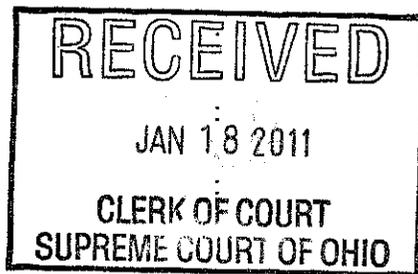


IN THE SUPREME COURT OF OHIO

Federal Insurance Company,	:	Case No. 2009-2307
American Alternative Insurance Corp.,	:	
	:	
Appellees,	:	On Appeal from the Allen County
	:	Court of Appeals, Third Appellate District
vs.	:	
	:	Court of Appeals
Executive Coach Luxury Travel, Inc., <i>et al.</i> ,	:	Case Nos. 1-09-17 & 1-09-18
	:	
Defendants,	:	
	:	
and	:	
Feroen J. Betts, etc., <i>et al.</i> ,	:	
	:	
Appellants.	:	



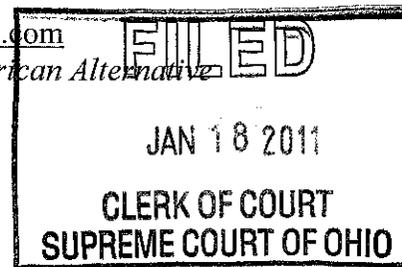
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ARGUMENT

Appellees Federal Insurance Company (“Federal”) and American Alternative Insurance Company (“AAIC”) have asked this Court to reconsider its December 28, 2010 decision in this matter. *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, Slip Opinion No. 2010-Ohio-6300 (hereafter “Decision”). But the Court’s decision was reasoned, considered, clear, and correct, and thus should not be revisited.

This Court uses reconsideration to “correct decisions which, upon reflection, are deemed to have been made in error.” (Quotations omitted). *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 380, 2002-Ohio-4905. The insurers have cobbled together a different purported standard for reconsideration,¹ but their “standard” should be seen for what it is: a pretext to legitimize reargument of the merits of the case. However, as this Court knows, its rules “prevent [the Court] from considering” such a reargument. *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, ¶79 (O’Connor, J., dissenting); see also S.Ct. Prac. R. 11.2(B) (“A motion for reconsideration *** shall not constitute a reargument of the case”). This holds true even if members of the Court “are not wholly persuaded that the original decision was correct.” *Id.* at ¶79, citing *Toledo Edison Co. v. City of Bryan*, 91 Ohio St.3d 1233, 1234, 2001-Ohio-272 (Pfeifer, J., concurring).

The insurers’ motions for reconsideration merely restate arguments which were raised in the briefs, discussed at oral argument, considered by the Court, and expressly rejected in the Court’s decision. Reconsideration is not justified here, and the insurers’ motions should be denied.

¹ For example, AAIC states that “[S.Ct. Prac. R.] 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.” (AAIC Motion, p.3). S.Ct. Prac. R. 11.2(A) says no such thing.

1. The Court properly considered the intent of the parties as reflected in the language of the Hartford Policy.

The primary argument of the insurers² is that reconsideration is necessary because “this Court’s decision eviscerates the contracting parties’ intent.” (AAIC Motion, p.3). In addition to being false, this is mere reargument which cannot form the basis for reconsideration.

AAIC argues that “neither Bluffton nor its insurers intended to insure [the bus driver].” (AAIC Motion, p.3). Federal similarly argues, without a single citation to record evidence, that it never intended to insure the bus driver, and asserts the Court disregarded this intent. (Federal Motion, pp.5-6). But both insurers argued this point in their brief, and the Court found it unpersuasive:

The appellees contend that they never intended to provide coverage for someone like Niemeyer, whom they consider an unforeseen third party. *We consider this contention disingenuous.* The omnibus clause is broad. It applies, with the above exceptions, to “anyone else.” We are not persuaded by the contention that the driver of a bus that Bluffton rented from a company in the business of renting buses is an unforeseen third party, when a clause in the insurance policy covers “anyone else” driving a hired auto.

(Emphasis added.) (Decision, ¶7). This reargument cannot serve as grounds for reconsideration.

S.Ct. Prac. R. 11.2(B).

The insurers cite *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, numerous times, and contend that the decision in this case has “eviscerated” *Galatis* by disregarding the intent of the contracting parties. But the insurers fail to note that the Court’s decision here is based upon one of *Galatis*’s bedrock tenets: the Court must “examine the insurance contract as a whole and presume that the intent of the parties is reflected in the

² AAIC and Federal each issued follow-form coverage agreeing to cover the risks underwritten in the underlying Hartford Policy. As the Court is aware, Hartford did not participate in the instant action, but agreed to be bound by its result.

language used in the policy.” *Galatis*, 2003-Ohio-5849, at ¶11, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. This Court *did* apply the insurers’ intent, because it applied the plain and ordinary meaning of the language *they chose to include* in their policies.

The insurers ask the Court to reconsider its decision, stray from the language of their policies, and apply the purported intent of the contracting parties. But even if the Court chose this route, there is no extrinsic evidence of this purported intent in the record.³ Further, to do so the Court would have to find the policy’s terms to be ambiguous, which they are not. Resort to speculation outside the record and outside of the language of the policy would be a complete departure from Ohio’s recognized legal standards of appellate review and contract interpretation.

2. The Court already considered, and was not persuaded by the law of other jurisdictions.

Next, Federal claims that reconsideration is appropriate because “[t]he Court fail[ed] to consider the decisions of the vast majority of states that have addressed the issue presented here.” (Federal Motion, p.8). This is false.

As a preliminary matter, Federal (and *amici curiae*) contend *Galatis* held that “reconsideration is warranted” when a court’s decision “stands in stark contrast with decisions of the vast majority of states.” *Id.* at p.12, quoting *Galatis*, 2003-Ohio-5849, at ¶19; *Amici Memo.*, p.10. With all due respect to Federal, this contention is misleading at best. *Galatis* did not address immediate reconsideration of a court’s decision. Rather, it held that conflicting law from

³ The insurers repeatedly state that Bluffton did not intend its insurance coverage to apply here. This contention is baffling -- not one piece of extrinsic evidence regarding Bluffton’s (or Hartford’s) intent is present in the record. Further, the parties were expressly forbidden from discovery on this issue because the trial court found, as did this Court, that the policy was unambiguous. The *sole record evidence* of Bluffton’s intent is the plain language of the Hartford Policy.

other jurisdictions can “support [a] decision to revisit the subject” in a subsequent case. *Galatis*, 2003-Ohio-5849, at ¶19.

The gist of this argument is: other jurisdictions apply a “possession and control” argument, so the Court should impose one here. But Federal’s list of cases overstates the ubiquity of the “possession and control” requirement in foreign jurisdictions. For example, the list implies the state of Wisconsin has uniformly adopted this requirement, but Appellants’ merit brief cited two Wisconsin cases that did not impose such a requirement when interpreting an analogous omnibus clause. See *Kettner v. Conradt* (Wis. App. Apr. 29, 1997), 210 Wis.2d 499, 1997 Wisc. App. LEXIS 457; *Reuter v. Murphy* (Wis. App. 2000), 240 Wis.2d 110, 622 N.W.2d 464. More egregiously, Federal’s list blatantly misrepresents the holding of *Pawtucket Mut. Ins. Co. v. Hartford Ins. Co.* (N.H. 2001), 147 N.H. 369, 787 A.2d 870, which held that “the common definition of ‘hire’ does not require an element of control, and we decline to add this additional restrictive requirement to the policy.” (Emphasis added.) *Id.* at 373. In addition, numerous other cases proffered by Federal are similarly inapplicable to the instant action.⁴ Federal has exaggerated the omnipresence of the “possession and control” requirement nationwide.

As with the “intent” issue discussed above, the “possession and control” issue has been considered and rejected by the Court. In its Merit Brief, Federal argued that “[c]ourts across the country *** have rejected the notion that an ‘auto’ only being used pursuant to a service contract – and not in possession and control of the named insured – is ‘hire[d]’ by, or ‘use[d] with permission’ of the named insured.” (Federal Merit Brief, p.21). AAIC made similar arguments

⁴ Appellants will not waste the Court’s time by distinguishing each of the fifty-eight (58) cases cited by Federal. However, the Court should note that many of these cases are inapplicable. For example, many of Federal’s cases imposed a control test for determining whether a vehicle was “borrowed” – a completely different inquiry from whether a vehicle was “hired.” Many of the cases did not involve omnibus clauses; others did not even involve insurance. See *Greene v. Lagerquist* (1934), 217 Iowa 718.

as to both “hire” and “permission.” (AAIC Merit Brief, pp.16, 24). But these arguments were rejected by the Court:

Appellees contend that the meaning of the word “hire” cannot be determined without recourse to federal circuit court cases, which define “hire” in terms of control and possession. *United States Fid. & Guar. Co. v. Heritage Mut. Ins. Co.* (C.A.7, 2000), 230 F.3d 331, 333. *** *We are not persuaded that these cases should be the law of Ohio.* First, they are factually inapposite in that they involve the loading and hauling of construction equipment and materials, not the transportation of people. Second, even under this test, we would conclude that Bluffton hired the bus.

(Emphasis added.) (Decision, ¶9). Finally, and perhaps most instructively, twenty-four (24) of the cases listed by Federal were included in the insurers’ merit briefs. This issue was argued fully and completely to the Court, and thus the Court should not entertain its reargument now.

3. The Court did not construe any ambiguity in favor of the Appellants or the bus driver.

The insurers and *amici curiae* contend that one statement in the Court’s decision warrants reconsideration: “We construe insurance policies liberally in favor of the insured.” (Decision, ¶8, citing *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko* (1995), 72 Ohio St.3d 120, 122; *Yeagar v. Pacific Mut. Life. Ins. Co.* (1956), 166 Ohio St. 71, paragraph one of the syllabus). From this sentence, the insurers and *amici curiae* conclude that *Galatis* has been “eviscerated” and a new standard has been imposed. But this argument is a red herring.

First, the statement above is still good law, and was not overruled by *Galatis*. Federal, rightly, points out that *Galatis* clarified this statement when it held 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 whether a claimant is insured is construed in favor of the policyholder.” (Citations omitted) *Galatis*, 2003-Ohio-5849, at ¶35; see also Federal Motion, pp.4-5. *Galatis*

specifically held that ambiguities are to be construed in favor of the insured (*i.e.*, “one who has been determined to be insured”); thus, the decision in this case is consistent with *Galatis*. *Id.*

More importantly, the concept of “construing” an insurance policy, either strictly against an insurer or liberally in favor of an insured or policyholder, only comes into play when there is an *ambiguity in the policy* which must be resolved. *Galatis*, 2003-Ohio-5849, at ¶34 (“ambiguities are construed in favor of the insured”). Otherwise, where the policy is unambiguous, there is nothing to “construe”; rather, the Court determines and applies the plain and ordinary meaning of the policy. *Id.* at ¶11, citing *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph two of the syllabus (“[w]e look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy”).

In the instant action, the Court found no ambiguity in the Hartford Policy and applied the plain and ordinary meaning of “hire” and “permission.” Accordingly, the Court could not have “construed” the Hartford Policy in an impermissible manner.

This Court did not overrule *Galatis* or any other Supreme Court precedent; to the contrary, paragraph 11 of *Galatis* supports the Court’s decision here. Thus, the insurers’ rearguments cannot constitute sufficient grounds for reconsideration of the Court’s prior decision.

4. The brief of *amici curiae* displays a fundamental misunderstanding of the Court’s decision, and should be disregarded.

A memorandum in support of reconsideration was filed by a group of various *amici curiae*. These *amici curiae*, many of whom have a tenuous (at best) interest in this case, ask the Court to reconsider its decision because, according to them, the decision has unintentionally changed settled law and will have a vast impact. But it is apparent from their memorandum the

amici do not understand the Court's decision, or the difference between "liability" and insurance coverage.

According to the *amici curiae*, the Court's decision has the following effect:

- "[The decision] requires policyholders to insure their independent contractors' torts ***" (*Amici Memo.*, pp.9-10);
- ["The Court found] that the bus driver was Bluffton University's servant ***" (*Amici Memo.*, p.10); and
- "[The decision] will be used by Ohio attorneys to argue that *** colleges and other entities can be held liable for any negligence of the driver ***" (*Amici Memo.*, p.10).

The first two points, as the Court is well aware, are blatantly false; the Court did not mandate the purchase of coverage or determine the liability of Bluffton University. The third point is an unsupported, spurious interpretation of the Court's decision. The Court's decision applies only to the Hartford policy and interpretation of similar policy language. The above points demonstrate that the memorandum of *amici curiae* should be disregarded.

5. The consequences proposed by the insurers will never come to pass.

In a last ditch attempt to avoid the obligations imposed by the plain meaning of the language used in their follow-form policies, the insurers resurrect several "dire" consequences which will purportedly result from the Court's decision. According to the insurers and *amici curiae*, premiums will allegedly rise and, citing a newspaper article as proof, the door has been opened to endless claims and unexpected liability. (AAIC Motion, pp.3-4). But as a practical matter, these scenarios will never come to pass.

Federal claims the Court's decision will lead to "widespread uncertainty," among other concerns. (Federal Motion, p.3). This is baseless speculation. To the contrary, the Court's

opinion -- which emphasizes the plain meaning of key terms in the Hartford Policy -- will lead to greater predictability in the interpretation of insurance contracts.

Further, many omnibus clauses contain exclusionary language which effectively limits the scope of coverage. Instead of issuing follow-form coverage, the insurers could have included express language excluding the employees and/or agents of “the owner or person from whom the [named insured] hired” the vehicle from “hired auto” coverage. *See American Interinsurance Exchange v. Commercial Union Assurance Co.* (C.A.4 1979), 605 F.2d 731, 733 (excluding from coverage “the owner *** of a hired automobile *** or any agent or employee of any such owner”). In fact, the Court specifically noted this in its discussion of *Combs v. Black*, 10th Dist. No. 05 AP-1177, 2006-Ohio-2439. (Decision, ¶11).

The bottom line is: with the stroke of a pen, the insurers can modify their policies, a luxury their policyholders do not have.

CONCLUSION

Reconsideration is “a common but usually unsuccessful request by parties who do not prevail in their arguments before” the Court. *State ex rel. Gross*, 2007-Ohio-4916, ¶31 (O’Connor, J., dissenting). The insurers and *amici curiae* have provided no legitimate reason for the Court to reconsider its decision in this case. Accordingly, the Court should decline to reconsider its decision in this matter.

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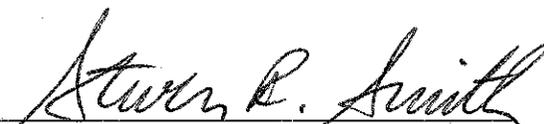
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