

ORIGINAL

IN THE SUPREME COURT OF OHIO

THERESA MILLER, et al.,	:	CASE NO. 12-0053
	:	
Plaintiffs/Appellees,	:	
	:	
v.	:	<i>On Appeal from the Portage County Court</i>
	:	<i>of Appeals, Eleventh Appellate District,</i>
MOTORISTS MUTUAL INSURANCE	:	<i>Case No. 2011 P 0016</i>
COMPANIES, et al.,	:	
	:	
Defendant/Appellant.	:	

MERIT BRIEF OF DEFENDANT/APPELLANT
MOTORISTS MUTUAL INSURANCE COMPANY

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STATEMENT OF FACTS

This appeal involves an insurance coverage dispute as to whether the accident caused by Daniel Masterson on July 12, 2008, constituted a single “accident” or more than one “accident” for purposes of liability coverage under the terms and provisions of Policy No. 5613-06-623507-02A issued by Appellant Motorists Mutual Insurance Company (hereinafter “Motorists”) and under Ohio law.

The evidence is undisputed that there was but one proximate, uninterrupted and continuing cause of the accident between Mr. Masterson’s vehicle and several motorcycles. Mr. Masterson was operating a 2005 Saturn westbound on State Route 5 in Portage County at a speed of approximately 54-55 miles per hour. (Stipulations, filed November 23, 2010, Ex. B). Six motorcycles were traveling in the opposite direction at a speed of approximately 50-55 miles per hour. (Stipulations, Ex. A). As the Masterson vehicle and the group of motorcycles approached one another, the Masterson vehicle traveled left of center. (Stipulations, Ex. A). The Masterson vehicle first struck the motorcycle operated by David H. Perrine, and a fraction of a second later, the Masterson vehicle struck a second motorcycle operated by Geoffrey Davis. (Stipulations, Ex. B).

Following the accident, the Ohio State Highway Patrol performed an extensive investigation and prepared a Reconstruction Report, No. 2008-154-67. (Stipulations, Ex. B). The accident reconstruction confirmed that the impacts involving the Perrine motorcycle and the Davis motorcycle occurred almost simultaneously. In fact, the Ohio State Highway Patrol concluded that 1) Mr. Masterson’s pre-crash speed was in the range of 54-55 miles per hour; 2) there was no evidence of any pre-crash braking by the Masterson vehicle; 3) the physical distance between the two impact areas (i.e., the impact with the Perrine motorcycle and the

impact with the Davis motorcycle) was 24.18 feet; and 4) the time between the two impacts was three-tenths of a second. (Stipulations, Ex. B). These conclusions of the Ohio State Highway Patrol establish that when Mr. Masterson's vehicle swerved left of center, his vehicle struck the Perrine motorcycle and then, just three-tenths of a second later, struck the Davis motorcycle. Thus, Mr. Masterson did not have time to take any evasive action, such as braking, swerving, etc., between the two impacts.

Following the accident, multiple claims were asserted against Mr. Masterson, and the issue arose as to the amount of liability coverage available under the policy issued by Motorists. Policy No. 5613-06-623507-02A provides liability coverage under Endorsement PP 70 02 (10-06) entitled "Personal Auto Policy" as follows:

PART A – LIABILITY COVERAGE

INSURING AGREEMENT

- A. We will pay damages for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an auto accident...

(Stipulations, T.d. 9, Ex. C, PP 70 02 (10-06), p. 2 of 12) (Emphasis sic). In addition, the Section entitled "Limit of Liability" in Endorsement PP 70 02 (10-06) provides as follows:

LIMIT OF LIABILITY

* * *

- D. When a Liability limit is shown in the Declarations for **bodily injury** and **property damage**, the first paragraph of the **LIMIT OF LIABILITY** provision in Part A is replaced by the following:

The limit of liability shown in the Declarations for "each person" for Bodily Injury Liability is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of **bodily injury** sustained by any one person in any one auto accident. Subject to this limit for "each person," the limit of liability shown in the Declarations for "each accident" for Bodily Injury Liability is our maximum limit of

liability for all damages for **bodily injury** resulting from any one auto accident. * * * This is the most we will pay regardless of the number of:

1. Insureds;
2. **Claims made;**
3. Vehicles or premiums shown in the Declarations; or
4. **Vehicles involved in the auto accident.**

(Stipulations, Ex. C, PP 70 02 (10-06), p. 4 of 12) (emphasis added). The word “accident” as utilized in the liability coverage provisions in Endorsement PP 70 02 (10-06) is not a defined word.

At the trial court level, the parties entered into Stipulations on all relevant facts, including damages, and filed Cross-Motions for Summary Judgment on the disputed coverage issue. Subsequently, the trial court ruled in an Order and Journal Entry filed on March 8, 2011, that the word “accident” in the Motorists policy is clear and unambiguous when considered in the context of the entire policy and that, while applying the “causation approach,” the incident involving Mr. Masterson constituted a single “accident” for purposes of liability coverage under the Motorists’ policy. (Appendix, p. 30). In arriving at this holding, the trial court rejected the arguments of Plaintiffs/Appellees Theresa Miller and Geoffrey Davis (hereinafter “Appellees”) by noting as follows:

Finally, Plaintiffs admit that a rear-end collision damaging multiple vehicles would be one “accident” under the Motorist’s policy. But there is no legal or practical difference between a succession of collisions caused by a single vehicle striking one vehicle ahead of it—which strikes the next vehicle ahead, and where a single vehicle strikes multiple vehicles in succession. The same active continuous force is causing damage to multiple vehicles. Motorist’s policy clearly applies to both types of accidents, and the results should be the same.

(See Appendix, p. 30). The Appellees then prosecuted an appeal to the Portage County Court of Appeals, Eleventh Appellate District, and in an Opinion issued on November 28, 2011, the court of appeals overruled the trial court’s Order and Journal Entry. In doing so, the Eleventh District

Court of Appeals held that the word “accident” in the Motorists’ policy is ambiguous since it is not defined in the policy and refused to apply the “causation approach” to a situation involving a liability policy which does not define the word “accident.” (Appendix, p. 22). Motorists respectfully disagrees with the holding by the Eleventh District Court of Appeals, and has prosecuted this appeal to the Ohio Supreme Court for the reason that the “causation approach” should be applied under Ohio law in determining whether a single “accident” or multiple “accidents” occurred when there is but one proximate, uninterrupted and continuing cause of a motor vehicle accident, even when the word “accident” is not defined in the insurance policy. The Ohio Supreme Court accepted the appeal on Proposition of Law No. I in a Judgment Entry filed on March 21, 2012.

ARGUMENT

Proposition of Law No. 1: When there is but one proximate, uninterrupted and continuing cause of a motor vehicle accident involving multiple vehicles, the “causation approach” applies and requires the finding that a single “accident” occurred for purposes of liability coverage under an insurance policy, even if the word “accident” is not defined in the policy.

A. Ohio Appellate Courts, and the United States District Court of the Northern District of Ohio, Have Applied the “Causation Approach” in Analogous Cases.

Several Ohio courts have adopted the “causation approach” in determining the number of “accidents” that have occurred for purposes of liability coverage under an insurance policy. *See Progressive Preferred Ins. Co. v. Derby*, 6th Dist. No. F-01-002, 2001 WL 672177 (June 15, 2001); *Greater Cincinnati Chamber of Commerce v. Ghanbar*, 157 Ohio App.3d 233, 2004-Ohio-2724, 810 N.E.2d 455 (1st Dist.); and *Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. Nos. 91932 and 92002, 2009-Ohio-1783, 2009 Ohio App. LEXIS 1512 (Apr. 16, 2009) *appeal not accepted*, 122 Ohio St.3d 1504, 2009-Ohio-4233, 912 N.E.2d 108. The application of the

“causation approach” by Ohio courts is consistent with the majority view of courts throughout the United States which have addressed the same or similar issue. *State Auto Property & Casualty Co. v. Matty*, 286 Ga. 611, 613, 690 S.E.2d 614 (2010); *CSX Transportation, Inc. v. Continental Ins. Co.*, 343 Md. 216, 233, 680 A.2d 1082 (1996); *Derby* at *3; and *Dutch Maid Logistics* at ¶26. In the present case, the trial court properly applied the “causation approach” and held that the incident involving Mr. Masterson constituted a single “accident” since the “same act of continuous force” caused the multiple impacts with the motorcycles. On appeal, the Eleventh District Court of Appeals declined to apply the “causation approach” by attempting to distinguish the Motorists’ policy on the basis that the word “accident” is not defined and is, therefore, ambiguous. However, Ohio law requires the application of the “causation approach” in determining whether a single “accident” or multiple “accidents” occurred for purposes of liability coverage under an insurance policy, even if the word “accident” is not defined in the policy.

The Sixth District Court of Appeals utilized the “causation approach” in *Progressive Preferred Ins. Co. v. Derby, supra*, while determining whether an accident involving two impacts constituted a single “accident” or two “accidents” under a policy issued by Progressive Insurance Company. *Derby* at *3. In analyzing the coverage issue, the court of appeals first looked to the policy which defined the word “accident” as follows:

[A] sudden, unexpected and unintended event, or a continuous or repeated exposure to that event that causes bodily injury or property damage and arises out of the ownership, maintenance or use of your insured auto.

Id. at *3. The Progressive policy also contained a “Limit of Liability” section which stated:

For the purpose of determining our Limit of Liability * * *, all bodily injury * * * resulting from continuous or repeated exposure to substantially the same conditions shall be considered as resulting from one accident.

Id. at *3. The court of appeals in *Derby* adopted the “causation approach” to determine the number of accidents under the Progressive policy, and noted as follows:

The rationale underlying the cause approach is the fact that “[p]roximate cause is an integral part of any interpretation of the words ‘accident’ or ‘occurrence’ as used in a contract for liability insurance ***.” Thus, where there is but one proximate, uninterrupted and continuous cause, all injuries and damages are included within the scope of that single proximate cause. We agree with this reasoning and, as do most of the jurisdictions, adopt a cause approach in determining the number of accidents or occurrences under a liability policy.

Id. at *3 (internal citations omitted) (emphasis added). In applying the “causation approach,” the court of appeals identified the single key factor as being “whether the tortfeasor ever regained control of his or her vehicle after the first collision.” *Id.* at *4, citing *Banner v. Raisin Valley, Inc.*, 31 F.Supp.2d 591, 593 (N.D. Ohio 1998). The *Derby* court also looked at the “interdependent nature of the two impacts and their continuity and proximity in time and location.” *Id.* at *4, quoting *Pemco Mut. Ins. Co. v. Utterback*, 91 Wn. App. 764, 960 P.2d 453 (1998). The court of appeals ultimately held that “[a]ll of these events were in a continuous series, closely linked in both time and space,” that a single “accident” had occurred within the meaning of the policy, and that Progressive was entitled to summary judgment as a matter of law. *Id.* at *5.

The Sixth District Court of Appeals in *Derby, supra*, relied heavily on the prior opinion of the United States District Court of the Northern District of Ohio, in *Banner v. Raisin Valley, Inc.*, 31 F. Supp.2d 591 (N.D. Ohio 1998), *rev’d on other grounds, Banner v. Raisin Valley, Inc.*, 33 Fed.Appx. 767 (6th Cir. 2002). In *Banner*, the driver of a tractor-trailer crossed left of center and struck four oncoming vehicles that were just a few car lengths apart. *Id.* at 592. The vehicles involved were traveling at a speed of approximately 55 miles per hour. *Id.* at 592. There was “absolutely no evidence that [the driver of the tractor-trailer] ever regained control of

the vehicle after colliding with the first car.” *Id.* at 592. Multiple claims were asserted against the driver of the tractor-trailer, who was insured by Reliance Insurance Company. *Id.* at 591.

The Reliance policy in *Banner* defined the word “accident” as “including continuous or repeated exposure to the same conditions resulting in bodily injury or property damage.” *Id.* at 592. The United States district court recognized that this definition contemplates multiple injuries resulting from a single cause, and that the limitation of liability section of the Reliance policy applies regardless of the number of vehicles involved in the accident. *Id.* at 592. The United States district court then applied the “causation approach” in determining the number of accidents under the Reliance policy. In doing so, the United States district court concluded that the majority of out-of-state jurisdictions have adopted the “causation approach” and that the “common thread between these cases is whether the driver ever regained control of his vehicle.” *Id.* at 593. In fact, the United States district court in *Banner* specifically noted that the only opinions finding multiple “accidents” were those in which the facts demonstrated that the driver either never lost control of his vehicle after the initial collision, or had regained control after the initial collision. *Id.* at 594. The United States district court then analyzed the relevant facts and held that only a single “accident” had occurred, despite the fact that the tractor-trailer had struck four separate motor vehicles. *Id.* The pertinent facts considered by the district court included the following:

This conclusion is based on the distance between the cars in the eastbound lane prior to the first collision, the rapid succession of the collisions, the statement of [the driver of the tractor-trailer] that he could not see any oncoming cars, but only a tunnel of debris, and the absence of any evidence showing that [the driver] ever regained control of his vehicle after the first collision. I conclude that the only possible inference is that Phillips lost control of his vehicle immediately prior to or during the initial collision with the Mustang and remained out of control during the subsequent collisions until his tractor-trailer came to rest.

Id. at 594. Accordingly, the United States district court held that a single “accident” had occurred for purposes of liability coverage under the Reliance policy.

A similar result was reached by the Eighth District Court of Appeals in *Dutch Maid Logistics, Inc., v. Acuity, supra*, 2009-Ohio-1783. In *Dutch Maid Logistics*, one of Dutch Maid Logistics’ employees was driving a tractor-trailer on a highway when he caused a multi-vehicle accident resulting in two deaths and bodily injuries to three other persons. *Id.* at ¶3-4. At the time of the accident, Dutch Maid Logistics was insured by Acuity Insurance Company. *Id.* at ¶1. The trial court granted summary judgment in favor of Acuity on the basis that there was only one “accident” for purposes of liability coverage. *Id.* at ¶9. On appeal, the Eighth District Court of Appeals noted that very few Ohio courts have addressed the issue regarding how to determine the number of “accidents” which have occurred under the terms of a liability insurance policy, but that the “causation approach” has been adopted as the majority view. *Id.* at ¶26. After applying the “causation approach,” the Eighth District Court of Appeals affirmed the summary judgment in favor of Acuity on the basis that a single “accident” had occurred despite the injuries to multiple persons. *Id.* at ¶29.

The First District Court of Appeals reached a similar result in *Greater Cincinnati Chamber of Commerce v. Ghanbar, supra*, 157 Ohio App.3d 233, 2004-Ohio-2724, 810 N.E.2d 455, involving different policy language than that found in the policies analyzed in *Derby, Banner*, and *Dutch Maid Logistics*. In *Ghanbar*, the tortfeasor drove into an Oktoberfest celebration, injuring more than 20 people. *Id.* at ¶2. The trial court granted summary judgment in favor of Progressive Insurance Company on the basis that the multiple injuries had resulted from a single accident, which was appealed. *Id.* at ¶6. In upholding the summary judgment in favor of Progressive, the court of appeals noted that the Progressive policy defined the word

“accident” as a “sudden, unexpected and unintended occurrence,” and that undefined words in the policy must be given their plain and ordinary meaning. *Id.* at ¶9. The court found the following facts to be relevant:

The injuries occurred as a result of a single act on the part of [the tortfeasor]. The evidence in the record indicated that [the tortfeasor] plowed through a crowd of people and injured them almost simultaneously. A single, indivisible course of conduct caused the injuries in question, and the trial court did not err in holding that the incident constituted a single occurrence with multiple victims.

Id. at ¶10. Based on such relevant facts, the court of appeals held that a single “accident” occurred, despite the multiple victims. *Id.*

During the appeal in *Ghanbar*, the plaintiffs argued that the trial court had erred in applying the “causation approach” since the Progressive policy did not contain the explicit language that an “accident” includes “continuous or repeated exposure to the same conditions.” *Id.* at ¶11. The court of appeals rejected this argument. In fact, the First Appellate District specifically held that the trial court reached the correct result regardless of whether the policy defined the word “accident” or not. *Id.* at ¶12. In addressing this issue, the court of appeals held as follows:

Moreover, even if the trial court did apply the causation theory, we hold that there was no error. As we have already held, the policy language in the case at bar supported the trial court’s conclusion that the injuries had resulted from a single accident. The trial court’s inquiry into whether a single cause had resulted in the injuries would have been proper even in the absence of language defining an “accident” in terms of causation. The question whether there had been a single accident under the policy was inextricably linked to the question of causation, and the trial court came to the proper conclusion under the undisputed facts of this case. Even in the absence of the “continuous or repeated exposure” language, the court correctly held that there was only one accident in the case at bar.

Id. (emphasis added). Accordingly, the court of appeals upheld the summary judgment in favor of Progressive on the basis that only one “accident” had occurred, despite the fact that the

Progressive policy did not contain the same definition of “accident” relied on by the courts in *Derby*, *Banner*, and *Dutch Maid Logistics*. *Id.*

In summary, three Ohio appellate courts have addressed the issue whether a single “accident” or multiple “accidents” occurred for purpose of liability coverage under an insurance policy by applying the “causation approach.” In two of these opinions, *Dutch Maid Logistics* and *Derby*, the appellate courts relied, in part, on the definition of the word “accident” in the respective policies which included language about “continuous or repeated exposure to the same conditions,” which definition was also relied on by the United States district court in *Banner*. However, in *Ghanbar*, the First District Court of Appeals reached the same result (i.e., a single “accident” occurred) as the *Derby*, *Banner* and *Dutch Maid Logistics* courts even though the policy in *Ghanbar* did not include the phrase “continuous or repeated exposure to the same conditions” in the definition of “accident.” Instead, the Progressive policy in *Ghanbar* defined “accident” as a “sudden, unexpected and unintended occurrence,” which is the common and ordinary meaning of the word. The First District Court of Appeals further held in *Ghanbar* that the application of the “causation approach” would have been proper even in the absence of a definition of the word “accident” in the Progressive policy.

In all of these cases involving the application of the “causation approach,” the appellate courts in Ohio have not only focused on the definition of the word “accident,” but have also looked at other important factors, such as the proximate cause of the accident, whether all injuries and damages arose out of a single proximate cause, and whether the policies in question contained a Limit of Liability provision that contemplated that multiple vehicles can be involved in, and multiple claims can arise out of, a single “accident.” In fact, one factor repeatedly relied on by Ohio courts is that the interpretation of the word “accident” must be consistent with the

Limit of Liability provision in the policy when considered as a whole. Based on all of these factors, Motorists respectfully submits that the rationale behind the *Derby*, *Banner* and *Dutch Maid Logistics* opinions and the holding in *Ghanbar* support the conclusion that Daniel Masterson caused a single “accident” for purposes of liability coverage under the Motorists’ policy.

B. An Improper Exception to the “Causation Approach” Has Been Adopted by the Eleventh District Court of Appeals in Cases Where the Word “Accident” is Not Defined in the Policy.

The Eleventh District Court of Appeals has carved out an improper exception to the application of the “causation approach” when addressing the issue of whether an accident with multiple vehicles constitutes a single “accident” or multiple “accidents” in those cases involving insurance policies which do not define the word “accident.” In *Nationwide Mut. Ins. Co. v. Godwin*, 11th Dist. No. 2005-L-183, 2006-Ohio-4167, the Eleventh District Court of Appeals relied on the lack of a definition for the words “accident” and “occurrence” to hold that the Nationwide policy was ambiguous. *Id.* at ¶51. The court of appeals also rejected Nationwide’s argument that the courts of Ohio have uniformly adopted the “causation approach” when construing the words “accident” and “occurrence” in liability policies. *Id.* at ¶50. In doing so, the court of appeals distinguished the *Derby* and *Banner* opinions since the policies involved in those cases had provided definitions of the word “accident,” whereas the Nationwide policy involved in *Godwin* did not. *Id.* at ¶48. The court of appeals did, however, recognize that its refusal to apply the “causation approach” conflicted with the opinion of the First Appellate District in *Ghanbar* as follows:

Only the decision of the First Appellate District in *Ghanbar* actually supports Nationwide’s position herein: i.e., that an accident or occurrence must be viewed solely in terms of the tortious conduct giving rise to the injuries, rather than the effects on the injured parties. And, even the *Ghanbar* court refused to endorse the

causation view entirely. Rather, it held that the trial court's construction of the subject policy was correct even in the absence of causation theory.

Id. After declining to follow the *Ghanbar* holding, the Eleventh Appellate District ultimately held that the absence of definitions of the words "accident" and "occurrence" in the Nationwide policy rendered the policy ambiguous, and the judgment against Nationwide was affirmed. *Id.* at ¶51.

The Eleventh District Court of Appeals applied the same rationale in its Opinion filed on November 28, 2011, in the present case. In overruling the trial court's Order and Journal Entry, the court of appeals distinguished the holdings in *Banner* and *Derby* on the basis that the policies analyzed by the courts in those cases contained a definition of the word "accident," while the Motorists' policy does not. The court of appeals then relied on its prior holding in *Godwin* to rule that the word "accident" is ambiguous as utilized in the Motorists' policy due to the lack of a definition.

Interestingly, in its Opinion issued in the present case, the Eleventh District Court of Appeals did not address Motorists' arguments based on the *Ghanbar* holding, despite its prior recognition that the holding in *Godwin* is in conflict with the holding of the First Appellate District in *Ghanbar*. Motorists respectfully asserts that the exception adopted by the Eleventh Appellate District is a "distinction without a difference," and that the "causation approach" should be applied in all circumstances under Ohio law in determining whether a single "accident" or multiple "accidents" occurred for purposes of liability coverage under an insurance policy, even when the word "accident" is not defined.

C. The Common and Ordinary Meaning of the Word “Accident” Requires the Application of the “Causation Approach” Even in Those Cases Where Such Word is Not Defined in the Policy.

Under the “causation approach,” “where there is but one proximate, uninterrupted and continuous cause, all injuries and damages are included within the scope of that single proximate cause.” *Derby, supra*, 2001 WL 672177 at *4. In other words, in determining whether an accident constitutes a single “accident” or multiple “accidents” for purposes of liability coverage, the focus of the analysis under the “causation approach” is on the issue of causation. One factor under the “causation approach” is whether the tortfeasor ever regained control of the vehicle after being involved in the first impact or collision. *Derby* at *4. Once the tortfeasor loses control of his or her vehicle and causes damage to multiple parties or vehicles in one “proximate, uninterrupted and continuous cause,” then all of the injuries and damages, regardless of the number of vehicles or persons involved, are deemed to be the result of a single proximate cause and, therefore, a single “accident.” This legal principle was applied in the *Derby*, *Banner* and *Dutch Maid Logistics* opinions. In *Godwin* and in the present case, the Eleventh Appellate District distinguished the *Derby* and *Banner* holdings by pointing out that those holdings relied on the definition of the word “accident” in the respective insurance policies. Yet, the courts in *Derby*, *Banner* and *Dutch Maid Logistics* relied on other significant factors, which should have led to the same result even if the word “accident” had not been defined in the subject policies.

In reviewing the language in an insurance contract, trial and appellate courts in Ohio must follow the rules of contract interpretation as summarized, in pertinent part, by the Ohio Supreme Court in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, as follows:

We examine the insurance contract as a whole and presume the intent of the parties is reflected in the language used in the policy. We 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. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.

Id. at ¶11-12 (internal citations omitted). In the present case, Motorists did not provide a definition of the word “accident” in its policy. In the absence of a definition, the court must then look to the common and ordinary definition of the word. Many Ohio courts have applied the plain, common and ordinary meaning of the word “accident” in other cases, including the following:

- *Randolph v. Grange Mutual Casualty Co.*, 57 Ohio St.2d 25, 385 N.E.2d 1305 (1979). The word “accident” as utilized as an undefined word in an insurance policy was determined by the Ohio Supreme Court to mean “an unexpected, unforeseeable event.” *Id.* at 29.
- *Grange Mutual Casualty Co. v. Tumbleson*, 4th Dist. No. 03CA2898, 2004-Ohio-2180. “Grange did not give a definition for accident in its policy. Apparently, it felt that its customers understood the concept. Many ‘common knowledge’ words are not defined because of the assumption that it is not necessary. * * * We must give the language of an insurance policy its plain and ordinary meaning. * * * Hence, we find that the word ‘accident’ is a ‘common knowledge’ word that does not need further explanation.” *Id.* at ¶35.
- *Freylack v. Dichiro*, 8th Dist. No. 52770, 1987 Ohio App. LEXIS 10208 (Dec. 24, 1987). “The words ‘accident’ and ‘accidental’ have never acquired any technical significance in law and, when used in an insurance contract, are to be construed and considered according to the ordinary understanding and common usage and speech of people generally.” *Id.* at *6-7.
- *Westfield Cos. v. Gibbs*, 11th Dist. No. 2004-L-058, 2005-Ohio-4210. The Eleventh District Court of Appeals applied the common and ordinary definition of the undefined word “accident” in the Westfield policy as follows:

An “accident” is an event proceeding from an unexpected happening or unknown cause without design and not in the usual course of things; an event that takes place without one’s expectation; an undesigned, sudden and unexpected event; an

event which proceeds from an unknown cause or is an unusual effect of a known cause and, therefore, unexpected. *Id.* at ¶17.

- *Havel v. Grange Mutual Casualty Co.*, 11th Dist. No. 2004-G-2609, 2006-Ohio-7014. The Eleventh District Court of Appeals determined the definition of the undefined word “accident” in the Grange policy as follows:

This court, consistently with other courts, has defined “accident” as “an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence.” *Id.* at ¶33.

- *Haimbaugh v. Grange Mutual Casualty Co.*, 10th App. No. 07 AP-676, 2008-Ohio-4001. “The ordinary meaning of the term ‘accident’ in an insurance policy refers to ‘unintended’ or ‘unexpected happenings.’” *Id.* at ¶30.

Each of these courts have interpreted the undefined use of the word “accident” in an insurance policy. Although the courts may have used different terminology, the meaning of the word “accident” is the same: an unintended, unexpected and unforeseeable event.

If the word “accident” had not been defined in the *Banner*, *Derby*, and *Dutch Maid Logistics* opinions, the application of the “causation approach” would have resulted in the same holding (i.e., the determination of a “single accident”) in all three cases based on the common and ordinary definition of the word “accident.” The First Appellate District recognized in *Ghanbar*, *supra*, that the application of the “causation approach” would result in the determination of a single “accident” even in the absence of the definition of the word “accident” in the policy. *Ghanbar*, 154 Ohio App.3d 233, 2004-Ohio-2724, 810 N.E.2d 455 at ¶12. In fact, the First District Court of Appeals specifically stated as follows:

The trial court’s inquiry into whether a single cause had resulted in the injuries would have been proper even in the absence of language defining an “accident” in terms of causation. The question whether there had been a single accident under the policy language was inextricably linked to the question of causation, and the trial court came to the proper conclusion under the undisputed facts of this case. Even in the absence of the “continuous or repeated exposure” language, the court correctly held that there was only one accident in the case at bar.

Id. (emphasis added). As implicitly recognized by the First Appellate District, a consistent application of Ohio law requires the application of the “causation approach” in all cases where there is an issue regarding whether one or more “accidents” occurred for purposes of liability coverage.

In *Ghanbar*, the Progressive policy did not contain the phrase “continuous or repeated exposure to the same conditions” in the definition of “accident.” Instead, the Progressive policy defined the word “accident” as a “sudden, unexpected and unintended occurrence,” which is essentially the common law definition of the word. *Ghanbar* at ¶3. The First Appellate District held in *Ghanbar* that multiple injuries caused by the tortfeasor as a result of an indivisible course of conduct constituted a single “accident” for purposes of liability insurance coverage. *Id.* at ¶12. However, the Eleventh District Court of Appeals rejected the *Ghanbar* rationale in both *Godwin* and the present case by holding that the absence of a definition of the word “accident” rendered the policy ambiguous. Yet, the Ohio Supreme Court has held that the “mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous.” *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-2214, 652 N.E.2d 684 (1995). Moreover, the Appellees, who are not parties to the insurance contract, are not entitled to the benefit of a strict construction or interpretation of the language in the policy. *Galatis, supra*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 at ¶14. If the policy is not ambiguous simply because of the lack of a definition, and the plain and ordinary meaning of the word “accident” is applied, then the result in the present case would be the identical holding reached by the First Appellate District in *Ghanbar*.

As noted by the Ohio appellate courts which have applied the “causation approach,” the definition of the word “accident” is not the sole factor to be considered in determining whether

one or more “accidents” have occurred for purposes of liability coverage. In fact, the issue of proximate cause is the determinative factor. In *Derby*, the Sixth District Court of Appeals noted that “[p]roximate cause is an integral part of any interpretation of the words ‘accident’ or ‘occurrence’ as used in a contract for liability insurance.” *Derby*, 2001 WL 672177 at *3. Likewise, the First Appellate District in *Ghanbar* stated that “whether there had been a single accident under the policy was inextricably linked to the question of causation” when the definition of the word “accident” did not contain the “continuous or repeated exposure” language or even if the policy did not define “accident” at all. *Ghanbar*, 157 Ohio App.3d 233, 2004-Ohio-2724, 810 N.E.2d 455 at ¶12. Moreover, the courts also considered whether the policy being analyzed contained a Limit of Liability provision which contemplated that multiple vehicles can be involved in and multiple claims can arise out of a single auto “accident.” If the policies being analyzed did contain a Limit of Liability provision, the courts were careful to make certain that the application of the “causation approach” was consistent with the Limit of Liability provision when the policy was considered as a whole. These factors, in addition to the common and ordinary meaning of the word “accident,” all support the application of the “causation approach” in cases where the word “accident” is not defined.

The application of the “causation approach” in the present case results in the conclusion that Daniel Masterson caused a single “accident” for purposes of liability coverage under the Motorists’ policy. Mr. Masterson was driving his motor vehicle at a speed of approximately 54-55 miles per hour while approaching a group of six motorcycles traveling approximately 50-55 miles per hour in the opposite direction. When the Masterson vehicle swerved left of center, the two impacts occurred only three-tenths of a second and 24.18 feet apart. It is undisputed that the two impacts were interdependent in terms of continuity and proximity in time and location, that

Mr. Masterson never regained control of his vehicle after the first impact with the Perrine motorcycle but before the second impact with the Davis motorcycle, and that the impacts and resulting injuries occurred almost simultaneously. Under the “causation approach,” and based on the plain and ordinary meaning of the word “accident,” this incident constituted a single “accident” for purposes of liability coverage under the Motorists’ policy.

D. In Determining the Meaning of the Undefined Word “Accident,” the Policy Must be Considered as Whole, Including the Limit of Liability Provision in the Policy, to Establish the Intent of the Parties to the Insurance Contract and to Avoid any Inconsistencies.

The application of the “causation approach” under the Motorists policy, even though the word “accident” is not defined, is entirely consistent with the remaining terms and conditions of the policy. Conversely, the holding by the Eleventh District Court of Appeals has created an inconsistency in the Motorists’ policy which should not and does not exist. Specifically, the holding that multiple “accidents” can arise when there is but one proximate, uninterrupted and continuing cause of a motor vehicle accident directly contradicts the “Limit of Liability” section contained within the Motorists’ policy.

The “Limit of Liability” section of Endorsement PP 70 02 (10-06) provides, in pertinent part, as follows:

LIMIT OF LIABILITY

- D. ...Subject to this limit for “each person,” the limit of liability shown in the Declarations for “each accident” for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury resulting from any one auto accident... This is the most we will pay regardless of the number of:
1. Insureds;
 2. **Claims made;**
 3. Vehicles or premiums shown in the declarations; or
 4. **Vehicles involved in the auto accident.**

(Stipulation, T.d. 9, Ex. C, PP 70 02 (10-06), p. 4 of 12). The language utilized in the “Limit of Liability” section of the Motorists’ policy specifically contemplates that multiple vehicles may be involved in and multiple claims may arise out of a single auto accident.

As held by the Ohio Supreme Court in *Galatis, supra*, the word “accident” as utilized in the Motorists’ policy must not only be given its plain and ordinary meaning, but must also be applied in a manner which is consistent when the insurance contract is considered as a whole. *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 at ¶11. Here, the Limit of Liability section in the Motorists’ policy specifically contemplates that multiple vehicles can be involved in and multiple claims can arise out of “the auto accident,” which obviously refers to a single auto accident. Under the Eleventh Appellate District’s holdings in *Godwin* and the present appeal, this limitation regarding the number of “vehicles involved in the auto accident” in the Motorists’ policy would be rendered meaningless, inconsistent and would have to be totally ignored. Such an interpretation of the Motorists’ policy would defy the general rules of insurance contract interpretation set forth by the Ohio Supreme Court in *Galatis*.

The Limit of Liability section of the Motorists’ policy eliminates any alleged ambiguity in the word “accident” as used in the policy. As required by *Galatis*, the word “accident,” as an undefined word, must not only be given its plain and ordinary meaning, but must also be applied in a manner which is consistent when the insurance contract is considered as a whole. *Id.* Here, if the insurance contract is viewed in its entirety, then the only consistent meaning and application of the word “accident” inevitably leads to the conclusion that multiple vehicles can be involved in and multiple claims can arise out of a single “accident,” even though the word “accident” has not been specifically defined in the policy.

The inclusion of this type of Limit of Liability language as found in the Motorists' policy was instrumental in the application of the "causation approach" by the Eighth District Court of Appeals in *Dutch Maid Logistics, supra*, 2009-Ohio-4233 at ¶29. Likewise, courts in out-of-state jurisdictions have relied heavily on such Limit of Liability provisions in holding that the "causation approach" should be applied even though the word "accident" is not defined in the policy. For instance, in *State Auto Property & Cas. Co. v. Matty*, 286 Ga. 611, 690 S.E.2d 614 (2010), the Supreme Court of Georgia analyzed a State Auto policy which did not define the word "accident," but which provided the identical Limit of Liability provision which is contained within the Motorists' policy, and held that the "policy at issue in this case, viewed as a whole, shows a clear intent to limit liability in accidents involving multiple vehicles." *Id.* at 612. In the present case, the Eleventh District Court of Appeals did not even attempt to reconcile the plain and ordinary meaning of the word "accident" with the Limit of Liability provision in the Motorists' policy; if it had, then the court of appeals could have only concluded that, interpreting the policy as a whole, the Motorists' policy specifically contemplated that multiple vehicles could be involved in and multiple claims can arise out of a single "accident."

E. The Coverage Position of Motorists is Consistent With the Majority of Other Jurisdictions Which Have Considered the Same or Similar Issue.

Many courts throughout the United States have applied the "causation approach" in cases involving a variety of circumstances. In fact, several courts in out-of-state jurisdictions have already considered the identical or very similar issue involved in this appeal, which is whether the "causation approach" should be applied in determining the number of "accidents" or "occurrences" when such words are not defined in an insurance policy. The majority of the other jurisdictions throughout the United States which have considered the identical or virtually similar

issue have applied the “causation approach,” and have held that an incident involving multiple vehicles constitutes a single “accident” or “occurrence” for purposes of liability coverage when there is but one proximate, uninterrupted and continuing cause. If the holding of the Eleventh Appellate District is upheld in this case, then Ohio will be taking a minority position on this issue.

In *Matty, supra*, 286 Ga. 611, the Supreme Court of Georgia was asked to provide an answer to the following certified question:

[H]ow to determine the meaning of the word “accident” in an automobile liability insurance policy when the word is not expressly defined in the policy and, more specifically, how to determine if there has been one accident or two when an insured vehicle strikes one claimant and then very shortly thereafter strikes another.

Id. at 611. The facts in *Matty* are strikingly similar to the facts in the present case. In *Matty*, an operator of a motor vehicle struck a bicyclist and, “just over a second” later, traveled 95 to 115 feet and struck a second bicyclist. *Id.* at 612. The insuring agreement in the State Auto policy included the word “accident,” but such word was not defined. *Id.* The State Auto policy did, however, provide a Limit of Liability provision which limited the amount of damages resulting from any one auto accident, regardless of the number of “vehicles involved in the auto accident.”

Id. at 612. In analyzing this issue, the Georgia Supreme Court held as follows:

The policy at issue in this case, viewed as a whole, shows a clear intent to limit liability in accidents involving multiple vehicles. The term “each accident” appears in the limitation of liability section of the policy, which provides that the limit of liability of \$100,000 for “each accident” is “the most [State Auto] will pay regardless of the number of: 1. ‘Insureds’; 2. Claims made; 3. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the auto accident.” Automobile accidents involving multiple vehicles and multiple injured parties (insureds and third parties) are an everyday occurrence on our roads. Recognizing this reality, this contractual language contemplates that there can be a single accident in which there are multiple vehicles, injured parties, and claims and provides that for that type of accident, there will be a liability limit of

\$100,000. See *Banner v. Raisin Valley, Inc.*, 31 F. Supp.2d 591, 592 (N.D. Ohio 1998).

Id. at 612-613. Thus, the Supreme Court of Georgia adopted and applied the “causation approach” in a case involving the undefined word “accident” by interpreting and analyzing the policy as a whole, particularly the Limit of Liability provision that demonstrated a clear intent to limit liability in accidents involving multiple vehicles to a single “accident.” To do otherwise, the court noted, would render meaningless the phrase “regardless of the number of...vehicles involved” in the auto accident as provided by the Limit of Liability section of the policy. *Id.* at 613.

The Georgia Supreme Court in *Matty* also analyzed the three general approaches (the “cause” theory, the “effect” theory and the “event” theory) typically utilized by other jurisdictions for construing the word “accident,” and concluded as follows:

Of the three theories that have been adopted by courts around the country to aid in the construction of the word “accident,” the clear majority rule is the “cause” theory. Under this theory, the number of accidents is determined by the number of causes of the injuries, with the Court asking if “[t]here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.” In the context of vehicle accidents involving multiple collisions that do not occur simultaneously (recognizing that it is almost impossible that such collisions can occur without any difference in time and place), courts look to whether, after the cause of the initial collision, the driver regained control of the vehicle before a subsequent collision, so that it can be said there was a second intervening cause and therefore a second accident.

Id. at 613-614 (internal citations omitted). The Georgia Supreme Court then noted in *Matty* that “an influential majority of jurisdictions has adopted” the cause theory, and held that the “causation approach” applies to insurance contracts interpreted under Georgia law even in the absence of a definition of the word “accident.” *Id.* at 615.

Other courts throughout the United States have also held that the words “accident” and “occurrence” are not ambiguous and that the “causation approach” should be applied in cases

involving insurance policies with a limitation of liability provision that contemplates that a single motor vehicle accident may involve multiple vehicles and multiple claims. *See, United Serv. Auto. Assn. v. Baggett*, 209 Cal. App.3d 1387 (1989) (“[T]he insurance policy provisions limiting maximum liability ‘for any one auto accident’ unambiguously contemplate two consecutive collisions as occurred here to be one accident”); *Hyer v. Inter-Ins. Exchange of the Auto Club of Southern Cal.*, 77 Cal. App. 343, 246 P. 1055 (1926) (“[W]hen the term “one accident” or “an accident” is used in automobile indemnity insurance contracts it is ordinarily and popularly understood to include a case where two or more persons are injured in person or in property as the result of an undesigned and unforeseen occurrence.”); *McCoy v. Draine*, Del. Sup. No. 87C-AU18A, 1991 Del. Super. LEXIS 54 (Feb. 1, 1991); (Holding that there was only one occurrence within the meaning of the policy, despite the lack of definition of occurrence, where defendant crossed over the center line striking two separate vehicles 1.4 seconds apart); *Johnson v. Hunter*, 386 S.C. 452, 688 S.E.2d 593 (2010) (“causation approach” applied resulting in holding that one “accident” occurred when the plaintiff’s vehicle was struck twice by the tortfeasor’s vehicle); *Truck Ins. Exchange v. Rohde*, 49 Wn.2d 465, 303 P.2d 659 (1956) (The Supreme Court of Washington held, “[W]e are of the opinion that the contract contemplated that the terms, ‘accident’ and ‘occurrence,’ [which were not defined] included all injuries or damage within the scope of the single proximate cause” in a case involving a motor vehicle striking three motorcycles.); *Olsen v. Moore*, 56 Wis.2d 340, 202 N.W.2d 236 (1972) (Supreme Court of Wisconsin applied “causation approach” in holding that the tortfeasor’s act of striking two automobiles, less than a second apart, constituted a single “accident” or “occurrence”).

In all of these out-of-state opinions, the respective insurance policies failed to define either the word “accident” or “occurrence.” Yet, all of the insurance policies analyzed by the

various courts contained limitation of liability language which contemplated that a single “accident” could include multiple claims and multiple vehicles. In considering the insurance policies as a whole, and in order to avoid any inconsistencies, the courts in the above out-of-state jurisdictions interpreted the undefined words “accident” or “occurrence” in a manner consistent with the limitation of liability provision, and applied the “causation approach.” When harmonizing all the provisions of the policy, these courts ultimately held that when there is but one proximate, uninterrupted and continuing cause of a motor vehicle accident involving multiple vehicles or claimants, then a single “accident” has occurred for purposes of liability coverage under an insurance policy.

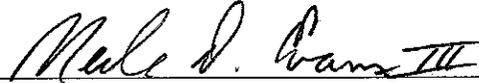
The coverage position of Motorists in this appeal is consistent with the holdings by the courts in the jurisdictions discussed above. After all, the Motorists’ policy contains a Limit of Liability which specifically provides that a single “accident” has occurred regardless of the number of vehicles involved. If the Motorists’ policy is considered as a whole, then the only interpretation of the Motorists’ policy which does not create any inconsistencies is that multiple vehicles can be involved in a single “accident,” regardless of whether the word “accident” is defined in the policy or not. The holding of the Eleventh District Court of Appeals in the underlying appeal essentially ignored the Limit of Liability provision in the Motorists’ policy, ignored the intent of the parties to the insurance contract, and created an inconsistency within the policy. Motorists respectfully asserts that the application of Ohio insurance contract law requires that the policy be interpreted as a whole to determine the intent of the parties and to avoid any inconsistencies, just as the courts held in the out-of-state opinions cited above. By doing so, and by applying the “causation approach” which has been adopted by at least three Ohio appellate

courts, then one can only conclude that Daniel Masterson caused a single “accident” for purposes of liability coverage under the Motorists’ policy.

CONCLUSION

Appellant Motorists Mutual Insurance Company respectfully asserts that the Eleventh District Court of Appeals erred in reversing the trial court’s Judgment Entry filed on March 8, 2011. As held in *Ghanbar*, the “causation approach” should be applied in all cases in determining the number of “accidents” for purposes of liability coverage under an insurance policy, including those cases where the policies do not provide a definition of the word “accident,” or where the definition does not include the “continuous and repeated exposure” language. Moreover, the Motorists’ policy includes a Limit of Liability provision which contemplates that multiple vehicles and multiple claims can arise out of a single auto “accident,” which eliminates any alleged ambiguity in the undefined word “accident.” Yet, the court of appeals failed to consider the policy as a whole and did not interpret the word “accident” consistently with the Limit of Liability provision, as required by Ohio law relating to the construction of insurance contracts. If the court of appeals had considered the policy as a whole and applied the “causation approach” adopted by other Ohio appellate courts, the court of appeals would or should have concluded that Daniel Masterson caused a single “accident” for purposes of liability coverage under the Motorists’ policy. For all of the reasons set forth herein, Appellate Motorists Mutual Insurance Company respectfully requests that this court reverse the Opinion and Judgment Entry of the Eleventh District Court of Appeals filed on November 28, 2011, and enter final judgment in its favor.

Respectfully submitted,



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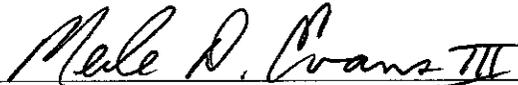
Counsel for Defendant/Appellant

PROOF OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendant/Appellant Motorists Mutual Insurance Company, was sent by ordinary U.S. mail to the following, this 17th day of May, 2012:

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Merle D. Evans, III

IN THE SUPREME COURT OF OHIO

THEERSA MILLER, et al.,)
)
 Plaintiffs/Appellees,)
)
 vs.)
)
 MOTORISTS MUTUAL INSURANCE)
 COMPANY, et al.,)
)
 Defendant/Appellant)

CASE NO. 12-0053

*On Appeal from the Portage County Court
of Appeals, Eleventh Appellate District*

*Court of Appeals
Case No. 2011-P-0016*

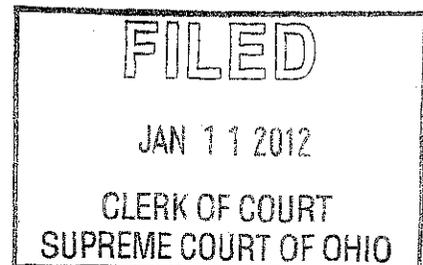
**NOTICE OF APPEAL OF
DEFENDANT/APPELLANT MOTORISTS MUTUAL INSURANCE
COMPANY**

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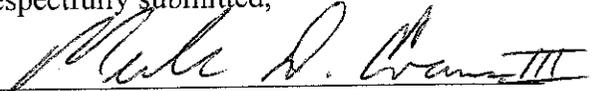
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*Attorney for Defendant/Appellant
Motorists Mutual Insurance Company*



Defendant/Appellant Motorists Mutual Insurance Company hereby gives notice of its appeal to the Supreme Court of Ohio from the Opinion and Judgment Entry of the Portage County Court of Appeals, Eleventh Appellate District, entered and journalized in Court of Appeals Case No. 2011-P-0016 on November 28, 2011. This case raises issues of public and great general interest.

Respectfully submitted,



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PROOF OF SERVICE

This is to certify that a copy of the foregoing **NOTICE OF APPEAL OF DEFENDANT/APPELLANT MOTORISTS MUTUAL INSURANCE COMPANY** was sent by regular U.S. Mail, postage prepaid, this 11th day of January, 2012, to the following:

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Merle D. Evans, III (#0019230)

FILED
COURT OF APPEALS

IN THE COURT OF APPEALS

NOV 28 2011

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

THERESA MILLER, et al.,	:	O P I N I O N
Plaintiffs-Appellants,	:	CASE NO. 2011-P-0016
- vs -	:	
MOTORIST MUTUAL INSURANCE COMPANY, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2010 CV 0428.

Judgment: Reversed.

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Merle D. Evans, III, Day Ketterer Ltd., Millennium Centre, Suite 300, 200 Market Avenue, North Canton, OH 44701-4213 (For Defendants-Appellees).

MARY JANE TRAPP, J.

{¶1} Appellants, Theresa Miller and Geoffrey Davis, appeal from a decision of the Court of Common Pleas of Portage County, granting summary judgment in favor of appellee, Motorist Mutual Insurance Company ("MMIC"), and denying appellants' motion for summary judgment. While the parties stipulate to the facts in this case and to the liability of the tortfeasor, they disagree over whether the multiple collisions giving

rise to this case constituted one "accident" for the purposes of insurance liability limits, or two. Given the failure of the insurance company to include a more precise definition of the policy term "accident," and use limiting language found in other policies that has withstood judicial scrutiny, we find that the incidents giving rise to Ms. Miller and Mr. Davis's claims constitute two accidents.

{¶2} **Substantive Facts and Procedural History**

{¶3} The facts in this case are undisputed. On the evening of July 12, 2008, Daniel Masterson was heading westbound on State Route 5, when he took his eyes off the road in order to reach to the floorboard to retrieve his lighter, and veered into the eastbound lane of traffic. The SUV Mr. Masterson was driving collided with a group of motorcycles headed eastbound. Mr. Masterson first collided with a motorcycle driven by David Perrine. In an attempt to avoid hitting Mr. Perrine's motorcycle, Michael Reese, who was driving behind Mr. Perrine, took evasive action, but was unable to avoid hitting Mr. Perrine's motorcycle and sliding into his path. Mr. Perrine and his passenger, Julia Hill, and Mr. Reese and his passenger, Kim Mook, sustained injuries.

{¶4} Within .3 seconds of striking Mr. Perrine, Mr. Masterson struck a motorcycle driven by Geoffrey Davis, and then traveled back across the westbound lane before crashing into a guardrail. Mr. Davis and his passenger, Theresa Miller, were also injured.

{¶5} Mr. Masterson was insured by MMIC, and his policy contained liability coverage for bodily injury with split limits of \$100,000 for "each person" and \$300,000 for "each accident." No dispute exists as to Mr. Masterson's liability, nor is there a

dispute that the collective value of the injuries sustained by Mr. Perrine, Ms. Hill, Mr. Reese, Ms. Mook, Mr. Davis, and Ms. Miller exceeded \$300,000.

{¶6} A dispute does exist, however, as to whether the incidents constitute one accident, limiting MMIC's liability to a single \$300,000 per accident payment, or whether they constitute two accidents, increasing MMIC's exposure in this case to, at most, \$500,000. Ms. Miller and Mr. Davis contend that Mr. Masterson's collision with their motorcycle constitutes a separate accident from the initial collision with Mr. Perrine's motorcycle, and that they are entitled to a separate \$300,000 per accident payment.

{¶7} Because MMIC's liability for at least one accident was not disputed, the parties entered into a Covenant Not to Execute, which provided that MMIC would make one "each accident" payment of \$300,000 to be split among the six injured parties, but provided for the ability to file a declaratory action seeking interpretation of MMIC's policy, and determination of whether the incidents constituted one or two accidents. The Covenant Not to Execute further provided that, should a court determine the incident to be two accidents, MMIC would pay an additional \$100,000 each to Ms. Miller and Mr. Davis.

{¶8} Ms. Miller and Mr. Davis ultimately filed a declaratory judgment action, and the parties submitted cross-motions for Summary Judgment and Declaratory Relief. The trial court granted summary judgment in favor of MMIC, finding "[t]he whole incident was one brief continuous course of conduct." The trial court relied on language in the "Limitation of Liability" portion of the policy to determine that "the term 'accident' or 'any one auto accident' includes all the vehicles involved in the collision." Applying the policy language to its finding that there was one continuous course of conduct, the trial court

held that there was only one accident, and that the parties were “therefore limited to a single recovery under the ‘Each Accident’ portion of [MMIC’s] policy, regardless of the number of motorcycles involved in the incident.”

{¶9} Ms. Miller and Mr. Davis timely appealed, and now bring the following assignment of error:

{¶10} “The trial court erred in ignoring this Court’s decision in *Godwin* and in granting MMIC’s motion for summary judgment and denying the plaintiffs’ motion for summary judgment.”

{¶11} **Standard of Review**

{¶12} We review de novo a trial court’s order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. “A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.” *Id.*, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶13} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial.’ The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element

of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

{¶14} **Interpretation MMIC's Policy**

{¶15} The controlling portion of MMIC's policy provides:

{¶16} "A. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one auto accident. This is the most we will pay regardless of the number of:

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{¶21} The policy, however, fails to define “accident.” Construction of written contracts, including insurance contracts, is a matter of law. *Time Warner Entertainment Co., LP v. Kleese-Beshara-Kleese*, 11th Dist. No. 2009-T-0010, 2009-Ohio-6712, ¶27, citing *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. “We review the interpretation of contracts de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108. We must give the language of an insurance policy its plain and ordinary meaning. *Dairyland Ins. Co. v. Finch* (1987), 32 Ohio St.3d 360, 362. We cannot create ambiguity where there is none; a policy must be resolved in favor of the insured only when a provision in a policy is ambiguous and susceptible to more than one reasonable interpretation. *Hacker v. Dickman*. (1996), 75 Ohio St.3d 118, 119.” *OSI Sealants, Inc. v. Wausau Underwriters Ins. Co.*, 11th Dist. No. 2003-L-181, 2005-Ohio-2528, ¶19. Because language in insurance policies is selected by the insurers, and they have ample opportunity to specifically define terms and protect themselves from liability, any ambiguity will be construed in favor of the insured. See *Gomolka v. State Auto Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 169.

{¶22} The question before the trial court and this court is whether the policy term “accident” is ambiguous. MMIC invites us, despite having failed to provide a definition for “accident,” to construe the term as the courts did in *Banner v. Raisin Valley, Inc.* (N.D. Ohio 1998), 31 F.Supp.2d 591 and *Progressive Preferred Ins. Co. v. Derby* (June 15, 2001), 6th Dist. No. F-01-002, 2001 Ohio App. LEXIS 2649, and adhere to a “causation approach.”

{¶23} The “causation approach” to policy interpretation focuses on the cause of the insured event, not the effects. See *Banner* at 593. However, “both the decisions in *Banner* and in *Derby*, while citing to the causation view in determining that one accident or occurrence had resulted in multiple injuries, were fundamentally based on construction of the term ‘accident’ in the subject liability policies. And, the definition of accident in each policy demanded those courts find that one accident or occurrence had resulted in multiple injuries.” *Nationwide Mut. Ins. Co. v. Godwin*, 11th Dist. No. 2005-L-183, 2006-Ohio-4167, ¶48.

{¶24} In both *Banner* and *Derby*, the limitation of liability clause contained the same “regardless of the number of vehicles involved in the auto accident” language found in MMIC’s policy. This is the limiting language relied upon by the trial court below. In an attempt to distinguish this case from *Godwin*, the trial court surmises that the *Godwin* court “apparently had insufficient policy language to help define the terms ‘accident’ or ‘occurrence,’ because the *Godwin* decision does not refer to such limiting language in its opinion.

{¶25} But, the real distinction lies in an omission in the MMIC policy, and it is this distinctive omission that controls the outcome of the case before us.

{¶26} While the *Godwin* decision only alludes to the policy language that controlled the outcome in *Banner* and *Derby*, we definitively find that the interpretation reached in *Banner* and *Derby* was dictated by the inclusion of a standard policy definition of the term “accident” as “a sudden, unexpected and unintended event, or a continuous or repeated exposure to substantially the same conditions.” Unlike *Banner* and *Derby*, the MMIC policy contains no such standard policy language. MMIC chose

the less descriptive and thus less limiting definitional language, and thus we have no alternative but to construe the ambiguity against the insurance company.

{¶27} Furthermore, MMIC suggests that the liability provisions, when considered as a whole, are clear and unambiguous as to the meaning of "accident." We however, look to the plain meaning of the word. The plain and ordinary meaning of "accident" is "an unexpected and undesirable event." Webster's II New College Dictionary (1999) 6. "A person unversed in the technicalities of insurance law might, therefore, easily conclude that [the insured's striking of each of the vehicles], sequentially, constituted separate accidents or occurrences, rather than the single accident or occurrence of losing control of the [car] ***." *Godwin* at ¶49.

{¶28} We may arrive at this same conclusion from a causation analysis as well. In considering the cause of Mr. Perrine, Ms. Hill, Mr. Reese, and Ms. Mook's injuries as compared to the cause of Ms. Miller and Mr. Davis's injuries, they appear decidedly different. The injuries to the former group are as a direct result of Mr. Masterson's collision with Mr. Perrine's motorcycle. Ms. Miller and Mr. Davis's injuries, however, do not stem from that collision; instead, they are a direct result of an independent collision between Mr. Masterson's vehicle and their own motorcycle.

{¶29} The trial court reasoned "there is no legal or practical difference between a succession of collisions caused by a single vehicle striking one vehicle ahead of it - which strikes the next vehicle ahead, and where a single vehicle strikes multiple vehicle in succession. The *same active continuous force* is causing damage to multiple vehicles ***." (Emphasis added.) The trial court then concludes that MMIC's policy "clearly applies to both types of accidents and the results should be the same."

{¶30} We would agree with the trial court, had MMIC included the “continuous or repeated exposure to substantially the same conditions” language in its policy, but it did not. Thus, as a matter of contract interpretation the results *cannot* be the same.

{¶31} MMIC’s liability policy specifically accounts for and limits its liability in an event such as the first collision, a chain reaction if you will, whereby the same automobile strike causes injuries to multiple parties and vehicles. The policy, however, does not specifically contemplate and limit MMIC’s liability in a sequence of events as presented in this case, where two separate and distinct automobile strikes cause injury to multiple parties. MMIC had the opportunity to define accident and construct its policy in a way which limited its liability in a situation such as the one before us. It chose not to do so, and thus we must construe the ambiguity in favor of Ms. Miller and Mr. Davis.

{¶32} The assignment of error is meritorious and the judgment of the Court of Common Pleas of Portage County is reversed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

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STATE OF OHIO)
)SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

THERESA MILLER, et al.,
Plaintiffs-Appellants,

JUDGMENT ENTRY

- VS -

CASE NO. 2011-P-0016

MOTORISTS MUTUAL INSURANCE,
COMPANY, et al.,

FILED
COURT OF APPEALS

NOV 28 2011

Defendants-Appellees.

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

For the reasons stated in the opinion of this court, the assignment of error has merit, and it is the judgment and order of this court that the judgment of the Court of Common Pleas of Portage County is reversed and judgment is entered for the appellants.

Costs to be taxed against appellees.



JUDGE MARY JANE TRAPP

FOR THE COURT

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rise to this case constituted one "accident" for the purposes of insurance liability limits, or two. Given the failure of the insurance company to include a more precise definition of the policy term "accident," and use limiting language found in other policies that has withstood judicial scrutiny, we find that the incidents giving rise to Ms. Miller and Mr. Davis's claims constitute two accidents.

{¶2} **Substantive Facts and Procedural History**

{¶3} The facts in this case are undisputed. On the evening of July 12, 2008, Daniel Masterson was heading westbound on State Route 5, when he took his eyes off the road in order to reach to the floorboard to retrieve his lighter, and veered into the eastbound lane of traffic. The SUV Mr. Masterson was driving collided with a group of motorcycles headed eastbound. Mr. Masterson first collided with a motorcycle driven by David Perrine. In an attempt to avoid hitting Mr. Perrine's motorcycle, Michael Reese, who was driving behind Mr. Perrine, took evasive action, but was unable to avoid hitting Mr. Perrine's motorcycle and sliding into his path. Mr. Perrine and his passenger, Julia Hill, and Mr. Reese and his passenger, Kim Mook, sustained injuries.

{¶4} Within .3 seconds of striking Mr. Perrine, Mr. Masterson struck a motorcycle driven by Geoffrey Davis, and then traveled back across the westbound lane before crashing into a guardrail. Mr. Davis and his passenger, Theresa Miller, were also injured.

{¶5} Mr. Masterson was insured by MMIC, and his policy contained liability coverage for bodily injury with split limits of \$100,000 for "each person" and \$300,000 for "each accident." No dispute exists as to Mr. Masterson's liability, nor is there a

dispute that the collective value of the injuries sustained by Mr. Perrine, Ms. Hill, Mr. Reese, Ms. Mook, Mr. Davis, and Ms. Miller exceeded \$300,000.

{¶6} A dispute does exist, however, as to whether the incidents constitute one accident, limiting MMIC's liability to a single \$300,000 per accident payment, or whether they constitute two accidents, increasing MMIC's exposure in this case to, at most, \$500,000. Ms. Miller and Mr. Davis contend that Mr. Masterson's collision with their motorcycle constitutes a separate accident from the initial collision with Mr. Perrine's motorcycle, and that they are entitled to a separate \$300,000 per accident payment.

{¶7} Because MMIC's liability for at least one accident was not disputed, the parties entered into a Covenant Not to Execute, which provided that MMIC would make one "each accident" payment of \$300,000 to be split among the six injured parties, but provided for the ability to file a declaratory action seeking interpretation of MMIC's policy, and determination of whether the incidents constituted one or two accidents. The Covenant Not to Execute further provided that, should a court determine the incident to be two accidents, MMIC would pay an additional \$100,000 each to Ms. Miller and Mr. Davis.

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{¶32} The assignment of error is meritorious and the judgment of the Court of Common Pleas of Portage County is reversed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.

of material fact. "To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. * * * If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293. After the movant has met that burden, the defending party cannot rest on his pleadings, but must produce some credible evidence on those issues upon which he bears the burden of proof at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, at paragraph three of the syllabus.

III. STIPULATION OF FACT

The parties' stipulation of fact establishes that Motorist's insured, Defendant Daniel Masterson ("Tortfeasor"), was driving on a two lane highway approaching Plaintiffs. Plaintiffs were in the opposing lane riding motorcycles along with five other motorcycles, all being driven in a close group, two abreast, and in their proper lane. As the motorcycles drew near, Tortfeasor dropped his lighter on the floorboard of his vehicle. When he reached down to get the lighter, he took his eyes off the road and went left of center. Tortfeasor did not notice he was left of center until his vehicle struck the first motorcycle. He then claimed to have "blacked out."

The first motorcycle struck by Tortfeasor spun in circles toward the edge of the roadway and crashed on the pavement, seriously injuring the driver. Tortfeasor's vehicle continued left

of center almost striking a second motorcycle, which swerved toward the right edge of the roadway, struck the first motorcycle skidding into his path, and crashed. Tortfeasor, still left of center, then struck a third motorcycle, the one driven by Davis, causing Davis and Miller, his rider, to crash into a guardrail. They both suffered serious, disabling injuries.

The physical evidence at the scene revealed that after hitting the two motorcycles, Tortfeasor's vehicle swerved abruptly to the right and crashed into a guardrail.

The Ohio State Patrol conducted a crash scene analysis and produced a detailed "Reconstruction Report." The physical evidence at the crash scene established that the collisions between Tortfeasor and the first and third motorcycles occurred 24 feet apart. The data system recorder in Tortfeasor's vehicle confirmed that he was going 55 mph. The elapse time between the two collisions was also recorded and indicated that these two collisions happened 0.3 seconds apart. Calculating the speed of Tortfeasor's vehicle and the physical evidence showing the collisions were 24 feet apart confirmed the recorder's reading of 0.3 seconds between the two collisions.

The recorder also indicated that Tortfeasor's brakes were not applied throughout the collisions and his final crash into a guardrail.

Motorist tendered the limits of Tortfeasor's policy.

The parties stipulated that if the term "accident" used in Motorist's insurance policy is ambiguous, Plaintiffs shall receive

an additional \$100,000 each for their injuries. If, however, the term "accident" is not ambiguous, all the crashed motorcycles are limited to a single recovery under Motorist's maximum policy limit, which has already been tendered to all of those injured in the incident.

IV. ANALYSIS OF LAW AND FACT

A. Issue Presented

The legal issue is this: Does the term "accident" in Motorist's insurance policy have a clearly evident meaning, or is it ambiguous and subject to different, reasonable interpretations in the factual context presented.

Plaintiffs assert that Tortfeasor's collision with each separate motorcycle is a separate "accident" under Motorist's policy, thus allowing multiple recoveries under the "Each Accident" portion of the policy. Motorist, on the other hand, maintains that Tortfeasor's collisions with the motorcycles are a single "accident" under its policy, thus limiting Plaintiffs and the other injured riders to a single recovery under the "Each Accident" portion of the policy.

B. Standard of Interpretation

The construction of insurance contracts is a matter of law. In construing contracts common words are given their ordinary meaning unless manifest absurdity would result, or unless some other meaning is clearly evident from the overall contents of the

insurance policy. Where the provisions of an insurance policy are clear and unambiguous courts will not enlarge the scope of the terms of the contract by implication in order to adopt a meaning different from that contemplated by the parties.

But where the language of an insurance policy is ambiguous and subject to different, reasonable interpretations, construction of the contract by the court is appropriate to resolve the ambiguity. Where the insurer has solely determined the policy language, an ambiguous term is construed most favorably for the insured.

C. Application of Law to Motorist's Policy

The parties have stipulated to the facts, so there is no dispute as to what happened.

Here, Tortfeasor negligently collided with two motorcycles and ran another off the road. The whole incident was one brief continuous course of conduct. Tortfeasor had lost proper control of his vehicle, crossed the center line toward six grouped motorcycles approaching in their proper lane, crashed into two motorcycles and ran another off the road, and then recrossed the center line and crashed into a guardrail. The two actual collisions with motorcycles occurred 24 feet apart, happening in 0.3 seconds. Plaintiffs were severely injured.

This legal dispute centers on whether the motorcycle crashes are separate "accidents" under the terms of Motorist's insurance policy. If each crashed motorcycle is a separate "accident," Plaintiffs are entitled to the stipulated recovery allowing

\$100,000 to each Plaintiff.

Motorist's insurance policy does not set out an expressed definition of "accident" or "auto accident," so the other provisions of the policy must be examined in order to discern the meaning of the word "accident."

Motorist's policy declaration lists the coverages and limits of liability as being \$100,000 for "Each Person" and \$300,000 for "Each Accident."

The "Limit of Liability" section in the policy provides as follows:

"A. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one auto accident. This is the most we will pay regardless of the number of:

- "1. Insureds; (Emphasis sic)
- "2. Claims made;
- "3. Vehicles or premiums shown in the Declarations; or
- "4. **Vehicles involved in the auto accident.**" (Emphasis added).

This policy provision expressly states that the maximum limit of coverage for all damages resulting from "one auto accident" is \$300,000, "regardless of the number of * * * [v]ehicles involved in the auto accident." (Emphasis added). This provision is clear that the term "accident" or "any one auto accident" includes all the vehicles involved in the collision. This term cannot be separated into numerous "accidents" arising from the same incident.

Motorist's policy language gives the term "accident" a clear and evident meaning in the context of the stipulated facts presented. The expressed wording of the policy clearly limits the term "accident" to include the whole incident, regardless of the number of vehicles involved. Any reasonable policy holder (here, the Tortfeasor) reading Motorist's policy would conclude that an "accident" included all vehicles involved. Thus, the term "accident" is not ambiguous and not subject to a different, reasonable interpretation.

In conclusion, the provisions of Motorist's insurance policy render the term "accident" clear and unambiguous. As there is no ambiguity, this Court cannot change the policy terms in order to adopt a meaning different from that contemplated by the parties to the policy. Plaintiffs are therefore limited to a single recovery under the "Each Accident" portion of Motorist's policy, regardless of the number of motorcycles involved in the incident. Thus, Plaintiffs cannot access the additional amounts of recovery stipulated between the parties.

(1) Plaintiffs' arguments.

Plaintiffs principally rely upon *Nationwide Mut. Ins. Co. v. Godwin*, 11th Dist. No. 2005-L-183, 2006-Ohio-4167, which found that the words "accident" and "occurrence" were not defined in the insurance policy, and concluded that those terms were ambiguous under the facts presented in that case. But in *Godwin*, the appeals court apparently had insufficient policy language to help define

the terms "accident" or "occurrence." Here, in contrast, Motorist's policy expressly includes in "any one accident" all the vehicles involved, and limits any recovery to a single recovery under the "Each Accident" portion of the policy.

Finally, Plaintiffs admit that a rear-end collision damaging multiple vehicles would be one "accident" under the Motorist's policy. But there is no legal or practical difference between a succession of collisions caused by a single vehicle striking one vehicle ahead of it - which strikes the next vehicle ahead, and where a single vehicle strikes multiple vehicles in succession. The same active continuous force is causing damage to multiple vehicles. Motorist's policy clearly applies to both types of accidents, and the results should be the same.

V. CONCLUSION

Upon review and consideration of the motions, pleadings, and stipulations of the parties filed herein, and construing the evidence most strongly in favor of the opposing party, the Court finds that there exists no genuine issue of material fact, and that Motorist is entitled to declaratory judgment as a matter of law.

IT IS THEREFORE ORDERED that the motion of Defendant Motorist Mutual Insurance Company for summary judgment seeking declaratory relief against Plaintiffs Theresa Miller and Geoffrey Davis be and hereby is granted, and it is declared that the term "accident" as used in Motorist's policy of insurance is not ambiguous and

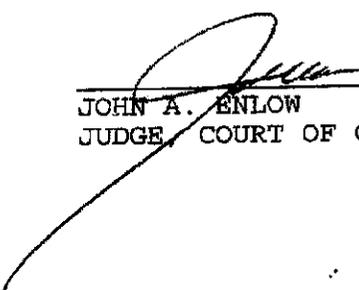
provides a single recovery to Plaintiffs under the "Each Accident" portion of Motorist's policy in a collision involving multiple motorcycles.

IT IS FURTHER ORDERED that the motion of Plaintiffs Theresa Miller and Geoffrey Davis for summary judgment seeking relief against Defendants Motorist Mutual Insurance Company and Daniel Masterson be and hereby is denied.

Costs taxed to Plaintiffs.

The Clerk is directed to serve upon all parties notice of this judgment and its date of entry upon the journal in accordance with Civ. R. 58(B).

SO ORDERED.



JOHN A. ENLOW
JUDGE, COURT OF COMMON PLEAS

cc: Robert P. Rutter, Attorney for Plaintiffs
Merl D. Evans, III, Attorney for Motorist

**NOTICE: AN ORDER HAS BEEN FILED
IN THE CASE IDENTIFIED BELOW:**

Notice is being mailed by regular mail on or before the 3rd day after the filing date of the entry to each attorney of record or each party with no attorney of record. Notice will not be sent to parties in default for failure to appear.

Mail to:

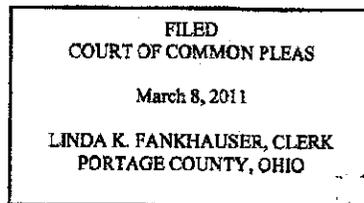
File Copy

Case Number: 2010 CV 00428

THERESA MILLER et al VS. MOTORISTS MUTAL INS CO et al

Date entry was filed: MARCH 8, 2011

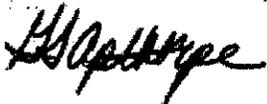
Court of Common Pleas, Portage County, Ravenna , Ohio



Certificate of Service Completed and filed by the Clerk

The document described above was mailed by ordinary mail to attys/parties by the clerk on MARCH 8, 2011.

Linda K Fankhauser, Clerk of Courts



Deputy Clerk

cc:

**MERLE D EVANS III
ROBERT PAUL RUTTER**

SCANNED