IN THE SUPREME COURT OF OHIO

CASE NO. 2012-0053

THERESA MILLER, et al.
Plaintiffs-Appellees

-v-

MOTORISTS MUTUAL INSURANCE COMPANIES, et al.
Defendant-Appellant

On Appeal from the Eleventh District Court of Appeals, Portage County, No. 2011-P-0016

AMICUS CURIAE BRIEF OF THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Authorities:

INTRODUCTION AND INTERESTS OF AMICUS CURIAE

The Ohio Association for Justice (OAJ) is an organization comprised of over one thousand attorneys practicing personal injury and consumer law in the State of Ohio. The OAJ is dedicated to the strengthening of the civil justice system and the preservation of the rights of individuals in litigation. In furtherance of this mission, the OAJ and its members advocate against legislation and judicial activism which would act to shift the burdens arising from harmful conduct from tortfeasors (and their insurers) to the injured victims.

The ability of Ohio citizens harmed in automobile accidents to obtain due compensation for their injuries has been dwindling for more than a decade since the passage of tort reform. The case at hand represents a dramatic extension of the insurance industry's efforts in this regard. Defendant-Appellant Motorists Mutual Insurance Companies has no favorable legislation or exclusionary language to point to in this instance. Instead, it is requesting that this Court disregard the longstanding axiom of Ohio law requiring courts to construe ambiguities in an insurance policy strictly against the insurer, and to write-in a definition not found in the policy itself in order to shield it from additional exposure.

The Eleventh District Court of Appeals properly refused to provide the after-the-fact policy addendum sought by the Appellant, holding that "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." This is the proper analysis under this Court's long-standing principles of insurance contract interpretation. *See Buckeye Union*

Ins. Co. v. Price, 39 Ohio St.2d 95, 99, 313 N.E. 2d 844 (1974). As such, the OAJ respectfully requests that this Court uphold the decision of the Eleventh District Court of Appeals.

STATEMENT OF CASE AND FACTS

The OAJ adopts the statement of the case and the statement of facts set forth in the Merit Brief of Plaintiffs-Appellees.

APPELLANT'S 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.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

I. The Eleventh District's decision is a correct application of Ohio law, which requires that all ambiguities in an insurance policy contract be construed liberally in favor of coverage.

"When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. We examine the insurance contract as a whole and 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, 219, 2003-Ohio-5849; citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999); *Employers' Liab. Assur. Corp. v. Roehm*, 99 Ohio St. 343, 124

N.E. 223, syllabus (1919); *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus (1987). When the language is susceptible to differing interpretations, this Court has long recognized the doctrine of *contra proferentum*, which requires that a court construe all ambiguities within an insurance policy strictly against the insurer so as to provide coverage so long as the interpretation is reasonable. *See Price*, 39 Ohio St.2d at 99; *Muncik v. Fidelity & Cas. Co. of New York*, 2 Ohio St.2d 303, 305, 209 N.E.2d 167 (1965); *Butche v. Ohio Cas. Ins. Co.*, 174 Ohio St. 144, 187 N.E.2d 20 (1962); *Home Indemnity Co. v. Village of Plymouth*, 146 Ohio St. 96, 64 N.E.2d 248 (1945). This well-established doctrine is predicated upon the understanding that contracts of insurance are prepared and drafted by the insurer, who has the ability to phrase such policies as to "prevent any mistake as to its meaning" and "could easily *** exclude a loss" arising under any particular set of circumstances. *Muchik*, 2 Ohio St.2d at 305.

The exclusionary language at issue in this matter, i.e. that defining "accident" as a collision or set of collisions resulting from "but one proximate, uninterrupted and continuing cause" is not found within the four corners of the automobile liability policy sold to the tortfeasor Daniel Masterson. The policy provided only that Appellant would "pay damages for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an auto accident." The Limit of Liability section of the policy then states in pertinent part:

> ***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.

Despite having a clear opportunity to do so,[1] Appellant failed to define the term "accident" in the policy so as to remove any confusion or dispute as to when numerous collisions or impacts become separate "accidents" for purposes of determining liability limits.

In wrestling with the interpretation of the words "accident" or "occurrence" in an insurance policy, courts in various jurisdictions generally subscribe to one of three approaches. The first, the causation view sought by the Appellant, focuses on the "cause or causes of the accident or occurrence." *See Banner v. Raisin Valley, Inc.*, 31 F. Supp.2d 591, 593 (N.D. Ohio 1998); citing *Dow Chemical Co. v. Associated Indemnity Corp.*, 727 F. Supp. 1524, 1526 (E.D. Mich. 1989). The "liability triggering event" test, on the other hand, focuses on the event or events which trigger liability on the part of the insured. *See, e.g. Maurice Pincoffs Co. v. St. Paul Fire and Marine Ins. Co.*, 447 F.2d 204, 206 (5th Cir. 1971) (holding that eight separate sales of contaminated bird seed constituted eight separate "occurrences" for purposes of coverage); *Hartford Accident & Indem. Co. v. Wesolowski*, 305 N.E.2d 907 (N.Y.Ct.App. 1973). The most liberal approach, when placed against the backdrop of the facts in this case, is known as the "effect" view, in that it focuses on the viewpoint of the injured party and holds that each

[1] As pointed out below, definitions of the term "accident" are commonplace in automobile insurance policies, including those at issue in the appellate decisions relied upon in Appellant's Merit Brief.

separate injury is a separate occurrence. *See, e.g., Elston Richards Storage Co. v. Indemnity Ins. Co. of North America*, 194 F. Supp. 673, 687 (D.C. Mich. 1960), *aff'd per curiam*, 291 F.2d 627 (6th Cir. 1961) (holding that "[A]lthough the damage to each appliance may have resulted from a single cause *** the damage to each appliance was a separate accident and therefore 'one event or occurrence' within the meaning of those words as used in the limits-of-liability provision***"); *Liberty Mut. Ins. Co. v. Rawls*, 404 F.2d 880, 881 (5th Cir. 1969) (holding that when "[t]here were two distinct collisions," two accidents had occurred under either the cause or effect theories), *citing Anchor Cas. Co. v. McCaleb*, 178 F.2d 322 (5th Cir. 1949).

Appellant has asked this Court to adopt the reasoning of the Northern District and the Sixth and Eighth Appellate Districts and to implement an across-the-board causation approach when determining the number of "accidents" so as to limit its exposure in this instance. *See Banner*, 31 F. Supp.2d at 594; *Progressive Preferred Ins. Co. v. Derby*, 6th Dist. No. F-01-002, 2001 WL 672177 (June 15, 2001); *Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. Nos. 91932, 92002, 2009-Ohio-1783 (April 16, 2009). However, as pointed out in the Eleventh District's decision, these cases are factually distinguishable in the most material aspect: the terms "accident" or "occurrence" were defined in those cases in a manner consistent with the causation approach. *See Banner*, 31 F. Supp.2d at 592 ("The policy definition of accident refers to "continuous" or "repeated" exposure to the same conditions."); *Derby*, 2011 WL 672117, at 3 (policy defined accident as "a sudden, unexpected and unintended event, or a **continuous or repeated exposure to that**

event***") (emphasis added); *Dutch Maid*, 2009-Ohio-1783 at ¶26 ("continuous or repeated exposure to the same conditions").[2]

None of the dictionary definitions of "accident" cited by the parties and the Court of Appeals in this case establish the causation approach as the only reasonable construction of the term. What constitutes a single "unexpected and undesirable event" is inherently subjective, and as such "[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***" *Miller v. Motorists Ins. Co.*, 196 Ohio App.3d 753, 2011-Ohio-6099, ¶ 27 (11th Dist.); *citing Godwin*, 2007-Ohio-4167 at ¶ 49; *see also Snedegar v. Midwestern Indemn. Co.*, 64 Ohio App.3d 600, 604, 582 N.E.2d 617 (10th Dist. 1989) ("the criterion is ambiguity from the standpoint of a layman, not a lawyer").

Despite the contentions of Appellant, this ambiguity is not remedied by the language in the Limit of Liability provision indicating that the "each occurrence" limits apply regardless of the number of "claims made" or "[v]ehicles involved in the auto accident." It could perhaps be argued that this phrasing would provide clarity in situations involving a chain reaction, simultaneous impact with multiple vehicles, or

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[2] The First District Court of Appeals utilized the cause approach in *Greater Cincinnati Chamber of Commerce v. Ghanbar*, 157 Ohio App.3d 233, 2004-Ohio-2724 although the definition of accident presented in that policy did not include the "continuous or repeated exposure" language cited in the cases above. It appears as though this holding is in conflict with the Eleventh District's opinions in this case and *Nationwide Mut. Ins. Co. v. Godwin*, 11th Dist. No. 2005-L-183, 2006-Ohio-4167; *see also Liberty Mut. Ins. Co. v. Rawls*, 404 F.2d 880 (5th Cir. 1969). The mere fact that courts have come to differing conclusions in this regard would seemingly indicate that the policy language at issue is ambiguous, thus requiring the more liberal interpretation in favor of coverage to be accepted. *See George H. Olmstead & Co. v. Metro Life Ins. Co.*, 118 Ohio St. 421, 161 N.E. 276 (1928), syllabus; *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 175 Ohio App.3d 266, 2007-Ohio-5576, 886 N.E.2d 876 (1st Dist.).

when claimants are in both the tortfeasor's vehicle and another. It cannot be said that the cause approach is the only reasonable conclusion where two distinct, independent impacts occur as is the case here. "An exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded." *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 665, 597 N.E.2d 1096 (1992) (emphasis in original); *citing Moorman v. Prudential Ins. Co.*, 4 Ohio St.3d 20, 21, 445 N.E.2d 1122 (1983). As additional coverage for multiple collision cases was not definitively written out of Daniel Masterson's insurance policy, the "effect" view should be found to apply, and the two impacts involving his vehicle on July 12, 2008 should be considered separate auto accidents in calculating the limits available in the case at hand.

II. The Appellant's Proposition of Law is impractical and overly broad, and would lead to confusion and contradictory results at the trial court level.

Throughout its Merit Brief, Appellant makes numerous references to the close proximity of the two accidents in terms of time and/or space. This should, however, be inconsequential to the Court's analysis of this matter. Despite the fact that they took place within .3 seconds, the fact remains that two distinct collisions took place. Mr. Masterson's vehicle made contact with two motorcycles more than twenty feet apart.

A court's perception of what constitutes one "accident" or two should not supplant or supplement the policy language at issue in any given case. The Proposition of Law offered by Appellant amounts to an overly broad "fix" of the confusion created in the aftermath of the events caused by Daniel Masterson's negligence on July 12, 2008. Although a time/space comparison may seem appropriate at first glance in this case, it is not difficult to conjure a number of scenarios in which "one proximate, uninterrupted and continuing" act of negligence can lead to numerous auto collisions miles (or minutes)

apart. For instance, it is certainly conceivable that an intoxicated tortfeasor who falls asleep at the wheel can strike a pedestrian and proceed unimpeded for another block or more before colliding with another vehicle. A driver susceptible to seizures or blackouts can negligently fail to take his or her medication and then proceed for miles on end, causing numerous collisions along the way.

Under either of these scenarios, a single "proximate, uninterrupted and continuing cause" can lead to collisions much further apart than what reasonable minds would consider a single "accident" given common parlance of the term. It is not unreasonable to conclude that an "unforeseen event" or a "misfortune or mishap" encompasses two distinct collisions a mile apart, regardless of the underlying cause of each. The rule of law advanced by the Appellant would therefore lead to confusion and disparate results among trial courts in Ohio. At what distance would the accidents become separate for purposes of determining policy limits? Is the "proximate, uninterrupted and continuing cause" the act of negligently driving oneself while prone to blacking out or the act(s) of driving through the stop sign(s)? Would it matter if Daniel Masterson momentarily corrected his vehicle, only to fishtail and lose control before striking the second motorcycle? What if he had the opportunity to correct but panicked and failed to do so? Is continuing to drive left of center the same "cause" as crossing the center-line to begin with?

Such questions would not be answered by the broad-stroked approach set forth in Appellant's Proposition of Law.[3] The "fix" sought by Appellant is best accomplished as

[3] As pointed out by the Plaintiffs-Appellees, the Proposition of Law asserted by Appellant could also have implications extending beyond automobile liability policies, as

it has been for years under Ohio law - by requiring contracting parties to draft agreements with clarity, rather than by having the judicial system define their terms for them. As the insurer and drafter of the contract at issue, the burden fell upon Motorists to remove all doubts as to when the single accident/multiple accident line was crossed. This Court should not accept the invitation to step in after-the-fact to amend the policy on their behalf.

CONCLUSION

Based on the foregoing, this Court should find that the Eleventh District correctly held that when an insurance policy is silent on the definition of the term "accident," such ambiguity is to be liberally construed in favor of the insured and that the "effect" test should be utilized in determining policy limits where multiple vehicles and separate impacts are involved. The OAJ and its members respectfully request that that the decision of the Eleventh District be upheld.

Respectfully submitted,

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commercial general liability policies often utilize similar "accident" or "occurrence" language. *See* Merit Brief of Plaintiffs-Appellees Theresa Miller, et al., pp. 14-15.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served by regular U.S. Mail on this 14th day of June, 2012 upon the following:

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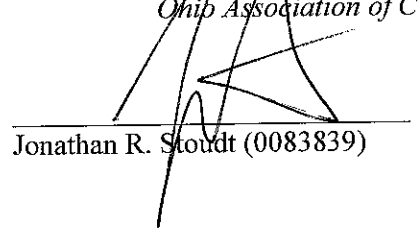

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