

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.	:	

REPLY BRIEF OF DEFENDANT/APPELLANT MOTORISTS MUTUAL INSURANCE COMPANY

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ARGUMENT

I. INTRODUCTION.

On May 18, 2012, Defendant/Appellant Motorists Mutual Insurance Company (hereinafter “Motorists”) filed its Merit Brief on the following Proposition of Law:

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.

Subsequently, Plaintiffs/Appellees Theresa Miller and Geoffrey Davis (hereinafter “Appellees”) filed their Merit Brief on June 14, 2012. In addition to the Merit Briefs filed by the parties, the Ohio Association of Civil Trial Attorneys has filed an Amicus Curiae Brief in support of the Appellant, and the Ohio Association for Justice (hereinafter “OAJ”) has filed an Amicus Curiae Brief in support of the Appellees. This Reply Brief will jointly address the arguments set forth in the Merit Brief of the Appellees and the Amicus Curiae Brief filed by the OAJ.

II. THE UNDEFINED WORD “ACCIDENT” AS UTILIZED IN THE MOTORISTS’ POLICY IS NOT AMBIGUOUS AS A MATTER OF LAW.

In their Merit Brief and Amicus Curiae Brief, the Appellees and the OAJ assert that the word “accident” as utilized in the Motorists’ policy is ambiguous, which assertion is contrary to Ohio law. The word “accident” has a clear and definite legal meaning, as applied by Ohio courts in prior opinions. In this appeal, Motorists is simply requesting the court to follow the well-established rules of contract interpretation of Ohio by applying the plain and ordinary meaning of an undefined word and by interpreting the insurance policy as a whole. If these rules of contract interpretation are followed, then the word “accident” in the Motorists’ policy is not ambiguous and one can only conclude that a single “accident” occurred under the facts and circumstances of this case.

As a preliminary matter, it is important to remember the facts of this case. Daniel Masterson was operating a motor vehicle in Portage County at a speed of approximately 54-55 miles per hour and was approaching a group of six motorcycles traveling in the opposite direction at the same approximate speed. (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 a motorcycle operated by David H. Perrine and then struck the motorcycle operated by Appellee Geoffrey Davis just three-tenths of a second later. (Stipulations, Ex. B). The investigation by the Ohio State Highway Patrol established that the distance between the two motorcycles at the time of impact was 24.18 feet. (Stipulations, Ex. B). Thus, the impacts between the Masterson vehicle and the two motorcycles occurred almost simultaneously.

The Insuring Agreement in the Motorists' policy provides that Motorists will pay damages for bodily injury or property damage for which an insured becomes legally responsible because of an "auto accident." The word "accident" is not defined in the policy. Yet, the common, ordinary and plain meaning of the word "accident" is an unintended, unexpected and unforeseeable event. (See Appellant's Merit Brief, pp. 14-15). Thus, in its Insuring Agreement, Motorists agreed to pay damages on behalf of Mr. Masterson for bodily injuries or property damages which arise out of an unintended, unexpected and unforeseeable event.

In *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 195-Ohio-2214, 652 N.E.2d 684 (1995), the Ohio Supreme Court held that the "mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous." *Id.* When a word is not defined in the policy, the court must look to the plain and ordinary meaning

of the word. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶11. In addition, the court must “examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy.” *Id.* “As a matter of law, a contract is unambiguous, if it can be given a definite legal meaning.” *Galatis* at ¶11. In the present case, the plain and ordinary meaning of the word “accident” is clear and unambiguous, and the insurance contract issued by Motorists, when interpreted as a whole, is not ambiguous as a matter of law.

In its policy, Motorists agreed in the Insuring Agreement to pay damages for bodily injuries or property damages arising out of an auto accident, which is an unintended, unexpected and unforeseeable event. Under the undisputed facts of this case, Mr. Masterson was involved in an accident, i.e. an unintended, unexpected and unforeseeable event, when he negligently drove left of center causing injury and damages to several persons. All injuries and damages caused to the motorcyclists arose out of this single negligent act or event. In other words, Mr. Masterson caused a single “accident,” and not multiple “accidents.”

The application of the plain and ordinary meaning of the word “accident” is entirely consistent with the Limit of Liability provision contained in the Motorists’ policy. This Limit of Liability provision states that the limit of liability shown in the declarations for “each accident” is the maximum amount that Motorists will be required to pay “resulting from any one auto accident...” Moreover, the Limit of Liability provision specifically states that the “each accident” limit of liability is the most that Motorists will pay regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations, or vehicles involved in the auto accident. (Stipulations, T.d. 9, Ex. C, pp. 70 02 (10-06), p. 4 of 12). This 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.

At the appellate level, the Eleventh District Court of Appeals failed to comply with the rules of insurance contract interpretation as articulated by the Ohio Supreme Court in *Galatis* in two respects. First, the Eleventh Appellate District failed to utilize the plain and ordinary meaning of the word “accident.” Such word, even though undefined, has a definite legal meaning, and its use in the insurance policy did not render the insurance contract ambiguous. Second, the Eleventh Appellate District did not interpret the policy as a whole as required by the rules of contract interpretation set forth in *Galatis*, and failed to reconcile the Limit of Liability provision with the rest of the policy. Instead, the Eleventh Appellate District held that the word “accident” was ambiguous since it was not defined, and also did not interpret the insurance contract as a whole. This holding by the Eleventh Appellate District defied the general rules of insurance contract interpretation and caused the terms and provisions of the insurance contract to be inconsistent. In this appeal, Motorists respectfully requests that this court apply the plain and ordinary meaning of the word “accident,” to give such word its definite legal meaning which has been utilized by other Ohio courts in prior opinions, and to interpret the insurance contract as a whole so that its terms and conditions are consistent as intended by the parties.

III. OHIO COURTS SHOULD APPLY THE “CAUSATION APPROACH” EVEN IN CIRCUMSTANCES WHERE THE WORD “ACCIDENT” IS NOT DEFINED.

As indicated above, the Insuring Agreement in the Motorists’ policy provides that Motorists will pay damages for bodily injury or property damage for which an insured becomes legally responsible because of an auto accident, which is an unintended, unexpected and unforeseeable event. Under the undisputed facts in this case, Mr. Masterson’s negligence in swerving left of center was an unintended, unexpected and unforeseeable event which caused

injuries and damages to multiple persons. For purposes of insurance coverage, this event or incident constituted a single “accident,” especially when the Limit of Liability provision is considered. Here, injuries and damages occurred to multiple persons, but it was still caused by a single accident or event, and any liability coverage is specifically limited by the “per accident” limitation on liability.

The issue of causation is an inherent part of any analysis of what injuries and damages arise out of the negligent act or event. In other words, when Motorists agreed to pay damages for bodily injuries or property damages “because of an accident,” Motorists obviously agreed to pay damages for those bodily injuries or property damages which were caused by the auto accident. In light of this recognition that causation is an inherent part of any analysis of what damages are covered by an insuring agreement in a liability policy, several Ohio appellate courts have adopted and applied 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). The United States District Court for the Northern District of Ohio also applied the “causation approach” in determining the number of “accidents” for purposes of liability coverage in *Banner v. Raisin Valley, Inc.*, 31 F.Supp.2d 591, (N.D. Ohio 1998) (applying Ohio law). In *Derby*, the court of appeals summarized the “causation approach” utilized to determine the number of “accidents” under a Progressive policy 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). Other factors relevant to the “causation approach” include “whether the tortfeasor ever regained control of his or her vehicle after the first collision” and the “interdependent nature of the two impacts and their continuity and proximity in time and location.” *Id.* at *4.

All of the appellate courts in Ohio which have considered whether a single “accident” or multiple “accidents” have occurred for purposes of liability insurance coverage have applied the “causation approach,” with the exception of the Eleventh District Court of Appeals. In *Derby*, *Banner* and *Dutch Maid Logistics*, the subject policies contained a definition of the word “accident” which included the phrase “including continuous or repeated exposure to the same conditions” or similar language. Yet, even if the word “accident” had not been defined in the policies involved in *Derby*, *Banner* and *Dutch Maid Logistics*, then the courts should have still applied the “causation approach” and reached the same results, as held in *Ghanbar* by the First District Court of Appeals. In *Ghanbar*, the First District Court of Appeals analyzed a policy issued by Progressive Insurance Company to determine if a single “accident” or multiple “accidents” had occurred when the tortfeasor drove into an Oktoberfest celebration, injuring more than 20 people. *Id.* at ¶2. The Progressive policy defined the word “accident” as a “sudden, unexpected and unintended occurrence,” which is essentially the common and ordinary meaning of the word. *Id.* at ¶9. More importantly, this definition of the word “accident” in the *Ghanbar* opinion did not contain the explicit language that an “accident” includes “continuous or repeated exposure to the same conditions.” *Id.* at ¶11. In its holding, the First Appellate District

specifically held in *Ghanbar* that a single accident had occurred under the Progressive policy regardless of whether the policy defined the word “accident” or not. *Id.* at ¶12. In fact, the court of appeals noted 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 held that there was only one accident in the case at bar.

Id. (emphasis added). Thus, the court of appeals in *Ghanbar* reached the same result as did the trial court in the present case, which is that a single “accident” had occurred even though the policy did not contain or include the “continuous or repeated exposure” language found in the policies analyzed in *Derby*, *Banner* and *Dutch Maid Logistics*.

Even if the word “accident” is not defined in an insurance policy, then the application of the plain and ordinary meaning of the word still results in the conclusion that a single “accident” occurred. This conclusion is further buttressed by the Limit of Liability language found in the Motorists’ policy which specifically contemplates that multiple claims may arise out of, and multiple vehicles may be involved in, a single motor vehicle accident. The inclusion of this type of limit of liability language as found in the Motorists’ policy was also instrumental in the application of the “causation approach” by the Eighth District of Appeals in *Dutch Maid Logistics*, *supra*, 2009-Ohio-4233 at ¶29.

The consistent application of law is a fundamental principal of Ohio law. With respect to whether an event or incident constitutes a single “accident” or multiple “accidents,” it does not matter if the word “accident” is defined or not. *Ghanbar* at ¶12. After all, even if the word is

not defined, and the plain and ordinary meaning of the word “accident” is utilized, then the “causation approach” should still be applied by Ohio courts for purposes of consistency. There is no logical basis to distinguish between policies which define the word “accident” in some manner and those which do not. Either way, “[t]he question whether there had been a single accident under the policy [is] inextricably linked to the question of causation.” *Ghanbar* at ¶12. The holding by the Eleventh District Court of Appeals has carved out an improper exception to the application of the “causation approach” under Ohio law, thereby creating an inconsistency which should not exist.

IV. THE ENTIRE UNDERLYING PREMISE OF THE APPELLEES’ ARGUMENT IN THEIR MERIT BRIEF IS INCORRECT AND NOT SUPPORTED BY OHIO LAW.

In their Merit Brief, the Appellees set forth their analysis of the coverage issues involved in this appeal. In making their coverage arguments, however, the Appellees have mistakenly based their entire argument upon an incorrect premise which is simply not the law of Ohio. Since the Appellees have based their entire coverage analysis on an incorrect proposition of law, the arguments set forth in the Appellees’ Merit Brief are flawed.

Throughout their Merit Brief, the Appellees incorrectly assert that “the term ‘accident’ must be construed from the point of view of the injured victim who is seeking insurance coverage.” (*See* Appellees’ Merit Brief, page 5). In fact, the Appellees specifically state as follows:

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).

(See Appellees' Merit Brief, page 5). Thus, the Appellees urge this court to determine whether one or more "accidents" occurred from the standpoint of the Appellees, and they rely upon the opinion of *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, as the alleged legal authority. Yet, this is not a correct statement of Ohio law. In fact, a close reading of the *Safeco* opinion clearly establishes that the Appellees have misinterpreted its holding and/or any dicta provided by the Ohio Supreme Court regarding the proper interpretation of an insurance contract, as the Ohio Supreme Court did not hold or otherwise state in *Safeco* that an interpretation of an insurance contract must be construed from the standpoint of the Plaintiffs or injured parties.

The *Safeco* opinion involved a coverage dispute between Safeco Insurance Company of America and its insureds, Lance and Diane White, who had been sued on a negligent supervision claim arising out of a sexual battery, or intentional tort, committed by their minor son. *Id.* at ¶6. Safeco Insurance Company had filed a declaratory judgment action against the Whites on the basis that the intentional act of their son did not constitute an "accident," and that the intentional act exclusion in the Safeco policy applied even to the parents. *Id.* at ¶9. The coverage issue to be determined was whether the son's intentional act precluded liability coverage for the parents, who did not act intentionally, but rather negligently. In *Safeco*, the Ohio Supreme Court noted that it had addressed a similar issue in *Doe v. Shaffer*, 90 Ohio St.3d 388, 738 N.E. 2d.1243 (2000), wherein the Court had held that the coverage determination, i.e., whether the act was intentional, must be made from the standpoint or perspective of the person seeking coverage. *Id.* at ¶24. In *Safeco*, the Ohio Supreme Court summarized its holding in *Doe v. Shaffer*, supra, as follows:

Thus, we held that liability coverage hinges on whether the act is intentional from the perspective of the person seeking coverage. As we stated, "the intentions of

the molester are immaterial to determining whether the allegedly negligent party has coverage.” *Doe*, 90 Ohio St.3d at 393,***Furthermore, we explained, “the critical issue is the nature of the intent—inferred or otherwise—of the party seeking coverage.”***

We concluded that “the intentions or expectations of the negligent insured must control the coverage determination, and not the intentions or expectations of the molester.”

Id. at ¶24-25. Thus, the Ohio Supreme Court held in *Safeco* that the issue of intent must be determined from the standpoint of “the person seeking coverage,” which would be the insured parents. Since the insured parents did not intentionally injure the plaintiff, the Ohio Supreme Court determined that the plaintiff’s injury was accidental from the standpoint of the insured parents, although their son had committed an intentional act. The Ohio Supreme Court did not hold that the coverage determination should be made from the perspective of the injured victim, as suggested by the Appellees in the present case.

In their Merit Brief, the Appellees have misconstrued the holding in *Safeco Ins. Co. of Am. v. White* by stating that the word “accident” in this case must be interpreted or determined from the standpoint of the injured parties, Geoffrey Davis and Theresa Miller. In fact, the Appellees claim that they are the “persons seeking coverage,” which is clearly a misapplication of the *Safeco* holding. Here, the “person seeking coverage” or the person covered is the insured under the Motorists’ policy, Daniel Masterson, and not the Appellees. Accordingly, the Appellees’ assertion that the word “accident” must be construed from their standpoint is an incorrect statement of Ohio law.

In fact, the Appellees are not entitled to the benefit of a strict construction or interpretation of the language in the Motorists’ policy. In *Westfield Ins. Co. v. Galatis*, *supra*, the Ohio Supreme Court noted as follows:

Likewise, where “the plaintiff is not a party to [the] contract of insurance ***, [the plaintiff] is not in a position to urge, as one of the parties, that the contract be construed strictly against the other party.” *Cook v. Kozell* (1964), 176 Ohio St. 332, 336, 27 Ohio Op.2d 275, 199 N.E.2d 566. This rings especially true where expanding coverage beyond a policyholder’s needs will increase the policyholder’s premiums. *Id.*

Id. at ¶14. Thus, contrary to the Appellees’ assertions, they are not entitled to a strict construction of the policy in their favor, nor must the word “accident” be construed from their standpoint. Instead, for purposes of determining whether one or more “accidents” occurred, the focus should be on whether the alleged injuries and damages arose out of a single proximate, uninterrupted and continuous cause or event, regardless of whether the word “accident” is defined in the policy or not.

Since the Appellees have relied on an incorrect proposition of law, many of the arguments in the Appellees’ Merit Brief lack any validity whatsoever. Motorists respectfully asserts that the correct interpretation and analysis of the word “accident” in the Motorists’ policy should be based on the policy language, the entirety of the insurance policy, and the applicable law in Ohio and elsewhere as already outlined in Motorist’s Merit Brief.

V. THE COURT SHOULD DISREGARD THE ATTEMPTS OF THE APPELLEES AND THE OAJ TO CHARACTERIZE MOTORISTS’ COVERAGE POSITION AS A “BLANKET RULE” WHICH APPLIES TO ALL LIABILITY POLICIES AND UNDER ALL CIRCUMSTANCES, REGARDLESS OF THE POLICY LANGUAGE.

Throughout their Merit Brief, the Appellees seem to suggest, as does the OAJ, that Motorists has proposed in its proposition of law that the court adopt some broad, sweeping, general principle of law which would apply in any and all circumstances under any and all liability insurance policies. In fact, the Appellees improperly state in their Merit Brief that “Motorists asks this Court to adopt the ‘causation approach’ as a general rule applicable to all insurance policies, regardless of their policy language.” (*See* Appellees’ Merit Brief, page 2).

This is an obvious attempt by the Appellees to defeat Motorist's proposition of law by suggesting that it will be applied in circumstances and in cases which are way beyond the scope of this appeal. However, the actual proposition of law to be addressed in this appeal involves the application of the "causation approach" in accidents involving motor vehicles when there is but one proximate, uninterrupted and continuing cause of the accident, and when the word "accident" has not been defined in an insurance policy. The Appellees' attempt to extend this simple proposition of law beyond its scope should be disregarded.

The undisputed facts of this case are relatively simple, as is the proposition of law which is the subject of the appeal. The Appellees have attempted to raise concerns regarding "implications far beyond the parameters of this case" as a reason why Motorists' proposition of law should be rejected. Motorists respectfully disagrees. Contrary to the Appellees' assertions, Motorists has not proposed some broad, sweeping generalization of law regarding the "causation approach" which would apply in any and all cases involving other facts and other policy language. Instead, Motorists has requested this court to apply the "causation approach" in a case involving a specific set of facts and a liability policy which does not define the word "accident." It is more accurate to state that Motorists is seeking an extension of the holdings by other Ohio appellate courts in *Derby*, *Ghanbar* and *Dutch Maid Logistics* and the United States District Court in *Banner* that the "causation approach" should be applied whenever there is but one proximate, uninterrupted and continuing cause of a motor vehicle accident involving multiple vehicles, even if the word "accident" is not defined in the policy. Motorists' coverage position is based upon the policy language, the plain and ordinary meaning of undefined words in the policy, existing Ohio law, and the majority view throughout the United States on this issue.

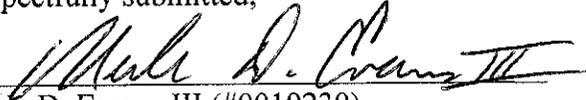
VI. CONCLUSION.

Contrary to the assertions by the Appellees and the OAJ, Motorists is not requesting this court to depart from the well-established rules of contract interpretation in Ohio or to adopt some broad, general sweeping principle of law which applies in any and all cases and under any and all circumstances, regardless of the policy language. Instead, Motorists is requesting the court to interpret the language in the Motorists' policy, apply the plain and ordinary meaning of the word "accident," interpret the policy as a whole, and apply the "causation approach" which has already been adopted and applied by other Ohio courts in analogous cases. 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 Limit of Liability provision in the Motorists' policy specifically contemplates that multiple vehicles may be involved in, and multiple claims can arise out of, a single auto "accident." Yet, the Eleventh District 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. 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 in its Merit Brief and in this Reply Brief, Appellant 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 to enter final judgment in its favor.

Respectfully submitted,


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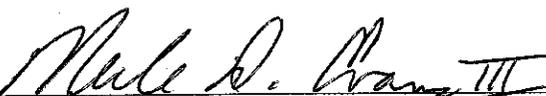
I certify that a copy of the foregoing **REPLY BRIEF OF DEFENDANT/APPELLANT MOTORISTS MUTUAL INSURANCE COMPANY** was sent by ordinary U.S. mail to the following, this 3rd day of July, 2012:

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