

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

APPELLEE AMERICAN ALTERNATIVE INSURANCE CORPORATION'S
 MOTION FOR RECONSIDERATION

D. John Travis (0011247)
 Gary L. Nicholson (0005268)
 Gallagher Sharp
 Sixth Floor – Bulkley Building
 1501 Euclid Avenue
 Cleveland, Ohio 44115
 (216) 241-5310 (Telephone)
 (216) 241-1608 (Telefax)
**Counsel for Plaintiff-Appellee
 Federal Insurance Company**

Steven R. Smith (0031778)
 Steven P. Collier (031113)
 Janine T. Avila (0055853)
 Adam S. Nightingale (0079095)
 Connelly, Jackson & Collier, LLP
 405 Madison Avenue, Suite 1600
 Toledo, Ohio 43604
 Email: ssmith@cjc-law.com
**Counsel for Defendant-Intervenor/
 Appellant Feroen J. Betts, Administrator
 Of The Estate of David J. Betts, Deceased**

James E. Yavorcik (0021546)
 Cubbon & Associates Co. L.P.A.
 500 Inns of Court Building
 405 North Huron
 Toledo, Ohio 43697-0387
 Email: jycubbon.com
**Counsel for Defendant-Intervenor/
 Appellant Timothy E. Berta**

Steven B. Ayers 0021778)
 Robert C. Buchbinder (0021778)
 Crabbe Brown & James
 500 S. Front Street, Suite 1200
 Columbus, Ohio 43215
 Telephone: (614) 229-4535
 Fax: (614) 229-4559
**Counsel for Plaintiff-Appellee
 American Alternative Insurance Corp.**

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 CLERK OF COURT
 SUPREME COURT OF OHIO

Douglas Desjardins
444 North Capital Street, NW
Hall of States, Suite 828
Washington, DC 20001
Email: dpd@cdelaw.net

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

John A. Smalley (00297540)
Dyer, Garofalo, Mann & Schultz
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
Telephone: 937-223-8888
Email: jsmalley@dgmslaw.com

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

Daniel I. Graham Jr.
Bates & Carey LLP
191 N. Wacker Drive, Suite 2400
Chicago, IL 60606
Telephone: 312-762-3213
Email: dgraham@batescarey.com
**Counsel for Plaintiff Appellee American
Alternative Insurance Corp.**

David W. Stuckey (0016902)
Robison, Curphey & O'Connell
Four Seagate, 9th Floor
Toledo, Ohio 43604
Telephone: 419-249-7900
Email: dstuckey@rcolaw.com
**Counsel for Defendant-Intervenor/
Appellant Caroline Arend, Administrator
of the Estate of Zachary H. Arend,
Deceased**

TO THE HONORABLE JUSTICES OF THE OHIO SUPREME COURT:

American Alternative Insurance Corporation respectfully requests rehearing on the grounds that this Court's decision eviscerates the contracting parties' intent and ignores its own prior decisions by liberally construing the insurance policies in favor of one who was not a party to the contract.

I. THE STANDARD FOR REHEARING IS MET HERE

Supreme Court Practice Rule 11.2(A) provides that this Court will rehear a case when its opinion wrongfully states the law, causes "confusion and misunderstanding," or unintentionally changes settled law. *State ex rel. Gross v. Indus. Comm.* (2007), 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162, ¶ 6, ¶¶ 18-21 (granting rehearing because decision generated confusion since it was perceived to have expanded the voluntary-abandonment doctrine).

Rehearing is proper here because this Court's decision changes settled law, thus generating confusion about the scope of coverage that Ohio businesses must afford third-party drivers. Moreover, it misapplies Ohio law by liberally construing policy language in favor of one who was not a party to the insurance contract, and in contravention of the contracting parties' intent.

II. REHEARING IS NEEDED TO CORRECT THIS COURT'S MISAPPREHENSION OF THE SCOPE OF BLUFFTON'S INSURANCE COVERAGE

The majority decision finds that the independent contractor/bus driver is insured under Bluffton University's insurance policies despite the fact that neither Bluffton nor its insurers intended to insure him. As the dissent notes, the omnibus provision here at issue is "standard in many insurance policies," and thus the majority decision "opens the door" to limitless claims by other third-party drivers notwithstanding the fact that the parties to the insurance contracts never intended to provide these drivers with liability coverage. (Decision, at ¶ 19)

The dissent's concerns are echoed by Ohio citizens who worry that the majority's decision radically departs from settled law by exposing Ohio businesses to unexpected liability. For instance, an article in the Columbus Dispatch states "the Ohio Supreme Court ... may have opened the door for liability headaches for other universities and even high schools." Alan Johnson, "Bluffton Ruling Puts Liability on Schools," *The Columbus Dispatch* (Dec. 29, 2010, 02:51 AM), <http://www.dispatchpolitics.com/live/content/local_news/stories/2010/12/29/copy/bluffton-ruling-puts-liability-on-schools.html?adsec=politics&sid=101>. According to the Dispatch, the majority decision has "sent shock waves through athletic programs" by unexpectedly extending school liability. *Id.* Otterbein University's athletic director interviewed for the article "called the decision 'scary.'" He cautioned that all school officials "are going to have to sit up and take notice," and predicted the decision would be "disastrous" for Ohio universities and potentially "devastating" to any smaller institution including "high schools, church groups, colleges - everybody." The article quotes other school officials as agreeing. *Id.* Ohio State and Capital University are both studying the decision to determine its impact on their programs. Capital's athletic director is quoted as being particularly concerned about the impact of the decision because they often charter busses to send "teams on snowy wet roads all the time." He believes the decision presents an important "issue for everyone." Otterbein University's athletic director noted it just flew its soccer team to Texas for the NCAA tournament wondering: "Are we liable for that, too?" *Id.*

The unreasonable expansion of liability predicted by the dissent is "precisely what troubles higher education legal experts about the Ohio court's ruling," according to a national education publication. Doug Lederman, "Expanded View of Travel Liability," *Inside Higher Ed* (Jan. 3, 2011), <http://www.insidehighered.com/news/2011/01/03/court_holds_university_liable_for_travel_related_deaths> That article interviewed numerous experts in the education field to gauge reaction to

this Court's decision. Ada Meloy, general counsel at the American Council on Education, opined that colleges and universities are now "vulnerable" in the wake of this Court's ruling. *Id.* Mark Briggs, former risk manager at the University of Illinois at Urbana-Champaign agreed, stating the decision "'shatter[s] the false perception that you were transferring all of the financial risk' when a college or university contracted with an insured provider to transport students or others off the campus." *Id.* According to Briggs, schools now face personal exposure if their coverage is insufficient to compensate an accident victim:

"[W]hat this decision shows is that once you use up the insurance limit [of the transportation provider], plaintiffs may look to your own limits" for recompense...

[I]f a court concludes (as the Ohio court did) that a university can be held liable for a serious incident, and its policy doesn't protect it, the institution itself could be financially responsible for the damages.

Id.

The confusion caused by this Court's decision warrants rehearing. The overwhelming negative reaction to this decision from Ohio school officials enforces the reality that Bluffton and its insurers – like all of the other Ohio schools and universities expressing concern over the decision – did not intend to cover the liability of third-party independent contractor drivers. As the dissent makes clear, the contracting parties' intent controls the coverage issue here and is not "immaterial" as found by this Court. (Decision, at ¶8) *Burris v. Grange Mut. Cos.* (1989), 46 Ohio St. 3d 84, 89, 545 N.E.2d 83 (fundamental goal in coverage cases is to ascertain the intent of the parties to the contract and give contract its intended effect). This is particularly true here, where the personal injury plaintiffs and the driver were not parties to the contract.

III. THIS COURT'S LIBERAL CONSTRUCTION OF THE POLICIES IN FAVOR OF PARTIES WHO ARE NOT SIGNATORIES TO THE CONTRACT CONTRAVENES NEARLY FIFTY YEARS OF THIS COURT'S PRECEDENT.

As recently as 2003, this Court reaffirmed two significant rules of policy construction. 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. *Westfield Insurance Company v. Galatis* (2003), 100 Ohio St.3d 216, 220, 2003-Ohio-5849, 797 N.E.2d 1256. Quoting *Cook v. Kozell* (1964), 176 Ohio St. 332, 336, 199 N.E.2d 566, *Galatis* states clearly that "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 is particularly true where, as here, "expanding coverage beyond a policyholder's needs will increase the policyholder's premiums." *Id.*

Contrary to *Galatis* and *Cook*, this Court liberally construed the omnibus clause in favor of the Appellants, all of whom are strangers to the contract of insurance. With the expansion of coverage now authorized by this Court, Bluffton's liability limits will be depleted as the result of exposure to risks that were never intended to be covered under the policy, and it will likely face significantly increased premiums as a result. The same is true for all Ohio insureds if the majority decision stands. Because this Court's decision departs from settled law by construing the policies in favor of those who are not parties to the contract, it will cause confusion to the Ohio legal community, thus justifying rehearing.

IV. THIS COURT MISAPPREHENDED THE FACTS OF RECORD AND THEN DID NOT DRAW ALL REASONABLE INFERENCES FROM THOSE FACTS IN THE INSURERS' FAVOR IN AWARDING THE APPELLANTS' SUMMARY JUDGMENT.

When both parties move for summary judgment, reasonable inferences must be drawn in favor of the non-movant in the context of each respective summary judgment motion. *Taft*

Broadcasting Company v. United States (6th Cir. 1991), 929 F.2d 240, 248 (on cross motions for summary judgment the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration).

Because this Court awarded the Appellants summary judgment, it was required to draw all reasonable inferences from the facts of record in the insurers' favor. It did not do this when it found that Bluffton: (1) hired the bus driven by Niemeyer; and (2) gave Niemeyer permission to operate it.

This Court found that Bluffton had hired Executive Coach's bus based upon evidence that it concluded showed that the university's coach, Grandey, exercised a sufficient level of possession and control over Executive Coach's bus. Specifically, this Court found Grandey "had certain size and leisure requirements" for the bus in that he "specifically requested a bus large enough to hold the entire team and that had a DVD player." (Decision, at ¶ 10) It also found that Grandey could "request that Niemeyer stop the bus for any reason, including whenever the players needed a break or a meal." (Decision, at ¶ 10) This Court noted "the Bluffton players loaded their equipment and luggage onto the charter bus." Finally, this Court stated that "when Grandey discovered that a DVD player was not working properly, he had the driver stop the bus, and Grandey fixed it." *Id.*

The first finding is not evidence of control over the operation of the bus; the bus had to be large enough to transport the team and the coaches, otherwise it would have been of no use to Bluffton. The second finding as to Grandey's alleged "requiring" of a DVD player is not supported by the record. Executive had already designated a bus with a DVD player by the time Grandey discussed that issue with Executive. In fact, Grandey testified that he "just asked if there was a DVD player on the bus" and was told that there was. (Supp. Pg. 16 at 48.) Grandey did not, in fact,

require a DVD player. That the Bluffton players loaded their equipment and luggage onto the charter bus, likewise, does not evidence possession and control of the bus. At best, it reflects mere use of the bus. Similarly, that Grandey could ask Niemeyer to stop for meals or bathroom breaks (although Grandey did not do so), or that he had asked another driver to stop the bus so that Executive could have the DVD player fixed, does not evidence Bluffton's possession and control of the bus, particularly when inferences from these "facts" are made in the insurers' favor. Indeed, a reasonable inference is that these were nothing more than a common courtesy whereby Niemeyer simply acquiesced to the request of his employer's customer. The insurers were entitled to all of these inferences. None of the findings individually or collectively establish Bluffton controlled the operation of Executive's bus sufficient to establish Bluffton "hired" it.

This Court found "permission" in the evidence that Grandey allegedly requested Niemeyer as its driver: "We also conclude that Niemeyer was driving the bus hired by Bluffton with Bluffton's permission because Executive had sought and Grandey had granted a request to allow Niemeyer to drive the bus." (Decision, at ¶ 13.) Yet the record does not support this finding. Grandey, himself, did not unequivocally admit that Executive sought his permission for Niemeyer to drive Executive Coach's bus. On the contrary, 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.) 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 that selected Niemeyer to drive the trip; and (2) Grandey assented to Executive's choice of driver. The record shows that only Executive could

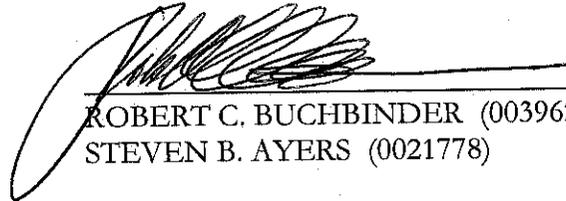
assign and approve the actual driver of its bus. (Supp. Pg. 10 at 98.) Executive did not need – and Bluffton could not give – permission for Niemeyer to drive Executive’s bus.

To the extent this Court finds the facts in dispute on the issues of control and permission, it should have remanded for consideration by the trial court.

For each and all of the foregoing reasons, Appellee American Alternative Insurance Corporation moves this Court for reconsideration and requests that this Court: (1) apply the correct standard of contractual interpretation and enforce the contract in accordance with the intention of the parties to the policy contract by holding that Niemeyer was not an “insured” pursuant to the omnibus clause; or (2) in the alternative, remand the case to the trial court for the finder of fact to determine whether the facts in this case establish the requisite level of control and possession necessary to constitute that Bluffton “hired” Executive’s bus and “permitted” Niemeyer to drive the bus of his employer, Executive, in order to fall within the omnibus clause.

Respectfully submitted,

CRABBE, BROWN & JAMES LLP
500 S. Front Street, Suite 1200
Columbus, OH 43215
(614) 229-4535 (614) 229-4559 (fax)
rbuchbinder@cbjlawyers.com
sayers@cbjlawyers.com



ROBERT C. BUCHBINDER (0039623)
STEVEN B. AYERS (0021778)

DANIEL I. GRAHAM, JR. (*pro hac vice*)
BATES & CAREY LLP
191 North Wacker Drive, Suite 2400
Chicago, IL 60606
Email: dgraham@batescarey.com
Attorneys for Appellee American Alternative Insurance Corporation

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 7th day of January, 2011.

Steven R. Smith
Stephen P. Collier
Janine T. Avila
Adam S. Nightingale
Connelly, Jackson & Collier LLP
405 Madison Avenue, Ste. 1600
Toledo, OH 43604
Email: ssmith@cjc-law.com
*Counsel for Appellant Feroen J. Betts, Administrator
of the Estate of David J. Betts, Deceased*

James E. Yavorcik
Cubbon & Associates Co., L.P.A.
500 Inns of Court Building
405 North Huron
P.O. Box 387
Toledo, OH 43697-0387
Email: jy@cubbon.com
Counsel for Appellant Timothy E. Berta

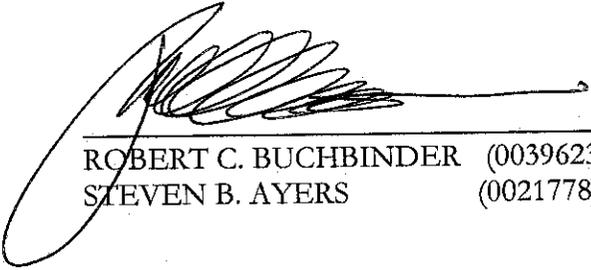
D. John Travis
Gallagher Sharp
Sixth Floor - Bulkley Building
1501 Euclid Avenue
Cleveland, OH 44115
Email: jtravis@gallaghersharp.com
Counsel for Appellee Federal Insurance Company

Daniel I. Graham, Jr.
Bates & Carey LLP
191 North Wacker Drive - Suite 2400
Chicago, IL 60606
Email: dgraham@batescarey.com
*Counsel for Appellee American Alternative Insurance
Corporation*

David W. Stuckey
Robison, Curphey & O'Connell
Four Seagate, Ninth Floor
Toledo, OH 43604
Email: dstuckey@rcolaw.com
*Counsel for Appellant Caroline Arend,
Administrator of the Estate of Zachary H. Arend,
Deceased*

John Smalley
Dyer, Garofalo, Mann & Schultz
131 N. Ludlow Street
Dayton, OH 45402
Email: jsmalley@dgmsslaw.com
*Counsel for Appellants Kim Askins and Jeffrey E.
Holp, Co-Administrators of the Estate of Cody E.
Holp, Deceased, James Grandey, and Todd Miller*

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



ROBERT C. BUCHBINDER (0039623)
STEVEN B. AYERS (0021778)