

In The Supreme Court Of Ohio

Federal Insurance Company and American Alternative Insurance Corporation)	Supreme Court Case No: 2009-2307
)	
)	
Plaintiffs/Appellees,)	On Appeal from the Allen County Court of Appeals, Third Appellate District Case
)	
v.)	
)	
Executive Coach Luxury Travel, Inc., et al.)	Court of Appeals
)	Case Nos. 1-09-17 and 1-09-18
)	
Defendants,)	
)	
&)	
)	
Feroen J. Betts, etc., et al.,)	
)	
Defendant- Intervenors/Appellants.)	

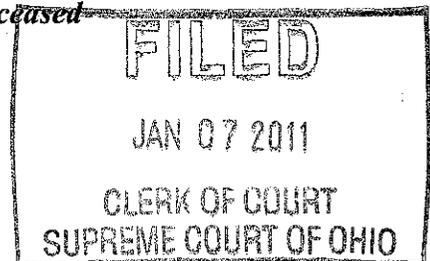
FEDERAL INSURANCE COMPANY'S MOTION FOR RECONSIDERATION

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**FEDERAL INSURANCE COMPANY'S BRIEF IN SUPPORT OF ITS
MOTION FOR RECONSIDERATION**

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Federal respectfully asserts that this Court should revisit and reconsider its decision in *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, Slip Opinion No. 2010-Ohio-6300, because it is: 1) based upon an obvious error in applying the incorrect standard for contractual interpretation as dictated by stare decisis; and 2) contrary to the majority view of Ohio's sister states on the coverage issue presented. By deviating from the settled rules of contract construction, the intent of the parties, and the majority view of other jurisdictions, this Court has embarked on a new and unique path of American jurisprudence where independent contractors will claim to be insureds under their customers' automobile (or trucking) liability policies. As the dissent states, a customer's policy may now afford a taxi or limousine company liability coverage for its driver's negligence. This is so even though the customer has no liability exposure and no interest in providing liability coverage for transportation service providers. One, thus, is reminded of the prophetic dissent of Justice Lundberg Stratton in *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St. 3d 557, 559: "Pandora's Box continues to release its contents."

Since this Court's ruling, several Ohio colleges and universities have expressed disbelief and concern over this Court's unanticipated expansion of insurance coverage to independent transportation providers. Their concerns arise from this Court's departure from settled law nationwide. The Ohio State University's spokeswoman is quoted in one article as stating that the University is "reviewing the Supreme Court's decision and considering whether or not any changes

are required in our insurance or transportation programs.”¹ Similarly, Capital University expressed shock at the unanticipated expansion of its insurance coverage and concern over the potential repercussions: “We’re sending teams on snowy and wet roads all the time. Transportation is a serious issue, and it doesn’t matter what division your teams play in. ***This is going to be an issue for everyone.*** We’re going to have to study this.”² (Emphasis added.)

The bus accident at issue is tragic and heart-wrenching, but bad facts do not justify bad law that will affect all Ohioans. There is no justification for extending Bluffton’s insurance coverage beyond that which it purchased or intended. Rather, such a holding: 1) is contrary to previously settled Ohio law which dictated that the intentions of the parties control; and 2) will only serve to pass that cost onto others—including Ohio’s schools, businesses, and individuals—who have no liability for the torts of independent contractors. There is no basis to expand insurance coverage beyond that which the policyholder--Bluffton--intended and expected under the settled national majority view on the scope of omnibus coverage.

Indeed, it was only a little over seven years ago that this Court faced a comparable issue and reasoned: “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 increase the policyholder’s premiums.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 220,

¹ See, e.g., Alan Johnson, *Bluffton Ruling Puts Liability on Schools*, Columbus Dispatch, Dec. 29, 2010, available at <http://www.dispatchpolitics.com>; headline clarified Dec. 30, 2010 (“Bluffton University’s insurance is liable for covering the costs of the deadly 2007 bus crash in Atlanta, the Ohio Supreme Court has ruled. Because of an editor’s error, a headline on Page A1 of yesterday’s *Dispatch* may have been misleading regarding liability.”)

² *Id.*

2003-Ohio-5849, ¶ 14. In *Galatis*, this Court revisited and partially overruled its prior decisions in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292, and *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, 86 Ohio St.3d 557, 1999-Ohio-124. In doing so, this Court recognized that the basis for sound contract interpretation is to give effect to the intentions of the parties to the contract rather than to expand coverage beyond the policyholder's needs to benefit third parties who did not contract with, or pay any premium to, the insurer for coverage.

This Court's decision in *Fed. Ins. Co.* eviscerates the sound reasoning of *Galatis* and takes Ohio back down the self-destructive path of extending coverage in favor of third parties while turning a blind eye to the intentions of the party who purchased insurance to cover that party's own liability risks in the first place. The opinion in this matter will result in increased litigation, unanticipated exposures, widespread uncertainty, and higher premiums. Federal, therefore, asks this Court to apply the correct standard for contract interpretation, consider the majority view of its sister states, and reconsider its decision accordingly.

II. STANDARD ON RECONSIDERATION.

S.Ct. Prac. R. 11.2(A) specifically allows a motion for reconsideration. While no set standard is applied to motions for reconsideration made to this Court,³ reconsideration is warranted where, as here, the decision "wrongfully" states the law, fails to consider the majority view nationwide, will cause "confusion and misunderstanding," or unintentionally changes settled law. *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, ¶ 6, 18-21; *Galatis*, at

³ At the court of appeals level, "[t]he test generally applied is whether the motion for reconsideration calls to the attention of the court [1] an obvious error in its decision or [2] raises an issue for consideration that was either [a] not considered at all or [b] not fully considered [by the court] when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 140; *Oberlin Manor v. Lorain County Bd. of Revision* (1994), 69 Ohio St. 3d 1, 2 (citing to the *Matthews* test).

¶ 19 (“Further, the *Scott-Pontzer* rationale stands in stark contrast with decisions of the vast majority of states that have considered similar issues. * * * Although not controlling, this broad-based disagreement with and criticism of *Scott-Pontzer* support our decision to revisit the subject.”).

III. THE STANDARD APPLIED BY THE COURT TO INTERPRET THE POLICY LANGUAGE AT ISSUE IS AN OBVIOUS ERROR.

A. THE POLICY SHOULD BE CONSTRUED IN FAVOR OF THE POLICYHOLDER (BLUFFTON), NOT THE BUS DRIVER (NIEMEYER), WHO DID NOT CONTRACT WITH, OR PAY PREMIUM TO, THE INSURER FOR COVERAGE.

In its December 28, 2010 decision, this Court sub silentio changes the standard applicable when someone other than the policyholder seeks coverage by claiming to be an insured. Specifically, this Court first recognizes that “[t]he issue is whether Niemeyer is an ‘insured’ within the language and meaning of Bluffton’s Hartford policy.” *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, Slip Opinion No. 2010-Ohio-6300 at ¶ 2. Then, this Court acknowledges that the “policy owner” is Bluffton and that Niemeyer claims to be an insured under the “omnibus clause.” *Id.* at ¶5. This Court then holds that “Niemeyer is an insured” based on the applicable standard that “[w]e construe insurance policies *liberally in favor of the insured.*” (Emphasis added.) *Id.* at ¶¶ 2 and 5. But that is an obvious error because that is not the standard previously applied under Ohio law, and there is no basis stated for changing the applicable standard under stare decisis.⁴

This Court states the applicable standard to be that “[w]hile an ambiguity is construed in favor of one who has been determined to be insured, an ambiguity in *the preliminary question of*

⁴ Repeatedly in its opinion, the Court states that Niemeyer is an insured because “anyone else” driving a hired auto with Bluffton’s permission is an insured. *Fed. Ins. Co.* at ¶ 7. But Federal never disputed that, indeed, “anyone” operating an auto hired by Bluffton with Bluffton’s permission is an insured. The issue presented is not whether Niemeyer qualifies as “anyone,” but rather, whether he was operating an auto “hired” by Bluffton with Bluffton’s “permission” at the time of the accident.

whether a claimant is insured is construed in favor of the policyholder.” (Emphasis Added.) *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 224-225, 2003-Ohio-5849, ¶¶ 14, 34-9 (“A claimant, however, is not necessarily an insured.”). This Court further correctly holds that “[t]he purpose of a commercial auto policy is to protect the policyholder.” *Id.* This Court, however, does not analyze the standard set forth about seven years ago under the elements necessary to abandon stare decisis. *Id.* at paragraph one of the syllabus. Yet the Court appears to have abandoned its prior precedent. The bench and bar, thus, will be faced with conflicting and confusing precedent which will result in a patchwork of decisions across the state until this Court once again revisits the applicable standard.

Federal, therefore, respectfully requests this Court to revisit its decision and apply the same standard as in its prior decisions. Federal will not engage in improper reargument of the merits but does respectfully suggest that the outcome may change if the correct standard is applied and that, even if it does not, the Court’s decision should be revised to, at minimum, reflect the correct standard to avoid confusion by the bench and bar.

B. THE POLICY LANGUAGE SHOULD BE READ IN CONTEXT SO AS TO GIVE EFFECT TO THE INTENT OF THE PARTIES TO THE CONTRACT.

Under this Court’s prior precedent, the policy provisions must be read in context with the “policy [construed] as a whole.” *King v. Nationwide Ins. Co.* (1988), 35 Ohio St. 3d 208, 212; *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St. 2d 166, 173; *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St. 3d 306, 2007-Ohio-4917, ¶7; and *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 220, 2003-Ohio-5849, ¶¶ 11-12. But in this action, the Court focuses upon the clause in the insurance that covers “anyone else” driving a hired auto, and reads “[t]wo key terms, ‘hire’

and ‘permission’” out of context based solely on their dictionary definitions. *Fed. Ins. Co.*, 2010-Ohio-6300 at ¶¶7, 12. The Court states that “[w]hether the insurance company intended the clause to apply is immaterial because the language of the policy supports a conclusion that Niemeyer is an insured.” *Fed. Ins. Co.*, 2010-Ohio-6300 at ¶8. Yet the applicable standard set by this Court’s prior cases is that “[w]hen confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement.” *Galatis*, at ¶ 11. The use of a new and inconsistent standard for contractual interpretation is an obvious error. By doing so, this Court abandons stare decisis for the second time.

This Court reverses a trial court and court of appeals that followed stare decisis. The trial court held that “any ambiguity construed in favor of the purported insured [Niemeyer] in this instance would provide an unreasonable interpretation of the words of the policy.” (Order Granting Plaintiff American Alternative Insurance and Plaintiff Federal Insurance Company’s Motions for Summary Judgment at p. 6). The trial court was “guided by *Cincinnati Ins. Co. v. CPS Holdings, Inc.* (2007), 115 Ohio St. 3d 306,” and granted the appellees’ separate motions for summary judgment because “Niemeyer’s employment and use of the Motor Coach was with [Executive’s], and NOT Bluffton University’s permission.” (*Id.* at pp. 3 and 4). The trial court found it unnecessary to decide whether Bluffton University owned, hired, or borrowed the bus, but the trial court held “that Bluffton College could not be found to have owned, hired, or borrowed the vehicle at the time of the accident” because “Bluffton College had contracted with Executive Coach for services and the bus was only incident to said contract”; and it was Executive who “selected the particular Motor Coach from [the motor coach owner/lessor] PFS to provide transportation incidental to the charter service.” (*Id.* at pp. 5-6). The court of appeals, following stare decisis, affirmed the decision of the trial court.

The court of appeals recognized that “[w]hile ordinary definitions and common understandings of the words ‘permission’ and ‘hire’ seem to include the concepts of mere ‘agreement,’ ‘consent’ or even ‘acquiescence’ to a matter, it is also clear that definitions of these terms in any legal context commonly refer to the requirement of having the ‘authority to grant the permission’ and/or exert a ‘substantial control’ over the matter or thing as well.” *Fed. Ins. Co. v. Executive Coach Luxury Travel*, Allen App. Nos. 1-09-17, 1-09-18, 2009-Ohio-5910, at ¶30. Following *Davis v. Continental Ins. Co.* (1995), 102 Ohio App.3d 82, the court of appeals stated: “In sum, we have determined that reasonable minds could not differ in concluding that Executive Coach and not Bluffton had predominate authority and control over the bus and driver under the charter contract in this case and that as a result, reasonable minds could not differ in concluding that the bus and driver were ‘hired’ by Executive Coach and not Bluffton within the meaning of those terms as used in the insurance contract.” (Id. at ¶39). The court of appeals noted that the terms “borrowed” and “hired” are used together in the contract, and must be read together and in context to effectuate the intent of the parties to the contract. See also, *American Internat. Underwriters Ins. Co. v. American Guarantee & Liability Ins. Co.* (2010), 181 Cal. App. 4th 616, 622-631, quoting *Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154. “Hired” thus requires possession and control of the vehicle by the insured just as does “borrowed.” And “permission” by the insured to use an auto cannot be reasonably read to include contracting for a transportation service’s use of its own vehicle to transport the insured.

This Court, though, ignores *Davis* and other Ohio case law, e.g., *Buckeye Union Cas. Co. v. Royal Indemn. Ins. Co.* (1963), 120 Ohio App. 429, 435, 203 N.E.2d 121 (“Since it is the transfer of possession and control * * * that raises the implication [of permission], and since [the named

insured] Connell did not transfer control or possession of this car to [the driver] Zum, there is no factual basis for implied permission from Connell to Zum.”), and reads *Combs v. Black*, 10th Dist. No. 05 AP-1177, 2006-Ohio-2439 at ¶18, narrowly, although the *Combs* court held: “Absent some degree of control over the vehicle, [the named insured] Tanner did not have the requisite authority from the [vehicle owner/independent contractor] Hucl to grant [the driver] Black express or implied permission to use the vehicle.” *Fed. Ins. Co.*, 2010-Ohio-6300 at ¶11.

Federal, therefore, respectfully asks the Court to revisit its decision, apply the standards of contract interpretation set by stare decisis, and reconsider its decision accordingly.

IV. THE COURT FAILS TO CONSIDER THE DECISIONS OF THE VAST MAJORITY OF STATES THAT HAVE ADDRESSED THE ISSUE PRESENTED HERE.

Courts in Ohio and nationwide have previously recognized that there cannot be “use with your permission” of an “‘auto’ you own, hire, or borrow” unless there is control and possession of the “auto.” Attached hereto is a nationwide survey listing cases from every state where control and possession were considered to determine whether the use of the motor vehicle was covered under the policyholder’s insurance. Yet this Court now says that “we do not adopt [a control and possession] test.” *Fed. Ins. Co.*, 2010-Ohio-6300 at ¶10.

This Court states that even if it adopted a control and possession test, this Court’s view of the collective facts is so contrary to the trial court and court of appeals, that it is the intervenors who are entitled to summary judgment -- that somehow reasonable minds could not differ in concluding that Bluffton and not Executive had predominate authority and control over Executive’s bus and driver. *Fed. Ins. Co.*, 2010-Ohio-6300 at ¶10. This Court cannot genuinely reach such a conclusion. Justice Stratton in her dissenting opinion recognizes:

As the trial court concluded: “Bluffton University’s use of the motor coach an any authority Bluffton had over the motor coach driver was always subject to the permission Executive Coach gave its driver and its customer Bluffton University to use the motor coach.” Additionally, the court found that Bluffton could not use the bus in any manner that Executive Coach did not allow.

Fed. Ins. Co., 2010-Ohio-6300 at ¶17.

This Court says that the “federal circuit court cases” cited by Federal are “factually inapposite in that they involve the loading and hauling of construction equipment and materials, not the transportation of people.” *Fed. Ins. Co.*, 2010-Ohio-6300 at ¶ 9. In doing so, though, the Court ignores the numerous decisions cited by Federal which address the meaning of “hired” auto coverage in the context of the transportation of passengers. Those decisions include:

- *Casino Air Charter, Inc. v. Sierra Pacific Power Co.* (1979), 95 Nev. 507, holding that “there was no hiring of an aircraft” to transport passengers because the named insured instead “contracted for the transportation services of an airplane and a qualified pilot” and, as here, has no liability for the crash and “neither designated a particular aircraft nor took any part in the preparation of a flight plan”;
 - *Phillips v. Ent. Transp. Serv. Co.* (Miss.App. 2008), 988 So.2d 418, ¶¶21-22, holding that “[t]he ‘hired auto’ provision in National’s insurance policy specifically provided for leasing, hiring, renting, or borrowing of an automobile. It did not cover the contracting for transportation services of an independent contractor. * * * [Instead], courts have recognized that ‘for a vehicle to constitute a hired automobile, there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use or control.’”;
- and

● *Fetisov v. Vigilant Ins. Co.* (July 25, 2006), N.J. Super. No. A-0828-04T2, 2006 N.J. Super. Unpub. LEXIS 1757 at *10-12, holding that the Detroit Red Wings hockey team “offered to pay a certain amount in compensation for the hire of a car and driver, and [the limousine company, like the bus company here,] accepted that offer by providing a limousine that it owned as part of its limousine fleet and, as a driver, Gnida. * * * Whether the team members could to an extent control the conduct of Gnida (an employee of independent contractor [limousine service]) once he commenced the ‘use’ of the vehicle is irrelevant for purposes of coverage. Coverage turns on ‘initial permission.’ * * * Here, initial permission by a named insured was lacking.”

In fact, the “majority of other courts” nationwide hold it is “unreasonable to suggest that [a transportation provider] was using its own vehicle with the [insured’s] permission; such an interpretation “would strain the plain meaning of the words and be contrary to the construction given similar terms in the authorities cited.”” *American Internat. Underwriters Ins. Co. v. American Guarantee & Liability Ins. Co.* (2010), 181 Cal. App. 4th 616, 622-631, quoting *Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154 (“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.”); accord *City of Los Angeles v. Allianz Ins. Co.* (2005) 125 Cal.App.4th 287; *RLI Ins. Co. v. Smiedala* (2010), 897 N.Y.S.2d 827 (“we conclude that only ‘an unnatural or unreasonable construction’ of that provision supports an

interpretation that Hale's personal vehicle was borrowed by Regional and then used by Hale with Regional's permission").⁵

Courts across the country have construed the omnibus clause reasonably and in keeping with the realities of everyday life. The decision of this Court, however, has startling implications, including one discussed at oral argument. Counsel for the intervenors asserted that if a lawyer got in a taxi cab and gave the driver directions, that vehicle (pursuant to this Court's decision) would be "hired" under a business auto policy issued to the law firm. Clearly, however, that would not be the intent of the law firm or insurance company. Counsel suggested, however, that the cab driver would not be an insured because business auto policies typically limit coverage to specified autos, whereas the Bluffton policies cover "any auto." Counsel's statement is at odds with reality. In fact, business auto policies, including those written for small businesses and law firms, often extend coverage to "any auto" because the insurer and insured do not know what vehicle may be used in the course of employment. Thus, a business person going to a meeting or a lawyer going to court may use a company vehicle or a private passenger auto. No matter what vehicle is used, the insured faces vicarious liability, so the policy is written to cover "any auto", in keeping with the intent of the insurer and insured to protect the insured. If the current decision stands, transportation providers will be afforded liability coverage under the business auto policies of customers in Ohio, in contravention of common sense and the intent of insureds and insurers. Reconsideration of the decision in this matter is appropriate.

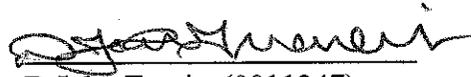
⁵See also, *S. Gen. Ins. Co. v. Alford* (1998), 234 Ga. App. 615; *Robert Cole Trucking Co. v. Old Republic Co.* (1985), 486 N.Y.S.2d 527; *Pub. Serv. Mut. Ins. Co. v. White* (1949), 4 N.J. Super. 523; *Weber v. State Farm Mut. Auto Ins. Co.* (2007), 216 Ore. App. 253; *Sachtjen v. Am. Family Mut. Ins. Co.* (Colo. 2002), 49 P.3d 1146; *Alabama Farm Bur. Mut. Cas. Ins. Co. v. Govt. Emp. Ins. Co.* (1970), 286 Ala. 414.

This Court recognizes that where its stated “rationale stands in stark contrast with decisions of the vast majority of states that have considered similar issues” reconsideration is warranted. *Galatis*, at ¶ 19 (“Further, the *Scott-Pontzer* rationale stands in stark contrast with decisions of the vast majority of states that have considered similar issues. * * * Although not controlling, this broad-based disagreement with and criticism of *Scott-Pontzer* support our decision to revisit the subject.”). Federal, therefore, respectfully asks the Court to revisit its decision, consider the decisions rendered by the courts of its sister states, revise its decision accordingly, and affirm the decisions of the courts below.

V. CONCLUSION

Federal Insurance Company asks this Court to revisit its decision, apply the rules of construction set by stare decises, and hold that: 1) the omnibus clause in a commercial auto policy providing coverage for anyone else while using with the named insured’s permission a covered auto the named insured owns, hires, or borrows does not extend liability coverage to a transportation service provider and its driver where the service provider does not relinquish possession and control of the auto to the customer/named insured; and 2) an auto is not “hired” by the named insured within the meaning of such an omnibus clause where the named insured contracts with a transportation service which provides both the auto and the driver.

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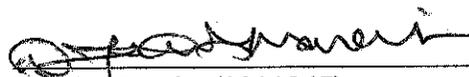
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Nationwide Survey that Permission to Use and Ownership, Hiring, and Borrowing of Vehicle Require Possession and Control of the Vehicle

Below is a national survey of cases showing that the Court's decision in *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, Slip Opinion No. 2010-Ohio-6300 at ¶10, not to adopt a control and possession test, is contrary to previous decisions from Ohio and every other state. The following decisions are a sampling of cases from all fifty states wherein the policyholder's (or its employee's) control and possession of a vehicle was found determinative of whether the use of the motor vehicle was used with the policyholder's permission and/or was owned, hired, or borrowed by the policyholder.

- Alabama: *Allstate Ins. Co. v. Moore* (Ala. Civ. App. 1983), 429 So.2d 1087, 1089.
- Alaska: *Continental Ins. Co. v. United States Fidelity & Guar. Co.* (Alaska 1974), 528 P.2d 430, 432, overruled in part on other grounds, *Farnsworth v. Steiner* (Alaska 1981), 638 P.2d 181, 184, fn.5 (passing on the award of prejudgment interest as part of "costs" after a Rule 68 offer of judgment).
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