Id.*, Pg. 14 at 38-39.) Bluffton could not terminate Mr. Niemeyer's employment with Executive Coach. (*Id.*, Pg. 20 at 71.) And while the Transportation Agreement between Executive Coach and Bluffton contemplated that the "customer" could pay for meals, lodging, and gratuity, it did not require him to do so. On the contrary, as Coach Grandey made clear, he did not intend to tip Mr. Niemeyer (*Id.*, Pg. 15 at 41-43), and he provided Mr. Niemeyer's meals and lodging as a courtesy, not as Mr. Niemeyer's compensation or because he was required to do so. (*Id.*)

Appellants assert that, if Coach Grandey had not approved Mr. Niemeyer for the trip, he would not have been the driver. Brief, Pg. 26. This is a moot point, as Coach Grandey acquiesced to Executive Coach's choice of driver. (Supp. Pg. 16 at 45-46.) Nevertheless, Appellants' own authority confirms that the policyholder's "ability to refuse certain drivers" does not establish control of a vehicle for purposes of the omnibus clause. *Occidental Fire & Cas. Co. v. Westport Ins. Corp.* (E.D. Pa. Sept. 10, 2004), No. 02-8923, 2004 U.S. Dist. LEXIS

18471 at \*30. Furthermore, Appellants' assertion overstates the reality of the relationship between Executive Coach and Bluffton. Executive Coach has made it clear that, although as a courtesy it tries to honor its customer's requests, the decision to do so is ultimately Executive Coach's. (Supp. Pgs. 10-11 at 97-101.) The reality of Executive Coach's business relationship with Bluffton was demonstrated on Bluffton's 2006 trip to Florida. On the 2006 trip, it was Coach Grandey who had initiated a conversation with Executive Coach about a specific driver. (*Id.*, Pg. 14 at 38-39.) Coach Grandey testified that he had requested a specific driver. (*Id.*) Executive Coach responded that the driver was unavailable and suggested a different driver. Coach Grandey agreed to Executive Coach's choice of driver. (*Id.*)

The significance Appellants attach to Mr. Niemeyer's wife travelling with Mr. Niemeyer aboard the Bus is likewise misdirected. Brief, Pg. 26. The fact that Mrs. Niemeyer travelled aboard the Bus with her husband evidences only an accommodation by Coach Grandey, which was permitted by Executive Coach's company policy. It was not evidence of an exercise of Bluffton's control.

According to Appellants, Bluffton was in "complete control" of the Bus' route throughout the course of the trip. Brief, Pg. 27. However, Coach Grandey testified there were no discussions with Executive Coach in connection with the 2007 trip about the route that the Bus was going to take. (Supp. Pgs. 16-17 at 45-51.) According to Coach Grandey, all Executive Coach "needed to know was the hotel we were stopping at." (*Id.*, Pg. 17 at 48.) While Coach Grandey had directions to the baseball fields at which they were playing, that does not give rise to a level of control under Ohio law. *Combs*, 2006-Ohio-2439, ¶18 ("Mere directions as to where to load and deliver are not sufficient to create a question of fact as to control"). And while Appellants attempt to create the impression of Coach Grandey sitting in the front row of the Bus,

directing the Bus' movements, Coach Grandey was, in fact, asleep at the time of the Accident. (Supp. Pg. 27 at 97.)

Appellants assert that Coach Grandey presented Executive Coach a detailed trip itinerary as part of Bluffton's "contract-negotiation process." Brief, Pg. 27. However, that is simply not true. The trip itinerary was faxed to Executive Coach months after the Transportation Agreement was executed. (Supp. Pg. 18 at 53-54.) So Coach Grandey did not fax the itinerary to Executive Coach as part of the contract-negotiation process. Rather, it was merely faxed to Executive Coach so that Executive Coach "knew what time we would be departing and roughly what time we would be returning." (*Id.*)

Appellants contend that Bluffton controlled the Bus because Coach Grandey "could, and did, deviate from" his itinerary. Brief, Pg. 27. But Appellants miss the point. Any deviation was always subject to *Executive Coach's* controlling authority over the Bus, which Executive Coach exercised over the Bus through Mr. Niemeyer and its other drivers. Executive Coach's drivers were expected to contact Executive Coach in the event of any substantial deviation from the itinerary. It was up to Executive Coach whether to permit the deviation. (Supp. Pgs. 9-11 at 96-98.)

The *only* purported deviation that Appellants can point to in this instance occurred when Coach Grandey requested that the Bus return to the university after discovering that the DVD player aboard the Bus was not working. Appellants contend that this illustrates Coach Grandey's "control" over the Bus. To the contrary, it confirms that the deviation was always subject to Executive Coach's controlling authority over the Bus. Appellants ignore that the Bus was returned so that Executive Coach could make the necessary repairs. Indeed, Coach Grandey's

testimony confirms that Executive Coach's driver contacted Executive Coach so that the problem with the DVD could be addressed. (*Id.*, Pg. 24 at 87.)

Appellants close their Brief by introducing a new argument: that the exercise of "control" is not the only means of acquiring the authority to grant permission to use a vehicle. Brief, Pg. 28. Essentially, Appellants contend that Executive Coach specifically granted Bluffton the ability to approve or reject Jerome Niemeyer as a driver, and that Executive Coach ceded the choice of driver to the customer. The argument is an improper one for several reasons.

First, the Appellants introduce this argument for the first time in this litigation. It was neither raised nor briefed in the lower courts. Accordingly, Appellants have waived the argument. *State v. Awan* (1986), 22 Ohio St.3d. 120, 120 (failure to raise at trial court level an issue "constitutes a waiver of such issue and a deviation from this state's procedure, and therefore need not be heard for the first time on appeal"); *McKinley v. Ohio Bureau of Workers' Comp.* (2006), 170 Ohio App.3d. 161, 177 (holding that it is a cardinal rule of appellate review that a party cannot assert new legal theories for the first time on appeal); *Stafford v. Columbus Bonding, Ctr.* (2008), 177 Ohio App.3d. 799, 811 (explaining that a party waives an issue by failing to raise it in the trial court, and it may not raise it for the first time on appeal).

Second, the Appellants cite absolutely no authority – controlling or persuasive – to support their argument. Their argument is, at best, a self-serving legal theory devised by Appellants.

Third, and most important, Appellants' argument that Executive Coach "delegated or transferred" its authority to Bluffton to grant Mr. Niemeyer permission to use the Bus simply has no factual basis. According to Coach Grandey, "Executive Coach had called me and ask[ed] hey, is Jerry okay to be your driver, and I said Jerry is okay." (Supp. Pg. 16 at 45.) On its face,

there is nothing in that testimony to indicate that Executive Coach transferred its authority to Bluffton to grant Mr. Niemeyer permission to use Executive Coach's Bus. Nor could Executive Coach delegate such authority to Bluffton. As discussed, PFS's lease with Executive Coach prohibited Executive Coach from delegating or transferring any authority or interest in the Bus. For all these reasons, Appellants "eleventh-hour" argument should be rejected.

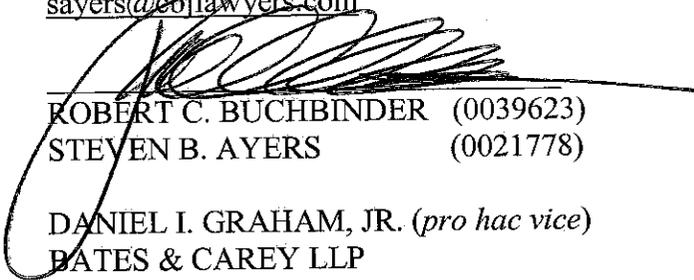
In summary, the Trial Court and a unanimous Appellate Court viewed this issue from the perspective that Ohio law requires. In doing so, both concluded that Mr. Niemeyer operated the Bus as Bluffton's permissive driver. The undisputed facts plainly demonstrate that Bluffton was incapable of giving Mr. Niemeyer permission to drive the Bus for purposes of the Omnibus Clause. Bluffton did not own the Bus or have an ownership interest in the Bus. Mr. Niemeyer used the Bus by virtue of his own right to possess and control the Bus through his employment with Executive Coach rather than through Bluffton's permission. Consequently, Mr. Niemeyer was not a permissive driver for purposes of triggering the Omnibus Clause. Therefore, the lower courts' findings that the Omnibus Clause does not extend insured status to Mr. Niemeyer should be affirmed.

### **III. CONCLUSION**

The construction of the Omnibus Clause that the Appellants advance is an unreasonable one, as both the Trial Court and the Appellate Court found. For the reasons stated above and upon the authorities cited, American Alternative Insurance Corporation respectfully requests that this Court affirm the judgments of the lower courts, find in favor of American Alternative Insurance Corporation and Federal Insurance Company, and grant such further and additional relief as the Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following counsel of record, by email and regular U.S. Mail, this 6<sup>th</sup> day of July 2010.

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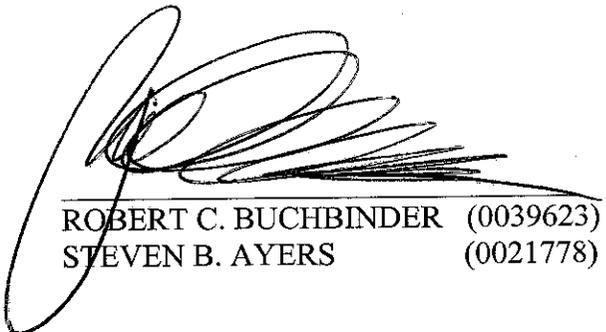
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(R071300)

Commercial Transportation Lease Agreement

This Lease Agreement (the "Agreement") effective as of July 19, 2000 is entered into by and between Partnership Financial Services, Inc. d/b/a ABC Financial Services ("Lessor"), and the undersigned ("Lessee"). If more than one party executes this Agreement as Lessee, each shall be jointly and severally liable hereunder.

1. LEASE; DISCLAIMER. Lessor hereby agrees to lease to Lessee and Lessee hereby agrees to lease from Lessor certain Vehicles for use in its business. Lessee's lease of a Vehicle shall be effective on the date Lessee accepts the Vehicle for Lease hereunder. Lessor hereby assigns the manufacturer's warranty to Lessee for the Lease Term. LESSEE AGREES THAT LESSOR IS NOT THE MANUFACTURER, DESIGNER OR DISTRIBUTOR OF THE VEHICLES AND THAT EACH VEHICLE IS OF A DESIGN SELECTED BY LESSEE AND SUITABLE FOR ITS PURPOSES. ALL VEHICLES ARE LEASED "AS IS." LESSOR MAKES NO REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO ANY VEHICLE INCLUDING, BUT NOT LIMITED TO: THE MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF A VEHICLE; THE DESIGN, QUALITY OR CAPACITY OF A VEHICLE; OR COMPLIANCE OF A VEHICLE WITH APPLICABLE LAW.

2. DELIVERY. Lessee shall inspect a Vehicle at the location of delivery. Lessee's removal of a Vehicle from such location shall constitute acceptance of the Vehicle and Lessee's warranty to Lessor that the Vehicle conforms to Lessee's specifications. Lessee agrees that Lessee's obligation to pay rent and other amounts with respect to such Vehicle shall be unconditional and that Lessee shall not be entitled to any reduction of, or setoff against, such amounts.

3. TERM OF AGREEMENT. This Agreement shall commence on the date set forth above, and continue until canceled or terminated by either party upon 30 days' written notice to the other. Notwithstanding termination, this Agreement shall remain in effect with respect to each Vehicle then leased until all terms and conditions of this Agreement are satisfied.

4. LEASE TERM. The noncancelable minimum Lease Term for each Vehicle is 367 days beginning upon the first rental payment date. Thereafter, the Lease Term may be extended provided that such extensions shall not extend the maximum Lease Term beyond the Lease Term set in Exhibit C hereto.

5. OPERATION. Lessee shall operate the Vehicles solely in the United States (Lessee acknowledges that breach of such covenant could adversely affect Lessor's assumed tax benefits and thereby subject Lessee to liability therefore) and in accordance with applicable federal, state and local law governing the use, operation, maintenance or alteration of the Vehicles. Lessee agrees to repair the Vehicles and to maintain them in safe and good mechanical condition and running order. All additions to a Vehicle become the property of Lessor and shall be surrendered with the Vehicle. NO VEHICLES MAY BE USED TO TRANSPORT HAZARDOUS SUBSTANCES.

6. NET LEASE. Lessee covenants that it will pay all costs, expenses, fees, charges, fines, interest, and taxes, including, without limitation, sales, property and use taxes, incurred in connection with the Vehicle's titling, registration, delivery, purchase, sale, rental, modification, and arising from the ownership, operation or use of the Vehicle during its Lease Term regardless of when assessed or payable. If Lessor pays any of the foregoing amounts, Lessee shall promptly reimburse Lessor and pay Lessor's then current administrative charge.

7. TITLE; REGISTRATION. Lessee, at its own expense, will obtain all required registration plates, permits or licenses for the Vehicles. If Lessor pays for any of the foregoing, Lessee will promptly reimburse Lessor. Lessee agrees to properly title and register the Vehicles in Lessor's name and, if Lessee is in possession of the title, to promptly deliver the title to Lessor. Lessee will bear all costs and expenses, including Lessor's administrative fee, to correct incorrect titles.

8. RENTAL CHARGES. Lessee will pay rental for the Vehicles in accordance with the relevant Exhibits, as well as all other rental charges provided for in this Agreement. Notwithstanding any provisions hereof to the contrary, the failure of Lessee to receive an invoice for such payments or to receive invoices on a timely basis shall not excuse or otherwise modify payment terms provided for herein or in Exhibits hereto and Exhibit T.

Lessee acknowledges that the periodic rental charges are based on a presumed after-tax return to Lessor. If any changes in federal or state tax laws or regulations (including a change in corporate income tax rate) cause Lessor's after-tax return to be reduced or impact the ability of Lessor to realize the full tax benefits contemplated herein, Lessor may, in compensation, prospectively adjust the periodic rental charges.

9. PAYMENT TERMS. Time is of the essence. If rent is not paid within ten (10) days of its due date, Lessee agrees to pay a late charge of five cents (\$.05) per dollar on, and in addition to, the amount of such rent but not exceeding the lawful maximum, if any. It is the intent of Lessor that it not receive directly or indirectly any amount in excess of that amount which may be legally paid. Any excess charges will be credited to Lessee or, upon request of Lessee, refunded. All charges are based upon Lessor's standard operating routines, existing business policy and computer systems capabilities.

10. SURRENDER OF VEHICLES. At the end of the minimum Lease Term, Lessee may, and at the end of the Lease Term, Lessee shall, upon reasonable written notice to Lessor, either purchase the Vehicle for its then fair market value or return the Vehicle to Lessor by delivering the Vehicle to Lessor at a mutually agreed location. Upon surrender or, if not surrendered, at final disposition, the Vehicle shall be in good, safe and lawful operating condition. Surrender of the Vehicle shall not be effective until Lessor has actual physical possession of the Vehicle and has received all license plates, registration certificates, documents of title, odometer and damage disclosures and other documentation necessary for the sale of the Vehicle. If, upon Lessee request, Lessor accepts an offer to purchase a Vehicle from Lessee or a purchaser identified by Lessee and Lessor does not take actual physical possession of the Vehicle, neither surrender nor sale shall be deemed to occur until Lessor delivers the certificate of title and receives payment. Any personal property in a Vehicle upon surrender shall be deemed abandoned and may be disposed of by Lessor without liability.

11. SALE OF VEHICLES. In the event Lessee elects not to exercise its purchase option, Lessor shall, and Lessee may, solicit from prospective purchasers wholesale cash bids for Vehicles. Such Vehicles shall be sold in a commercially reasonable manner. From the sales proceeds of a sale to Lessee or any other party, Lessor shall deduct all unamortized acquisition fees, sales expenses paid or incurred by Lessor in undertaking such sale and any late fees, taxes or other amounts due with respect to the Vehicles, regardless of when assessed or payable, the balance remaining to constitute the Net Proceeds which shall be payable to Lessor. If Lessor sells any vehicle owned by Lessee or a third party, Lessee agrees that the sale of such vehicle shall be subject to the indemnity herein and to pay Lessor's then current sale fee.

12. TERMINAL RENTAL VALUE. As an incentive to the Lessee to maintain the value of the Vehicle by good maintenance, repair and careful use during its Lease Term, the parties agree that the enhancement or reduction in value shall be compensated as follows:

- a. **Refund of Rental.** If the Net Proceeds from the sale to either Lessee or a third party exceed the Terminal Rental Value (as defined in Exhibit T), Lessor shall retain an amount equal to the Terminal Rental Value, and remit the excess to Lessee as a refund of rental.
- b. **Rental Charge.** If the Net Proceeds from the sale to either Lessee or a third party are less than the Terminal Rental Value, Lessee shall pay Lessor at the time of the sale the amount of the difference between the Net Proceeds and the Terminal Rental Value.

**13. INSURANCE.** Before delivery of any Vehicle, Lessee shall purchase from a responsible insurance company acceptable to Lessor and Lessee shall maintain, during the Lease Term of each Vehicle, the following coverages and deliver to Lessor a certificate thereof:

- a. **Liability insurance** naming Lessor as an Additional Insured with limits of coverage as Lessor may require, but in no event less than \$1 million combined single limit per occurrence (\$5 million for Vehicles capable of transporting 9 or more passengers). No self-insured retention or deductible is permissible unless approved in writing by Lessor.
- b. **Comprehensive and collision insurance** naming Lessor as Loss Payee with coverage for the actual cash value of each Vehicle and subject to a deductible no greater than the following amounts unless approved by Lessor: \$5,000 for intercity coaches; \$2,500 for school buses, shuttle buses and vans and ambulances; \$1,000 for medium and heavy duty trucks and trailers, tool trucks, tow trucks and tire service trucks. Lessee shall also obtain no-fault insurance complying with applicable legal requirements. Lessee shall bear all risk of loss, damage or destruction to the Vehicle (which may exceed actual cash value), however caused, from the time of acceptance until surrender to Lessor.
- c. **Conditions.** All insurance policies shall provide for 30 days' prior written notice to Lessor of any cancellation or reduction in coverage. Lessor has no obligation to examine insurance certificates or to advise Lessee if its insurance is not in compliance with this Agreement. Lessee authorizes Lessor to endorse Lessee's name to insurance checks related to the Vehicles and to take any actions to pursue insurance claims and recover payments if Lessee fails to do so.
- d. **Casualty.** In the event for any reason a Vehicle becomes worn out, lost, stolen, destroyed or unusable (herein, each, a "Loss"), on the rental payment date next succeeding the occurrence of such Loss, Lessee shall pay to Lessor the sum of (x) the Stipulated Loss Value (as defined in Exhibit S) of the affected Vehicle (determined as of the rental payment date immediately preceding the date of such Loss), and (y) all rent and other amounts which are then due under this Agreement. Upon payment of all such sums, the term of this Lease as to such affected Vehicle shall terminate. So long as no event of default shall have occurred and be continuing, any insurance proceeds attributable to such Vehicle shall be payable to reimburse Lessee for the payments required hereunder up to the amount of the Stipulated Loss Value. Lessee understands that such Stipulated Loss Value may exceed the actual cash value of the Vehicle as determined by the insurer of the Vehicle and that Lessee remains required to pay the entire amount due hereunder. In the event the Loss occurs after the first annual anniversary of the Lease, Lessee may, provided it is not in default under this Agreement, and in lieu of the payment requirement in this subsection, exercise its option to purchase the Vehicle(s) suffering a Loss for an amount equal to the higher of the then fair market value and the Terminal Rental Value determined pursuant to Exhibit T.

**14. INDEMNITY.** LESSEE WILL INDEMNIFY AND DEFEND LESSOR (INCLUDING ANY OF ITS AFFILIATES) AGAINST ANY LOSS, LIABILITY OR CLAIM DIRECTLY OR INDIRECTLY RELATING TO THE OWNERSHIP, LEASE, MAINTENANCE, USE, CONDITION (INCLUDING BUT NOT LIMITED TO, PATENT AND LATENT DEFECTS WHETHER OR NOT DISCOVERABLE, PRODUCT LIABILITY CLAIMS OR THE CONDITION OF THE VEHICLE AT SURRENDER) OR SURRENDER OF ANY VEHICLE BETWEEN THE TIME OF DELIVERY TO LESSEE AND THE TIME OF SURRENDER. IF LESSOR SELLS ANY VEHICLE TO LESSEE, ANY OF ITS EMPLOYEES OR A PURCHASER FROM WHOM LESSEE OBTAINS AN OFFER, LESSEE'S COVENANTS OF INDEMNITY WITH RESPECT TO SUCH VEHICLE SHALL CONTINUE. THIS INDEMNITY IS ABSOLUTE AND UNCONDITIONAL AND INCLUDES CLAIMS OF NEGLIGENCE, STRICT LIABILITY, ENVIRONMENTAL LIABILITY AND BREACH OF WARRANTY, BUT DOES NOT EXTEND TO CLAIMS OR LIABILITY ARISING FROM THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LESSOR, ITS AGENTS OR EMPLOYEES. THIS INDEMNITY SHALL SURVIVE THE TERMINATION OF THIS AGREEMENT.

**15. NATURE OF AGREEMENT.** THE PARTIES INTEND ALL LEASES OF VEHICLES HEREUNDER TO BE TRUE LEASES. Lessee has no right, title or interest in and to any Vehicle leased hereunder except as lessee, and Lessee has no option to purchase any Vehicle for any amount less than its fair market value. Lessor has the right to mark the Vehicle at any time stating its interest as owner and to receive and retain compensation related to the Vehicles from manufacturers, suppliers and vendors. Without prejudice to the intention of the parties that this Agreement be a true lease, Lessee hereby grants Lessor a security interest in the Vehicles, all vehicles and other equipment and property subject to other leases or loans with Lessor, and all proceeds, accessions, documents, instruments, accounts, chattel paper, equipment and general intangibles related thereto to secure all of Lessee's obligations under this or any other agreement with Lessor. Lessee hereby grants Lessor its power of attorney to act for and on behalf of Lessee in all matters pertaining to the titling and registration of Vehicles and the filing, recording or perfecting of Lessor's interest and title in the Vehicles, including execution of Uniform Commercial Code financing statements, and agrees to execute such other documents as may be necessary to effect or evidence such grant. A photocopy or other reproduction of this Agreement shall be sufficient as a financing statement.

**16. FINANCIAL STATEMENTS; INSPECTIONS.** The creditworthiness of Lessee and any guarantor is a material condition to this Agreement. Lessee shall provide Lessor with financial information reasonably requested by and satisfactory to Lessor each year of this Agreement. Nothing herein shall be construed to require Lessor to lease any vehicle. Lessor may inspect the Vehicles and related records at any time upon reasonable notice.

**17. DEFAULT; REMEDIES.** If Lessee shall fail to make the payments, maintain insurance coverage or title any Vehicle properly and in a timely manner, all as herein required or after 10 days' written notice shall fail to perform any of its other covenants under this Agreement, or Lessee or any guarantor shall (i) make an assignment for the benefit of creditors, or suffer a receiver or trustee to be appointed, or file or suffer to be filed any petition under any bankruptcy or insolvency law of any jurisdiction; or (ii) discontinue business; or (iii) dissolve, terminate, cease its corporate or partnership existence or die; or (iv) be in default under any other agreement it may have with Lessor or any parent, subsidiary or affiliate of Lessor; or (v) suffer a material adverse change in operating or financial condition which impairs Lessee's ability to perform its obligations hereunder or Lessor's title to or rights in the Vehicles; or (vi) make any representation or warranty herein, or in any document delivered to Lessor in connection herewith, which shall prove to be false or misleading in any material respect; or (vii) merge, consolidate, or undergo a change in controlling ownership; or (viii) be in default under any other agreement it may have with Lessor or any parent, subsidiary or affiliate of Lessor; then in such event Lessee shall be in default under this Agreement. A default under the terms of this Agreement shall constitute a default under any other agreement Lessee has with Lessor, or any parent, subsidiary or affiliate of Lessor. Lessor shall have the right to offset any amounts due to Lessee against amounts due to Lessor and all rights and remedies available at law or in equity including, without limitation, the right to repossess any and all Vehicles leased hereunder (and for that purpose, Lessor or its agents may enter upon any premises owned by or under the control of Lessee or any of its employees or affiliates). Notwithstanding repossession and sale of any Vehicle, Lessor may recover from Lessee all damages sustained as a result of Lessee's default, and is not accountable to Lessee for any proceeds of any such sale. Such damages shall include but not be limited to: the full amount of

rentals then due and unpaid, the Stipulated Loss Value of the Vehicles calculated pursuant to Exhibit S as of the rental payment date immediately preceding the default, and all other amounts of any nature due under this Agreement including, without limitation any amounts due as terminal rental adjustments, together with all costs of collection and repossession including attorneys' fees and collection fees. All of Lessor's rights and remedies shall be cumulative and not exclusive.

18. NO CONSEQUENTIAL DAMAGES. In no event shall Lessor be liable for any loss of profits, other consequential damages or inconvenience resulting from any delay in delivery, theft, damage to, loss of, defect in or failure of any Vehicle, or the time consumed in recovering, repairing, adjusting, servicing, or replacing same and there shall be no abatement or apportionment of rental during such time. EXCEPT WITH RESPECT TO LESSEE'S OBLIGATIONS OF INDEMNITY HEREUNDER, EACH PARTY AGREES THAT: ITS SOLE AND EXCLUSIVE REMEDY FOR ANY MATTER OR CAUSE OF ACTION RELATED DIRECTLY OR INDIRECTLY TO ANY BREACH BY THE OTHER PARTY OF THIS AGREEMENT SHALL BE A CONTRACT ACTION; DAMAGES SHALL BE LIMITED TO ACTUAL AND DIRECT DAMAGES INCURRED; AND NO INDIRECT, CONSEQUENTIAL OR PUNITIVE DAMAGES WILL BE CLAIMED.

19. ASSIGNMENTS. LESSEE SHALL NOT ASSIGN, SUBLET, LIEN, ENCUMBER, OR TRANSFER ANY INTEREST IN ANY OF THE VEHICLES LEASED HEREUNDER OR ANY INTEREST IN THIS AGREEMENT TO ANY PARTY WITHOUT THE WRITTEN CONSENT OF LESSOR. ANY SUCH CONSENT BY LESSOR SHALL NOT RELIEVE LESSEE OF ITS OBLIGATIONS AND LIABILITIES. Lessor may assign all or any part of its right, title and interest in this Agreement or the Vehicles, including all receivables.

20. RELATED ENTITIES. Any Vehicles leased or operated by present or future subsidiaries, parents or affiliates of Lessee shall be within the terms and conditions of this Agreement, unless covered by a separate agreement with such subsidiary, parent or affiliate, and Lessee agrees that, in the event such subsidiary, parent or affiliate does not perform according to the terms and conditions of this Agreement, Lessee guarantees such performance.

21. WAIVER OF JURY TRIAL. BOTH PARTIES TO THIS AGREEMENT HEREBY WAIVE ANY AND ALL RIGHT TO ANY TRIAL BY JURY IN ANY ACTION OR PROCEEDINGS DIRECTLY OR INDIRECTLY HEREUNDER.

22. GOVERNING LAW. THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER SHALL IN ALL RESPECTS BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH, THE INTERNAL LAWS OF THE STATE OF CONNECTICUT (WITHOUT REGARD TO THE CONFLICT OF LAWS PRINCIPLES OF SUCH STATE), INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, REGARDLESS OF THE LOCATION OF THE VEHICLES. THE PARTIES FURTHER AGREE THAT ALL ACTIONS OR PROCEEDINGS ARISING, DIRECTLY OR INDIRECTLY, FROM THIS AGREEMENT, SHALL BE LITIGATED, AT THE OPTION OF LESSOR, IN COURTS HAVING SITUS WITHIN THE STATE OF CONNECTICUT, AND LESSEE HEREBY CONSENTS TO THE PERSONAL JURISDICTION OVER LESSEE BY ANY LOCAL, STATE OR FEDERAL COURT SELECTED BY LESSOR THAT IS LOCATED WITHIN THE STATE OF CONNECTICUT. LESSEE WAIVES ANY OBJECTION TO VENUE IN ANY SUCH ACTION AND AGREES NOT TO DISTURB SUCH CHOICE OF FORUM BY LESSOR. LESSEE HEREBY CONSENTS TO SERVICE OF PROCESS BY MAIL AND THAT SUCH SERVICE BY MAILING SHALL CONSTITUTE DUE AND PERSONAL SERVICE UPON LESSEE.

23. ODOMETER DISCLOSURE STATEMENT. Federal law (and State law, if applicable) requires that Lessee as lessee disclose, and Lessee shall disclose, the mileage of each Vehicle to Lessor in connection with the transfer of ownership of the Vehicle. Failure to complete an odometer disclosure statement or making a false statement may result in fines and/or imprisonment. LESSEE AGREES TO PAY AN ADMINISTRATIVE FEE IF LESSEE FAILS TO PROVIDE A REQUIRED ODOMETER OR DAMAGE DISCLOSURE STATEMENT AT TIME OF SURRENDER.

24. MODIFICATIONS. This Agreement, its Exhibits, Schedules and amendments contain the entire understanding of the parties and merge all oral understandings. Purchase orders relating to Vehicles may be issued by Lessee for administrative convenience, but are subject to the terms and conditions of this Agreement and shall not amend or supplement it. ANY MODIFICATIONS, CHANGES, OR AMENDMENTS MAY BE MADE ONLY IN A WRITING DULY SIGNED BY LESSEE AND LESSOR. FAILURE OF EITHER PARTY TO ENFORCE ANY RIGHT GRANTED HEREIN SHALL NOT BE DEEMED A WAIVER OF SUCH RIGHT.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by duly authorized representatives.

LESSOR:  
Partnership Financial Services, Inc. d/b/a ABC Financial Services

By: [Signature]

Title: Risk Analyst

Address: 11010 Prairie Lakes Drive, Eden Prairie, MN 55334

LESSEE:  
Executive Coach Luxury Travel, Inc.

By: [Signature]

Title: President

Address: 10269 St. Rt 224, Ottawa, OH 45875



1002

**EXHIBIT C**  
**Rental Schedule No. 001**  
**Uneven Rentals**  
Dated This 7-19-00

This Exhibit C is a part of and subject to that certain Lease Agreement (hereinafter the "Agreement"), dated July 19, 2000, between the LESSOR and the LESSEE set forth below.

<u>Number of Units</u>	<u>Capitalized Lessor's Cost Per Unit</u>	<u>Manufacturer</u>	<u>VIN Number</u>	<u>Model and Type of Equipment</u>
1	\$380,116.00	Van Hool	YE2TC13B3Y2044124	T2145 InterCity Coach

Lease Term (in Months, exclusive of any interim rental period): 84

Mileage allowance: n/a  
Excess mileage charge: n/a

The Capitalized Cost of each Vehicle is computed by adding the following amounts:

- (i) The invoice price of the Vehicle including sales tax, if applicable; and
- (ii) The invoice price of any authorized additions or modifications to the Vehicle made pursuant to LESSEE's request.

The Capitalized Cost of the Vehicle(s) is: \$ 380,116.00

LESSEE shall pay to LESSOR the following rentals as specified herein:

- 1) Interim Rent: Not Applicable
- 2) Basic Term Rent: Commencing on 8-1-00 and on the same day of each month thereafter, Lessee agrees to pay to Lessor Eighty Four (84) consecutive monthly rental payments as follows:
 

Payment 1 @	\$ 21,500.00
2 - 84 @	\$ 4,490.00
- 3) Advance Rent: Upon execution of this Exhibit, Lessee agrees to pay to Lessor the total amount of Twenty One Thousand Five Hundred and 00/100 Dollars (\$21,500.00) of which Twenty One Thousand Five Hundred and 00/100 Dollars (\$21,500.00) will be applied to the first rental as it becomes due and payable.

LESSOR:  
Partnership Financial Services, Inc. d/b/a ABC Financial Services  
By: [Signature]

LESSEE:  
Executive Coach Luxury Travel, Inc.  
By: [Signature]  
Rick J. Stechschulte

Title: Risk Analyst

Title: President



EXHIBIT S  
To Schedule No. 001  
Dated This 7-19-00

STIPULATED LOSS VALUES  
(FOR CASUALTY/DEFAULT PURPOSES ONLY)

This Exhibit S is a part of and subject to that certain Lease Agreement, and other Exhibits thereto (hereinafter the "Agreement"), dated July 19, 2000, between Partnership Financial Services, Inc. d/b/a ABC Financial Services ("Lessor"), and Executive Coach Luxury Travel, Inc. ("Lessee").

The Stipulated Loss Value of any Vehicle(s), as of any date, shall be an amount equal to the product of (i) the original Capitalized Cost (as set forth in such Exhibit C) and (ii) the percentage indicated below opposite the Rental Period in which such date occurs. "Rental Period" shall mean any period commencing with the first (1st) day of the Lease Term of such Vehicle(s) to and including the date on which the second rental payment is made and any rental payment date to and including the date immediately preceding the next rental payment date. If casualty occurs within the first 12 months, use stip loss percent from month 13 and add back any unpaid rents in periods 1 - 12.

Rental Period	Stipulated Loss Percentage	Rental Period	Stipulated Loss Percentage	Rental Period	Stipulated Loss Percentage
13	94.081	37	78.615	61	58.619
14	93.537	38	77.866	62	57.701
15	92.997	39	77.111	63	56.778
16	92.449	40	76.348	64	55.846
17	91.886	41	75.578	65	54.910
18	91.307	42	74.801	66	53.968
19	90.721	43	74.015	67	53.017
20	90.127	44	73.221	68	52.058
21	89.522	45	72.421	69	51.096
22	88.908	46	71.613	70	50.131
23	88.284	47	70.798	71	49.164
24	87.650	48	69.976	72	48.194
25	87.008	49	69.146	73	47.216
26	86.356	50	68.308	74	46.234
27	85.694	51	67.463	75	45.250
28	85.023	52	66.610	76	44.266
29	84.343	53	65.749	77	43.260
30	83.653	54	64.881	78	42.261
31	82.955	55	64.005	79	41.253
32	82.249	56	63.120	80	40.235
33	81.536	57	62.230	81	39.228
34	80.816	58	61.335	82	38.231
35	80.089	59	60.436	83	37.245
36	79.356	60	59.532	84	34.999

(NOTE: The foregoing table assumes that the Rental Payment for the Rental Period has been made.)

LESSOR:  
Partnership Financial Services, Inc. d/b/a ABC Financial Services

By: [Signature]

Title: Risk Analyst

Date: 8/2/00

LESSEE:  
Executive Coach Luxury Travel, Inc.

By: [Signature]  
Rick J. Stechschulte

Title: President

Date: X July 19, 2000

NOTE: If this account terminates early, for any reason, ABC Financial Services will repay the unamortized 3% penalty adder to GE Capital at the time of termination. Please contact the Commercial Transportation department in Eden Prairie, MN at the time of termination.



**EXHIBIT T**  
**To Schedule No. 001**  
**Dated This 7-19-00**

**TERMINAL RENTAL VALUE**  
**(FOR EARLY TERMINATION PURPOSES ONLY)**

This Exhibit T is a part of and subject to that certain Lease Agreement, and other Exhibits thereto (hereinafter the "Agreement"), dated July 19, 2000, between Partnership Financial Services, Inc. d/b/a ABC Financial Services ("Lessor"), and Executive Coach Luxury Travel, Inc. ("Lessee").

The Terminal Rental Value of any Vehicle(s), as of any date, shall be an amount equal to the product of (i) the original Capitalized Cost (as set forth in such Exhibit C) and (ii) the percentage indicated below opposite the Rental Period in which such termination date occurs and (iii) all rentals and other amounts which are due under this Agreement to the date of sale. "Rental Period" shall mean any period commencing with the first (1st) day of the Lease Term of such Vehicle(s) to and including the date on which the second rental payment is made and any rental payment date to and including the date immediately preceding the next rental payment date.

Rental Period	Termination Percentage	Rental Period	Termination Percentage	Rental Period	Termination Percentage
13	94.061	37	78.615	61	58.619
14	93.537	38	77.866	62	57.701
15	92.997	39	77.111	63	56.778
16	92.449	40	76.348	64	55.846
17	91.886	41	75.578	65	54.910
18	91.307	42	74.801	66	53.968
19	90.721	43	74.015	67	53.017
20	90.127	44	73.221	68	52.058
21	89.522	45	72.421	69	51.090
22	88.908	46	71.613	70	50.131
23	88.284	47	70.798	71	49.164
24	87.650	48	69.976	72	48.194
25	87.008	49	69.146	73	47.215
26	86.356	50	68.308	74	46.234
27	85.694	51	67.463	75	45.250
28	85.023	52	66.610	76	44.250
29	84.343	53	65.749	77	43.260
30	83.653	54	64.881	78	42.261
31	82.955	55	64.005	79	41.253
32	82.249	56	63.120	80	40.235
33	81.536	57	62.230	81	39.228
34	80.816	58	61.335	82	38.231
35	80.089	59	60.436	83	37.245
36	79.356	60	59.532	84	34.999

(NOTE: The foregoing table assumes that the Rental Payment for the Rental Period has been made.)

LESSOR:  
Partnership Financial Services, Inc. d/b/a ABC Financial Services

LESSEE:  
Executive Coach Luxury Travel, Inc.

By: [Signature]

By: [Signature]  
Rick J. Stechschulte

Title: Risk Analyst

Title: President

Date: 8/1/00

Date: X July 19, 2000



EXHIBIT A

Acceptance Notice

To Schedule No. 001

Dated This 7-19-00

This Exhibit A is part of and subject to the Lease Agreement between Partnership Financial Services, Inc. d/b/a ABC Financial Services ("LESSOR") and the undersigned ("LESSEE").

<u>Quantity</u>	<u>Year</u>	<u>Manufacturer</u>	<u>Serial Number</u>	<u>Model and Type of Equipment</u>
1	2000	Van Hool	YE2TC13B3Y2044121	T2145 Intercity Coach

The undersigned hereby confirms to LESSOR that the Vehicles referred to above have been delivered to and have been received by the undersigned; that all installation or other work necessary prior to the use thereof has been completed; that said Vehicles have been examined and/or tested and are in good operating order and condition and are in all respects satisfactory to the undersigned; and that said Vehicles have been fully accepted by the undersigned. LESSEE: IF YOU EXECUTE THIS ACCEPTANCE NOTICE WITHOUT INSPECTING THE VEHICLES REFERRED TO HEREIN, YOU ASSUME ALL RESPONSIBILITY FOR ANY RESULTING LIABILITY AND ALL OF THE FOREGOING STATEMENTS WILL BE PRESUMED TRUE.

Vehicles immediately listed above are located at: 10269 St. Rt 224, Ottawa, OH, 45875. The Vehicles will be titled and registered at this location.

LESSEE  
Executive Coach Luxury Travel, Inc.

By: *Rick J. Stechschulte*  
Rick J. Stechschulte

His: President

Date: July 19th 2000

B.O. Dennis Phil 419-505-2820  
 B.E. Miller 3/6/07 We Paid Bluffton  
 ACC DENY 3-2-07 11:16 AM  
 Revised from 4533  
 James' cell # 419-303-4115  
 2-15 Section 4/m cell # 419-303-4115

Jerry

EXECUTIVE COACH  
 LUXURY TRAVEL, INC.  
 10269 St. Rt. 224  
 P. O. Box 321  
 Ottawa, OH 45875  
 (1-419-523-5590)

Coach # 2 FAX (1-419-523-5002) Charter Order# 4560  
 \*NON-SMOKING COACH

ERIC - Dean of Students  
 419-358-3248

Thank you for choosing us for your transportation provider. Our goal is for you to have a safe and rememberable trip.

Departure Date of Event <u>March 1-10, 2007</u>	Special Fees, Tolls, Parking Fees, Permits	\$ <u>Provided by Custom</u>
<u>March 1-10, 2007</u>	Driver's Room	\$ <u>Provided by Custom</u>
*Event* <u>Bluffton U. Baseball</u>	Quoted Coach Charge	\$ <u>7695.00</u>
<u>to Sarasotto + Ft Myers, FL</u>	Mileage Charge (\$2.00 per mile to Pick-up Point Only)	\$ <u>7695.00</u>
Contact Person <u>James Brandy</u>	\$ <u>    </u> for Extra Hours After Quoted Hours	\$ <u>    </u>
Phone Number <u>419-358-3292</u>	Gratuity (Tip)	\$ <u>Provided by Custom</u>
Name & Address <u>Bluffton University</u>	Based on <u>57</u> Passenger Coach for <u>    </u> hours	\$ <u>    </u>
<u>1 University Drive</u>	Security Deposit/Received Date <u>1/17/07</u>	\$ <u>100.00</u>
<u>Bluffton, OH 45817-2104</u>	Ohio Sales Tax	\$ <u>    </u>
	Balance Due	\$ <u>7695.00</u>

PICK-UP LOCATION (DETAIL) Bluffton University

Report Time 10:00 PM Departure Time 7:00 Arrival Time     

DESTINATION LOCATION (DETAIL) Sarasotto, FL

RETURN FROM LOCATION  
 Report Time      Departure Time      Date Returned     

- TERMS AND CONDITIONS OF CONTRACT**
- \* Return one copy of signed contract and a security deposit of \$100.00 to confirm lease of Executive Coach Luxury Travel, Inc.
  - \* Need detailed map of pick-up site and destination site at least 10 days before departure date. Should also list all stops with adequate directions.
  - \* Total amount of trip cost quoted must be paid 10 days in advance of trip departure date. Total at this time to be paid, is in addition to the ~~\$100.00 security deposit.~~
  - \* Cancellations must be received 30 days prior to departure or security deposit is forfeited (unless prior arrangements have been made). Note: See cancellation Item #2 on contract.
  - \*\* NOTE: After completed trip, \$100.00 security deposit will be returned to lessee if no damage, excess cleaning, or excess charges (hours exceeds total hours quoted) are made during the use of Executive Coach Luxury Travel, Inc.

RICK J. STECHSCHULTE  
 EXECUTIVE COACH LUXURY TRAVEL, INC.

James B. Brandy Jr.  
 CUSTOMER SIGNATURE/DATE

EXECUTIVE COACH  
LUXURY TRAVEL, INC.  
10269 ST. RT. 224  
P.O. BOX 321  
OTTAWA, OHIO 45875

1. PRICE SUBJECT TO CHANGE: All prices quoted in confirmation represent current tariff rates at time bus is ordered and are subject to change. If changes in tariff occur between the time the bus is ordered and the date that the trip actually takes place, then the customer's charges will be adjusted to reflect the changes in effect on the date of the trip. Sur-charge on fuel can be up to 10% of trip.
2. CANCELLATION: A charge of \$100.00 per day for any cancellations less than 30 days before departure will be assessed the Charter Party unless arrangements have been made in writing to Executive Coach and agreed to by company and its subcontractor.
3. ALLOWANCES: No allowances or reductions of any kind shall be made in the rates set forth on this order.
4. ADDITIONAL CHARGES: When at the request of the Chartering Party, any change in service results in an increase in miles or hours to that specified on the charter service order furnished, and additional charge shall be made for all such additional service. Any change resulting in a reduction of charges will be subtracted from the estimated cost and will be refunded to the Charter Party after completion of the trip. Tolls, highway fees, etc., will be separate and addition elements in the determination of any additional charges.
5. DAMAGE TO BUSES OR MOTORCOACH: The cost of repairing damage to buses or motorcoach resulting from acts of members of the Chartering Party or passengers shall be charges to the Chartering Party and is payable as soon as such cost has been determined.
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.
7. EQUIPMENT: Equipment furnished by the company is thoroughly inspected by its maintenance guidelines before being assigned to the charter service to ensure uninterrupted service, if for some reason beyond the control of the subcontractor, a mechanical failure makes it necessary the replacement of a bus originally assigned to the charter service, the replacement bus may be of a different type, in no case shall the company or the subcontractor be liable for consequential damages resulting from mechanical failure or delay.
8. BAGGAGE: Passengers baggage shall be carried without additional charge, subject to the available accommodations provided by the interior and/or exterior racks, if any. The Company and the Subcontractor assume no responsibility whatever for baggage carried on charter trips.
9. OBJECTIONABLE PERSONS: The Company and the Subcontractor 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 or Subcontractor.
12. EXPLOSIVES OR FIREWORKS: Explosives or Fireworks shall not be carried on buses or exploded or set off in or from buses.
13. SKI-BOOTS HOLDERS: Because of their irregular shape and hard sharp corners which represent an extraordinary hazard, Ski-boot holders may only be carried in baggage compartments beneath the bus.
14. UNUSUAL CLEANING: When the nature of the charter trip is such that a greater than normal amount of time and material will be necessary to clean bus or buses properly upon its return to the garage the company and subcontractor, at their option may require additional cost to cover such additional time and materials.

\*\*\*\*\*

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

\*\*\*\*\*

Federal Insurance Company and  
American Alternative Insurance Corporation

: Consolidated Case No. CV-2008-0143

: Judge Richard K. Warren

Plaintiffs,

: **JOINT STIPULATION OF FACTS**

vs.

Executive Coach Luxury Travel, Inc., et al.

Defendants,

and

Feroen J. Betts, etc., et al.

Defendant-Intervenors.

\*\*\*\*\*

In the interest of clarifying the issues before the Court and narrowing the scope of discovery, the parties to this action hereby stipulate that the following facts are not in dispute:

1. Plaintiff American Alternative Insurance Corporation ("AAIC") issued to Bluffton University ("Bluffton") a Commercial Umbrella Policy of insurance bearing Policy No. 60A2UB000243301 with a policy period of December 15, 2006 to December 15, 2007, and with

liability limits of \$5 million (\$5,000,000) (“the AAIC Policy”). A true and accurate copy of the AAIC Policy is adjoined to this stipulation as Exhibit A.

2. Plaintiff Federal Insurance Company (“Federal”) issued to Bluffton a Chubb Commercial Excess Follow-Form Policy of insurance bearing Policy No. 7983-94-78 with a policy period of December 15, 2006 to December 15, 2007, and with liability limits of \$15 million (\$15,000,000) (“the Federal Policy”). A true and accurate copy of the Federal Policy is adjoined to this stipulation as Exhibit B.

3. Hartford Fire Insurance Company (“Hartford”) issued to Bluffton a Special Multi-Flex Policy, Commercial Automobile Coverage Part, bearing Policy No. 33 UUN UK8593 with a policy period of December 15, 2006 to December 15, 2007, and with liability limits of \$1 million (\$1,000,000) (the “Hartford Policy”). True and accurate copies of certain forms and endorsements applicable to the Hartford Policy are adjoined to this stipulation as Exhibit C.

4. Subject to various terms, conditions, and exclusions, Coverage A of the AAIC Policy provides Excess Following Form Liability Over Underlying Claims Made or Occurrence Coverage.

5. Subject to various terms, conditions, and exclusions, the Federal Policy provides Excess Follow-Form Coverage.

6. The AAIC Policy’s Coverage A is subject to the same terms, conditions, agreements, exclusions, and definitions as the “Underlying Insurance” except as otherwise provided in the AAIC Policy; provided, however, that in no event will Coverage A’s insurance apply unless the “Underlying Insurance” applies (or would apply but for the exhaustion of its applicable “Limit of Liability”).

7. The AAIC Policy's Schedule of Underlying Insurance lists the Hartford Policy as underlying insurance for purposes of automobile liability coverage.

8. The Federal Policy is subject to the same terms, conditions, agreements, exclusions, and definitions as the "Controlling Underlying Insurance" except as otherwise provided in the Federal Policy; provided, however, that in no event will the Federal Policy apply unless the "Controlling Underlying Insurance" applies (or would apply but for the exhaustion of its applicable "Limit of Liability").

9. The Federal Policy's Schedule of Controlling Underlying Insurance lists the AAIC Policy as controlling underlying insurance.

10. Section II.A. (Liability Coverage) of the Hartford's Policy's Business Auto Coverage Form states that Hartford will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which its insurance applies, caused by an "accident" and resulting from the ownership, maintenance, or use of a "covered auto."

11. Item Two of the Declarations of the Hartford Policy's Commercial Automobile Coverage Part states that, for the purposes of liability coverage, any "auto" is a covered "auto."

12. Section II.A.1. of the Hartford Policy's Business Auto Coverage Form states that, subject to several exceptions, insured status extends to: (a) Bluffton for any covered "auto" (section II.A.1.a.); (b) "[a]nyone else while using with your [*i.e.*, Bluffton's] permission a covered 'auto' you [*i.e.*, Bluffton] own, hire or borrow ..." (section II.A.1.b.); and (c) "[a]nyone liable for the conduct of an "insured" described [in paragraphs II.A.1.a. and II.A.1.b.] but only to the extent of that liability" (section II.A.1.c.).

13. Bluffton contracted with Defendant Executive Coach Luxury Travel, Inc. (“Executive Coach”) to transport the players and coaches of Bluffton’s baseball team in a motor coach to play baseball games scheduled in Sarasota, Florida in March 2007. This arrangement was memorialized in a written agreement (“the Agreement”).

14. On March 2, 2007, during the policy period of the Hartford, AAIC, and Federal Policies, a motor coach carrying players and coaches of Bluffton’s baseball team was involved in a vehicular accident in northwestern Atlanta, Fulton County, Georgia (“the Motor Coach Accident”).

15. At the time of the Motor Coach Accident, the players and coaches of Bluffton’s baseball team were being transported to play baseball games in Florida in a motor coach. This motor coach was owned by Partnership Financial Services, Inc. (“Partnership”), and leased from Partnership by Executive Coach. At the time of the Motor Coach Accident, the motor coach was operated by Executive Coach’s employee/driver, Jerome Niemeyer, now deceased.

16. Five Bluffton baseball players, Jerome Niemeyer, and his wife, were killed in the Motor Coach Accident, and numerous other bus occupants were injured.

17. As a result of the Motor Coach Accident, numerous suits for bodily injury and wrongful death have been brought against Executive Coach and the Estate of Jerome Niemeyer, deceased.

18. The legal liability of Mr. Niemeyer and Executive Coach for the Motor Coach Accident is not at issue in the instant insurance-coverage action.

Approved by:

By \_\_\_\_\_

Steven P. Collier  
[scollier@cjclaw.com](mailto:scollier@cjclaw.com)  
Janine T. Avila  
[javila@cjclaw.com](mailto:javila@cjclaw.com)  
Steven R. Smith  
[ssmith@cjclaw.com](mailto:ssmith@cjclaw.com)  
Connelly, Jackson & Collier LLP  
405 Madison Avenue, Suite 1600  
Toledo, Ohio 43604

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

By \_\_\_\_\_

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

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

By \_\_\_\_\_

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Lima, Ohio 45801

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Inc.*

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Washington, D.C. 20001

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individually, and as the Administrator of  
the Estate of Tyler Williams, Deceased*

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mboreratty@bright.net  
125 West Main Street  
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Ottawa Ohio 45875

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of the Estate of Jerome Niemeyer, deceased*

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rbuchbinder@cbjlawyers.com  
Crabbe Brown & James LLP  
500 South Front Street, Suite 1200  
Columbus, Ohio 43215

*By w/permission*

*Counsel for American Alternative  
Insurance Corporation*



**American Alternative Insurance Corporation**

7985941811  
8/20/07  
*[Signature]*

College Road East  
Bluffton, NJ 08543-5241  
Phone: 800-305-4954  
Fax: 609-275-2082

April 25, 2007

To Whom It May Concern:

Re: Policy No.: 60-A2-UB-0002433-01

Insured: Bluffton University  
College Hall  
University Drive  
Bluffton OH 45817-2104

Attached is a true and certified copy of the above policy.

*Terri Vicari*  
Terri Vicari  
Authorized Representative  
Insurance Company Operations  
609-275-2028

4-25-07  
Date

*Kathryn R. Sine*  
Authorized Notary

4/25/07  
Date

**Kathryn R. Sine**  
Notary Public of New Jersey  
My Commission Expires Feb. 2, 2012

*Feder*

AUG 13

*SA*



American Alternative Insurance Corporation

555 College Road East, Princeton, New Jersey 08543-5241

Phone: (800) 305-4954

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL OF THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE STATED IN THIS POLICY.

Commercial Umbrella Policy DECLARATIONS

Policy No. 60A2UB000243301

Renewal of Number: 60A2UB0002433-00

Policy Issue Date: 01/10/2007

Item 1. Named Insured and Mailing Address: (No. Street, Town or City, State, Zip Code) Bluffton University

College Hall 1 University Drive Bluffton

OH 45817 2104

Producer No.: B00694 Producer's Name and Mailing Address: WH Greene & Associates Incorporated 400 Quaker Road East Aurora, NY 14052

Named Insured is: [ ] Individual, [ ] Partnership, [ ] Corporation, [ ] Joint Venture, [X] Other School Business of the Named Insured is: Private College

Item 2. Policy Period: From: 12/15/2006 to 12/15/2007

12:01 A.M. Standard Time at your mailing address shown above

Item 3. Premium: \$ 20,940.00 Terrorism Premium (Certified Acts): \$

[X] Flat [ ] Adjustable

Deposit Premium: \$ 20,940.00

Minimum Premium: \$ 5,235.00

Rate: Per: First Installment \$ Subsequent Installment(s) \$ Basis

Item 4. Limits of Insurance:

- a. Each Occurrence \$ 5,000,000 b. Products Completed Operations Aggregate [(where applicable)] \$ 5,000,000 c. General Aggregate \$ 5,000,000 d. Retained Limit \$ 10,000

Item 5. Retroactive Date: (applicable to Claims Made Coverages)

Item 6. Underlying Insurance: See: Schedule of Underlying Insurance

Item 7. Forms and Endorsements: See: Schedule of Forms and Endorsements

Authorization: In Witness Whereof, the Company issuing this policy has caused this policy to be signed by its authorized officers, but this policy shall not be valid unless also signed by a duly authorized representative of the Company American Alternative Insurance Corporation

Signature of Secretary: Ron Willcox

Signature of President: Albert J. Beer

Countersigned Date:

Authorized Representative

THESE DECLARATIONS, THE ATTACHED SCHEDULE OF UNDERLYING INSURANCE, TOGETHER WITH THE ATTACHED SCHEDULE OF FORMS AND ENDORSEMENTS, AND ANY FORMS AND ENDORSEMENTS WE MAY LATER ATTACH TO REFLECT CHANGES, MAKE UP AND COMPLETE THE ABOVE NUMBERED POLICY.

**Schedule of Forms and Endorsements  
COMMERCIAL UMBRELLA POLICY**

Effective date of  
this Schedule: 12/15/2006

Issue date: 01/10/2007

Attached to and forming part of  
Policy No.: 60A2UB000243301

Issued To: Bluffton University

The following is a schedule of Forms and Endorsements issued with the policy at inception:

Form ID Number:	Edition Date:	Form Name:
✓ CU1000A 07-94		SCHEDULE OF UNDERLYING LIMITS
✓ CU1000B 04-95		COMMERCIAL UMBRELLA POLICY
✓ CU1008 07-94		AGG LIMITS OF LIAB-AMEND ENDT
✓ CU1047 07-94		DISCRIMINATION EXCL
✓ CU1049 07-94		EMPLOYEE BENEFITS LIAB LMT ENDT
✓ CU1064 07-94		FOREIGN LIAB EXCL
✓ CU1102 07-94		PROPERTY DAMAGE EXCL
✓ CU1116 07-94		SCHOOLS, COLLEGES OR UNIVERSITIES
✓ CU1125 07-94		TRAMPOLINE AND REBOUNDING EQUIP EXCL
✓ CU1157 07-94		ASBESTOS EXCL
✓ CU1173 04-95		EMPLOYMENT RELATED PRACTICES EXCL
✓ CU1175 04-95		LEAD CONTAMINATION EXCL
✓ CU1217 12-01		FOREIGN JURISDICTIONS
✓ CU1222 02-02		FUNGI OR BACTERIA EXCL
✓ CU1224 02-02		AMENDMENT OF INSURING AGMNT
✓ CU1235 11-02		EXCL OF CERTIFIED ACTS OF TERRORISM
✓ CU1246 08-04		EXCL-VIOLATION OF STATUTES EMAIL FAX PHONE
✓ CU1248 08-04		EXCL-SILICA DUST
✓ VLOH01 01-96		OH FRAUD WARNING
✓ VLOH03 12-02		OH CHANGES-CANCEL AND NONRENEWAL



American Alternative Insurance Corporation

Schedule of Underlying Insurance

COMMERCIAL UMBRELLA POLICY

See Supplemental Schedule

Effective date of this Schedule: 12/15/2006

Issue date: 01/10/2007

Attached to and forming part of Policy No.: 60A2UB000243301

Issued To: Bluffton University

Underlying Insurer

(a) Name: Hartford (Stop Gap)

Type of Coverage: Employers' Liability

Limits of Insurance: Coverage B - Employers' Liability

\$ 1,000,000 each Accident

Policy Number: on file

Disease

\$ 1,000,000 each Policy  
\$ 1,000,000 each Employee

Term: 12/15/06 - 12/15/07

(b) Name: Hartford

Commercial General Liability

\$ 1,000,000 each Occurrence  
\$ 2,000,000 General Aggregate (other than Products Completed Operations)

Policy Number: on file

Occurrence  
 Claims Made

\$ 2,000,000 Products Completed Operations Aggregate  
\$ 1,000,000 Personal and Advertising Injury  
\$ Fire Damage  
\$ Legal Liability  
\$ Water Damage  
\$ Legal Liability

Term: 12/15/06 - 12/15/07

(c) Name: Hartford

Automobile Liability

Bodily Injury Liability  
\$ each Person  
\$ each Occurrence

Policy Number: on file

Property Damage Liability  
\$ each Occurrence  
or  
\$ 1,000,000 Combined Single Limit

Term 12/15/06 - 12/15/07

(d) Name: Hartford

Employee Benefits

\$ 1,000,000  
  
1,000,000

Policy Number: on file

Occurrence  
 Claims Made

Term: 12/15/06 - 12/15/07

The Underlying Policies shown in this Schedule include the following coverage indicated by "x":

- 1. Comprehensive Automobile Liability including ALL owned, non-owned and hired cars.
- 2. Commercial General Liability including ALL Premises and Operations of the Insured.

Schedule of Underlying Insurance (SUPPLEMENTAL PAGE)

COMMERCIAL UMBRELLA POLICY

Effective date of  
this Schedule: 12/15/2006

Issue date: 01/10/2007

Attached to and forming part of  
Policy No.: 60A2UB000243301

Issued To: Bluffton University

Underlying Insurer	Type of Coverage	Limits of Insurance
(e) Name: Evanston Insurance	Medical Professional	\$ 1,000,000

Policy Number: on file

Term: 12/15/06 - 12/15/07

Occurrence  
 Claims Made

3,000,000

(f) Name: RSUI	School Board & EPL	\$ 1,000,000
-------------------	--------------------	--------------

Policy Number: on file

Term: 12/15/06 - 12/15/07

Occurrence  
 Claims Made

1,000,000

(g) Name:		\$
-----------	--	----

Policy Number:

Term:

Occurrence  
 Claims Made

(h) Name:		\$
-----------	--	----

Policy Number:

Term:

Occurrence  
 Claims Made

(i) Name:		\$
-----------	--	----

Policy Number:

Term:

Occurrence  
 Claims Made

Schedule of Underlying Insurance (SUPPLEMENTAL PAGE)

COMMERCIAL UMBRELLA POLICY

Effective date of  
this Schedule: 12/15/2006

Issue date: 01/10/2007

Attached to and forming part of  
Policy No.: 60A2UB000243301

Issued To: Bluffton University

Underlying Insurer	Type of Coverage	Limits of Insurance
--------------------	------------------	---------------------

(j) Name:

\$

Policy Number:

Occurrence  
 Claims Made

Term:

(k) Name:

\$

Policy Number:

Occurrence  
 Claims Made

Term:

(l) Name:

\$

Policy Number:

Occurrence  
 Claims Made

Term:

(m) Name:

\$

Policy Number:

Occurrence  
 Claims Made

Term:

(n) Name:

\$

Policy Number:

Occurrence  
 Claims Made

Term:

THIS POLICY PROVIDES COVERAGE ON A CLAIMS MADE BASIS UNDER COVERAGE A IF THE SCHEDULED UNDERLYING POLICY PROVIDES CLAIMS MADE COVERAGE. IF COVERAGE IS SO PROVIDED ON A CLAIMS MADE BASIS, IT APPLIES ONLY TO CLAIMS MADE AGAINST AN INSURED DURING THE POLICY PERIOD OR EXTENDED REPORTING PERIOD, IF APPLICABLE. PLEASE READ CAREFULLY.

# COMMERCIAL UMBRELLA POLICY

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we," "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in bold print have special meanings found in Section VI - DEFINITIONS.

## I. INSURING AGREEMENTS

We, the Company, in return for the payment of the premium, agree with you, as follows:

A. **Coverage A – Excess Following Form Liability Over Underlying Claims Made or Occurrence Coverage**

We will pay, on behalf of the **insured**, sums in excess of the amount payable under the terms of any Underlying Insurance as stated in the Schedule of Underlying Insurance, that the **insured** becomes legally obligated to pay as damages because of injury or damage to which this insurance applies.

This insurance is subject to the same terms, conditions, agreements, exclusions and definitions as the Underlying Insurance except as otherwise provided in this policy; provided, however, that in no event will this insurance apply unless the Underlying Insurance applies or would apply but for the exhaustion of its applicable Limit of Liability.

If the Scheduled Underlying Policy affords coverage on a **claims made** basis then for this insurance to apply:

1. the injury or damage must be caused by an **occurrence**;
2. the claim for the injury or damage must first be made against the **insured** during the **Policy Period** or the **Extended Reporting Period** provided herein; and
3. a. the **bodily injury or property damage**; or,  
b. the **occurrence causing the personal injury, advertising injury, or professional liability**;

must take place on or after the Retroactive Date shown in Item 5 of the Declarations and before the termination of this policy;

If the Scheduled Underlying Policy affords coverage on an occurrence basis then for this insurance to apply:

1. the injury or damage must be caused by an **occurrence**; and
2. a. the **bodily injury** or **property damage**; or,  
b. the **occurrence** causing the **personal injury**, **advertising injury**, or **professional liability injury**;

must take place during the **Policy Period**.

**B. Coverage B – Umbrella Occurrence Based Liability Coverage Over Retained Limit**

We will pay, on behalf of the **insured**, damages with respect to liability for loss in excess of the Retained Limit as specified in Item 4(d) of the Declarations, or the amount payable by any **other insurance**, whichever is greater, up to the applicable Limits of Insurance shown in the Declarations when liability is imposed on the **insured** by law or when liability is assumed by the **insured** under an **insured contract** because of:

1. **bodily injury or property damage** which occurs during the **Policy Period** and is caused by an **occurrence**; and
2. **personal injury or advertising injury** to which this coverage applies, caused by an **occurrence** committed during the **Policy Period**.

Coverage B will NOT apply to any loss for which insurance is afforded under Coverage A or which arises out of subjects of insurance or exposures to loss for which Underlying Policies are required to be maintained under Section V - CONDITIONS, I. MAINTENANCE OF SCHEDULED UNDERLYING INSURANCE.

**C. Extended Reporting (Applicable to Coverage A Only)**

1. **Extended Reporting Periods**

If Scheduled Underlying Policy(ies) provide coverage on a **claims made** basis then, as set forth in Section I, paragraph A above, this policy provides coverage on a **claims made** basis and:

- a. We will provide a Basic Extended Reporting Period as described in subparagraph 2 below and, if you purchase it, a Supplemental Extended Reporting Period as described in subparagraph 3 below, IF,
  - i) this insurance is cancelled or not renewed; or
  - ii) we renew or replace this insurance with other insurance that:
    - (a) has a Retroactive Date later than the Retroactive Date shown in the Declarations of this policy; or
    - (b) does NOT apply to injury or damage on a **claims made** basis.

RECEIVED

JUN 27 '07

CORP. CLAIM HQ



SABC

Date: June 25, 2007,

Based on a review of electronic and hardcopy records, I certify that the attached is a true and correct representation of our records for

33uunuk8593  
Hartford policy number

Effective: 12/15/2006 through 12/15/2007  
Effective Date Expiration date

Issued by: Hartford Fire Insurance Company  
Writing company

I am unable to certify the above due to missing information from the policy. The following form or endorsement is missing and can not be replicated.


Danielle Marlin *Danielle Marlin*  
Name  
Professional Support Department

San Antonio  
Hartford Office Location

00024

San Antonio Business Center  
P.O. BOX 33015  
San Antonio, TX 78265-3015  
Toll Free 800 457 2379  
Facsimile 877 905 0457

# Special Multi-Flex

POLICY

From The Hartford



00025

This SPECIAL MULTI-FLEX POLICY is provided by the insurance company(s) of The Hartford Insurance Group, shown below.

**COMMON POLICY DECLARATIONS**



POLICY NUMBER: 33 UUN UK8593 K3  
RENEWAL OF: 33 UUN UK8593

Named Insured and Mailing Address:  
(No., Street, Town, State, Zip Code)

BLUFFTON UNIVERSITY  
1 UNIVERSITY DRIVE  
BLUFFTON , OH 45817  
(ALLEN COUNTY)

Policy Period: From 12/15/06 To 12/15/07

12:01 A.M., Standard time at your mailing address shown above.

In return for the payment of the premium, and subject to all of the terms of this policy, we agree with you to provide insurance as stated in this policy. The Coverage Parts that are a part of this policy are listed below. The Advance Premium shown may be subject to adjustment.

Total Advance Premium: \$146,895.00

**Coverage Part and Insurance Company Summary**

**Advance Premium**

IN RECOGNITION OF THE MULTIPLE COVERAGES INSURED WITH THE HARTFORD, YOUR POLICY PREMIUM INCLUDES AN ACCOUNT CREDIT.

PROPERTY CHOICE  
HARTFORD FIRE INSURANCE COMPANY  
HARTFORD PLAZA  
HARTFORD, CONNECTICUT 06115

\$106,045.00

LISTING OF ADDITIONAL COVERAGE PARTS CONTINUED ON THE FOLLOWING PAGE.

Form Numbers of Coverage Parts, Forms and Endorsements that are a part of this policy and that are not listed in the Coverage Parts.

HM0001 IL00171198 IH09850206 IL00210702 ILO2441105 PC00010103 HM00200295  
HA00250204 HC00100798 HC00200295 HC00250295

Agent/Broker Name: HYLANT GROUP, INC/DUBLIN

This policy is not binding unless countersigned by our Authorized Representative: *[Signature]*

Countersigned by

Authorized Representative

00979

\*20002333UK85930101



COMMON POLICY DECLARATIONS (Continued)

POLICY NUMBER: 33 UUN UK8593

ADDITIONAL COVERAGE PARTS (CONTINUED)

COVERAGE PART AND INSURANCE COMPANY SUMMARY

ADVANCE PREMIUM

COMMERCIAL INLAND MARINE

HARTFORD FIRE INSURANCE COMPANY

HARTFORD PLAZA

HARTFORD, CONNECTICUT 06115

\$ 3,047.00

COMMERCIAL AUTO

HARTFORD FIRE INSURANCE COMPANY

HARTFORD PLAZA

HARTFORD, CONNECTICUT 06115

\$ 14,539.00

COMMERCIAL GENERAL LIABILITY

EMPLOYEE BENEFITS LIABILITY

HARTFORD FIRE INSURANCE COMPANY

HARTFORD PLAZA

HARTFORD, CONNECTICUT 06115

\$ 23,264.00

01/3/02  
[Signature]

798 3.94/18/001

**COMMERCIAL AUTOMOBILE  
COVERAGE PART - DECLARATIONS  
BUSINESS AUTO COVERAGE FORM**



**POLICY NUMBER: 33 UUN UK8593**

This COMMERCIAL AUTOMOBILE COVERAGE PART consists of:

- A. This Declarations Form;
- B. Business Auto Coverage Form; and
- C. Any Endorsements issued to be a part of this Coverage Form and listed below.

01008

\*20002333UK85930101

**ITEM ONE - NAMED INSURED AND ADDRESS**

The Named Insured is stated on the Common Policy Declarations.

**ADVANCE PREMIUM: \$ 14,539.00**

**AUDIT PERIOD: ANNUAL**



Except in this Declarations, when we use the word "Declarations" in this Coverage Part, we mean this "Declarations" or the "Common Policy Declarations."

Form Numbers of Coverage Forms, Endorsements and Schedules that are part of this Coverage Part:

- |  |  |   |  |  |
|--|--|---|--|--|
| <input checked="" type="checkbox"/> HA00040302 | <input checked="" type="checkbox"/> HA00340200 | <input checked="" type="checkbox"/> HA00121102T | <input checked="" type="checkbox"/> CA00011001 | <input checked="" type="checkbox"/> HA21020692 |
| <input checked="" type="checkbox"/> CA99030306 | <input checked="" type="checkbox"/> CA21330306 | <input checked="" type="checkbox"/> CA24021293  | <input checked="" type="checkbox"/> CA99231293 | <input checked="" type="checkbox"/> HA00241290 |
| <input checked="" type="checkbox"/> HA20070200 | <input checked="" type="checkbox"/> HA99081290 | <input checked="" type="checkbox"/> HA99160706  | <input checked="" type="checkbox"/> HA99260406 |  |

**COMMERCIAL AUTOMOBILE  
 COVERAGE PART - DECLARATIONS  
 BUSINESS AUTO COVERAGE FORM (Continued)**

POLICY NUMBER: 33 JUN UK8593

**ITEM TWO - SCHEDULE OF COVERAGES AND COVERED AUTOS**

This policy provides only those coverages where a charge is shown in the advance premium column below. Each of these coverages will apply only to those "autos" shown as covered "autos." "Autos" are shown as covered "autos" for a particular coverage by the entry of one or more of the symbols from the COVERED AUTO Section of the Business Auto Coverage Form next to the name of the coverage.

Coverages	Covered Autos	Limit The Most We Will Pay for Any One Accident or Loss	Advance Premium
LIABILITY	01	\$ 1,000,000	\$ 8,708.00
PERSONAL INJURY PROTECTION (or equivalent No-Fault coverage)		Separately stated in each Personal Injury Protection Endorsement.	
ADDED PERSONAL INJURY PROTECTION (or equivalent added No-Fault coverage)		Separately stated in each Added Personal Injury Protection Endorsement.	
OPTIONAL BASIC ECONOMIC LOSS (New York only)		\$25,000 each eligible injured person.	
PROPERTY PROTECTION INSURANCE (Michigan only)		Separately stated in the Property Protection Insurance Endorsement.	
MEDICAL EXPENSE AND INCOME LOSS BENEFITS (Virginia only)		Separately stated in the Medical Expense and Income Loss Benefits Endorsement.	
AUTO MEDICAL PAYMENTS	02	\$ or the limit separately stated for each "auto" in ITEM THREE.	\$ 560.00
UNINSURED MOTORISTS	02	\$ SEE FORM HA2102 OR STATE FORM(S)	\$ 331.00
UNDERINSURED MOTORISTS (When not included in Uninsured Motorist Coverage)	02	\$ SEE FORM HA2102 OR STATE FORM(S)	\$ 1,979.00

COMMERCIAL AUTOMOBILE  
 COVERAGE PART - DECLARATIONS  
 BUSINESS AUTO COVERAGE FORM (Continued)

POLICY NUMBER: 33 UUN UK8593

ITEM TWO - SCHEDULE OF COVERAGES AND COVERED AUTOS (Continued)

01009  
+2000233UK85930101

Coverages	Covered Autos	Limit The Most We Will Pay for Any One Accident or Loss	Advance Premium
PHYSICAL DAMAGE		See ITEM FOUR for hired or borrowed "autos".	
COMPREHENSIVE COVERAGE	02, 08	Actual Cash Value, Cost of Repair, or the Stated Amount shown in ITEM THREE, whichever is smallest, minus any deductible shown in ITEM THREE for each covered "auto".	\$ 614.00
SPECIFIED CAUSES OF LOSS COVERAGE		Actual Cash Value, Cost of Repair, or the Stated Amount shown in ITEM THREE, whichever is smallest, minus \$ deductible for each covered "auto" for "loss" caused by mischief or vandalism.	
COLLISION COVERAGE	02, 08	Actual Cash Value, Cost of Repair, or the Stated Amount shown in ITEM THREE, whichever is smallest, minus any deductible shown in ITEM THREE for each covered "auto".	\$ 1,598.00
TOWING AND LABOR	03	\$ or the amount separately stated for each "auto" in ITEM THREE, whichever is greater, for each disablement.	\$ 90.00
Endorsement Premium (Not included above)			\$ 570.00
<b>TOTAL ADVANCE PREMIUM:</b>			<b>\$ 14,539.00</b>

**COMMERCIAL AUTOMOBILE  
 COVERAGE PART - DECLARATIONS  
 BUSINESS AUTO COVERAGE FORM (Continued)**

POLICY NUMBER: 33 UUN UK8593

---

**ITEM THREE - SCHEDULE OF COVERED AUTOS YOU OWN**

---

Applicable only if "Schedule of Covered Autos You Own" is issued to form a part of this Coverage Form.  
 FORM HA0012 ATTACHED

---

**ITEM FOUR - SCHEDULE OF HIRED OR BORROWED AUTO COVERAGE AND PREMIUMS**

---

**LIABILITY COVERAGE**

**RATING BASIS IS COST OF HIRE.** Cost of hire means the total amount you incur for the hire of "autos" you don't own (not including "autos" you borrow or rent from your partners or "employees" or their family members). Cost of hire does not include charges for services performed by motor carriers of property or passengers.

State	Estimated Cost of Hire IF ANY	Rate Per Each \$100 Cost of Hire 1.152	Advance Premium \$ 64.00 MP
-------	----------------------------------	---	--------------------------------

**TOTAL ADVANCE PREMIUM:** \$ 64.00 MP

---

**ITEM FIVE - SCHEDULE FOR NON-OWNERSHIP LIABILITY**

---

Named Insured's Business	Rating Basis	Number	Advance Premium
Other than a Social Service Agency	Number of Employees Number of Partners	250	\$ 504.00
Social Service Agency	Number of Employees Number of Volunteers		

**TOTAL ADVANCE PREMIUM:** \$ 504.00 MP



# Quick Reference Commercial Auto Coverage Part Business Auto Coverage Form

**READ YOUR POLICY CAREFULLY**

## **BUSINESS AUTO COVERAGE FORM DECLARATIONS**

- o Named Insured And Address
- o Coverages, Covered Autos And Limits Of Insurance
- o Rating Exposures, Rates And Estimated Premium

## **BUSINESS AUTO COVERAGE FORM**

	Beginning on Page
<b>PREAMBLE</b>	
o Definitions of "You" and "We" .....	1
<b>SECTION I - Covered Autos</b>	
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o Owned Autos You Acquire After the Policy Begins .....	2
o Certain Trailers, Mobile Equipment And Temporary Substitute Autos .....	2
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o Coverage .....	2
o Who Is An Insured .....	2
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<b>SECTION IV - Business Auto Conditions</b>	
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- Legal Action Against Us .....	8
- Loss Payment - Physical Damage Coverages .....	8
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- Concealment, Misrepresentation Or Fraud ...	8
- Liberalization .....	8
- No Benefit To Bailee - Physical Damage Coverages .....	8
- Other Insurance .....	8
- Premium Audit .....	9
- Policy Period, Coverage Territory .....	9
- Two Or More Coverage Forms Or Policies Issued By Us .....	9
<b>SECTION V - Definitions</b> .....	9

# BUSINESS AUTO COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

## SECTION I – COVERED AUTOS

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".

### A. Description Of Covered Auto Designation Symbols

Symbol	Description Of Covered Auto Designation Symbols	
1	Any "Auto"	
2	Owned "Autos" Only	Only those "autos" you own (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins.
3	Owned Private Passenger "Autos" Only	Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.
4	Owned "Autos" Other Than Private Passenger "Autos" Only	Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.
5	Owned "Autos" Subject To No-Fault	Only those "autos" you own that are required to have No-Fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have No-Fault benefits in the state where they are licensed or principally garaged.
6	Owned "Autos" Subject To A Compulsory Uninsured Motorists Law	Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.
7	Specifically Described "Autos"	Only those "autos" described in Item Three of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).
8	Hired "Autos" Only	Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent, or borrow from any of your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households.
9	Nonowned "Autos" Only	Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business or your personal affairs.

**B. Owned Autos You Acquire After The Policy Begins**

1. If Symbols 1, 2, 3, 4, 5 or 6 are entered next to a coverage in Item Two of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.
2. But, if Symbol 7 is entered next to a coverage in Item Two of the Declarations, an "auto" you acquire will be a covered "auto" for that coverage only if:
  - a. We already cover all "autos" that you own for that coverage or it replaces an "auto" you previously owned that had that coverage; and
  - b. You tell us within 30 days after you acquire it that you want us to cover it for that coverage.

**C. Certain Trailers, Mobile Equipment And Temporary Substitute Autos**

If Liability Coverage is provided by this Coverage Form, the following types of vehicles are also covered "autos" for Liability Coverage:

1. "Trailers" with a load capacity of 2,000 pounds or less designed primarily for travel on public roads.
2. "Mobile equipment" while being carried or towed by a covered "auto".
3. Any "auto" you do not own while used with the permission of its owner as a temporary substitute for a covered "auto" you own that is out of service because of its:
  - a. Breakdown;
  - b. Repair;
  - c. Servicing;
  - d. "Loss"; or
  - e. Destruction.

**SECTION II – LIABILITY COVERAGE**

**A. Coverage**

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

We will also pay all sums an "insured" legally must pay as a "covered pollution cost or expense" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of covered "autos". However, we will only pay for the "covered pollution cost or expense" if there is either "bodily injury" or "property damage" to which this insurance applies that is caused by the same "accident".

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

**1. Who Is An Insured**

The following are "insureds":

- a. You for any covered "auto".
- b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
  - (1) The owner or anyone else from whom you hire or borrow a covered "auto". This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.
  - (2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.
  - (3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.
  - (4) Anyone other than your "employees", partners (if you are a partnership), members (if you are a limited liability company), or a lessee or borrower or any of their "employees", while moving property to or from a covered "auto".
  - (5) A partner (if you are a partnership), or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.

- c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

## 2. Coverage Extensions

### a. Supplementary Payments

In addition to the Limit of Insurance, we will pay for the "insured":

- (1) All expenses we incur.
- (2) Up to \$2,000 for cost of bail bonds (including bonds for related traffic law violations) required because of an "accident" we cover. We do not have to furnish these bonds.
- (3) The cost of bonds to release attachments in any "suit" against the "insured" we defend, but only for bond amounts within our Limit of Insurance.
- (4) All reasonable expenses incurred by the "insured" at our request, including actual loss of earnings up to \$250 a day because of time off from work.
- (5) All costs taxed against the "insured" in any "suit" against the "insured" we defend.
- (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" against the "insured" we defend, but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

### b. Out-Of-State Coverage Extensions

While a covered "auto" is away from the state where it is licensed we will:

- (1) Increase the Limit of Insurance for Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. This extension does not apply to the limit or limits specified by any law governing motor carriers of passengers or property.
- (2) Provide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered "auto" is being used.

We will not pay anyone more than once for the same elements of loss because of these extensions.

## B. Exclusions

This insurance does not apply to any of the following:

### 1. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured".

### 2. Contractual

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

- a. Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
- b. That the "insured" would have in the absence of the contract or agreement.

### 3. Workers' Compensation

Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

### 4. Employee Indemnification And Employer's Liability

"Bodily injury" to:

- a. An "employee" of the "insured" arising out of and in the course of:
  - (1) Employment by the "insured"; or
  - (2) Performing the duties related to the conduct of the "insured's" business; or
- b. The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph a. above.

This exclusion applies:

- (1) Whether the "insured" may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

But this exclusion does not apply to "bodily injury" to domestic "employees" not entitled to workers' compensation benefits or to liability assumed by the "insured" under an "insured contract". For the purposes of the Coverage Form, a domestic "employee" is a person engaged in household or domestic work performed principally in connection with a residence premises.

**Combs v. Black, 2006-Ohio-2439, No. 05AP-1177 (OHCA10)****2006-Ohio-2439****Audney A. Combs, Administrator of The Estate of Tanita Combs et al., Plaintiffs-Appellants,****v.****Wayne S. Black et al., Defendants-Appellees.****No. 05AP-1177****Court of Appeals of Ohio, Tenth District****May 16, 2006**

APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 02CVC-03-2479)

*Stanley B. Dritz and Melissa R. Lipchak, for appellants.**Smith, Rolfes & Skavdahl Co., L.P.A., Matthew J. Smith and M. Andrew Sway, for appellee Owners Insurance Co.**Caborn & Butauski Co., L.P.A., and David A. Caborn, for appellee Erie Insurance Co.*

OPINION

TRAVIS, J.

{¶1} Appellants, Audney Combs, individually and as Administrator of the Estate of Tanita Combs and Frances Combs, appeal from the Franklin County Court of Common Pleas' October 6, 2005 judgment entry granting Owners Insurance Company's ("Owners") motion for summary judgment and from the court's July 20, 2005 judgment entry granting Erie Insurance Company's ("Erie") motion for summary judgment. For the following reasons, we affirm the trial court's judgments.

{¶2} On February 27, 2001, the car occupied by Frances Combs and her daughter, Tanita Combs, was struck by a dump truck owned by Anthony Hucle and Hucle Concrete Construction Company ("Hucle"), and driven by Wayne Black ("Black"), a Hucle employee. Frances Combs suffered personal injuries, and Tanita Combs suffered fatal injuries as a result of the accident.

{¶3} Hucle is a concrete supplier and contractor. Tanner Construction, owned by R. Keith Tanner ("Tanner"), hired Hucle to do the concrete work on Tanner's projects. On the day of the accident, Hucle instructed Black to remove and rebuild a porch that Hucle had been contracted to build on a house Tanner was constructing in Timberview. Hucle ordered Black to take Hucle's dump truck so that he could return the broken up concrete from the old porch to Hucle's house. On the way to the job site, Black stopped at Ohio Ready Mix to pick up and deliver the gravel ordered by Tanner to complete the job.<sup>[1]</sup> Once he had delivered the gravel to the job site, Black left to return the dump truck with the broken up concrete to Hucle's house, retrieve his box truck and tools and then return to the job site to complete the concrete project. On his way to Hucle's house, Black struck the car driven by Frances Combs and her daughter, Tanita.

{¶4} On March 5, 2002, appellants filed suit against Hucle and Black for personal injury and negligent infliction of emotional distress to Frances Combs, wrongful death in the death of Tanita Combs, and loss of consortium to Audney Combs. Appellants also filed an uninsured/underinsured motorist ("UM/UIM") claim against their insurance carrier Erie.<sup>[2]</sup> Liability for the accident was not disputed. The case proceeded to bench trial regarding damages on October 4, 2004. The court awarded \$1.6 million to Audney Combs, as Administrator of the Estate of Tanita Combs, for his wrongful death claim and \$100,000 for his loss of consortium claim. Frances Combs was awarded \$300,000 for negligent infliction of

emotional distress and \$100,000 for bodily injury.

{¶15} Progressive Insurance Company ("Progressive") covered both Black and Hucle under its motor vehicle liability policy, which provided a single limit for bodily injury coverage in the amount of \$100,000. Upon judgment of the trial court, Progressive tendered \$100,000 to Francis Combs in partial satisfaction of her claim.

{¶16} On December 3, 2004, Erie filed a motion for partial summary judgment, claiming that it was entitled to a setoff of the \$100,000 paid by Progressive to Frances Combs for her bodily injury and the derivative claim of Audney Combs for loss of consortium. The trial court granted Erie's motion on July 5, 2005. Appellant now appeals this decision.

{¶17} Although Tanner had been dismissed from the case,<sup>[3]</sup> appellants filed a supplemental complaint on January 31, 2005 against Tanner's insurance carrier, Owners. Appellants alleged that Black was entitled to coverage at the time of the accident under the terms of Owners' policy as issued to Tanner. More specifically, appellants argued that Black was insured because he was using a non-owned vehicle in the business of the named insured, Tanner. Owners filed a motion for summary judgment, which was granted by the trial court on September 14, 2005.<sup>[4]</sup>

{¶18} Appellants assert two assignments of error:

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE OWNERS INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT.

II. THE TRIAL COURT ERRED IN DETERMINING, AS A MATTER OF LAW, THAT APPELLEE, ERIE, WAS ENTITLED TO SET OFF THE ONE HUNDRED THOUSAND DOLLARS (\$100,000) PAID UNDER THE PROGRESSIVE POLICY TO PARTIALLY COMPENSATE APPELLANT, FRANCES COMBS, FOR THE DAMAGES SHE SUFFERED AS A RESULT OF THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

{¶19} Appellate review of motions for summary judgment is de novo. The moving party bears the burden of proving: (1) no genuine issues of material fact exist; (2) the moving party is entitled to summary judgment as a matter of law; and (3) reasonable minds can come to only one conclusion, which is adverse to the nonmoving party. Civ.R. 56. The nonmoving party must present specific facts beyond the pleadings to show genuine issues of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280.

{¶10} At the heart of both assignments of error is contract interpretation. An insurance policy is a contract between the insurer and the insured. *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St.3d 107. 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, 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. This rule was further upheld in *U.S. Fidelity & Guarantee Co. v. Lightning Rod Mut. Ins. Co.* (1997), 80 Ohio St.3d 584, and *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208.

{¶11} Appellants' first assignment of error questions the trial court's determination that Black was not an insured under the clear and unambiguous language of Tanner's insurance policy. Appellants further assert that the trial court erroneously failed to consider whether the truck being used at the time of the accident was "used in the business" of Tanner. Appellants contend that only after such a determination could the trial court then consider whether Blacks' use of Hucle's truck was with Tanner's permission.

{¶12} We must first consider the language of Owners' policy regarding the scope of coverage. In pertinent part, the policy states:

We will pay those sums the insured becomes legally obligated to pay as damages because of "bodily

injury" or "property damage" arising out of the maintenance or use of an "auto" you do not own or which is not registered in your name, but which is used in your business.

Appellant argues the endorsement defines an insured as:

1. Any person
2. Using the auto
3. Not owned by such person
4. Provided the actual use is with your permission.

(Appellants' brief at 14.)

{¶13} Appellants go to great lengths to convince us that the phrase "used in your business," is synonymous with the phrase "while performing duties related to the 'Named Insured's' business," which is commonly used in insurance contracts. As such, appellants argue that the Third District Court of Appeals' decision in *Zirger v. Ferkel*, Seneca App. No. 13-02-05, 2002-Ohio-2822 is pertinent to this case. There, the court determined that the insurance policy language "duties related to the 'Named Insured's' business" not only granted coverage to an employee acting in the course and scope of employment, but extended coverage beyond that to any actions related to such business. However, in *Zirger*, the Third District Court of Appeals interpreted the policy to mean that *employees* were covered by their employers' insurance policies.

{¶14} At the time of the accident, Black was employed by Hucle, not Tanner. The record reveals that Black was using the dump truck as part of his employment with Hucle. Appellants offer no facts to show that Black was employed by Tanner.<sup>[5]</sup>

{¶15} While appellants concede that Black was not an employee of Tanner, they continue to argue that Black is an insured under the language of Owners' policy because the policy expressly covers "any person," not just an employee. Therefore, appellants contend that the Third District Court of Appeals's expanded interpretation of "named insured's business" and any actions related to that business should apply to "any person" under the language of Owners' policy. Still, we decline to apply or adopt the scope of coverage as interpreted by the court in *Zirger*, as it is inapposite to our current analysis and goes beyond the plain and unambiguous language of the policy. Clearly, the parties to the contract did not intend for coverage under their policy to extend so far.

{¶16} The crux of the issue is who gave Black permission to operate the vehicle. Courts in the past have dealt with the ambiguity created by this issue. Appellants cite case law establishing that permission may be implied from the conduct of the parties. See *Frankenmuth Mut. Ins. Co. v. Selz* (1983), 6 Ohio St.3d 169; *West v. McNamara* (1953), 159 Ohio St. 187; and *Rice v. Jodrey* (1984), 19 Ohio App.3d 183. We do not dispute the validity of these holdings. However, the facts of those cases do not square with the salient facts here. In each of the previous cases, the *owner of the vehicle* gave permission to another party to use the vehicle. The operator then used the vehicle beyond the scope of the permission or delegated the use of the vehicle to a third, unauthorized party. In this case, Tanner was not the owner of the vehicle. Nor was Tanner given any authority or control over the vehicle to dictate its use.

{¶17} To extend coverage to Black pursuant to the case law in *Frankenmuth*, *West* and *Rice*, Hucle would have had to give Tanner permission to use Hucle's truck before Tanner could then authorize Black's use. Absent authority from Hucle, Tanner could not lawfully extend express or implied permission to Black. Therefore, appellants' contention that Tanner impliedly gave Black permission to use Hucle's truck is errant.

{¶18} Appellants make a lengthy argument for why we should find implied permission. However, they neglect to show how or where Tanner obtained the authority from Hucle to authorize Black's use of Hucle's truck. Appellants showed only that Tanner asked Black to pick up a load of gravel, charge it to Tanner's account and deliver the gravel to the job site. "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. No. C-940884, citing, *Hamlin v. McAlpin Co.* (1964), 175 Ohio St. 517. Absent some degree of control over the vehicle, Tanner did not have the requisite authority

from Hucle to grant Black express or implied permission to use the vehicle.

{¶19} Additionally, it is clear from the endorsement that, regardless of permission or whether the use of Hucle's truck was in the "business of the 'Named Insured,'" Black is still ineligible for coverage under Tanner's policy with Owners. The endorsement excludes from coverage:

The owner or lessee (of whom you are a sublessee) of a hired "auto" or the owner of an "auto" you do not own or which is not registered in your name which is used in your business or any agent or employee of any such owner or lessee.

The language is clear. The truck used for hauling gravel for Tanner's business is neither owned by Tanner nor registered in his name. The owner of the truck, Hucle, is excluded from coverage by Owners. Black was an employee of Hucle Concrete and agent of Tony Hucle at the time of the accident, ergo he is also excluded.

{¶20} 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 Hucle Concrete's employee, not 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 Hucle's truck. Black was simply not covered by Owners at the time of the accident. Accordingly, appellants' first assignment of error is overruled.

{¶21} In their second assignment of error, appellants appeal the trial court's determination that Erie was entitled to set off the \$100,000 paid by Progressive in partial restitution for Frances Combs' claim for emotional distress. Appellants argue Erie was not entitled to set off the payment by Progressive. The trial court ruled earlier in the case that emotional distress did not qualify as bodily injury under the terms of the insurance policy. Additionally, Erie's UM/UIM policy is only entitled to a setoff for amounts paid for bodily injury.

{¶22} It is appellants' contention that the trial court erred in holding that, by not allowing the setoff, appellants would receive more than if the tortfeasors had been uninsured, which would in turn violate established public policy. R.C. 3937.18(A)(2), as it was enacted on the date of the accident, states, in part, that:

\* \* \* Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverage, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

{¶23} Erie's policy language echoes that of R.C. 3937.18 to allow for setoffs. *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271, and *Littrell v. Wigglesworth* (2001), 91 Ohio St.3d 425 interpreted R.C. 3937.18 to prevent a policy holder from being put in a better position by being injured by an underinsured tortfeasor than by an uninsured one. We agree with this proposition. Had Black and Hucle been uninsured, appellants would have only been able to collect \$100,000 from Progressive. As underinsured, if we do not allow Erie to set off Progressive's payment, appellants will receive a minimum of \$200,000. Such an outcome clearly contradicts the statutory intent of R.C. 3937.18(A)(2).

{¶24} Appellants further protest the trial court's decision that a setoff does not violate the Due Process Clause. Appellants cite the Supreme Court of Ohio's requirement in *McMullen v. Ohio State Univ. Hosp.* (2000), 88 Ohio St.3d 332, and *Buchman v. Wayne Trace Local School Dist. Bd. Of Ed.* (1995), 73 Ohio St.3d 260 that setoffs must be applied to and match damages already received. It is appellants' theory that the damages they received from Progressive were for Frances Combs' claim of emotional distress, which would not be payable under the terms of Erie's insurance policy. As such, they have not received any damages for bodily injuries, which are payable under the terms of Erie's policy. Therefore, appellants surmise that allowing Erie to set off the \$100,000 paid by Progressive for emotional distress against its own coverage for bodily injury would violate due process.<sup>[6]</sup>

{¶25} Appellants' arguments, while creative and compelling, are erroneous in light of the applicable case law, the clear and unambiguous language of Progressive's insurance policy and the statutory language and intent of R.C. 3937.18. While the court sympathizes with the unfortunate tragedy suffered by appellants, it cannot stretch or

manipulate statutory and contractual language to fashion a remedy.

{¶26} Erie provides coverage in the amount of \$100,000 per person and \$300,000 per accident. However, the policy also allows for a reduction by "the amounts paid by or for those liable for *bodily injury* to anyone we protect." (Emphasis added.) The trial court previously determined, without objection from appellants, that emotional distress does not qualify as "bodily injury" for purposes of insurance coverage.<sup>[7]</sup>

{¶27} It may appear that, because appellants earmarked the \$100,000 paid by Progressive as damages for emotional distress, Erie would not be allowed to set off that amount against its liability coverage for her bodily injury claims. However, the trial court correctly noted that what is relevant is where the money comes from, not how the money is allocated once received by the appellants. Erie's policy allows for a reduction for payments already made under all "applicable bodily injury liability bonds." Black and Hucle were covered by Progressive's Commercial Auto Liability Policy, which provides:

Coverage A - Bodily Injury

Coverage B - Property Damage

We will pay damages, OTHER THAN PUNITIVE OR EXEMPLARY DAMAGES, for which an insured is legally liable because of an accident.

Appellants are correct in their argument that it is clear from the language of Progressive's policy that liability coverage extends to more than just bodily injuries. However, their argument that coverage applies to *all* damages extends beyond reasonable interpretation of the plain and unambiguous language and, therefore, is erroneous. The policy clearly states that coverage is available under Progressive's policy only for bodily injury and property damage.

{¶28} From the beginning, the parties stipulated that Black was liable for the damages arising from his accident with Frances Combs and her daughter. The case proceeded to bench trial on the issue of damages for four claims: bodily injury, loss of consortium, wrongful death and negligent infliction of emotional distress. Under the terms of Progressive's policy, the \$100,000 policy limit was paid pursuant to the policy's bodily injury coverage (as there were no claims for property damage) for which the insured (Black and Hucle) were legally liable as a result of the accident.

{¶29} Therefore, appellants' assertion that Progressive's payment was in partial satisfaction of Frances Combs' claim for negligent infliction of emotional distress is not well-taken. For all intents and purposes, Progressive's \$100,000 restitution was made pursuant to its bodily injury coverage for personal injuries incurred by its insured.

{¶30} Given our determination that Progressive's \$100,000 payment was, in fact, made as partial restitution for Frances Combs' bodily injuries, appellants have no basis for their due process claim. Accordingly, Erie is entitled to set off Progressive's payment, and appellants' second assignment of error is overruled.

{¶31} Based on the foregoing, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

PETREE, J., concurs.

WHITESIDE, J., concurs in judgment only.

WHITESIDE, J., retired of the Tenth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

Whiteside, J., concurring in judgment only.

{¶32} Although I concur in the judgment, I do so for the reason that, regardless of whether there is a genuine issue of material fact as to the nature of the relationship between Black and Tanner, that relationship ended prior to the

occurrence of the accident which is the subject of this action, as supported by fn. 5 of the majority opinion. However, there is no suggestion that Black's use of Hucle's truck for Tanner's benefit was not the result of some type of arrangement between Tanner and Hucle which possibly gives rise to a reasonable inference (when the evidence is construed in Black's favor) that Hucle had loaned both the truck and driver (Black) to Tanner to use for Tanner's benefit to obtain the materials and deliver them to Tanner. Also, there is at least a reasonable inference (when the evidence is construed in Black's favor) that Tanner had directed Black where to go to pick up the materials, what materials to pick up, and where to deliver the materials.

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Notes:

[1] Per their standard course of dealing, Tanner would pick up the gravel himself for larger jobs. On smaller jobs, Hucle or his employees would haul the gravel in Hucle's dump truck and charge the cost to Tanner's account.

[2] Appellee Erie provided coverage of \$100,000 per person and \$300,000 per accident.

[3] Appellants amended their original complaint on February 26, 2003 to include a claim against Tanner on the theory of respondeat superior. Tanner was dismissed without prejudice on January 14, 2004.

[4] Appellants and Erie filed a combined motion for summary judgment against Owners, which was denied. Erie is not appealing the judgment in favor of Owners.

[5] At best, an agency relationship existed between Black and Tanner to the extent that, *prior* to the accident, Black used Hucle's truck to pick up and deliver materials owned by Tanner. However, the delivery of the materials effectively ended any agency relationship that *may* have existed; Black was no longer acting for the "Named Insured's" business.

[6] This court notes that nowhere in the record does anyone except appellants categorize the payment from Progressive as compensation for Frances Combs' emotional suffering. Rather, it appears from the facts presented that appellants unilaterally earmarked said compensation as partial satisfaction for Frances Combs' emotional distress only *after* the trial court determined that emotional distress is not "bodily injury" for the purposes of coverage. The trial court rendered a judgment on June 20, 2004 that emotional distress did not qualify as bodily injury. More than four months later, on November 8, 2004, notice of partial satisfaction of the judgment by Progressive was filed with the trial court. Regardless, the label applied to the funds is irrelevant to the ultimate decision of this case.

[7] This court has further developed the issue of bodily injury and insurance coverage by consistently holding that "[n]onphysical harms such as emotional distress are not 'bodily injury' as defined by R.C. 3937.18 and therefore not covered under the Erie policy." *Erie Ins. Co. v. Favor* (1998), 129 Ohio App.3d 644, at 649; see, also, *Mains v. State Auto Mut. Ins. Co.* (1997), 120 Ohio App.3d 534; *Bernard v. Cordle* (1996), 116 Ohio App.3d 116.

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Not Reported in A.2d, 2006 WL 2051116 (N.J.Super.A.D.)  
(Cite as: 2006 WL 2051116 (N.J.Super.A.D.))

**H**

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Superior Court of New Jersey,  
Appellate Division.

Viacheslav FETISOV and Ladlena Fetisov, Individually and as Assignees of Gambino's Westside Limousine Service, Inc. and Richard Gnida, Irina Konstantinov, Individually and as Conservator for Vladimir Konstantinov, a Mentally Incapacitated Person, and as Guardian ad litem for Anastasia Konstantinov, a Minor, and as Assignees of Gambino's Westside Limousine Service, Inc. and Richard Gnida, Plaintiffs-Appellants,

v.

VIGILANT INSURANCE COMPANY, Federal Insurance Company, Westchester Fire Insurance Company, Travelers Indemnity Company, Indemnity Insurance Company of America, and United States Fidelity & Guaranty Company, Defendants-Respondents,

and

General Star National Insurance Company, Reliance Insurance Company, Royal Insurance Company, TIG Insurance Company, CIGNA/ACE Insurance Company, National Surety Corporation<sup>FN1</sup>, Defendants.

FN1. Incorrectly identified in the complaint as Fireman's Fund Insurance Company.

Argued May 23, 2006.

Decided July 25, 2006.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, L-675-01.

Richard M. Goodman (Goodman, Lister & Peters) of the Michigan bar, admitted pro hac vice, argued the cause for appellants (Wilentz Goldman & Spitzer, attorneys; Richard M. Goodman, Frederick K. Becker, and Brian J. Molloy, of counsel, Mr. Goodman, Mr. Becker, Mr. Molloy and Kathleen J. Kalahar, of the Michigan bar, admitted pro hac vice, all on the brief).

Gerard H. Hanson argued the cause for respondents Vigilant Insurance Company and Federal Insurance Company (Hill Wallack, attorneys; Gerard H. Hanson, Marilyn S. Silva, Todd J. Leon, of counsel; Mr. Hanson on the joint brief).

George Hardin argued the cause for respondents Westchester Fire Insurance Company and Indemnity Insurance Company of North America (Hardin, Kundla, McKeon & Poletto, attorneys; Mr. Hardin and John R. Scott, of counsel; Mr. Scott on the joint brief).

Robert M. Vinci argued the cause for respondents Travelers Indemnity Company and United States Fidelity and Guaranty Company (Drinker Biddle & Reath, attorneys; Mr. Vinci on the joint brief).

Before Judges AXELRAD, PAYNE and SABATINO.

PER CURIAM.

\*1 The Detroit Red Wings hockey team won the Stanley Cup in 1997. Following their victory, various celebrations occurred, including a golf outing that took place on June 13, 1997. On the preceding night, while at a local restaurant with the team, a team player, Kris Draper, called Gambino's Westside Limousine Service, an entity that he had used in a private capacity on a number of occasions, and contracted through its employee, Ann Milsom, to hire four limousines and drivers to transport the participants in the golf outing to and from the func-

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tion. On the succeeding day, Gambino's dispatched, among the limousines, one driven by its employee Richard Gnida. While driving the limousine, Gnida lost control of the vehicle, causing injuries to plaintiffs Viacheslav Fetisov and Vladimir Konstantinov, both players, and Sergei Mnatsakanov, a team masseur. Although Fetisov recovered from his injuries, Konstantinov and Mnatsakanov, both of whom sustained injury to the brain, have not, and their careers have ended.

An action was instituted in Michigan against Gambino's and Gnida on behalf of Fetisov, Konstantinov and Mnatsakanov, which resulted in a settlement in an amount in excess of two million dollars. Following payment of policy limits by the insurer for Gambino's and an assignment of rights by Gambino's and Gnida, an additional action was brought in New Jersey on behalf of the injured men, together with their spouses and children, to recover the unsatisfied amount of the judgment from the twelve insurers listed in the caption, claiming entitlement to benefits as the result of coverage allegedly provided to Gambino's and Gnida under business auto policies (BAPs) issued to the National Hockey League (NHL) and Little Caesar's, the corporate owner of the Red Wings, and under commercial general liability (CGL) coverage issued to the Red Wings.

Following discovery and motions for summary judgment, the motion judge found no coverage to exist, determining that (1) no triable issue existed as to whether the Detroit Red Wings, Inc. "hired" the limousine; (2) the Detroit Red Wings, Inc. did not have the power to give the driver, Gnida, "permission" and did not give him permission to use the limousine, and thus omnibus insurance coverage was not triggered; (3) the exclusion contained in the "who is insured" clause of the policies applied to Gnida; and (4) the Detroit Red Wings, Inc. was not a "named insured" under the NHL policy. Plaintiffs have appealed. We affirm.

I.

On appeal, plaintiffs and defendants present extended factual argument, dependent upon theories of contract as well as actual and apparent agency, as to whether the Red Wings organization hired the limousine driven by Gnida. For purposes of this opinion, we will assume that it did, because we find that the coverage issue presented can be resolved without addressing that point. Distilled to its essence, the issue that we must determine is whether Gnida was a "permissive user" under omnibus coverage afforded by the policies at issue. <sup>FN2</sup>

FN2. The Chubb Group of Insurance Companies, whose subsidiaries (Federal Insurance Company and Vigilant Insurance Company) issued the policies whose language is at issue, is headquartered in New Jersey. Little Caesar's and the Detroit Red Wings, Inc. are Michigan insureds, and the underlying accidents occurred in Michigan. Consequently, we have considered the applicability of the laws of both New Jersey and Michigan to this dispute. However, because we find no conflict between those laws in connection with the permissive user issue before us, we need not decide what law to apply. *Veazey v. Doremus*, 103 N.J. 244, 248 (1986); *FileNet Corp. v. Chubb Corp.*, 324 N.J.Super. 476, 483 (Law Div.1997), *aff'd o.b.*, 324 N.J.Super. 419 (App.Div.1999).

Both New Jersey and Michigan mandate omnibus coverage (called residual liability coverage in Michigan) for motor vehicles. *See, e.g.*, N.J.S.A. 39:6B-1 (use of motor vehicles) and *Mich. Comp. Laws* § 500.3009 (use of motor vehicles) and § 257.520 (use of vehicles not owned by insured). Under the laws of each state, coverage is triggered only when the vehicle is used with the permission of the insured. *See, e.g.*, *Butler v. Bonner & Barnewall, Inc.*, 59 N.J. 567, 574-75 (1970) and *Clevenger v. All-*

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*state Ins. Co.*, 505 N.W.2d 553, 557  
(Mich.1993).

\*2 Omnibus, or “additional insured” coverage was developed to effectuate “the overriding legislative policy of assuring financial protection for the innocent victims of motor vehicle accidents,” *Bellafronte v. General Motors Corp.*, 151 N.J.Super. 377, 382 (App.Div.1997), that would be lacking if coverage were restricted solely to the acts of the named insured. See also *State Farm Mut. Auto. Ins. Co. v. Zurich Am. Ins. Co.*, 62 N.J. 155, 179-80 (1973) (Weintraub, C.J., concurring in part); *Matits v. Nationwide Mut. Ins. Co.*, 33 N.J. 488, 496 (1960); *Coburn v. Fox*, 389 N.W.2d 424, 428 (Mich.1986). In general, an omnibus provision affords coverage for liability arising out of the ownership, maintenance, operation or use of a motor vehicle, and it is triggered when evidence exists that the tortfeasor is a “permissive user” of the vehicle, a matter determined by use of the “initial-permission” rule. *Proformance Ins. Co. v. Jones*, 185 N.J. 406, 412-13 (2005); *French v. Hernandez*, 184 N.J. 144, 152 (2005). That rule provides that “[a]s long as the initial use of the vehicle is with the consent, express or implied, of the insured, any subsequent changes in the character or scope of the use ... do not require the additional specific consent of the insured.” *Verriest v. INA Underwriters Ins. Co.*, 142 N.J. 401, 413 (1995)(per curiam)(internal quotations omitted); see also *Cowan v. Strecker*, 229 N.W.2d 302, 304-05 (Mich.1975); *Roberts v. Posey*, 194 N.W.2d 310, 314 (Mich.1972); *Foutz v. Dietz*, 254 N.W.2d 813, 816-17 (Mich.Ct .App.1977)(all construing owner's civil liability statute, *Mich. Comp. Laws* § 257.401). As stated by the Supreme Court in *French*: “Simply put, once an owner gives his vehicle's keys to another person for a drive, the courts ordinarily will find coverage, even if the driver deviates from the expected scope of use of the vehicle, unless the driver's later conduct amounts to a theft or the like of the vehicle.” 184 N.J. at 152 (citing *Butler v. Bonner & Barnewall, Inc.*, 56 N.J. 567, 574-75 (1970)); see also *Roberts*,

*supra*, 194 N.W.2d at 312 (“The owner who gives his keys to another, and permits that person to move several thousand pounds of steel upon the public highway, has begun the chain of events which leads to damage or injury.”).

The French Court observed that: “The initial-permission rule was adopted because it” ‘best effectuate[d] the legislative policy of providing certain and maximum coverage.’ “ *Ibid.* (quoting *Verriest, supra*, 142 N.J. at 412 (quoting *Matits, supra*, 33 N.J. at 496)). However, as the *French* opinion demonstrates, application of the initial-permission rule is not limitless, and when neither actual nor implied permission can be demonstrated, the insurer affording omnibus coverage is entitled to summary judgment. In *French*, the Court recognized the fact that, in light of the policy goal of insuring financial recovery to innocent victims, courts have liberally construed automobile insurance policies broadly, and resolved all doubts in favor of coverage, “does not mean, however, that an insurance policy can be stretched beyond all reason to fit a set of facts that fall beyond the reach of the omnibus clause.” *Ibid.*

## II.

\*3 The three policies at issue in this case all contained omnibus provisions. The BAP policy issued by Federal Insurance Company to the NHL contained the following definition of an insured:

The following are “insureds”:

- a. You for any covered “auto.”
- b. Anyone else while using with your permission a covered “auto” you own, hire or borrow except:
  - (1) The owner or anyone else from whom you hire or borrow a covered “auto.”

For liability insurance purposes, only hired autos (“those ‘autos’ you lease, hire, rent or borrow”) and non-owned autos (“those ‘autos’ you do not own,

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lease, hire, rent or borrow that are used in connection with your business”) were covered by the policy.

Little Caesar's BAP policy, also issued by Federal Insurance Company, contained an identical definition of insured. However, its liability coverage was extended to “any ‘auto.’” Finally, the CGL policy issued by Vigilant Insurance Company to the Detroit Red Wings, Inc. defined insured as:

1. you for any covered auto.
2. anyone else while using, with your permission, a covered auto except
  - a. the owner or anyone else from whom you hire or borrow a covered auto.

Coverage under the Red Wings policy included non-owned and hired autos.<sup>FN3</sup> Significantly, each of the three policies provided that “you” referred to the named insured.

FN3. The coverage provided by the defendant excess carriers followed the form of the underlying policies.

### III.

Our review of the coverage provided under the NHL's policy satisfies us that its omnibus clause cannot be read to provide insurance for the liability of Gambino's and Gnida. Even if we assume that the limousine and driver were contracted for by the Red Wings, that organization was not an insured under the NHL's policy. Because it was not an insured, it could not act as the “you” providing initial permission for the use of the vehicle, even if facts supported such initial permission, which we find they do not. The named insured on the NHL policy was “National Hockey League Services, Inc.” Although a March 3, 1997 endorsement identified additional named insureds, the Detroit Red Wings, Inc. is not among them. Plaintiffs argue that insured status for the Red Wings can somehow be found in

the following designation:

World Cup of Hockey, a cooperative effort of the National Hockey League and National Hockey League Players' Association, the National Hockey League, its affiliates and subsidiaries, and the National Hockey League Players' Association.

We reject that argument as wholly contrary to the plain meaning of the identifying phrase. As a consequence, we affirm summary judgment in favor of the defendants issuing primary or excess coverage to the NHL pursuant to its BAP policy.

### IV.

We affirm summary judgment in favor of the insurers of Little Caesar's and the Detroit Red Wings on a related basis. As we have noted, the omnibus clauses at issue become effective only if a named insured (*i.e.*, the Red Wings) granted initial permission for Gnida to “use” Gambino's limousine. Gambino's is not a named insured under either the Little Caesar's or Detroit Red Wings policies.

\*4 However, the relationship between the Detroit Red Wings and Gambino's was a contractual one. The Red Wings offered to pay a certain amount in compensation for the hire of a car and driver, and Gambino's accepted that offer by providing a limousine that it owned as part of its limousine fleet and, as a driver, Gnida. Gambino's, not the Red Wings, owned the limousine. Acting as an independent contractor,<sup>FN4</sup> it was the one that provided initial permission for the use of the vehicle by giving the vehicle's keys to Gnida. *French, supra*, 184 N.J. at 152; *Butler, supra*, 56 N.J. at 574; *see also Roberts, supra*, 194 N.W.2d at 312. If Gambino's had not done so, and if no limousine had shown up to transport the team's members and employees, the Red Wings would have had a breach of contract action against Gambino's. It would not, however, have had the right to transfer the limousine's keys from Gambino's to Gnida or to otherwise provide

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initial permission to him to operate the vehicle.<sup>FN5</sup>

FN4. The status of a limousine service as an independent contractor has been recognized in *Robinson v. Jiffy Executive Limousine Co.*, 4 F.3d 237 (3d Cir.1993) (New Jersey law). See also *Lowe v. Zarghami*, 158 N.J. 606, 615-06 (1999) (discussing indicia of independent contractor status).

FN5. We distinguish these facts from those present when a car is rented without a driver.

Because only Gambino's was in a position to grant initial permission to Gnida and because Gambino's was not a named insured, the coverage that plaintiffs seek is not available to them. 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. Coverage turns on "initial permission." Thereafter, any subsequent use short of theft or the like, though not within the contemplation of the parties, constitutes a permitted use. *Matits, supra*, 33 N.J. at 496-97 (discussing the initial permission rule); *Cowan, supra*, 229 N.W.2d at 304-05. Here, initial permission by a named insured was lacking. There is thus no coverage.

In light of our resolution of the initial permission issue as it relates to the defendants' omnibus coverage, we find no need to address the remaining issues raised in this appeal.

Affirmed.

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