Establishing Liability Coverage For Permissive Users

"[T]he General Assembly intended... to protect the public against careless... entrustment of vehicles...."

The Financial Responsibility Law in Ohio requires that automobile owners maintain a liability policy of insurance for vehicles which they operate, as well as "any other person ... using any such motor vehicle with the express or implied permission of the insured....."[1] This type of insurance is referred to as "omnibus coverage."[2] Despite this requirement, an early decision by the Ohio Supreme Court has cast a five-decade long series of exceptions to this rule, thereby permitting insurance companies to escape their statutory duties.

The Ohio Supreme Court, in the 1948 case of *Gulla v. Reynolds*, considering the language of an omnibus policy provision, was asked to adopt the "initial permission rule" to afford liability coverage to a person operating the vehicle on loan from the owner.[3] The "initial permission rule" provides that "for one's use or operation of the car to be with the 'permission' of the named assured, etc., within the meaning and effect of an omnibus clause, he need have received only permission or authority to take and use the car in the first instance."[4] Characterizing the "initial permission rule" as the "extreme" and the "minority" view at the time, the Supreme Court declined to adopt it, echoing the dubious concern of the lower appellate court:

> [The initial permission rule] obviously lends itself to gross abuse by an unscrupulous individual who, in violation of his express instructions, might retain possession of the automobile indefinitely and operate it over unlimited territory with the insurance still in effect. If such extreme unlimited coverage is to be afforded, it would seem that in fairness to all concerned it should be so stated in the policy.[5]

The Supreme Court, therefore, opted to adopt the "actual use rule," which provides, "within the meaning and effect of an omnibus clause, permission or consent must have been given, impliedly at least, not only to the taking and use of the car in the first instance, but also to the particular use being made of the car at the time in question."[6]

Subsequent to *Gulla*, the Supreme Court has had the opportunity to reconsider the viability of the "actual use" rule on three separate occasions -- in *Frankenmuth Mut. Ins. Co. v. Selz*,[7] *Erie v. Fisher*,[8] and *Continental v. Whittington*.[9] Each time the Supreme Court has left the *Gulla* "actual use" rule intact.

In *Selz*, the Supreme Court denominated the earlier holding as it is now known: the "minor deviation rule" — "[t]hat is, where the use of the property deviates only slightly from the purpose for which permission was initially granted, the standard omnibus clause in a liability insurance policy will be interpreted to extend coverage."[10] Unfortunately for the injured claimants in *Selz*, the Court held that the user of the boat exceeded the scope of permission, thus constituting a "gross deviation" upon which basis coverage was denied. In the spectrum of deviations, the phrase *moderate deviation* has yet to creep in to the debate. It makes one wonder then, how easy is it to make the differentiation between a *gross* deviation and *minor* deviation. The differentiation between the terms in many cases has been a matter of semantics, leaving an opening for many insurance companies to respond in a Pavlovian manner: coverage denied due to gross deviation.

Finally, after four and one-half decades of variant results, the Supreme Court ap-

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peared ready to revisit and reconsider the viability of the "minor deviation" rule in the 1994 case of *Continental Ins. Co. v. Whittington.* The issue, however, was not ripe for consideration, because the jury verdict was reinstated on other grounds, and the Court declined the opportunity.[11] Given the tenor of *Whittington*, along with the developing trend in Ohio jurisprudence to favor the availability of tortfeasor liability coverage, although the"minor deviation" rule remains valid, it will hopefully have a short shelf-life.

In the meantime, the harshness of the "minor deviation" rule is somewhat ameliorated by the "reasonable belief" rule, a related but distinct doctrine where coverage is afforded if the user reasonably believed that he or she had the owner's permission.[12] In order for this rule to apply, however, the insurance contract must be phrased in such a manner to extend coverage based upon the user's "reasonable belief" of authorization. When this rule has been applied, coverage has been found even in a situation where the user was on a complete departure from the initial grant of permission.[13]

As with all contracts of insurance, principles of contract interpretation require coverage exclusions to be unambiguously drafted.[14] Where such exclusions are found to be ambiguous, such exclusions are construed against the drafter, and liberally in favor of the insured.[15] Consequently, claimants can take advantage of ambiguously worded permissive use provisions to argue that coverage should be extended.

Moreover, the burden of proof is on the insurance company to prove that the particular use is beyond the scope of permission.[16] The insurance company which claims that coverage is precluded bears the burden of proving that the user has taken "a complete departure" or, as the case may be, that she did not have a reasonable belief of permission.[17]

This article surveys cases in Ohio finding and rejecting coverage based on these concepts, and urges that the time has come for the "initial permission" rule to take the place of the "minor deviation" rule.

1. Gross Departures — Coverage Denied

The Supreme Court, in *Frankenmuth Mut. Ins. Co. v. Selz,* was confronted with a factual scenario much like that presented by *Gulla*. Returning to its holding in *Gulla*, the Court stated:

> The facts of *Gulla* reveal that Strauss had given Reynolds express permission to use the truck to make a delivery approximately a block and a half away. Five hours later, and in a different part of the city, Reynolds struck and injured the plaintiff.
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> We refused to interpret the omnibus clause involved in *Gulla* to extend coverage to the plaintiff's claim arising from the accident because, at the time of the accident, Reynolds was not operating the vehicle within the scope of the permission initially granted by Straus. In so holding, the "slight" or "minor deviation" rule was adopted in Ohio. That is, where the use of the property deviates only slightly from the purpose for which permission was initially granted, the standard omnibus clause in a liability insurance policy will be interpreted to extend coverage. However, if the use represents a gross deviation from the scope of permission, no coverage will be afforded.[18]

In *Selz*, the user was a close friend of the boat owner who had skied with the owner, and who was employed at a Marina that was performing repairs on the boat. While the *Selz* Court concluded that Mr. Selz had implied permission to use the boat for a test drive after repairs had been performed, he did not have permission to be using the boat when the accident occurred later in the evening. Thus, the Supreme Court affirmed the denial of coverage to the injured claimants.

In *Erie v. Fisher,* Fisher operated a work vehicle in which Brenda Hess was injured. The employer had imposed a "no personal use" rule, which was in effect but was sporadically enforced at the time of the accident. Because the accident occurred seven hours after Fisher left work while he was driving Hess home from the bar in an intoxicated state, the Supreme Court affirmed the rejection of coverage to the injured claimant, again clinging to the "minor deviation" rule:

> The initial permission rule was rejected, as it "lends itself to gross abuse by an unscrupulous individual who, in violation of his express instructions, might retain possession of the automobile indefinitely and operate it over unlimited territory with insurance still in effect."... As this rationale remains valid, we decline appellant's invitation to adopt the initial permission rule.[19]

In *Westfield v. Grange,*[20] an employee was given permission to make a delivery in a company vehicle, but no coverage was extended because the accident did not occur until six and one-half hours later after the employee had left a social visit at the home of a friend, where the employee had been consuming alcohol.[21] Based on these facts, the Third District held that there was a gross deviation as a matter of law.[22]

In *Economy Fire & Cas. Co. v. Kazee,*[23] a son-in-law argued that permission to use his mother-in-law's vehicle should have been implied based upon prior usage. The Tenth District, however, found that no permission was implied because all prior uses were for short trips, and the accident occurred at a time when the user was on an hours-long trip around the City of Columbus to numerous bars on a beer drinking binge.

American Select Insur. Co. v. Bates[24] also involved a son-in-law on a gross departure from his mother-in-law's grant of permission. Jean Luc borrowed his mother-in-law's car to retrieve an auto part, and was instructed to return the car immediately afterwards. He did not return the car as instructed, and instead retained the car for another three days, during which time his mother-in-law reported it stolen when she was unsuccessful in locating Jean Luc. On the third day, Jean Luc negligently caused a collision. The insurer denied coverage stating that Jean Luc's use of the vehicle at the time of the collision was "without the express or implied permission of the owners...."[25] Facing the issue of which standard to apply (the reasonable belief standard versus the minor deviation rule), the Fourth District held that the reasonable belief standard was a sound rule, but that "the scope of permission is one factor to be considered under the reasonable belief standard."[26] The *Bates* court reasoned that "Bates' departure was so complete that a reasonable person could not believe his use was still permissive."[27] Thus, the insurance com-

pany owed no duty of indemnification under either standard.

In *Gonczy v. Tector,*[28] the Ninth District Court of Appeals held that summary judgment was appropriate where no express permission had been given, and that implied permission could not be inferred from the fact that the owner knew the user was going to the store for wine coolers, and knew that the user did not have a car, there was one other car available for the user to drive.

2. Minor Deviations — Coverage Afforded

In *Continental v. Whittington,* the Ohio Supreme Court reinstated a jury finding of implied permission based upon the "custom and practice" of extensive prior personal use by numerous employees. Multiple witnesses testified that there was a "long and established history involving personal use of company vehicles."[29] *Whittington* involved a factual scenario much like *Erie v. Fisher,* inasmuch as Whittington was a produce business that owned multiple vehicles used by employees for business and personal reasons. On the night of the accident, a Whittington employee, Sonner, drove other Whittington employees to their homes after the work day was completed. Sonner returned to his home, but then decided to go to a friend's home and to "take the van out on the town." Sonner gave contradictory testimony at his deposition and at trial as to the history of personal use of company vehicles; nevertheless, a jury found that Sonner had implied permission to use the vehicle at the time of the accident based upon the totality of evidence presented. The court of appeals reversed the jury verdict, holding that Sonner's use of the vehicle constituted a "gross deviation" because no permission could be found, "either express or implied."[30] As stated previously, the Supreme Court reinstated the jury verdict, finding that "substantial justice was done at the trial court level." Unfortunately for Ohio jurisprudence, the Supreme Court left intact the "minor deviation" rule because it was unnecessary under the circumstances to decide whether to abandon it in favor of the "initial permission rule."

In *Long v. Hurles,*[31] the Third District Court of Appeals, was faced with a factual situation much like *Whittington,* and much like the scenario it addressed ten years earlier in *Westfield v. Grange.*[32] Unlike its earlier holding, however, the Third District upheld a finding of coverage, commenting:

> [T]he vice president testified that he had told Hurles that the company vehicles were restricted to company use, but also indicated that employees had asked to use the vehicles for personal business. He testified that permission "depend[ed] on the person." Hurles testified that the vice president told him on one occasion that "he needed the trucks back that night." Hurles also acknowledged that an employee is supposed to ask permission, but if the owner or vice president wasn't "around," he would just let someone know he was taking a vehicle. Specifically, Hurles had taken a company truck home on other occasions, including weekends and the Thursday and Friday prior to the accident, with and without permission. No disciplinary action was taken as a result of these actions. Moreover, even though Hurles "gathered since I worked there" that he was to restrict use of a vehicle to transportation to and from work, he testified that there were no specific instructions regarding "how you should go about taking it home and what you should use it for." He further indicated that he had previously used a company truck for short errands and had never been told that he was prohibited from utilizing the truck in this manner.[33]

In *Cincinnati v. Reither,*[34] the Sixth District Court of Appeals upheld a finding of coverage where a collision occurred involving an eighteen year old young man driving back from the quarry in an intoxicated state, who had the vehicle on loan through permission granted by another individual who had permission to do so, where the only restriction placed on the use of the vehicle was to "be back by dinner time," even though the person who granted permission testified that she would not have done so had she known "Robert [would] use the car to go to Clearwater Quarry [with] a car load of young friends and that they were planning to consume quantities of beer at the quarry."

In *Cincinnati Ins. Co. v. Babcock,*[35] the Sixth District reversed a trial court's denial of coverage where an employee, during a break taken in the course of a workday, drove to an ice cream shop in an adjacent city and negligently caused a collision. Holding that the employee had a reasonable belief that he was permitted to use the vehicle at the time of the collision, the *Babcock* court stated:

> [The city employee] was granted sole and exclusive possession of the city truck. The trip for ice cream can be construed as nothing more than a slight deviation from permitted use. Given the scope of the permission granted by appellant's employer, and the lack of proof submitted by appellee on this issue, we conclude that appellant had a reasonable belief that he was permitted to use the truck during working hours to stop for refreshments, even to the extent of briefly crossing city boundaries.[36]

3. No Restrictions on Scope of Use – Coverage Afforded

In *Sawyer v. Allen,* the Twelfth District Court of Appeals held that a genuine issue of material fact existed as to the scope of use given the following factual scenario:

> [D]uring a conversation at school Huffman gave Allen permission to drive the vehicle. Allen testified that Huffman gave her the keys to the car and said she could use the vehicle. Allen further testified that Huffman told her to return to the school when Huffman got out of class at 1:30 p.m. and that Huffman did not prohibit her from going to locations besides her boyfriend's residence.
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> Huffman testified at her deposition that Allen asked her if Allen could use the vehicle to visit Allen's boyfriend. According to Huffman, the only limitation she placed on Allen was that Allen had to be back at the school by 1:30 p.m.
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> A perusal of the testimony on the conversation between Allen and Huffman fails to turn up any specific limitations on the use of

> the vehicle by Allen other than that Allen return the vehicle to the school by 1:30 p.m. This limitation speaks to the time and not the actual purpose for which Allen could use the vehicle.[37]

In *Buckeye Ins. Co. v. Spaulding,*[38] the Twelfth District Court of Appeals held that the insurance company failed to meet its burden in establishing a "gross departure" from the scope of permission where an employee was involved in an accident while driving a company owned pick-up truck in the early morning hours, well after the conclusion of the work day. The evidence revealed that the employee drove his own car to and from work, but at the time of the collision it was being repaired, such that he borrowed the company owned truck. In support of its holding, the *Spaulding* Court stated:

> There was no evidence showing that Sumner placed any restriction on Spaulding's use of the truck. In fact, when specifically asked if he placed any restrictions on Spaulding's use of the truck, Sumner answered "no." Sumner indicated that he let Spaulding use the truck as his employer and as a friend of his family. He testified that he did not object to Spaulding's using the truck for personal use, rather it was the type of personal use to which he objected. Buckeye places great reliance upon Sumner's testimony that he would not have let Spaulding use the truck had he known he was going to a bar.[39]

In *Bowen v. Price,*[40] an insurance company contended that the vehicle user exceeded the scope of permission at the time the collision occurred:

> At trial, plaintiff testified that she was not told by anyone at Sons that she was not to use the truck for personal travel. She and several other retailers testified that other retailers drove their trucks for personal travel and that the supervisor, Kenneth Levine, was aware of many of these personal uses. Sons' vice president, Dan Rankin, testified that it was the company's policy to inform drivers that personal use of the trucks was prohibited. He further stated that he was unaware of any personal uses and that retailers would be reprimanded if any personal use were known by him. He admitted, however, that he had not conversed with plaintiff and had no personal knowledge of what she was told by Levine, who was not called as a witness by either party, even though he was also alleged to be the Sons' employee with knowledge of personal use by retailers.

The Tenth District held that, in order to avoid coverage, the insurance company had the burden "to establish as an affirmative defense that the nature of the use so substantially varied from that for which permission had been granted as to constitute a complete departure from the scope of the permitted use." Finding that the trial court incorrectly placed the burden on the driver, and finding that there was conflicting evidence on that issue, the *Price* court reversed the referee's recommendation of no liability coverage.

At least two cases in Ohio have examined whether a prohibition against drinking under a car rental contract limits the scope of liability coverage available.[41] In each of these cases, the insurance company argued that the renter's intoxication voided coverage available under the contract, but, fortunately for the injured victims, each court rejected these arguments. Notably, the Tenth District held that such provisions are unenforceable because exclusions from liability coverage for drivers who fail to obey the law would render the omnibus coverage a nullity in direct violation of R.C. 4509.51.[42] Likewise, the Fifth District held that an omnibus policy "covers any permissive user regardless of their manner of use."[43]

4. Reasonable Belief – Coverage Afforded

Leading the way in defining the "reasonable belief" concept was the case of *Blount v. Kennard.*[44] In *Blount*, the Twelfth District upheld the existence of insurance coverage for a driver who caused a multi-vehicle accident while operating his friend's vehicle. Blount took his friend's car after trying unsuccessfully to arouse his friend after a night of partying. When Blount's friend eventually awoke, he called Blount and instructed him to return the car, a request with which Blount was complying at the time the collision occurred.

State Auto argued that it was entitled to be reimbursed for the property damage claim it paid because its policy contained the following exclusion: "We do not provide Liability Coverage for any person ... [u]sing a vehicle without a reasonable belief that that person is entitled to do so." The *Blount* court held that "[i]n determining whether Blount had a 'reasonable belief'... the trial court had to consider subjective and objective factors, including the extent of permission granted to Blount." The appellate court upheld the finding that Blount did have a reasonable belief, notwithstanding the fact that Blount did not possess a valid operator's license. The Twelfth District stated that:

> The trial court noted that Blount had driven the vehicle with Kennard's permission on at least two prior occasions, including the evening before the accident. Additionally, the court found that the note which Blount left for Kennard indicated that he expected little objection from Kennard and that he would return the car upon Kennard's request. Although Kennard was angry that Blount took the car, he did not object to Blount driving the car back to him, but, in fact, he instructed him to return it. From these facts, which we find supported by competent, credible evidence in the record, the trial court concluded that Blount had a reasonable belief that he had permission to return the car and, therefore, a reasonable belief that he was entitled to use the car within the meaning of the pertinent policy language.[45]

In *Broz. v. Winland,*[46] three individuals were seriously injured in a collision involving an unlicensed driver. Arguing that no liability coverage should be extended for the injured claimants, the insurance company asserted that coverage was excluded for drivers "using the ve-

hicle without a reasonable belief that the person was entitled to do so."

At trial, Melissa testified concerning the events leading up to this tragedy. According to Melissa, on July 16, 1989, she accompanied her friend, Tisa Yates, and Tisa's parents to a high school graduation party. Tisa, her parents, and Melissa arrived at the party around 5:30 p.m. Tisa's brother, Daniel, also attended the party; however, he drove separately.

At approximately 8:15 p.m., Tisa's parents decided to leave the party. Mr. and Mrs. Yates informed the girls they would be back around 9:30 p.m. to take them home. After Mr. and Mrs. Yates left, the girls offered to drive another friend home. Although neither Tisa, age eighteen, nor Melissa, age seventeen, had a driver's license, Tisa's brother Daniel gave his car keys to Tisa and gave Tisa permission to drive his car. Daniel, however, expressly instructed his sister not to let Melissa drive. Melissa overheard this conversation.

Once outside the house, Tisa asked Melissa to back the car out of the parking space, because she had difficulty in doing so. According to Melissa, Melissa continued driving at Tisa's request. Melissa also testified that she sought to relinquish the driving responsibilities to Tisa on two more occasions, but Tisa claimed she could not drive because she had been drinking. Although Tisa testified that Melissa had specifically requested permission to drive, she admitted she allowed Melissa to do so because she was afraid that they could be stopped by the police, and she felt the penalties would not be as harsh for a seventeen-year-old.

After driving their friend home, the girls were on their way back to the party when Melissa lost control of the vehicle, causing this tragic collision.

In reviewing conflicting holdings from various appellate courts, the Supreme Court settled on the more reasoned approach articulated in *Blount, supra*: "We approve appellate case law which holds that permission from an authorized user creates a question of fact as to whether the driver had a reasonable belief that she was entitled to use the car."[47] Adopting the holding in *Blount v. Kennard,*[48] the Supreme Court in *Broz* held that "the test under the insurance policy was not whether the plaintiff believed he was licensed to drive but whether he reasonably believed he was authorized to drive the car."[49] Applying its holding, the *Broz* Court found that a jury question existed as to whether the unlicensed tortfeasor "had a reasonable belief that she was entitled to use the car."[50]

In *Ludwig v. Niccum,*[51] an employee of Mohre electronics was sent to a customer's home (Donald Kimpel) to obtain his truck. Niccum was instructed by his employer to return by a specific route to Mohre electronics where a car radio would be installed. Instead of following these instructions, Niccum intended to drive to his parent's home, taking a different route than instructed. While on the alternate route, Niccum lost control of Kimpel's truck, and caused extensive property damage to the home of Leonard and Sharon Ludwig, and utility equipment owned by Northwestern Electric. A urine test revealed that Niccum was under the influence of marijuana at the time of the accident. The trial court found that Kimpel's insurance company owed no duty of indemnification because Niccum was on a gross deviation from his permitted use; that Mohre Electronics was not liable because Niccum was on a frolic and detour; but that Niccum's parents' insurer did owe a duty of indemnification because Niccum was a child residing in their home. German Mutual, the parents' insurer, argued that it should not be liable for the property damage Niccum caused because a series of policy exclusions, including a reasonable belief exclusion, voided coverage. The Sixth District, in a lengthy analysis, rejected the insurance company's arguments, and affirmed the trial court's holding:

> Several courts have addressed the exclusion that is the subject of this case. The standard to be applied is whether the driver of the vehicle reasonably believed that he or she was authorized to drive the vehicle, notwithstanding the means of obtaining the authorization. *Broz v. Winland* (1994), 68 Ohio St.3d 521, 526, 629 N.E.2d 395; *Blount v. Kennard* (1992), 82 Ohio App.3d 613, 617, 612 N.E.2d 1268. The scope of "reasonable belief" to use a vehicle is broader than "having permission" to use such a vehicle. *Lightning Rod Mut. Ins. Co. v. Ray* (June 30, 1992), Lake App. No. 91-L-073, unreported. However, in determining whether the user reasonably believed that he or she was entitled to use the motor vehicle, the fact that the owner/possessor of the vehicle granted the user the permission to use it carries great weight. *State Farm Mut. Auto Ins. v. Progressive Cas. Ins.* (July 26, 1988), Montgomery App. No. 10748, unreported; *Collins v. Fessler* (Dec. 5, 1983), Miami App. No. 83-CA-20, unreported.
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> Here, the undisputed facts are that William Niccum was directed to pick up and deliver Kimpel's truck to Mohre Electronics. Niccum had previously operated business vehicles as part of his duties. Kimpel granted Niccum permission to drive the vehicle. These facts are sufficient to demonstrate that Niccum had a reasonable belief that he was authorized to use the Kimpel vehicle.

Recognizing that "reasonable belief" was a separate and distinct concept from the "minor deviation" rule, the *Niccum* court declined German Mutual's assertion that a gross deviation is tantamount to a finding of *no reasonable belief.*[52]

In *Harper v. Cincinnati Insur Co.,*[53] a passenger injured in a collision sought uninsured motorist coverage from the company insuring the loaned vehicle. Cincinnati Insurance denied the claim, citing its exclusion for persons "using the vehicle without a reasonable belief that that person is entitled to do so." The injured claimant had been loaned the vehicle to drop the vehicle owner at work, and to obtain a water heater part. After obtaining the part, the claimant met up with other friends, imbibed alcoholic beverages, and eventually allowed another friend to drive, at which time the vehicle was wrecked. After a bench trial, the court concluded that there were no credible restrictions imposed on the use of the vehicle, such that the claimant did have a reasonable belief of entitlement to use the vehicle.[54] The Third District affirmed the trial court's decision given the following record:

> The testimony established that appellee had his own set of keys to the Z-28, that he bought gasoline on a regular basis and that he paid for approximately one- half of any repairs done to the vehicle during the time that he lived with Mathers. Appellee also testified that Mathers frequently allowed him to use the Z-28 for trips to Toledo and Defiance, and that

> Mathers did not place any time or mileage restrictions on appellee's use. Although Mathers testified that he had placed many restrictions on appellee's use of the Z-28, the trial court specifically found that testimony not to be credible. In short, the evidence in this case supports the conclusion that appellee and Mathers were in essence "co-users" of the Z-28.[55]

The *Harper* court also rejected Cincinnati's assertion that a reasonable belief cannot exist unless express permission is given by the owner.[56] In this regard the court stated, "permission is only one factor to be considered in a reasonable belief analysis ..., we reject appellant's argument and conclude that reasonable belief can exist despite the fact that no express permission to use the vehicle is given."[57]

In *Midwest Mut. Ins. Co. v. Lightning Rod Mut. Ins. Co.*,[58] a driver explicitly excluded on a policy was found to have a reasonable belief of coverage. Michael Dalto, the excluded driver, was to have been named in the policy, but was not due to an insurance agent's clerical error -- he was assured by the agent that he was covered under the policy, but after the accident, when the policy arrived, it listed Michael as an excluded driver. Based upon the totality of the evidence, the court found that Michael had a reasonable belief.[59] Ultimately, however, no coverage was extended to the injured claimants because they were Michael's family members and thus excluded under the "family member" exclusion in the liability portion of the policy.[60]

In *State Farm Mut. Auto Ins. v. Progressive Cas. Ins.*,[61] the Second District Court of Appeals reversed a judgment notwithstanding the verdict, and reinstated a jury finding that the driver did have a reasonable belief of permission. In this case, a vehicle on loan to the owner's daughter was involved in a collision while being operated by the daughter's friend. The jury found that the friend had a reasonable belief of permission, even though the owner expressly forbade his daughter from loaning the car to others. The appellate court reinstated the verdict, because the evidence showed that the friend was likely unaware of the owner's prohibitions.[62]

5. No Reasonable Belief – Coverage Denied

Buckeye Union v. Lawrence[63] involves a remarkable substitution of the fact finding role by the Third District Court of Appeals. *Lawrence* presented a factual scenario much like *Broz v. Winland* (a case that reached the Supreme Court four years later). The car was loaned, alcohol was imbibed and another person ended up behind the wheel. The trial court, after hearing the testimony, found that the driver at the time of the collision did have a reasonable belief of permission. The appellate court, however, usurped the trial court's fact finding role, seizing upon what it perceived to be inconsistencies in the evidence which explained how the driver came to be behind the wheel. Based upon these perceived inconsistencies, the Third District concluded, "[i]t is unrealistic to conclude that he had a 'reasonable belief' that he was authorized to drive that car at that particular time."[64] Ultimately, the *Lawrence* court, perhaps in an effort to make its fact-finding usurpation more palatable, concluded that the driver's intoxication and reckless driving made it unrealistic that he possessed a reasonable belief that he had permission to operate the vehicle.[65] Twelve years later, the *Lawrence* holding, while never specifically reversed, certainly seems untenable, especially in light of later holdings, such as the Supreme Court's decision in *Broz v. Winalnd*, the Sixth District's decision in *Niccum*, and the Third District's own apparent reversal of *Lawrence* in *Harper v. Cincinnati Insur Co.*

In *Wilson v. GRE Ins. Co.*,[66] the Sixth District upheld a judgment in favor of an insurance company which excluded coverage for an otherwise insured family member, because the policy also contained an unambiguous exclusion for persons using the vehicle "without a reasonable belief of having permission" to do so.[67] Daniel Gallagher was an adult child residing in his mother's home, and had his mother's permission to use her car to run three errands after dropping her at work. Rather than running the errands, Daniel met a friend, and the two drank whiskey and went to a shopping mall. On a second trip to the mall, after purchasing another bottle of whiskey, mall security contacted Daniel's father when the two got into an argument. Daniel's father escorted Daniel home, but Daniel again left in his mother's car, met a group of friends, imbibed additional alcohol, and negligently caused an accident. Daniel admitted at a deposition that he broke numerous rules that his mother set forth as conditions to using her car, and the *Gallagher* court held that he had no reasonable belief that he had permission to use the car, and that his use at the time of the collision constituted a gross departure. Accordingly, no liability coverage was available.[68]

Gallagher is at odds with two earlier decisions from the Fifth and Third Districts which found that coverage was extended under almost identical factual scenarios. In *State Auto v. Hawk*,[69] the Fifth District, construing the policy in a different vein, arrived at a different conclusion than in *Gallagher*, on the ground that the "reasonable belief requirement" was not applicable to the named insured and his or her family members:

> We conclude that the "any person" clause, used to define the scope of coverage, is an omnibus clause referring to third persons other than the insured and his or her family. "Any person" in this context, means "any *other* person."
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> The "any person" exclusion clause when read *in pari materia* with the "any person" coverage clause, must also mean "any other person" other than the insured and his or her family member. Any other reading of the clause does violence to the intentions of the parties, as well as lead to bizarre results....[70]

Following the well reasoned logic of *Hawk*, the Third District found that coverage existed for the son of a named insured, even though the son was not a licensed driver.[71] *Tromm* involved a factual scenario much like that presented in *Hawk*. In both *Tromm* and *Hawk*, it was not necessary to determine whether the family member had a reasonable belief of permission; nor was it necessary to determine whether the family member was on a slight deviation or a gross deviation. Simply put, the family member was an insured under the policy, and, unlike *Wilson*, that is where the analysis ended.

6. Permissive Use by the Second Permittee

This scenario arises most often in rental car cases and dealership loaner cases, because the policies involved in these cases do not often comply strictly with the Financial Responsibility Act (FRA). The Supreme Court, in *Bob-Boyd Lincoln Mercury v. Hyatt,*[72] held that insurance policies issued is these contexts need not necessarily comply with the FRA. As a result of this dark day in Ohio jurisprudence, cars are permitted on the highways which cause unreimbursable injuries and damages, a notion that runs counter to the purpose of the FRA and the philosophy of tort law.

One such example is the case of *Dillard v. Indiana Insur. Co.*[73] In *Dillard*, a car dealership loaned a vehicle to a customer while the customer's vehicle was being repaired. An acquaintance of the customer (after claiming to have received permission from the customer) took the vehicle for a drive, at which time he caused a fatal accident. Indiana Insurance denied coverage for the loss because the policy issued to the dealership required "permission of the named insured." Thus, Indiana Insurance argued that the acquaintance could only operate the vehicle if he had the dealer's permission. In other words, according to Indiana Insurance, the customer was incapable of giving the acquaintance permission.[74] The Second District was persuaded by this argument.[75]

The *Dillard* court did recognize an exception to the second permittee doctrine – where some benefit is conveyed to the first permittee.[76] As noted by the *Dillard* Court, several other Ohio courts applied the exception in numerous contexts. For instance, the exception was applied where the first permittee was intoxicated, and was being driven home by the second.[77] And it was applied where a daughter was assisting her mother in transporting members of a softball team.[78]

7. Time for Change

The rationale for clinging to the "minor deviation" rule has never changed. Each time the Supreme Court has been asked to reconsider this aspect of Ohio jurisprudence, it has clung to its retention, and each time the same hollow rationale is echoed: Because the alternative rule "lends itself to gross abuse by an unscrupulous individual who, in violation of his express instructions, might retain possession of the automobile indefinitely and operate it over unlimited territory with the insurance still in effect."[79] But this begs the question – does the initial permission rule really encourage "gross abuse by an unscrupulous individual," or is this just a bit of arcane sophistry?

Consider the observations made by the Ohio Supreme Court in *Haryasyn v. Normandy Metals, Inc.*[80]:

> At one time liability insurance was attacked as an encouragement to antisocial conduct and relaxation of vigilance toward the rights of other, by relieving the actual wrongdoer of liability... As tort law evolved toward an emphasis on victim compensation ... and it became apparent that no dire consequences in fact resulted ... public policy came to favor liability insurance for negligent acts as a means of assuring that innocent persons are made whole.....[81]

As a result of *Haryasyn*, Ohio courts have come to recognize that tort law favors insurance coverage in negligence cases.[82] And so it appears that, if an appropriate set facts reaches the Supreme Court, the outmoded thinking of *Gulla* may seriously be called into question. Truly, what incentive does an "unscrupulous individual" have under *Gulla* to return the vehicle in accordance with the owner's specifications? If the rationale of *Gulla* is to be believed, if the unscrupulous individual does not have liability insurance, then, as a consequence, the unscrupulous individual will not be unscrupulous and will always return the vehicle at the time and place as the owner directs. Fifty years of tragic litigation has shown that unscrupulous vehicle-borrowers continue to disobey the instructions of vehicle-owners, despite the fact that they thereby forfeit any entitlement to coverage. Time and again, victims of these unscrupulous individuals have gone uncompensated, or have had to turn to alternative means of recovery. Wouldn't it make better sense to shift the risk of loss in such case to the person that entrusted the "unscrupulous individual" with the instrumentality in the first place, and allow his or her insurance policy to cover that risk?

Perhaps a man ahead of his time, Justice Matthias, in his dissent in *Gulla,* made the following sage observations of the purpose behind Ohio's Financial Responsibility Law:

> This requirement shows that the General Assembly intended not only to protect the public against careless drivers but against careless entrustment of vehicles to them by their owners.... The purpose of the financial responsibility law is to protect the public from loss by injury caused by financially irresponsible drivers.[83]

The viability of the minor deviation rule should also comes under scrutiny in light of the variant results over the last five decades from courts throughout Ohio. The result under the present standard varies according to the appellate panel applying it and the result they desire. The facts of certain cases are identical to others, yet disparate results occur.

Given the fact that tort law favors insurance coverage, the fact that tort law favors placement of responsibility on the culpable party (i.e., the vehicle owner who loans the vehicle in the first place) rather than on the innocent victim, the weakness of the rationale espoused in support of the minor deviation rule, and the fact that the present rule has spawned five decades of variant results, the time has come to recognize and accept what Justice Matthias long ago observed.

1. R.C. 4509.51

2. *Gulla v. Reynolds* (1949), 151 Ohio St. 147, 85 N.E.2d 116; 7 Am Jur.2d. Automobile Insurance 249.

3. *Gulla, supra.*

4. *Gulla, supra,* (quoting 5 Am. Jur. 804)

5. *Gulla, supra.*

6. *Gulla, supra.*

7. (1983) 6 Ohio St.3d 169.

8. (1984) 15 Ohio St.3d 380, 474 N.E.2d 320.

9. (1994) 71 Ohio St.3d 150, 642 N.E.2d 615.

10. *Selz* at 170, 1204.

11. *Whittington* at 159, 622.

12. *Broz v. Winland* (1994), 68 Ohio St.3d 521, 629 N.E.2d 395; *Ludwig v. Nicum* (10/22/99) Williams App. No. WM-99-004, 1999 WL 961446, unreported.

13. *Nicum* at *5.

14. *Allstate Ins. Co. v. Boggs* (1972), 27 Ohio St.2d 216, 271 N.E.2d 855.

15. *Id.*

16. *Whittington, supra* at 159-60, 622; *Bowen v. Price* (9/10/84), Franklin App. No. 83AP-541, 1984 WL 5906, unreported; *Buckeye Union v. Spaulding* 1992 WL 276536, unreported; *Sawyer v. Allen* (Sept. 7, 1993), Butler App. CA93-03-038, 1993 WL 34390, unreported.

17. *Id.*

18. *Selz* at 170, 1204.

19. *Erie v. Fisher* at 383, 324.

20. (Nov. 17, 1986), Wyandot App. No. 16-85-7,1986 WL 12900, unreported.

21. *Id.* at *5.

22. *Id.*

23. (Dec. 31, 1984), Franklin App. No. 83AP-1123, 1984 WL 6063, unreported.

24. (Dec. 17, 1987), Ross. App. No. 1381, 1987 WL 28946, unreported.

25. *Bates* at *1.

26. *Id.* at *2.

27. *Id.* at *3.

28. (May 26, 1999) Medina App. No. 2839-M, 1999 WL 334769, unreported.

29. *Id.* at 153, 617.

30. *Id.* at 155, 619.

31. (1996)113 Ohio App. 228, 600 N.E.2d 722.

32. *Williams, supra.*

33. *Hurles* at 232-33, 726.

34. (Sep. 24, 1993), Wood App. No. 92WD085, 1993 WL 372223, unreported.

35. (Apr. 29, 1988), Lucas App. No. L-87-035, 1988 WL 39730, unreported.

36. *Babcock* at *3.

37. *Sawyer* at *2.

38. (Oct. 5, 1992), Brown App. No. CA92-03-004, 1992 WL 276536, unreported.

39. *Spaulding* at *2.

40. (Sep. 20, 1984), Franklin App. No. 83AP-541, 1984 WL 5906, unreported.

41. *Allstate v. Porter* (July 28, 1992), Franklin App. No. 91AP-1441, 1992 WL 185669, unreported; *Jewell v. State Farm* (April 15, 1994), Licking App. No. 93 CA 89, 1994 WL 167934, unreported.

42. *Porter* at *5.

43. *Jewell* at *3.

44. (1992), 82 Ohio App.3d 613, 617, 612 N.E.2d 1268.

45. *Blount* at 617, 1268.

46. (1994), 68 Ohio St.3d 526, 629 N.E.2d 395.

47. *Broz* at 526, 398 (citing *Collins v. Kissler* (Dec. 5, 1983), Miami App. No. 83-CA-20, 1983 WL 2569, unreported; *State Farm v. Progressive* (July 26, 1988), Montgomery App. No. CA 10748, 1988 WL 79316, unreported).

48. (1992), 82 Ohio App.3d 613, 612 N.E.2d 1268.

49. *Broz* at 526, 399.

50. *Id.*

51. (Oct. 22, 1999), Williams App. No. WM-99-004, 1999 WL 961446, unreported.

52. *Niccum* at *5.

53. (Dec. 28, 1998), Defiance App. No. 4-98-03, 1998 WL 901736, unreported.

54. *Harper* at *2.

55. *Harper* at *4.

56. *Harper* at *5.

57. *Id.*

58. (March 15, 1994), Belmont App. No. 92-B-53, 1994 WL 87188, unreported.

59. *Id.* at *4.

60. *Id.* at *6.

61. (July 26, 1988), Montgomery App. No. 10748, 1988 WL 79316, unreported.

62. *Id.* at *3-4 (citing *Collins v. Fessler* (Dec. 5, 1983), Miami App. No. 83-CA-20, unreported).

63. (1990), 70 Ohio App.3d 76, 590 N.E.2d 406.

64. *Lawrence* at 79, 409.

65. *Lawrence* at 79, 409 (citing *Carbone v. INA Ins. Co. of Ohio* (March 19, 1981), Cuyahoga App. Nos. 42622 and 42772, unreported).

66. (Sept. 16, 1994), Lucas App. No. L-93-361, 1994 WL 506154.

67. *Id.* at *2.

68. *Id.* at *3.

69. (March 17, 1986), Stark App. No. CA-6751, 1986 WL 3922, unreported.

70. *Hawk* at *1-2 (emphasis original).

71. *Preston v. Tromm* (April 26, 1990), Marion App. No. 9-88-31, 1990 WL 61748, unreported.

72. (1987) 32 Ohio St.3d 300, 513 N.E.2d 331.

73. (July 2, 1999), Montgomery App. No. 17401, 1999 WL 961162, unreported.

74. *Dillard* at *4 (citing *Collins v. Fessler* (Dec. 5, 1983), Miami App. No. 83 CA 20, unreported); *6 (citing *Cincinnati Ins. Co. Kramer* (1993), 91 Ohio App.3d 528, 632 N.E.2d 1333 – involving a rental car).

75. *Dillard* at *3-4 (citing *West v. McNamara* (1953), 159 Ohio St. 187, 111 N.E.2d 909).

76. *Id.* at *6.

77. *Id.* (citing *Drake v. State Farm Ins. Co.* (Oct. 15, 1998) Cuyahoga App. No. 73502, unreported).

78. *Id.* (citing *Ohio Casualty Ins. Co. v. National General Ins. Co.* (Mar 17, 17, 1992), Mahoning App. No. 91 CA 6, unreported).

79. See e.g., *Gulla* at 120; *Frankenmuth Mut. Ins. Co. v. Selz* (1983), 6 Ohio St.3d 169, 171, 451 N.E.2d 1203, 1205; *Erie v. Fisher* (1984), 15 Ohio St.3d 380, 384, 474 N.E.2d 320, 324; and *Continental v. Whittington* (1994), 71 Ohio St.3d 150, 163, 642 N.E.2d 615, 624 (Wright, J. diss.)

80. (1990), 49 Ohio St.3d 173, 551 N.E.2d 962, 965.

81. *Haryasyn* at 176, 965 (citing Prosser & Keeton, The Law of Torts (5th ed.. 1984) 585, Sec. 82, Keeton & Widiss, Insurance Law (1988) 517, Sec. 5.4(c)(5)).

82. See *Doe vs. Shaffer* (2000), 90 Ohio St. 3d 388, 738 N.E.2d 1243, 1248.

83. *Gulla* at 152, 122. OT