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IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF PLAINTIFFS-APPELLEES THERESA MILLER, ET AL.

Richard M. Garner (0016734)
David W. Orlandini (0064850)
DAVIS & YOUNG, LPA
140 Commerce Park Drive, Suite C
Westerville, Ohio 43082
(614) 901-9600
Email: rgarner@davisyoung.com

Counsel for Amicus Curiae
The Ohio Association of Civil Trial Attorneys

Robert P. Rutter (0021907)
RUTTER & RUSSIN, LLC
One Summit Office Park, Suite 650
4700 Rockside Road
Independence, Ohio 44131
(216) 642-1425
brutter@ohioinsurancelawyer.com
Counsel for Plaintiffs/Appellees Theresa

Merle D. Evans, III (0019230)
DAY KETTERER, LTD.
Millennium Centre, Suite 300
200 Market Avenue, North
Canton, Ohio 44701-4213
(330) 455-0173
Email: mdevans@day-ketterer.com
Counsel for Defendant /Appellant Motorists Mutual Insurance Companies

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

ARGUMENT OPPOSING MOTORISTS' PROPOSITION OF LAW 1

Motorists' Proposition of Law Number 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.

CONCLUSION 15

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Case	Page
Akins v. Harco Ins. Co., 158 Ohio App.3d 292, 2004-Ohio-4267, 815 N.E. 2d 686 (6th Dist.).....	7
Am. Cynamid Co. v. Am. Home Assurance Co. 30 Cal. App. 4th 969, 35 Cal. Rptr. 2d 920 (Cal. Dist. Ct. App. 1994.....	2
Am. Red Cross v. Travelers Ind. Co. 816 F. Supp. 755 (D.D.C. 1993).....	15
Anchor Cas. Co. v. McCaleb 178 F. 2d 322 (5th Cir. 1950).....	8, 9
Banner v. Raisin Valley Inc. 31 F.Supp. 591, 592 (N.D. Ohio 1998).....	3, 12
Butche v. Ohio Cas. Ins. Co. 174 Ohio St. 144, 187 N.E.2d 20 (1962).....	7
Cincinnati Insurance Co. v. ACE INA Holdings 175 Ohio App. 3d 266, 2007-Ohio-5576, ¶56, 886 N.E.2d 876 (1st Dist.).....	2, 8, 12
Dutch Maid Logistics, Inc. v. Acuity 8th Dist. Nos. 91932, 92002, 2009-Ohio-1783, 2009 WL 1019857 (Apr. 16, 2009).....	6, 8, 15
Freylack v. Dichiro 8th Dist. No. 52770, 1987 WL 30377 (Dec. 24, 1987).....	5
George H. Olmsted & Co. v. Metro Life Ins. Co. 118 Ohio St. 421, 161 N.E. 276 (1928).....	9
Grange Mut. Cas. Co. v. Tumbleson 4th Dist. No. 03CA2898, 2004-Ohio-2180 (Apr. 23, 2004).....	5
Greater Cincinnati Chamber of Commerce v. Ghanbar 157 Ohio App. 3d 233, 2004-Ohio-2724, 810 N.E.2d 455 (9th Dist. 1986)...	8
Haimbaugh v. Grange Mut. Cas. Co. 10th Dist. No. 07AP-676, 2008-Ohio-4001, 2008 WL 3198723 (Aug. 7, 2008).....	5

Harbor Ins. Co. v. Central Nat'l Ins. Co.
211 Cal. Rptr. 902, 906 (1985 Cal. App.)..... 10

Hartford Accident & Indemn. Co. v. Wesolowski
305 N.E.2d 907 (N.Y. Ct. App. 1973)..... 9

Havel v. Grange Mut. Cas. Co.
11th Dist. No. 2004_G-2609, 2006-Ohio-7014, 2006 WL 3833871
(Dec. 29, 2006)..... 5

In re Prudential Lines, Inc.
158 F. 3d 65 (2nd Cir. 1998)..... 15

Johnson v. Hunter
688 S.E.2d 593, 595, fn.1 (S.C. 2010)..... 12

Liberty Mut. Ins. Co. v. Rawls
404 F.2d 880 (5th Cir. 1969)..... 8

Longaberger Co. v. U.S. Fidelity & Guar. Co.
31 F.Supp. 2d 595 (S.D. Ohio 1998)..... 6

Nationwide Mutual Ins. Co. v. Godwin
2nd Dist. No. 21012, 2006-Ohio-4167, ¶ 48, 2006 WL 2335559
(Aug. 11, 206)..... 4, 10, 11, 12

Nicor Inc. v. Associated Elec. And Gas Ins. Servs. Ltd.
860 N.E.2d 280 (Ill. 2006)..... 6

Owens-Illinois v. Aetna Casualty & Surety Co.
597 F. Supp. 1515 (D.D.C. 1984)..... 14

Progressive Preferred Ins. Co. v. Derby
6th Dist. No. F-01-002, 2001 WL 672177 (June 15, 2001)..... 3, 4, 12

Randolf v. Grange Mut. Cas. Co.
57 Ohio St. 2d 25, 385 N.E.2d 1305 (1979)..... 5

Safeco Ins. Co. v. White
122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426..... 5

State Auto Property & Cas. Co. v. Matty
690 S.E.2d 614, 620 (Ga. 2010)..... 10

Sterling Merch. Co. v. Hartford Ins. Co.
30 Ohio App. 3d 131, 506 N.E.2d 1192 (9th Dist. 1986)..... 8

Soc'y of Roman Catholic Church v. Interstate Fire & Cas. Co.
26 F.3d 1359 (5th Cir. 1994)..... 14

Thompson v. Government Emp. Ins. Co.
592 P.2d 1284 (Ariz. App. 1979)..... 9

U.E. Texas One-Barrington, Ltd. V. General Star Indemnity Co.
243 F.Supp.2d 652 (W.D. Tex. 2001)..... 14

Westfield Ins. Co. v. Galatis
100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256..... 2

Westfield Cos. V. Gibbs
11th Dist. No. 2004-L-058, 2005-Ohio-4210, 2005 WL 1940305
(Aug. 12, 2005..... 5

Miscellaneous

Couch on Ins. §21:14 (3d Ed.)..... 9

STATEMENT OF FACTS

All of the facts are contained in the Stipulations agreed to by the parties. Plaintiffs do not have any significant disagreements with Motorists' recitation of the facts.

ARGUMENT OPPOSING MOTORISTS' PROPOSITION OF LAW

Motorists' Proposition of Law Number 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.

I. THE RELEVANT POLICY LANGUAGE

Section A of Motorists' liability insurance policy, form PP 70 02 (10-06), page 2 of 12, grants coverage under the following terms:

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

The policy limits liability coverage for bodily injury "because of an auto accident" to $100,000 "each person" and $300,000 "each accident."

Under Limit of Liability, Section D, the policy further provides that:

> 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 form 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.

The policy does not define "accident."

II. POLICY CONSTRUCTION IS BASED ON THE LANGUAGE OF THE POLICY AND IS NOT CONTROLLED BY A "ONE SIZE FITS ALL" APPROACH.

Motorists' proposition of law requires this Court to ignore longstanding rules of insurance policy construction, which give great significance to policy language, and instead use a "one size fits all" approach.

Under Ohio law, construction of an insurance policy requires the court to examine the language of the contract and to presume that the intent of the parties is reflected in the language used in the policy. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

In accordance with this view, the court stated in *Am. Cynamid Co. v. Am. Home Assur. Co.*, 30 Cal. App. 4th 969, 35 Cal. Rptr. 2d 920 (Cal.Dist.Ct.App. 1994):

> In questions of insurance coverage the court's initial focus must be upon the language of the policy itself, not upon 'general' rules of coverage that are not necessarily responsive to the policy language.

See also Cincinnati Ins. Co. v. ACE INA Holdings, 175 Ohio App. 3d 266, 2007-Ohio-5576, ¶56, 886 N.E.2d 876 (1st Dist.) in which the court stated:

> We note that in calculating the number of occurrences under an insurance policy, blanket judicial application of any one test could frustrate the contracting parties' intent. Courts must adhere to policy language in making a determination whether the cause test applies.

Motorists asks this Court to adopt the "causation approach" as a general rule applicable to all insurance policies, regardless of their policy language. This request runs counter to well-established rules of insurance contract interpretation and should be rejected by the Court.

III. THE TERM "ACCIDENT" IS NOT DEFINED IN THE POLICY, THUS DISTINGUISHING THIS CASE FROM MOST OF THE CASES RELIED ON BY MOTORISTS.

Motorists' policy does not define the term "accident." Most of the Ohio cases on which Motorists relies *did* define "accident," and they defined it in a technical manner that does not appear in any dictionary. For example, the policy in *Progressive Preferred Ins. Co. v. Derby*, 6th Dist. No. F-01-002, 2001 WL 672177 (June 15, 2001) defined "accident" as:

> [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.

The policy also stated in the Limit of Liability provision that:

> 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.

Similarly, the Reliance policy in *Banner v. Raisin Valley, Inc.*, 31 F.Supp.2d 591, 592 (N.D. Ohio 1998) defined "accident" as "including continuous or repeated exposure to the same conditions resulting in bodily injury or property damage."

Dictionary.com contains several typical definitions of accident including (i) "an unforeseen event or one without an apparent cause," (ii) "an undesirable or unfortunate happening that occurs unintentionally and usually results in harm, injury, damage, or loss," and (iii) "a misfortune or mishap, especially one causing injury or death."

It is readily apparent that when insurance policies define "accident," they mean something more than the typical dictionary definition of "accident" – the term is defined to also include "continuous or repeated exposure" to the harmful event.

The court in *Nationwide Mut. Ins. Co. v. Godwin*, 2nd Dist. No. 21012, 2006-Ohio-4147, ¶48, 2006 WL 2335559 (Aug. 11, 2006), noted this difference:

> [B]oth 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.
>
> * * *
>
> In this case, Nationwide provided no definition of either "accident" or "occurrence" in its policy. A person unversed in the technicalities of insurance law might, therefore, easily conclude that Mr. Chepla's striking each of the Godwins, sequentially, constituted separate accidents or occurrences, rather than the single accident or occurrence of losing control of the minivan.

The Court of Appeals in the case at bar similarly noted and relied on the absence of a definition of the term "accident" in Motorists' policy:

> [T]he 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.
>
> [W]e 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.

In construing Motorists' policy, this Court must give the term "accident" its common every day meaning, and not the technical definition that appears in the cases being relied on by Motorists.

IV. THE TERM "ACCIDENT" MUST BE CONSTRUED FROM THE POINT OF VIEW OF THE INJURED VICTIM WHO IS SEEKING INSURANCE COVERAGE.

Motorists' policy language does not dictate from which vantage point this Court should determine the number of accidents. The policy is silent on this point. Therefore, the Court should construe the policy broadly in favor of coverage.

In doing so, this Court must construe the term "accident" from the standpoint of the injured parties – Geoffrey Davis and Theresa Miller. *See Safeco Ins. Co. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, ¶ 26 (noting that whether an act intentional or negligent must be viewed from the point of view of the person seeking coverage).

V. ONE REASONABLE INTERPRETATION OF "ACCIDENT" IS THAT THE TERM MEANS "COLLISION," AND THAT SEPARATE COLLISIONS WITH SEPARATE PERSONS RIDING ON SEPARATE VEHICLES CONSTITUTE SEPARATE ACCIDENTS.

Ohio courts have wrestled with the meaning of the term "accident" in numerous cases and contexts. *See e.g.*, *Randolf v. Grange Mut. Cas. Co.*, 57 Ohio St.2d 25, 385 N.E.2d 1305 (1979) (deciding whether insured incurring liability under R.C. § 3109.09 for intentional damage caused by another insured was "property damage caused by . . . an accident."); *Grange Mut. Cas. Co. v. Tumbleson*, 4th Dist. No. 03CA2898, 2004-Ohio-2180 (Apr. 23, 2004) (coverage issue was whether shooting was accidental versus intentional for purposes of finding an occurrence); *Freylack v. Dichiro*, 8th Dist. No. 52770, 1987 WL 30377 (Dec. 24, 1987) (deciding if an accident occurs if person riding on trunk of a car falls off and dies); *Westfield Cos. v. Gibbs*, 11th Dist. No. 2004-L-058, 2005-Ohio-4210, 2005 WL 1940305 (Aug. 12, 2005) (findings acts supporting fraud and trespass judgments not "accidents" under policy); *Havel v. Chapek*, 11th Dist. No. 2004-G-2609, 2006-Ohio-7014, 2006 WL 3833871 (Dec. 29, 2006) (finding negligent supervision an "accident" under policy); *Haimbaugh v. Grange Mut. Cas. Co.*, 10th Dist. No.

07AP-676, 2008-Ohio-4001, 2008 WL 3198723 (Aug. 7, 2008) (finding no "accident" where insured intended to cut down trees).

The term "accident" means different things in different contexts.

The typical meaning of "accident" is "an unforeseen and unplanned event or circumstance." MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/accident. Although this definition may seem clear in the abstract or when applied to certain facts, the word "accident" is ambiguous when applied to facts in the case at bar. The ambiguity of a policy provision must be judged in reference to the facts of the particular case. *See Longaberger Co. v. U.S. Fidelity & Guar. Co.*, 31 F. Supp. 2d 595 (S.D. Ohio 1998).

In the present case, relying on the plain meaning of "accident" for purposes of determining the number of accidents under an auto liability policy is problematic because what seems like a single unforeseen event to the person triggering the incident may be perceived as multiple accidents from those who sustained injury or damage as a result of the insured's conduct. *See Nicor Inc. v. Associated Elec. And Gas. Ins. Servs. Ltd.*, 860 N.E.2d 280 (Ill. 2006).

In short, the term "accident" is ambiguous because its plain meaning can support equating the term with "collisions" and a finding of either one or more accidents / collisions depending from which individual's perspective the Court views the "accident."

This ambiguity is reflected by the conflicting meanings that courts have ascribed to the term in calculating the number of accidents under an insurance policy's "each accident" liability limit. Generally, courts have interpreted "accident" in three ways: (1) the cause view, (2) the effects view, and (3) the event view. *See, e.g., Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. Nos. 91932, 92002, 2009-Ohio-1783, 2009 WL 1019857 (Apr. 16, 2009).

Under the cause view, the number of accidents is determined by referring to the cause or causes of the accident. That is, if one proximate, uninterrupted and continuing cause results in multiple injuries, then there is a single accident. Conversely, the effects view determines the number of accidents by looking at the effect an event had (*i.e.*, how many individual injuries result from an event). Finally, the event view appears to determine an accident by reference to the liability triggering event.

Thus, while an accident is clearly something that is unexpected, the term is nonetheless ambiguous because it can be reasonably construed in three ways:

(1) By reference to the cause or causes of the accident ("cause approach");

(2) From the point of view of the person being struck by the car, so that when each person was struck, an accident occurred to each person ("effects approach"); or,

(3) By reference to the number of events that resulted in the injuries and liability in question ("events approach").

In the present case, a layman would certainly conclude that only one accident occurred under scenario (1) or (3). Masterson's negligence and initial collision created the circumstances for the subsequent collisions and injuries.

But the same cannot be said under scenario (2). From Davis and Miller's point of view, being struck by Masterson's SUV constituted an accident / collision separate and apart from the one resulting from Masterson's collision with Perrine. When a policy can be reasonably interpreted in more than one way, the reviewing court **should not review the choices and pick the most reasonable interpretation**. Rather, the court *must* adopt the most liberal interpretation of the policy that is reasonably possible. *Butche v. Ohio Cas. Ins. Co.*, 174 Ohio St. 144, 187 N.E.2d 20 (1962); *see also Akins v. Harco Ins. Co.*, 158 Ohio App.3d 292, 2004-Ohio-4267, 815 N.E.2d 686 (6th Dist.) ("any reasonable construction which results in coverage of the insured

must be adopted by the trial court."); *Sterling Merch. Co. v. Hartford Ins. Co.*, 30 Ohio App.3d 131, 506 N.E.2d 1192 (9th Dist. 1986).

Because the policy term restricting MMIC's liability for "each accident" can be reasonably construed from the point of view of the person struck by Masterson's car, that interpretation must be adopted because it is the most liberal one under the facts of this case.

From Davis and Miller's point of view, Masterson's SUV first collided with Perrine's motorcycle, and then collided with Davis' motorcycle. Two separate collisions could be viewed to be two separate accidents. This is one reasonable interpretation of the undefined term "accident;" that is, that accident equates with collision.

VI. THE CAUSATION APPROACH IS NOT THE ONLY ACCEPTED APPROACH THAT CAN BE USED TO INTERPRET THE TERM "ACCIDENT."

Motorist points out that *Greater Cincinnati Chamber of Commerce v. Ghanbar*, 157 Ohio App.3d 233, 2004-Ohio-2724, 810 N.E.2d 455 (9th Dist. 1986), and a number of out-of-state decisions have applied the "causation approach" even when the term "accident" is not defined in the policy. While these decisions may represent one reasonable interpretation of the term "accident," they do not represent the only one.

However, as discussed above, courts have also calculated the number of accidents under an insurance policy's "each accident" liability limit by applying the "effects" view. *Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. Nos. 91932, 92002, 2009-Ohio-1783; *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 175 Ohio App.3d 266, 2007-Ohio-5576, 886 N.E.2d 876 (1st Dist.); *Anchor v. McCaleb*, 178 F.2d 322 (5th Cir. 1950); *Liberty Mut. Ins. Co. v. Rawls*, 404 F.2d 880 (5th Cir. 1969) (holding that impacts that occurred 2 to 5 seconds apart and 30 to 300 feet apart were two distinct collisions and accidents).

Under this view, the number of accidents is determined by looking at the effect an event had (*i.e.*, how many individual injuries resulted from it). *Anchor*, 178 F.2d at 324 ("[t]he wording 'each accident,' as used in the policy, must be construed from the point of view of the person whose property was injured.").

Still other courts apply the "event" view which determines an accident by reference to the liability triggering event. *Hartford Accident & Indemn. Co. v. Wesolowski*, 305 N.E.2d 907 (N.Y.Ct.App. 1973).

The fact that "accident" has been reasonably interpreted by courts in three different ways should make this Court wary of adopting the blanket causation approach advocated by Motorist. As noted in COUCH ON INSURANCE, 21:14 (3d. ed.):

> The fact that courts of several jurisdictions have arrived at different constructions as the meaning of the words in a policy provision, and in some instances have taken opposite views, is some indication that the terms are ambiguous.

When there is a split of opinion across the country on insurance policy construction, the rule in Ohio is set forth in *George H. Olmsted & Co. v. Metro. Life Ins. Co.*, 118 Ohio St. 421, 161 N.E. 276 (1928):

> Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent, and effect thereof, the question whether such clause is ambiguous ceases to be an open one.

See also Thompson v. Government Emp. Ins. Co., 592 P.2d 1284 (Ariz. App. 1979) ("[i]f judges learned in the law can reach so diametrically conflicting conclusions as to what the language of the policy means, it is hard to see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it.").

The better approach for this Court is to keep with its precedent and resolve this coverage issue by examining the particular language of the policy prepared by Motorists and applying the well-established rules of policy interpretation. This is precisely the approach advocated by the three dissenting judges in the *Matty* decision touted by Motorists:

> Adherence to this precedent eviscerates the need to adopt a hard and fast analytical approach from other jurisdictions . . . when certain terms in an insurance policy are undefined. 'The burden is on the insurer to make its intent clear and unmistakable and to explicitly show any exceptions to coverage.' * * * Here, it is unnecessary to adopt any of the theories requested by the district court because the matter may be resolved by rules of contract construction.

State Auto Prop. & Cas. Co. v. Matty, 690 S.E.2d 614, 620 (Ga. 2010); *see also Harbor Ins. Co. v. Cent. Nat'l Ins. Co.*, 211 Cal. Rptr. 902, 906 (1985 Cal. App.) (stating trial court erroneously applied blanket "occurrence" rule of coverage instead of focusing on the particular language of the policies involved).

VII. THE ELEVENTH DISTRICT COURT OF APPEALS ADOPTED A REASONABLE CONSTRUCTION OF THE TERM ACCIDENT IN *GODWIN* BY APPLYING STRAIGHT-FORWARD PRINCIPLES OF POLICY INTERPRETATION.

In *Nationwide Mut. Ins. Co. v. Godwin*, 2nd Dist. No. 21012, 2006-Ohio-4147, 2006 WL 2335559 (Aug. 11, 2006), Chepla seriously injured Mr. and Mrs. Godwin by striking them sequentially with his minivan when the Godwins were driving their respective motorcycles. Nationwide insured Chepla under a policy covering damages as a result of an "accident" and limiting Nationwide's liability for "each occurrence." In light of Nationwide's failure to define "accident" or "occurrence," the court found the policy ambiguous and recognized that "accident" or "occurrence" can be reasonably construed from the point of view of the person being struck by the automobile:

> In this case, Nationwide provided no definition of either "accident" or "occurrence" in its policy. A person unversed in the technicalities of insurance law might, therefore, easily conclude that Mr. Chepla's striking each of the Godwin's, sequentially, constituted separate accidents or occurrences, rather than the single accident or occurrence of losing control of the minivan.

Id. at ¶49. This is the correct analysis and conclusion. Rather than apply a blanket "per accident" rule advocated by Nationwide, the appellate decision in *Godwin* resolved the matter by rules of construction. Because a reasonable interpretation of the undefined term "accident" existed that favored the insureds, the court concluded that each of the Godwins were entitled to recovery up to the per occurrence policy limits.

VIII. THE ANALYSIS RELIED ON BY THE ELEVENTH DISTRICT COURT OF APPEALS IS CONFIRMED BY *ACUITY*, *BANNER*, AND *DERBY*.

The analysis relied on by *Godwin* and the court of appeals in this case is actually supported by several Ohio cases cited in Motorists' brief.

In *Acuity*, for instance, the court was called upon to decide whether the cause or effects view applied to determine the number of accidents that occurred under a motor vehicle policy. In doing so, the court noted the clear and definite meaning that the phrase "continuous or repeated exposure to same conditions" has acquired by consistent judicial construction:

> [C]ourts both within and outside of Ohio, that have addressed this issue uniformly follow the "causation" view, when, as here, the term 'accident' includes the unambiguous phrase 'continuous or repeated exposure to the same conditions' when referring to multiple parties involved in the same continuous course of conduct.

Because the definition of "accident" in the policy at issue included this unambiguous phrase, the *Acuity* court had no trouble concluding that a plain reading of the policy required application of the "cause" view.

Given this clear definition, the court also found *Godwin* distinguishable:

> [*Godwin*] is factually distinguishable from the case at bar in that it involved policy terms "accident" and "occurrence" that were left undefined by the drafters. Having no language to rely on in the policy, the Eleventh District construed such terms against the drafters and in favor of the insureds. Here, the policy terms are defined; the only discrepancy is how those terms should be applied. Therefore, [*Godwin*] is inapplicable to these facts. *Id.* at ¶27.

Similarly, the policies in both *Banner* and *Derby* defined "accident" to include "continuous or repeated exposure to the same conditions." Because this definition removed any ambiguity from the meaning of "accident," these courts applied the cause approach and found a single accident despite multiple vehicles and persons injured. *See Banner v. Raisin Valley, Inc.*, 31 F.Supp.2d 591, 594 (N.D. Ohio 1998) ("[t]he collisions in this case resulted from the "continuous or repeated exposure to the same condition," namely, a tractor trailer that struck four cars before coming to rest.").

The analysis set forth in *Acuity* and applied in *Banner* and *Derby* illustrates that when the policy contains an unambiguous definition of the term "accident," applying the cause test (or any other test) is simply a matter of giving effect to the clear policy language. *Cincinnati Ins. Co. v. ACE INA Holdings*, 175 Ohio App. 3d 266, 2007-Ohio-5576, ¶56, 886 N.E.2d 876 (1st Dist.).

For this reason, Motorists' suggestion that these courts also focused on issues of proximate cause to aid in the interpretation of "accident" is simply wrong. (*See* pg. 10 of Motorists' Brief). Issues such as "whether all injuries and damages arose out of a single proximate cause" only come into play once the court decides that the policy calls for the application of the "causation approach" in the first instance. *See Johnson v. Hunter*, 688 S.E.2d 593, 595, fn.1 (S.C. 2010).

In the present case, the terms of the policy did not require the cause test. As such, whether the collisions to Davis and Perrine's respective motorcycles arose out of a single

proximate cause was not determinative for purposes of calculating the number of accidents under the policy's "per accident" limit.

IX. THE OTHER POLICY LANGUAGE IDENTIFIED BY MOTORISTS DOES NOT ALTER THE OUTCOME AND, AT MOST, CREATES AN AMBIGUITY THAT MUST BE RESOLVED IN FAVOR OF COVERAGE.

Motorists also argues that the causation approach is supported by the Limit of Liability section which states that $300,000 is the "maximum amount of liability for all damages resulting from any one auto accident . . . regardless of the number of . . . claims made . . . or vehicles involved in the auto accident." Plaintiffs disagree.

The Limit of Liability language simply recognizes that, whatever the definition, an "accident" may involve more than one vehicle or claim. This language cannot aid in the interpretation of "accident" because the Limit of Liability provision only applies to events that *first meet the definition of "accident."* For this reason, the language in the Limit of Liability section of the policy is not helpful in making the initial determination of the meaning of "accident" because it is necessary to determine which events qualify as "accidents" before the limitation on accidents becomes applicable.

Motorists contends that under *Godwin* and the instant appeal, the limitation regarding the "number of 'vehicles involved in the auto accident' . . . would be rendered meaningless, inconsistent and would have to be totally ignored." This is not so. It is easy to visualize a single accident that involves more than one insured, claim, or vehicle.

For example, an insured driving three passengers rear-ends a car containing two people. The accident involves multiple claimants, claims, and vehicles, but it is still a single accident and the single limit of liability applies. In such a case, the most the insurer would be liable for is a

single "each accident" limit – even if four people are injured and the collective value of their injuries exceeds that amount.

The policy does not stipulate a limit of liability resulting from only one proximate cause. If Motorists wanted its policy to be interpreted in the same manner as those in which the "causation approach" has been followed, then it should have so defined the term "accident" in its policies.

X. THERE ARE OTHER FACT PATTERNS IN WHICH THE NUMBER OF ACCIDENTS OR OCCURRENCES MUST BE DETERMINED.

This case has implications far beyond the parameters of this case. Coverage under a standard CGL policy is triggered by an "occurrence," which is usually defined as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." Accordingly, the terms "accident" and "occurrence" are often used interchangeably, such that a ruling affecting one term will likely apply to the other.

As noted in STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES, §2.06(h)(2), "[m]any disputes turn on characterization of the number of occurrences because this is so important to determining the total amount of available insurance coverage."

See the following cases, for example:

- *Owens-Ill. v. Aetna Cas. & Sur. Co.*, 597 F.Supp. 1515 (D.D.C. 1984) (the manufacture and sale of insulation that resulted in the insured being named in thousands of asbestos-related lawsuits was a single occurrence);

- *U. E. Tex. One-Barrington, Ltd. v. Gen. Star Indem. Co.*, 243 F.Supp.2d 652 (W.D. Tex. 2001) (holding that numerous plumbing leaks throughout apartment complex caused by same plumbing defect constituted 19 separate occurrences for purposes of satisfying self-insured retention under excess policy);

- *Soc'y of Roman Catholic Church v. Interstate Fire & Cas. Co.*, 26 F.3d 1359 (5th Cir. 1994) (diocese's negligent supervision of priest who molested

several boys over course of several policy years constituted a separate occurrence for each boy for each policy year);

- *Am. Red Cross v. Travelers Ins. Co.*, 816 F.Supp. 755 (D.D.C. 1993) (each act of distributing HIV-contaminated blood from a single contaminated source constitutes a separate occurrence triggering a separate per occurrence limit);

- *In re Prudential Lines, Inc.*, 158 F.3d 65 (2nd Cir. 1998) (each claimant who was exposed to asbestos constituted a separate occurrence for purposes of applying the "per occurrence" deductible).

Note that insureds are not always on the same side when it comes to arguing about the number of occurrences. Sometimes an insured wants there to be multiple occurrences—such as when it is provided additional coverage through the triggering of multiple "per occurrence" limits. Sometimes, however, an insured wants all related conduct to constitute only one occurrence—such as when it wants to avoid numerous "per occurrence" deductibles or satisfy a "per occurrence" self insured retention.

The same analogy holds true for insurers. This is not an issue where one side necessarily loses and one side wins. Rather, the winner and loser in any particular situation depends on the underlying rationale for the determination of the number of accidents or occurrences.

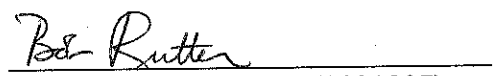
The point is that the issue before the Court is larger than the simple issue between Motorists and the Plaintiffs. The Court's ruling will very likely have an impact on many types of high-profile insurance coverage disputes because, as the court noted in *Dutch Maid*, "[f]ew Ohio courts have addressed this issue." Since neither side cited an opinion of this Court in their jurisdictional briefs, it is fair to conclude that the Ohio Supreme Court has not previously ruled on this or any similar issue.

XI. CONCLUSION

The actual terms of Motorists' auto insurance liability policy should dictate how the number of accidents is determined for purposes of applying the "per accident" liability limits.

For whatever reasons, Motorists chose not define "accident" in a way that required a finding of a single accident despite multiple vehicles and injuries resulting from one proximate cause. By leaving the term "accident" undefined, Motorists left its policy open to the reasonable interpretation that the number of accidents refers to the number of collisions for purposes of applying the "per accident" liability limit. This Court should decline Motorists' invitation to apply a blanket proximate cause "per accident" rule and affirm the Eleventh District's decision.

Respectfully submitted,



ROBERT P. RUTTER (0021907)
One Summit Office Park, Suite 650
4700 Rockside Road
Cleveland, Ohio 44131
(216) 642-1425
brutter@ohioinsurancelawyer.com

CERTIFICATE OF SERVICE

A copy of the foregoing has been forwarded by regular U.S. Mail upon the following on the 13th day of June, 2012:

Merle D. Evans, III
DAY KETTERER, LTD.
Millennium Centre, Suite 300
200 Market Avenue, North
P.O. Box 24213
Canton, Ohio 44701-4213

Counsel for Defendant/Appellant Motorists Mutual Insurance Companies

David W.Orlandini
Richard M. Garner
DAVIS & YOUNG, LPA
140 Commerce Park Drive Suite C
Westerville, Ohio 43082

Counsel for Amicus Ohio Association of Civil Trial Attorneys

Bob Rutter
ROBERT P. RUTTER