

In the
Supreme Court of Ohio

FEDERAL INSURANCE COMPANY,
AMERICAN ALTERNATIVE
INSURANCE CORP.,

Appellees,

v.

EXECUTIVE COACH LUXURY
TRAVEL, INC., *et al.*,

Defendants,

and

FEREON J. BETTS, etc., *et al.*,

Appellants.

Case No. 2009-2307

On Appeal from the Allen County Court of
Appeals, Case Nos. 1-09-17 & 1-09-18

**MEMORANDUM OF *AMICI CURIAE* OHIO INSURANCE INSTITUTE,
ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES
OF OHIO, AMERICAN INSURANCE ASSOCIATION, OHIO CHAMBER
OF COMMERCE, OHIO MANUFACTURERS' ASSOCIATION, NATIONAL
FEDERATION OF INDEPENDENT BUSINESS – OHIO, OHIO COUNCIL OF
RETAIL MERCHANTS, OHIO STATE MEDICAL ASSOCIATION, OHIO
HOSPITAL ASSOCIATION, AND OHIO SOCIETY OF CPAS
IN SUPPORT OF RECONSIDERATION**

Steven R. Smith (0031778)
(Counsel of Record)
Steven P. Collier (0031113)
Janine T. Avila (0079095)
CONNELLY, JACKSON & COLLIER LLP
405 Madison Avenue, Suite 1600
Toledo, Ohio 43604
ssmith@ejc-law.com

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

Thomas E. Szykowny (0014603)
(Counsel of Record)
Michael R. Thomas (0000947)
VORYS, SATER, SEYMOUR AND
PEASE, LLP
52 E. Gay Street
PO Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5671
Fax: (614) 719-4990
teszykowny@vorys.com

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James E. Yavorcik (0021546)
CUBBON & ASSOCIATES, CO., LPA
500 Inns of Court Building
405 North Huron
Toledo, Ohio 43697-0387
Jy@cubbon.com

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

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

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

John A. Smalley (0029540)
DYER, GAROFALO, MANN & SCULTZ
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
Tel: (937) 223-8888
jsmalley@dgmslaw.com

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

D. John Travis (0011247)
Gary L. Nicholson (0005268)
GALLAGHER SHARP
Sixth Floor-Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
Tel: (216) 241-5310
Fax: (216) 241-1608
jtravis@gallaghersharp.com

*Counsel for Plaintiff-Appellee Federal
Insurance Company*

*Counsel for Amici Curiae Ohio Insurance
Institute, Association of Independent Colleges
and Universities of Ohio, American Insurance
Association, Ohio Chamber of Commerce,
Ohio Manufacturers' Association, National
Federation of Independent Business – Ohio,
Ohio Council of Retail Merchants, Ohio State
Medical Association, Ohio Hospital
Association, and Ohio Society of CPAs*

Steven B. Ayers
Robert C. Buchbinder
CRABBE, BROWN AND JAMES, LLP
500 South Front Street, Suite 1200
Columbus, Ohio 43215

*Counsel for Plaintiff-Appellee American
Alternative Insurance Corp.*

Daniel I. Graham, Jr.
BATES & CAREY, LLP
191 N. Wacker Drive, Suite 2400
Chicago, Illinois 60606
Tel: (312) 762-3213
dgraham@batescarey.com

*Counsel for Plaintiff-Appellee American
Alternative Insurance Corp.*

David W. Stuckey (0016902)
ROBINSON, CURPHEY & O'CONNELL
Four Seagate, 9th Floor
Toledo, Ohio 43604
Tel: (419) 249-7900
Dstuckey@rcolaw.com

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

STATEMENT OF INTEREST OF *AMICI CURIAE*

The amici curiae who have joined in this Memorandum strongly urge the Court to reconsider its decision in this case. They individually and collectively support the position of appellee Federal Insurance Company that reconsideration is necessary because the Court's majority opinion unintentionally changes settled law, deviates from the conclusions of other courts nationwide, and will result in confusion and misunderstanding. As it stands, the decision will upset the expectations and intentions of commercial policyholders at their own financial expense.

Insurance is one of the largest industries in Ohio and an important pillar of our state's economy, generating business activity that benefits all Ohio citizens. Insurance makes modern life possible for both businesses and individuals by spreading risks of loss that a single business or individual could not bear alone. However, the insurance industry cannot provide that protection unless insurers' legal obligations are calculable and determinate. These legal obligations are defined by the coverage provisions of insurance policies and by principles of Ohio insurance law. The majority opinion in this case adopted a novel legal approach that enlarges insurers' duties beyond those defined limits and distorts the underlying risk calculation on which premiums are based. It bestows coverage on an "insured" who is not a party to the insurance contract and paid no part of the premium, contradicting the reasoned intentions and expectations of insured and insurer alike. This harms insurers, the business enterprises they insure, and the policyholders, who ultimately must pay premiums that will account for the entirely new exposures.

A. Amici Curiae

Amicus curiae Ohio Insurance Institute (“OII”) is the professional trade association for property and casualty insurance companies in the State of Ohio, and its members include approximately 50 domestic insurers as well as reinsurers and foreign insurance companies. Amicus curiae American Insurance Association (“AIA”) is a national trade association representing more than 300 major property and casualty insurance companies, located in Ohio and most other states, that collectively underwrite more than \$117 billion in premiums annually for virtually all types of property and casualty insurance. OII and AIA closely monitor judicial decisions like the ruling in this case that raise important issues of insurance law, and both organizations have previously participated as amici curiae in many significant insurance cases decided by this Court. Each is uniquely qualified to provide a broad perspective on insurance law issues as well as practical insight into the consequences that the majority’s opinion will have for insureds and insurers.

Founded in 1893, amicus curiae Ohio Chamber of Commerce is Ohio’s most diverse business advocacy organization. It works on behalf of its more than 5,000 members and the thousands of Ohio citizens they employ to create a strong pro-jobs business climate in Ohio that is conducive to economic growth. Amicus curiae National Federation of Independent Business - Ohio (“NFIB/O”) is the national voice for small and independent businesses in Ohio. A nonprofit and nonpartisan organization, NFIB/O has members in all fifty states, who work together to promote and protect small businesses. Amicus curiae Ohio Council of Retail Merchants (“OCRM”) is an alliance of more than 3,000 companies that represent various entities in the retail and wholesale supply chain; it works aggressively to ensure that their perspective is communicated clearly to Ohio government officials. OCRM, NFIB/O, and the Ohio Chamber of

Commerce identify and respond to legislative and judicial issues that affect businesses in ways that harm Ohio. Their members have a strong interest in preserving predictable and stable legal outcomes that make business generally, and risk evaluations in particular, possible.

Amicus curiae Ohio Manufacturers' Association ("OMA") has helped the largest sector of Ohio's economy succeed and grow for more than a century; its members work together to create global competitive advantages for Ohio manufacturers that enhance the quality of life across the state. Amicus curiae Ohio Society of Certified Public Accountants ("OSCPA") is a professional association of more than 23,000 certified public accountants who work in public accounting, corporations, industry, educational institutions, and government to meet the accounting and financial needs of Ohio businesses and individual residents.

Amicus curiae the Ohio State Medical Association ("OSMA") is a non-profit professional association consisting of approximately 20,000 physicians, medical residents, and medical students in all specialties. Amicus curiae Ohio Hospital Association ("OHA") is a private non-profit trade association established in 1915; its membership is comprised of 169 private, state, and federal government hospitals and more than 18 health systems, all located within Ohio.

Amicus curiae Association of Independent Colleges and Universities of Ohio ("AIUCO") has 51 members located in every region of the state. These independent institutions include research universities, liberal arts colleges, and religiously affiliated colleges. It is especially interested in the present case because its members and other Ohio schools frequently purchase transportation services from commercial carriers to transport their sports teams and other students on a variety of trips and educational activities. Ohio's colleges and universities do not have extra financial resources to provide insurance coverage for unrelated third parties.

B. Interest of Amici Curiae

In its initial decision in this case, the majority found that the driver of a bus that was chartered by Bluffton University from Executive Coach Luxury Travel, Inc., for transportation to and from a baseball game was an “insured” under insurance policies that the University had purchased. It began with the premise that the University’s insurance policy should be interpreted liberally in favor of the driver even though he is not a party to the insurance contract and even though neither the insurer nor the policyholder intended to provide insurance coverage to him. – Ohio St.3d –, 2010-Ohio-6300, at ¶8. The majority then concluded that the policy covered the bus driver, Jerome Niemeyer, as an “insured” because “Bluffton hired the bus from Executive and granted permission to Niemeyer to drive the bus.” (Id.)

In short, the majority used a “liberal” interpretation of the insurance policy, in favor of a stranger to the policy, to find dictionary definitions of words in the policy that create “coverage” that the contracting parties never wanted or intended, and that the “insured” never paid for. As previously noted by appellees, it is no surprise that other courts across the country have rejected this approach and have held that an organization that hires a company to provide transportation services does not “hire” the company’s vehicle or “give permission” to the company’s driver to drive it, and that the driver therefore is not an “insured.”

This scenario is reminiscent of an earlier decision of this Court in which it liberally interpreted language in an insurance policy, in favor of a non-party to the insurance contract, by finding dictionary definitions for words used in the policy that ignored the actual intentions of the contracting parties. See *Scott-Ponzer v. Liberty Mutual Five Ins. Co.* (1999), 85 Ohio St.3d 660, 1990-Ohio-292, limited by *Westfield Insurance Co. v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849. Until it was limited, the *Scott-Ponzer* decision extended unintended insurance

coverage to third parties and thereby undermined the risk calculations on which insurance premiums had been based, resulting in higher insurance premiums for policyholders for coverage they did not expect, want, or benefit from. The majority's opinion in the present case will result in similar problems if it is not reconsidered by this Court.

Amici curiae and their many members are also extremely troubled about other ramifications of the majority opinion for Ohio and Ohioans. The opinion departs in significant ways from the Court's previous decisions in this area of law and will be offered as legal precedent to unsettle that settled law. Among other things, the majority opinion suggests that an organization that charters a bus from a commercial carrier "hires" the bus, "gives permission" to the driver to drive the bus, and has "control and possession" of the bus. This inadvertently invites plaintiffs' attorneys to argue that the organization is legally liable for the driver's negligence when there is no insurance, an outcome the majority could not have intended.

Pursuant to Supreme Court Practice Rule 11.2(C), amici curiae Ohio Insurance Institute, Association of Independent Colleges and Universities of Ohio, American Insurance Association, Ohio Chamber of Commerce, Ohio Manufacturers' Association, National Federation of Independent Business-Ohio, Ohio Council of Retail Merchants, Ohio State Medical Association, Ohio Hospital Association, and Ohio Society of CPAs respectfully urge the Court to reconsider its decision on this case.

ARGUMENT

Until the majority opinion in the present case, this Court's decisions had consistently emphasized that the polestar for interpreting and applying contractual provisions is the shared intention of the parties to the contract. See, e.g., *Westfield ins. Co. v. Galatis* (2003), 100 Ohio St. 3d 216, 219, 2003-Ohio-5849, at ¶ 11; *Aultman Hospital Ass'n v. Community Mut. Ins. Co.*

(1989). 46 Ohio St. 3d 51, 53; *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St. 2d 244, 247. In other words, courts should enforce the parties' agreement rather than obligations they never agreed to. The Court has recognized a number of legal principles that serve as aids to determine the parties' actual intentions and, thus, the meaning of the terms of their contracts.

In the present case, the majority opinion invokes the maxim that the language used in a contract is construed against the party that drafted the contract. See, e.g., *Central Realty Co. v. Clutter* (1980), 62 Ohio St. 2d 411, 413. In the context of insurance coverage disputes, where the contractual language of insurance policies is typically drafted by the insurer, this rule of construction generally requires that the policy language be interpreted in favor of the policyholder. See, e.g., *King v. Nationwide Ins. Co.* (1988), 35 Ohio St. 3d 208, 211. However, the rule is far from absolute even with respect to insurance policies. In *Galatis*, *supra*, the Court cautioned that "[t]here are limitations to this rule:"

"Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy." *Morfoot v. Stake* (1963), 174 Ohio St. 506, paragraph one of the syllabus. 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 [to the contract], that the contract be construed strictly against the other party." *Cook v. Kozell* (1964), 176 Ohio St. 332, 336. This rings especially true where expanding coverage beyond a policyholder's needs will increase the policyholder's premiums.

100 Ohio St.3d at 220, 2003-Ohio-5849, at ¶14.

Each of the three points raised by the *Galatis* Court applies here. The majority's opinion in the present case makes an unreasonable interpretation of the policy, which was not intended by the insurer or the policyholder, in order to construe the policy language in favor of a litigant

who was not a party to the insurance contract, and one result of this expanded coverage will likely be higher costs for the policyholders for new coverage they do not want or need.

Because an insurance policy, like any contract, should be considered in light of its evident purpose, general rules of construction cannot “extend the coverage of the policy to absurd lengths,” *Gelatis*, supra, 100 Ohio St.3d at 224, 2003-Ohio-5849, at ¶35, and “will not be applied so as to provide an unreasonable interpretation of the words” used in a policy. *Cincinnati Ins. Co. v. CPS Holdings, Inc.* (2007), 115 Ohio St. 3d 306, 308, 2007 – Ohio – 4917, at ¶8. This is particularly true where, as here, the person who seeks a broad interpretation of policy language and expansive coverage is a third party with no connection to the insurance contract.

As this Court observed in *Cook v. Kozell* (1964), 176 Ohio St. 332, 336, expanding insurance coverage at the behest of a third party “would be a disadvantage to both parties to the contract,” the policyholder as well as the insurer. In the present case, for example, this results in insurance coverage for an occurrence as to which the policyholder has no liability. The policyholder will be effectively penalized because it will ultimately have to pay for the judicially expanded coverage, even though the policyholder has no reason to purchase that coverage for unrelated third parties. As a unanimous Court explained in *Cook*, supra:

An insured gets the coverage he pays for, and, if the coverage is to be increased beyond that which he needs or for which the policy provides, the premiums necessarily will be increased. Therefore, the plaintiff who is not a party to the contract is not in a position to urge a construction of the contract which would be detrimental to both parties to the contract.

176 Ohio St. at 336.

The majority opinion in the present case ignores the reasoning and the result of the Court’s prior decisions in *Galatis*, supra, and *Cook*, supra. It requires policyholders to insure

their independent contractors' torts, increasing costs for Ohio residents and institutions while providing no benefits to them. Unless it is reconsidered by the Court, the majority opinion will be cited by future litigants as a departure from the Court's previous decisions and an invitation to expand insurance coverage in ways that harm insureds and insurers alike.

The Court should also consider the potential consequences of the majority's opinion for Ohio law generally, outside the field of insurance. The opinion holds that a college or other organization that charters a bus from a commercial transportation company has sufficient "control and possession" over the bus and the driver to establish that it "hired" the bus and that it "granted permission" to the driver to drive the bus. Whatever the majority's intention, this portion of its opinion will be used by Ohio attorneys to argue that transportation companies are not truly independent contractors of those who purchase their services, and that colleges and other entities can be held liable for any negligence of the driver even though the driver is an employee of the transportation company, not the college. This will have a profoundly negative effect on long-established Ohio law and on Ohio businesses that rely on that law when they use independent contractors' services. There is no basis in the prior decisions of this Court for finding that the bus driver was Bluffton University's servant merely because he was willing to make rest stops along the road when requested to do so.

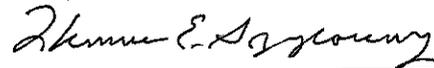
Appellee has pointed out that courts in Ohio and nationwide recognize that a policyholder who charters bus or air transportation, or simply hails a taxicab, does not have sufficient control over the operator to be held liable for the operator's negligence. The Court has held that such a "stark contrast" between its opinion and decisions in the vast majority of other states warrants reconsideration. *Galatis*, supra. This is particularly true where the ruling places a burden on small and large Ohio businesses that compete against businesses in those states and other

countries. Amici curiae respectfully request that the Court reconsider its opinion and that it restore a level playing field for their members.

CONCLUSION

For the reasons outlined above, amici curiae urge the Court to grant appellees' motion for reconsideration.

Respectfully submitted,



Thomas E. Szykowny (0014603)
(Counsel of record)
Michael R. Thomas (0000947)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Tel: (614) 464-5671
Fax: (614) 719-4990
teszykowny@vorys.com

*Counsel for Amici Curiae Ohio Insurance
Institute, Association of Independent
Colleges and Universities of Ohio, American
Insurance Association, Ohio Chamber of
Commerce, Ohio Manufacturers'
Association, National Federation of
Independent Business – Ohio, Ohio Council
of Retail Merchants, Ohio State Medical
Association, Ohio Hospital Association, and
Ohio Society of CPAs*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum of Amici Curiae Ohio Insurance Institute, Association of Independent Colleges and Universities in Ohio, American Insurance Association, Ohio Chamber of Commerce, Ohio Manufacturers' Association, National Federation of Independent Business-Ohio, Ohio Council of Retail Merchants, Ohio State Medical Association, Ohio Hospital Association, and Ohio Society of CPAs in Support of Appellees' Motion for Reconsideration was served via regular United States mail on this 7th day of January 2011 on each of the following:

Steven R. Smith
(Counsel of Record)
Steven P. Collier
Janine T. Avila
CONNELLY, JACKSON & COLLIER LLP
405 Madison Avenue, Suite 1600
Toledo, Ohio 43604

*Attorneys for Appellant Fereon J. Betts,
Administrator of the Estate of David J. Betts,
Deceased*

James E. Yavorcik
CUBBON & ASSOCIATES, CO., LPA
500 Inns of Court Building
405 North Huron
Toledo, Ohio 43697-0387

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

Douglas Desjardins
444 North Capital Street, NW
Hall of States, Suite 828
Washington, DC 20001

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

Steven B. Ayers
Robert C. Buchbinder
CRABBE, BROWN AND JAMES, LLP
500 South Front Street, Suite 1200
Columbus, Ohio 43215

*Counsel for Plaintiff-Appellee American
Alternative Insurance Corp.*

Daniel I. Graham, Jr.
BATES & CAREY, LLP
191 N. Wacker Drive, Suite 2400
Chicago, Illinois 60606

*Counsel for Plaintiff-Appellee American
Alternative Insurance Corp.*

David W. Stuckey
ROBINSON, CURPHEY & O'CONNELL
Four Seagate, 9th Floor
Toledo, Ohio 43604

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

John A. Smalley
DYER, GAROFALO, MANN & SCULTZ
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402

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

D. John Travis (0011247)
Gary L. Nicholson (0005268)
GALLAGHER SHARP
Sixth Floor-Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
Tel: (216) 241-5310
Fax: (216) 241-1608
jtravis@gallaghersharp.com

*Counsel for Plaintiff-Appellee Federal
Insurance Company*



Thomas E. Szykowny