

ORIGINAL

IN THE SUPREME COURT OF OHIO

THERESA MILLER, et al.	:	Case No. 2012-0053
	:	
Appellees	:	On Appeal from the
	:	Portage County Court of Appeals
vs.	:	Eleventh Appellate District
	:	
MOTORISTS MUTUAL INSURANCE	:	Court of Appeals
COMPANIES, et al.	:	Case No. 2011-P-0016
	:	
Appellant	:	

**AMICUS CURIE BRIEF OF THE OHIO ASSOCIATION OF CIVIL TRIAL
ATTORNEY'S URGING REVERSAL ON BEHALF OF APPELLANT
MOTORISTS MUTUAL INSURANCE COMPANIES**

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INTRODUCTION

This case presents the Court with the opportunity to clarify the appropriate standard of law Ohio courts should follow in determining the number of accidents that occurred for purposes of liability coverage under an insurance policy.

The facts of this particular matter involve an automobile accident where the tortfeasor lost control of his vehicle, crossed the center line and struck two motorcycles .3 seconds apart and caused a third to drive off of the roadway. The legal dispute to be clarified involves what test the court should employ in deciding the number of “accidents” that took place in this continuous and uninterrupted event. The trial court employed the majority view of the “causation approach” and found that one accident took place “regardless of the number of *** [v]ehicles involved in the auto accident.” On appeal, the Eleventh District Court of Appeals reversed and found that an ambiguity exists in the Motorists insurance policy requiring it to rely upon the effect approach in finding that two accidents occurred.

In determining the number of accidents or occurrences under liability insurance policies, courts have generally applied one of three general approaches: the causation view, which focuses on the cause or causes of the accident; the effect view, which focuses on the effect or result of the accident; or the liability triggering event view, which focuses on the liability triggering event. *Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. Nos. 91932, 92002, 2009-Ohio-1783, citing *Banner v. Raisin Valley, Inc.* 31 F.Supp.2d 591 (N.D. Ohio 1998).

In considering these varied approaches, Ohio courts have consistently applied the “causation approach” in determining the number of “accidents” or “occurrences” 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 (1st Dist.); and *Dutch Maid Logistics, Inc.*, 2009-Ohio-1783. This is true even in cases where the insurance policy did not define the term “accident” or “occurrence.” Despite this, the Eleventh District of Court of Appeals rejected the “cause approach” and employed the “effect view” in reversing the trial court’s finding of a single accident

The Eleventh District’s decision to diverge from the majority of Ohio courts has drawn the interest of The Ohio Association of Civil Trial Attorneys (“OACTA”) which is an organization of over 500 attorneys, corporate executives and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of claims against individuals, corporations and governmental entities. For nearly 50 years, OACTA’s mission has been to provide a forum where such professionals can work together on common problems and promote and improve the administration of justice in Ohio.

In furtherance of this mission, OACTA submits this Amicus Curiae Brief urging this Court to reject the “effect” test and adopt a qualitative “cause” approach that considers the temporal connection between the alleged negligent act and the injuries when determining the number of accidents that occurred for purposes of liability coverage under an insurance policy.

STATEMENT OF THE CASE AND FACTS

On the evening of July 12, 2008, Daniel Masterson was driving his vehicle west on State Route 5 in Portage County, Ohio. Traveling in the opposite direction was a collection of six (6) motorcyclists and their passengers. As Masterson and the motorcycles were about to pass each other, Masterson lost control of his vehicle and crossed the center line, entering the lane of travel occupied by the motorcyclists.

Masterson first struck the motorcycle operated by David Perrine. Almost immediately after striking Perrine's motorcycle, Masterson struck the motorcycle operated by Geoffrey Davis. These impacts occurred .3 seconds apart.¹ Traveling behind Perrine was Michael Reese. He tried to avoid the accident, but was unable to avoid hitting Perrine's motorcycle and slid off of the roadway. Each driver and their passenger were injured.

Masterson was insured by Appellant Motorists Mutual Insurance Companies. His automobile insurance policy contained liability coverage for bodily injury damages with limits of \$100,000 for "each person" and \$300,000 for "each accident."

The six (6) individuals injured in this accident each filed a claim against Masterson for their respective injuries. The claims presented by these six individuals combined to exceed \$300,000 in damages. Following the submission of these multiple claims, a dispute arose as to whether this continuous and uninterrupted event constituted one accident or two accidents.

Plaintiffs/Appellees ultimately filed a declaratory judgment action seeking a judicial determination of whether this case presents a single accident or multiple accidents under the automobile insurance policy issued by Appellant Motorists.

After submitting cross-motions for summary judgment, the Trial Court concluded that this accident constituted a single accident under the Motorists policy. The Motorists insurance policy's Insuring Agreement states:

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

¹ Ohio Courts have judicially noticed that the average person's reaction time is about three-fourth of a second. *Ashbrook v. Cleveland Ry. Co.*, 33 Ohio Law Abs. 497, 34 N.E.2d 992 8th Dist. 1941); *State v. Bush*, 88 Ohio Law Abs. 161, 182 N.E.2d 43 (7th Dist. 1962).

The term accident is not specifically defined in the Motorists policy. However, the policy clearly contemplates and recognizes that multiple claimants could be injured in a single accident in the Limitation of Liability clause. The Limitation of Liability section states:

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 a 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 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.

Based upon the facts of this accident and the language of the Motorists policy, the Trial Court concluded that “the provisions of Motorists’ insurance policy render the term ‘accident’ clear and unambiguous.... Plaintiffs are therefore limited to a single recovery under the “Each Accident” portion of the Motorists’ policy, regardless of the number of motorcycles involved in the incident.”

Without consideration of *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 26, 2003-Ohio-5849 at ¶11, when this Court stated that “[a]s a matter of law, a contract is unambiguous if it can be given a definite legal meaning”, the Eleventh District Court of Appeals reversed, finding the language of the Motorists policy ambiguous based solely on the failure to define the word “accident.” However, as this Court stated in *Randolph v. Grange Mut. Cas. Co.*, 57 Ohio St.2d 25 (1979), the word “accident” does have a definite legal meaning. Despite this, the Court of

Appeals erroneously presumed an ambiguity in the policy. Compounding this error, the Court of Appeals refused to apply the causation approach in determining the number of accidents that were involved in this single event. Rather, the court felt compelled to employ the effect approach as suggested by the claimants in concluding that it “must” find that two accidents occurred.

Motorists has prosecuted this appeal to this Court. In accepting this appeal, this Court agreed to review Proposition of Law No. I.

LAW AND ARGUMENT

PROPOSITION OF LAW: 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.

The Motorists insurance policy states that it will pay damages for bodily injury that an insured is responsible to pay because of an “auto accident.” Therefore, in order for Plaintiffs/Appellees to recover for their bodily injury damages under the Motorists policy, their damages must have been caused by an “accident.”

The Motorists policy does not define the term “accident.” Because of this, the Court of Appeals incorrectly declared that the term is ambiguous. In doing so, the Court of Appeals stated that:

MMIC had the opportunity to define “accident” and construct its policy in a way that 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 [Plaintiffs/Appellees].

Miller v. Motorists Mut. Ins. Co., 196 Ohio App.3d 753, 2011-Ohio-6099 (11th Dist.), ¶31.

Just because Motorists did not take the opportunity to expressly define the term “accident” does not mean that the term is ambiguous. According to this Court, the amount of definition needed to avoid ambiguity in an insurance policy is not very high: “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. *Galatis*, 100 Ohio St.3d 26, 2003-Ohio-5849 at ¶11. In other words, the language in an insurance policy is to be understood in its ordinary, usual or popular sense and in such a way as to reflect the presumed intent of the parties. *See, Randolph*, 57 Ohio St.2d at 28.

In *Randolph*, this Court has already held that the undefined word “accident” as used in an insurance policy has the definite legal meaning of “an unexpected, unforeseeable event. *Randolph*, 57 Ohio St.2d at 29.

In *Westfield Ins. Co. v. Coastal Group, Inc.*, 9th Dist. No. 05CA008664, 2006-Ohio-153 (Jan 18, 2006), the Court stated the rule as follows:

The CGL Policy does not define “accident.” However, it is axiomatic that ‘where common words appear in a written instrument, they will be given their ordinary meaning unless ‘manifest absurdity’ results or unless some other meaning is clearly intended from the face or overall contents of the instrument.’”

Id., at ¶13.

In *State Farm & Cas. Co. v. Boyson*, 8th Dist. No. 76194, 2000 WL 897361 (July 6, 2000), the Court explained:

“An ‘accident’ is an event proceeding from an unexpected happening or unknown cause without design and not in the usual course of things....This understanding comports with both the plain and ordinary usage of the word in everyday affairs, and with prior pronouncements of the courts of Ohio.”

Id., at *5, citing, *Aguiar v. Tallman*, 7th Dist. No. 97CA116, 1999 WL 148367 (March 15, 1999).

Based upon this long standing Ohio precedent, the term “accident” is not ambiguous. Accordingly, the Eleventh District erred in relying on the lack of a definition in the Motorists policy as a basis for construing that policy in favor of the claimants. Motorists’ use of the undefined term “accident” does not require the court to acquiesce to the wishes of a claimant

seeking to be paid. Such an approach leads to a “manifest absurdity.” *See, Galatis*, 100 Ohio St.3d at ¶34-39, *citing West v. McNamara*, 159 Ohio St. 187, 197 (1953) as holding:

The universal rule that insurance policies are to be construed strictly in favor of the insured operates in favor of such insured persons as are covered by the policy, and *** is not applicable to extend the coverage of the policy to absurd lengths so as to provide a right of action ***”

Implicit in tort law is the concept of proximate cause. Consistent with this, the Insuring Agreement in the Motorists policy requires that recoverable bodily injury damages must be a proximate cause of an auto accident. The Court of Appeals erred by failing to give effect to the express condition of proximate cause set forth in the Insurance Agreement. Rather, the court should have performed a proper causation analysis that included a review of the temporal and sequential relationship between the negligent act and the injuries to determine the correct standard to follow when ruling on the question of how many accidents occurred as a result of the single event caused by Mr. Masterson crossing the center line of State Route 5.

This Court has consistently required such a qualitative causal relationship between the alleged accident, event, happening or uninterrupted, continuous and repeated exposure to certain conditions and the alleged injuries that are recoverable under a liability insurance policy.

In *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, this Court addressed the degree of the causal connection required between an alleged occurrence and consequent injury. In *Anders*, in pertinent part, two homebuyers sued two home-sellers for negligent failure to disclose structural, electrical, mechanical, and plumbing defects in the home they sold. The sellers sought defense and indemnity from their homeowners and umbrella policies—claiming that the buyers' lawsuit sought damages because of "property damage" *caused by* an occurrence. This Court acknowledged there may be "property damage" and there may be an "occurrence", however, the "occurrence" alleged by the buyers *did not cause* the

"property damage" sought in the lawsuit, explaining:

For liability coverage to exist, the property damage must "arise out of an occurrence," that is, an accident resulting in property damage. The property damage in this case was alleged to have been caused by the faulty installation of insulation. The occurrence for purposes of the policy was not the nondisclosure of the damage.

Id. at ¶35.

Even though the nondisclosure may have been causally connected with the buyers' damages in a remote way, it was not sufficiently causally connected to qualify as an "occurrence" for purposes of the liability insurance available to the sellers because it was not the actual instrumentality that caused the complained of "property damage". This was true even though the nondisclosure was closer in time to the buyers' damages than the faulty installation that actually caused the "property damage".

This qualitative causal analysis is consistent with this Court's treatment of causal-connection insurance provisions in other contexts. For instance, for nearly thirty years, this Court has been clear and unequivocal that for damages to "arise out of the ownership, maintenance or use of the uninsured motor vehicle, the uninsured motor vehicle must be the specific instrumentality causing the damages not just a remote cause. *Kish v. Central Nat'l Ins. Grp. Of Omaha*, 67 Ohio St.3d 41, 49-52 (1981); *Lattanzi v. Travelers Ins. Co.*, 72 Ohio St.3d 350, 1995-Ohio-189; *Estate of Nord v. Motorists Mut. Ins. Co.*, 105 Ohio St.3d 366, 2005-Ohio-2165. This Court has rejected a "but-for" analysis in this context, explaining that "[a] 'but for' analysis is inappropriate to determine whether recovery should be allowed under uninsured motorists provisions The relevant inquiry is whether the chain of events resulting in the accident was unbroken by the intervention of any event unrelated to the use of the vehicle." *Kish*, 67 Ohio St.2d at 50.

The Motorists policy at issue in this case provides that it will pay bodily injury damages that were caused by an unexpected or unintended happening or event. Expressly included within this Insuring Agreement is the concept of proximate cause. In *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, syllabus, this Court explained that policy language imposing a causation requirement is satisfied where there is a direct connection between the injury and the occurrence:

It is recognized that "arising out of" is one that "suggests the necessity for a causal connection between the premises and the injury. Ordinarily, 'arising out of' does not mean merely occurring on or slightly connected with but connotes the need for a direct consequence or responsible condition. As we view it, to satisfy the 'arising out of' exclusion in the policy, it would be necessary to show that the premises, apart from the insured's conduct thereon, was causally related to the occurrence." (Citations omitted).

Because an argument can be made that all events and happenings are causally connected in some metaphysical way, a qualitative causal analysis between the event and the resulting injuries has been critical to obtaining, reasonable interpretations of insurance policies. Use of the "effect" approach will relegate an insurance policy's liability limits to a near surplusage, applying only to accidents involving one vehicle and one passenger, while subjecting insurers to unpredictable and potentially enormous liability in numerous cases. See, *State Auto Property & Cas. Co. v. Matty*, 286 Ga. 611 (2010).

Courts applying the more balanced and reasonable "cause" approach analyze whether a single event is the proximate, uninterrupted and continuing cause of the alleged multiple injuries. If so, then there was one single accident.

If another cause intervenes between the negligence of the insured and the alleged multiple injuries, then there is more than one accident.

In *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, the First Appellate District, in an

asbestos case, stated that “[u]nder the cause test, the number of occurrences is determined by reference to the cause or causes of the damage or injury, rather than the number of individual claimants.” 175 Ohio App.3d 266, 2007-Ohio-5576, ¶45 (1st Dist.).

Similarly, the Supreme Court of Wisconsin adopted the “cause” approach and pronounced:

Wisconsin has adopted the “cause theory” to determine how many occurrences have taken place ... Under the cause theory, ‘where a single, uninterrupted cause results in all of the injuries and damage, there is but one ‘accident’ or ‘occurrence’” ... “If the cause is interrupted or replaced by another cause, the chain of causation is broken and there has been more than one accident or occurrence.”

Plastics Eng. Co. v. Liberty Mut. Ins. Co., 315 Wis.2d 556, 759 N.W.2d 613 (2009).

The State of Georgia also recently adopted the “cause” approach in the context of vehicle accidents that involve multiple collisions that do not occur simultaneously. *See, Matty*, 286 Ga. at 613. In this case, the court recognized that it is almost impossible for multi-vehicle crashes to occur without any difference in time and place. As a result, the Georgia Supreme Court instructed the lower courts to 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 that there was a second intervening cause and therefore a second accident, for purposes of insurance coverage. *Id.* at 614-17.

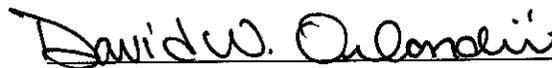
In applying the “cause” approach to the case at hand, it is patently clear that Masterson’s act of crossing the center line and crashing into Plaintiffs/Appellees’ motorcycles .3 seconds apart was a single, continuous, uninterrupted event that resulted in multiple injuries. Masterson never regained control of his vehicle after the first impact with the Perrine motorcycle and before he struck the Davis motorcycle. As a result, this Court should reverse the Eleventh District’s decision finding that two accidents occurred, and it should clarify

the law of Ohio by adopting the cause approach in determining the number of accidents or occurrences under liability insurance policies.

CONCLUSION

When determining the number of accidents/occurrences under liability insurance policies, this Court should apply the causation approach, following the well-reasoned analysis adopted in the *Banner v. Raisin Valley, Inc., supra*; *Progressive Preferred Ins. Co. v. Derby, supra*; *Greater Cincinnati Chamber of Commerce v. Ghanbar, supra*; and *Dutch Maid Logistics, Inc. v. Acuity, supra*, cases, and by the Wisconsin and Georgia Supreme Courts. Here, a single event caused the accident at issue and, therefore, is a single accident with multiple injuries; it was not multiple accidents that resulted in multiple injuries. For all of the above reasons, the decision from the Eleventh District Court of Appeals should be reversed.

Respectfully Submitted,



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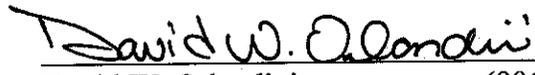
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