

IN THE SUPREME COURT OF OHIO

Ernest Lemm, <i>et al.</i> ,	:	
	:	
Appellants,	:	Case No. 01-1786
	:	
v.	:	Certified conflict from the
	:	Franklin County Court of Appeals
The Hartford,	:	
	:	
Appellee	:	

REPLY BRIEF OF *AMICUS CURIAE*, OHIO DEPARTMENT OF INSURANCE  
 IN SUPPORT OF APPELLEE, THE HARTFORD

Jeffrey S. Sutton (0051226)  
 Jones, Day, Reavis & Pogue  
 1900 Huntington Center  
 41 South High Street  
 Columbus, Ohio 43215  
 Phone: (614) 469-3855  
 Fax: (614) 461-4198

Frank E. Todaro (0038500)  
 21 East State Street, Suite 300  
 Columbus, Ohio 43215  
 Phone: (614) 242-4333  
 Fax: (614) 242-3948

Counsel for Plaintiff-Appellants  
 Ernest and Alice Lemm

Michael Y. Scudder, Jr. (0073438)  
 Jones, Day, Reavis & Pogue  
 North Point  
 901 Lakeside Avenue  
 Cleveland, Ohio 44114  
 Phone: (216) 586-3939  
 Fax: (216) 579-0212

Counsel for Defendant-Appellee,  
 The Hartford

Ann E. Henkener (0025248)  
 Assistant Attorney General  
 Health and Human Services Section  
 30 E. Broad Street  
 Columbus, Ohio 43215  
 Phone: (614) 466-8600  
 Fax: (614) 466-6090

Counsel for *Amicus Curiae*,  
 Ohio Department of Insurance

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
I. ARGUMENT .....	1
Proposition of Law: A homeowner’s insurance policy that provides liability coverage for bodily injury sustained by a residence employee in an auto accident is not a motor vehicle liability policy subject to requirements of former R.C. 3937.18 .....	1
A. Common Sense Should Be Applied In The Instant Case .....	1
B. Public Policy And Economic Interests Support Denying Coverage Under Appellee’s Policy .....	2
1. The Hartford reasonably relied on the approval of the Ohio Department of Insurance in offering its homeowner’s policy without offering uninsured motorists’ coverage.....	2
2. Finding by this Court inconsistent with The Hartford’s reliance on the regulatory determinations of the Ohio Department of Insurance could destabilize the insurance industry to the detriment of policyholders.....	4
3. Good public policy does not provide a policy holder with an unexpected windfall .....	5
C. This Court Should Rely On The Expertise Of The Ohio Department Of Insurance In Its Determinations Of What Constitutes A Motor Vehicle Liability Policy Under Former R. C. 3937.18 .....	5
II. CONCLUSION.....	7
CERTIFICATE OF SERVICE .....	8

**TABLE OF AUTHORITIES**

	<u>Page</u>
 <b>Cases</b>	
<i>Advocacy Organization for Patients and Providers v. Auto Club Insurance Association</i> (6 <sup>th</sup> Cir. 1999), 176 F.3d 315 .....	4
<i>Auer v. Robbins</i> (1996), 519 U.S. 452 .....	6
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> (1984), 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694.....	5
<i>Colby v. Metropolitan Property &amp; Casualty Ins. Co.</i> (Mass. 1995), 420 Mass. 799, 806, 652 N.E.2d 129, 131 .....	6
<i>Davidson v. Motorists Mutual Insurance Co.</i> (2001), 91 Ohio St.3d 26.....	1, 2
<i>Davis v. Shelby</i> (June 14, 2001), 2001 Ohio App. LEXIS 2625, Cuyahoga App. No. 78610, unreported .....	1
<i>Northwestern Ohio Bldg. &amp; Constr. Trades Council v. Conrad</i> (2001), 92 Ohio St.3d 282 .....	5
<i>Smiley v. Citibank</i> (1996), 517 U.S. 735.....	6
 <b>Statutes</b>	
R.C. Chapter 3935.....	3
R.C. 3935.02 .....	3
R.C. 3935.03 .....	4
R.C. 3935.04 .....	2
R.C. 3937.02 .....	4
R.C. 3937.03 .....	2
R.C. 3937.18 .....	1, 3, 5, 7

## I. ARGUMENT

**Proposition of Law: A homeowner's insurance policy that provides liability coverage for bodily injury sustained by a residence employee in an auto accident is not a motor vehicle liability policy subject to requirements of former R.C. 3937.18.**

### A. Common Sense Should Be Applied In The Instant Case.

The Court below in *Davis v. Shelby* (June 14, 2001), 2001 Ohio App. LEXIS 2625, Cuyahoga App. No. 78610, unreported, relied on this Court's decision in *Davidson v. Motorists Mutual Insurance Co.* (2001), 91 Ohio St.3d 262 to reach its decision to simply apply common sense to the issue at hand. The Ohio Department of Insurance (Department) supports this Court's decision in *Davidson*, and wholeheartedly endorses this Court's underlying philosophy in *Davidson* as both a correct interpretation of the law, and as good public policy. Elementary principles of contract construction dictate that there be a meeting of the minds between the two parties. Everyone should understand what the agreement is, and all the rights and responsibilities assumed. The policyholders are not arguing that they had an understanding that their homeowner's policy would provide uninsured motorists' coverage at the time they received the policy. The Hartford is affirmatively stating its understanding of the policy was that there was no inclusion of uninsured motorists' coverage or any responsibility to provide it under statute. The Hartford's understanding was confirmed by the Department when the Department approved publicly filed rates that included no rate component for any liabilities that might be incurred by The Hartford for uninsured motorists' coverage.

This Court in *Davidson* rejected a hypertechnical reading of former R.C. 3937.18. Certainly the off-road vehicles in question were indeed vehicles. Certainly they had motors. But this Court correctly applied common sense and determined that these motor vehicles were not of the nature contemplated by the statute or the homeowner's policy in question, and determined

that the inclusion of coverage for off-road vehicles did not transform the homeowner's policy into a motor vehicle policy. Likewise, this Court should reject a hypertechnical reading of the "residence employee" language at issue in the instant case, and use common sense to determine that this language does not convert a homeowner's policy into something it is not – a motor vehicle policy.

As indicated by The Hartford in its merit brief, the coverage in the homeowner's policy in the instant case is more remote and more incidental than the coverage in the *Davidson* situation. In *Davidson*, the provision at question applied to motorized vehicles. In the instant case, coverage is extended not to a vehicle but to a residence employee. Another hypothetical then needs to be added to the situation to place the residence employee in a motor vehicle to make the Plaintiffs' argument. Thus, under the principles of *Davidson*, incidental coverage that is even more remote and more incidental than the situation in *Davidson* should not transform a homeowner's policy into a motor vehicles policy.

**B. Public Policy and Consumer Impacts Support Denying Coverage Under Appellee's Policy.**

**1. The Hartford reasonably relied on the approval of the Ohio Department of Insurance in offering its homeowner's policy without offering uninsured motorists' coverage.**

The Appellants correctly assert in their Response/Reply Brief that insurance companies drafted the language in the insurance policy in question. More importantly, however, the insurer filed the required proposed policy forms and rates with the Department. Those forms and rates were properly filed under R.C. 3935.04, which requires insurance companies who proposed to offer homeowners policies to file such forms and rates. That filing did not include a component for uninsured motorists. The Hartford did not make a concurrent filing under R.C. 3937.03,

which requires that insurance companies who proposed to offer automobile liability coverage file proposed forms and rates. The Department accepted The Hartford's filing of proposed forms and rates for the homeowner's policy without a concurrent filing for uninsured/underinsured motorists' coverage, and with no articulated coverage for uninsured motorists included. In light of Ohio's laws, including former R.C. 3937.18, the Department approved rates that did not contain a component for uninsured motorists' coverage.

The statutory framework the legislature enacted clearly indicates its intent to treat the homeowner's policy differently from the motor vehicle policy. At the time the standard form containing the "residence employee" language in question was filed, the Department required homeowner's policy forms and rates to be filed under R.C. Chapter 3935, and comply with its provisions. R.C. 3935.02 states in part:

Section 3935.01 to 3935.17, inclusive, of the Revised Code do not apply:

\* \* \*

(D) To motor vehicles insurance, or to insurance against liability arising out of ownership, maintenance, or use of motor vehicles.

By contrast, motor vehicle insurance policy forms and rates are filed with the Department under a different chapter of the code, Chapter R.C. 3937. There is a long tradition of delineating these lines of coverage, those sections having been brought over from the Ohio General Code when it was revised in 1953. The Department was carrying out the legislative intent of that delineation,

Insurance companies such as The Hartford have a right to rely on the Department's review of their forms and rates. They have a right to rely on the Department's determination that insurance coverage provided under the terms of that form and the submitted rates, does not require the offering of uninsured motorists' coverage, and a right to expect that there was no exposure for uninsured motorists' claims. The Sixth Circuit has recently recognized that an insurance company can rely on bulletins sent out by its regulators. In *Advocacy Organization for*

*Patients and Providers v. Auto Club Insurance Association* (6<sup>th</sup> Cir. 1999), 176 F.3d 315, an insurance company sent letters to providers indicating their intent to bring civil actions against the providers if they continued to balance bill the insureds. In response to a complaint filed by the providers claiming the letters constituted extortion, the insurance company submitted an “Interpretive Statement” issued by Michigan’s Commissioner of Insurance. The Plaintiffs objected, claiming the bulletin did not have the force and effect of law. The Sixth Circuit found:

Even if such a bulletin lacks the force of law, it would certainly have lulled even the most skittish – or cynical – of insurers into believing that the sending of letters that complied with the bulletin’s requirements was not a malicious act.

*Id.* at 328. Likewise, The Hartford relied on the Ohio Department of Insurance’s approval of its rates, and the fact that those rates had no component that could be used for reserves for payment of uninsured motorists’ claims, when it sold those policies to customers.

**2. A Finding by this Court inconsistent with The Hartford’s reliance on the regulatory determinations of the Ohio Department of Insurance could destabilize the insurance industry to the detriment of consumers.**

One role of the Department is to maintain stability in the Ohio property and casualty market through its regulatory review and approval process. The Department must assure that the rates for both homeowners’ policies and automobile liability policies are not excessive, inadequate, or unfairly discriminatory. R.C. 3935.03, R.C. 3937.02. As attested to by the Chief Actuary of the Ohio Department of Insurance, there was no rate component provided for uninsured motorists’ coverage in the homeowners’ policies such as the one at issue in the instant case. Therefore, insurance companies such as The Hartford have no funds reserved for this unexpected liability. Being exposed to unexpected liabilities creates instability, and a need for the company and its investors to obtain a greater return on the capital invested because that capital is at greater risk. The insurance industry works most efficiently in a context in which the

company can determine its risks actuarially, based on prior experience, and have a reasonable expectation that it will not be required to pay for unexpected liabilities which neither it, nor its regulators, nor its customers, had any reason to believe existed. Insurance companies can provide the lowest rates to customers when the companies have properly rated the risks they have assumed.

**3. Good public policy does not provide a policy holder with an unexpected windfall.**

The Appellant policyholders make no allegation that it was their understanding at the time of entering into the agreement for the homeowners' policy at issue that the "residence employee" clause would automatically provide uninsured motorists' coverage for them, and as such, they did not have any reason to rely on that coverage being available to them. As shown by the Ohio Department of Insurance, no payment was made for that coverage. The Appellant policyholders do not claim to have paid for such uninsured motorists' coverage. As such, by their own admission, they are seeking an unexpected windfall. In light of the consequences of such a ruling not only to The Hartford, but to the majority of insurance companies who use such standard language in their homeowner's policies, a ruling in their favor would be unconscionable.

**C. This Court Should Rely On The Expertise Of The Ohio Department Of Insurance In Its Determinations Of What Constitutes A Motor Vehicle Liability Policy Under Former R. C. 3937.18.**

This Court has long accorded deference to an administrative agency's construction of its own governing statutes, based both on its own precedents, and U.S. Supreme Court precedent. *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad* (2001), 92 Ohio St.3d 282, 287; *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694. *Chevron* recognizes that a full understanding of the force of a statutory

policy in a given situation is dependant on more than ordinary knowledge as subjected to agency regulations, and therefore:

Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer \* \* \* .

*Id.* at 844. The United States Supreme Court has recognized that an *amicus* brief, such as the one herein, is an appropriate manner in which an agency can convey its application of statutes within its purview. *Smiley v. Citibank* (1996), 517 U.S. 735; *Auer v. Robbins* (1996), 519 U.S. 452.

Likewise, supreme courts of other states have relied on the expertise of administrative agencies such as the Ohio Department of Insurance. For example, in a situation strikingly similar to the instant case, the Massachusetts Supreme Court determined that the Commissioner of Insurance for Massachusetts was entitled to deference in deciding what needed to be included in a standard automobile policy:

It is also true, however, that within the limits set by statute, the Commissioner of Insurance (commissioner) decides what the terms of a standard policy will be, \* \* \* and the commissioner's interpretation of the relevant statutes, although not controlling, is entitled to deference. *Massachusetts Medical Soc'y v. Commissioner of Ins.*, 402 Mass. 44, 55, 520 N.E.2d 1288 (1988). *American Family Life Assurance Co. v. Commissioner of Ins.*, 388 Mass. 468, 474-475, 446 N.E.2d 106, cert. denied, 464 U.S. 850, 78 L. Ed. 2d 147, 104 S. Ct. 160 (1983). By approving the policy in issue here, the commissioner made clear that, in the commissioner's opinion, G.L.c 175, Section 113L, does not require that the underinsured motorist provision of a standard automobile policy protect the named insured when the underlying bodily injury or death was sustained by a person not insured by the policy.

*Colby v. Metropolitan Property & Casualty Ins. Co.* (Mass. 1995), 420 Mass. 799, 806, 652 N.E.2d 129, 131. In both *Colby* and the instant case, the Commissioner/Superintendent of Insurance needed to apply the insurance department's governing statutes in order to determine

whether to approve a standard policy. It is through that approval process each department made its policy concerning the application of the statute.

The Ohio Superintendent of Insurance should be afforded the same due deference afforded the Massachusetts commission. Through the Ohio Superintendent's actions in sanctioning the forms and rates submitted by The Hartford for its homeowner's policy, he has applied the requirements of former R.C. 3973.18. That application is that former R.C. 3973.18 does not require the offering of uninsured motorists' coverage along with the offering of homeowner's coverage containing the "residence employee" language in question.

## **II. CONCLUSION**

The Ohio Department of Insurance again requests that this Court defer to the administrative expertise of the Ohio Department of Insurance, and that this Court determine that a homeowner's policy which includes coverage for a "residence employee" is not an "automobile liability or motor vehicle liability policy" as contemplated by former R.C. 3937.18.

Respectfully submitted,

**BETTY D. MONTGOMERY** (0007102)  
Attorney General

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**ANN E. HENKENER** (0025248)  
Assistant Attorney General  
Health and Human Services Section  
30 East Broad Street, 26th Floor  
Columbus, Ohio 43215-3428  
(614) 466-8600  
(614) 466-6090 Facsimile

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Reply Brief of *Amicus Curiae*, Ohio Department of Insurance was sent via regular U.S. Mail on this \_\_\_\_ day of April, 2002, to: **Jeffrey S. Sutton**, Jones, Day, Reavis & Pogue, 1900 Huntington Center, 41 South High Street, Columbus, Ohio 43215, and **Michael Y. Scudder, Jr.**, Jones, Day, Reavis & Pogue, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114, Counsel for Defendant-Appellee, The Hartford; **Frank E. Todaro**, 21 East State Street, Suite 300, Columbus, Ohio 43215, Counsel for Plaintiff-Appellants, Ernest and Alice Lemm; **Robert W. Kerpshack**, 21 East State Street, Suite 300, Columbus, Ohio 43215 Counsel for *Amicus Curiae*, Ohio Academy of Trial Lawyers; **W. Charles Curley** and **Jenifer J. Murphy**, Keener, Doucher, Curley & Patterson, 88 East Broad Street, Suite 1750, Columbus, Ohio 43215, Counsel for *Amicus Curiae*, Municipal Mutual Insurance Company; **Anne Marie Sferra**, Bricker & Eckler, LLP, 100 S. Third Street, Columbus, Ohio 43215, Counsel for the American Insurance Association; **Alexander M. Andrews**, Ulmer & Berne, LLP, 88 East Broad Street, Suite 1980, Columbus, Ohio 43215, Counsel for *Amicus Curiae*, the National Association of Independent Insurers.

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**ANN E. HENKENER**  
Assistant Attorney General