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I. EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC AND GREAT GENERAL INTEREST

Two trends in the law intersect in this appeal: the positive trend of softening the rigid, knee-jerk reaction to the utterance of the word "insurance" in a civil trial, and the negative trend of according less deference to trial judges in what one appellate court has labeled as "you-had-to-be-there" situations. By accepting this case, the Court will be able through its decision to give important clarifying guidance to litigants, litigators, trial judges and appellate courts in these two areas.

Ohio jurors are intelligent. They know that Ohio law requires every licensed driver to carry insurance or post a bond, and when they sit in judgment in civil cases arising out of automobile accidents they know that one or more insurance policies are likely implicated. Thus, even in cases when the word "insurance" is not uttered during trial, jurors presume there is insurance lurking behind the scenes.¹

There is a risk that jurors will improperly base the amount of damages they award upon assumptions about the amount of insurance available and/or whether an insurance company has paid or will be paying all or part of the damages incurred by the plaintiff. Recognizing this, with increasing frequency experienced trial judges have begun including a jury instruction, crafted by the Ohio Bar Association, advising jurors that they are not to consider or discuss whether either party has or had insurance and are not to add or subtract from any award based upon a belief that party does or does not have insurance.

¹ Writing for the majority in a medical malpractice, Justice Pfeifer expressed concern that "too often courts have a Pavlovian response to insurance testimony – immediately assuming prejudice" and observed that "[i]t is naïve to believe that today's jurors, bombarded for years with information about health care insurance, do not already assume in a malpractice case that the defendant doctor is covered by insurance." *Ede v. Atrium South OB-GYN, Inc.* (1994), 71 Ohio St.3d 124, 127, 642 N.E.2d 365. That observation applies equally – perhaps even stronger – to jurors' assumptions about the presence of automobile liability insurance.

Despite this positive trend, appellate courts in some instances continue to exhibit a Pavlovian reaction when the word "insurance" slips from a witness' lips at trial. Jumping to the illogical conclusion that the trial was so tainted that the trial judge was obligated to either immediately issue a curative instruction or declare a mistrial, they reverse and remand without regard for the years of effort and tens of thousands of dollars spent bringing the case to trial.

Intertwined with the foregoing is the degree of deference trial judges deserve in determining whether they believe testimony has tainted a trial. Although appellate court decisions pay homage to the black-letter law that trial judges should be accorded deference with respect to matters about which they were in a unique position to observe, in many instances, as here, this homage has become nothing more than a passing nod. The Court should accept this case and use it as a means for reinforcing – or clarifying – the deference trial judges should be given.

II. STATEMENT OF THE CASE AND FACTS

This is a run-of-the-mill auto accident case in which liability was stipulated and the parties proceeded to trial on the issues of causation and damages. The plaintiff's treating physician related the plaintiff's injuries to the accident. As is frequently the case, the tortfeasor's insurance company responded by hiring a local doctor – in this case, Dr. Gerald Steiman – to conduct a defense medical examination and to testify that the plaintiff's injuries and complaints either were fabricated or were unrelated to the accident.

At trial, the following exchange occurred during the plaintiff's cross-examination:

- Q. Isn't it true you told Dr. Steiman you were having regular headaches leading up until the time of the accident?
- A. Dr. who?
- Q. Steiman?

A. Who? I didn't treat with a Dr. Steiman.

Q. But you did see Dr. Steiman, correct?

A. That was something concocted by your insurance company.

(Tr. Vol. I, pp. 100-101.) This is the only instance during the entire four-day trial in which the word "insurance" was uttered. After this exchange, defense counsel requested a break and moved for mistrial. (Tr. Vol. I, p. 102.) The trial court properly denied the motion and explained the reason:

That motion is denied. I don't even -- I doubt the jury even heard it. It was kind of said as an afterthought. It was very quick. I almost didn't catch it.

If necessary, I'll give an instruction to the jury. We have a standard instruction. Insurance always comes up in these cases. In more than half of the jury trials I've done, somebody mentions insurance during the trial. It happens all the time. We have a standard instruction to give to the jury to address that.

You know, oftentimes insurance issues are brought up by the jury themselves in questions. So it's just a constant thing that we deal with, and we have instructions to address that to the jury.

(Tr. Vol. I, pp. 102-103.) The defendant's counsel did not ask for an immediate curative instruction.

The defendant presented Dr. Steiman's testimony by videotape. In his testimony Dr. Steiman stated that he performed various "tests" on the plaintiff in the presence of her husband. In the plaintiff's rebuttal case her husband testified as follows:

Q. Dr. Steiman has testified. Of course, you heard his testimony a moment ago and [sic] he palpated an area of her back with pressure that he knew to be 8 pounds per square inch?

A. That's an absolute lie, because Dr. Steiman did not touch my wife the whole time I was there.

(Tr. Vol. III, p. 465.)

Defense counsel did not object to the rebuttal testimony. At the conclusion of all of the evidence, defense counsel renewed the motion for a mistrial and the trial court again properly denied the motion.

The trial court's instructions to the jury included the following instruction taken directly from the Ohio State Bar Association's model jury instructions:

It is a common concern among jurors as to the existence or non-existence of insurance. Some jurors wish to know whether the plaintiff had insurance that paid any of his or her medical bills or whether the defendant was covered by insurance. In your deliberations, you are not to consider or discuss the issue of whether either party has or had insurance. You are to decide the issues in this case based upon the evidence presented to you, not upon any considerations concerning insurance. In no event may you add or subtract from any award based on whether either party has or does not have insurance.

When the trial court reviewed the proposed instructions with counsel, defense counsel did not object to the "insurance" instruction. The trial court stated as follows:

Well, as you recall what happened was that while a witness was testifying, I believe it was -- it was the plaintiff Marion Ockenden, there was an offhand reference kind -- at the end of a statement to something to the effect of the examination by Dr. Steiman being concocted by the insurance company. And at that time my view was that I doubt that the jury even heard it. I barely heard it. It was kind of thrown in at the end of an answer. It was very quiet. I'm not convinced that they even heard it.

But there was a motion for mistrial made based on that. So I'm kind of in the situation where if I didn't give a curative instruction, you could make the argument to the Court of Appeals that there was a mention of insurance and the court didn't give an (sic) curative instruction to tell the jury not to regard insurance.

So I feel it's necessary because of the motion for mistrial to put in an instruction telling the jury in case you heard that, you can't consider that. So that's the reason that I think it needs to be in there.

I don't think it is in any way formatted or positioned in a way that draws attention to it any more than any other instruction. It has the same type of heading and format as all the other instructions, so I don't believe there's anything improper about that.

(Tr. Vol. III, pp. 5-6.)

The Tenth District Court of Appeals reversed. Relying solely on an outdated case that no other court has relied upon for the same proposition, the appellate court strained to find that the plaintiff's mention of the word "insurance" so irreversibly tainted the proceedings that a mistrial was the only solution.

The trial judge made clear on the record that he did not believe the jurors heard the plaintiff's statement, which the judge described as "very quick," "kind of said as an afterthought," and so "very quiet" that the judge – who, like the court reporter, was right next to the witness and was positioned between the witness stand and the jury box – "barely heard it." Although the appellate panel obviously was not present at trial and was in no position to dispute the trial judge's observations, it nonetheless presumed that because the statement appeared on the record the trial judge was *incorrect* in his assessment of the situation. In short, the court of appeals gave no deference whatsoever to the trial judge's observations in this "you-had-to-be-there" situation.

III. PROPOSITIONS OF LAW AND SUPPORTING ARGUMENTS

Proposition of Law No. 1: WHEN DURING TRIAL A WITNESS MAKES A PASSING REFERENCE TO INSURANCE, AND WHEN THE STATEMENT IS NOT ELICITED OR UTTERED TO PROVE OR INFER NEGLIGENCE, THE MENTION OF INSURANCE DOES NOT WARRANT A MISTRIAL ABSENT A STRONG SHOWING OF PREJUDICE.

In a medical malpractice case in which insurance was mentioned at trial, this Court observed that because insurance is so prevalent it was naïve to believe jurors did not already assume the defendant doctor was covered by insurance. *Ede*, supra, at p. 127. That observation is even stronger in automobile accident cases, where jurors know that licensed drivers must

either carry liability insurance or post a bond. In such an environment, courts should relax their application of Evid.R. 411.

On the whole, appellate courts have increasingly recognized that the mention of insurance typically does not warrant a mistrial. See, e.g., *Henson v. K. Collins Plumbing, Inc.*, 12th Dist. No. CA2005-07-069, 2006-Ohio-3090; *Edwards v. Louy*, 6th Dist. No. L-01-1367, 2002-Ohio-3818. When the reference to insurance does not infer that a party is negligent, the mention of insurance does not run afoul of Evid.R. 411. Judges should not presume that every mention of the word "insurance" implies that the party with insurance is at fault.

Today, jurors and witnesses alike live in a time where insurance touches on all that we do, and it is therefore hardly surprising that the word "insurance" often makes its way into cases. Although trial attorneys remind witnesses that they are not to mention the word "insurance" at trial, it is unrealistic to expect witnesses to always remember this admonition, particularly in the heat of cross-examination. When such a reference occurs inadvertently, the trial judge should be given wide latitude to determine whether an immediate curative instruction is warranted in addition to the now-routine "insurance" instruction at the end of the case.

Proposition of Law No. 2: WHEN A WITNESS MAKES A STATEMENT DURING TESTIMONY AND THE STATEMENT IS ARGUABLY IMPROPER BUT MADE IN SUCH A WAY THAT IT APPEARS TO THE TRIAL COURT THAT THE JURY DID NOT HEAR THE TESTIMONY, A REVIEWING COURT SHOULD DEFER TO THE TRIAL COURT'S DECISION NOT TO GRANT A MOTION FOR A MISTRIAL.

As compared to a reviewing court, a trial judge is in a better position to determine whether a jury has heard an arguably improper statement at trial. For example, this Court has long held that a trial judge is in the best position to observe a jury's reaction to an emotional outburst. See *State v. Bradley* (1965), 3 Ohio St.2d 38, 40-41, 209 N.E.2d 215. The same is true when jurors are potentially impacted by outside influences during trial. *State v. Phillips* (1995),

74 Ohio St.3d 72, 89, 656 N.E.2d 643. The principle espoused in those cases should extend to instances in which the trial judge determines whether the jury heard certain testimony.

When a trial judge believes that a witness has testified to something that is arguably improper but also believes the jury did not likely hear the testimony because of the manner in which it was uttered, the judge should be given broad discretion in how to address the situation. In such a "you-had-to-be-there" situation, the trial judge – not a reviewing court looking at a transcript – is in the position of perceiving the event as it occurs at assessing the likelihood that the jury heard the information. If the trial judge believes the jury likely heard something improper, the judge must then decide whether to give an immediate curative instruction (which risks underscoring the significance of the information) or whether to let the moment pass and address the issue through the final jury instructions.

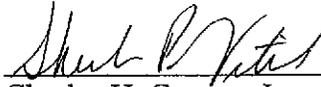
The trial court must be given broad discretion to make such a call. If not – if, as here, an appellate court instead takes it upon itself to make assumptions as to whether it is likely that the jury heard the information – parties, litigators, juries and witnesses are deprived of the benefit of having a jurist present to make such calls as the situations arise.

The deference accorded trial judges in "you-had-to-be-there" situations should be great but is slowly being eroded. This Court should act to restore the proper boundary.

IV. CONCLUSION

This Court should accept and review the decision by the Tenth District Court of Appeals to address the two important issues discussed above.

Respectfully submitted,



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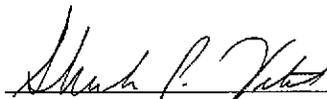
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Marion and Timothy Ockenden

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellants was served upon the following counsel of record, by ordinary U.S. mail, postage prepaid, this 16th day of June, 2008:

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APPENDIX

Counsel

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Marion Ockenden et al., :
 :
 Plaintiffs-Appellees, :
 :
 v. : No. 07AP-235
 : (C.P.C. No. 05CVH-3291)
 :
 Dorel B. Griggs, Jr., : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

O P I N I O N

Rendered on May 1, 2008

Cooper & Elliott, LLC, and Charles H. Cooper, Jr., for appellees.

Gallagher, Games, Pryor, Tallan & Littrell, LLP, and Andrew J. Kielkopf, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, P.J.

{¶1} Defendant-appellant, Dorel B. Griggs ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas denying his motion for a mistrial.

{¶2} On March 24, 2005, plaintiffs-appellees, Marion Ockenden ("Ms. Ockenden"), and her husband Timothy Ockenden ("Mr. Ockenden"), collectively referred to as appellees, filed a complaint alleging (1) negligence; (2) negligence per se; (3) respondeat superior; and (4) loss of consortium. The complaint arises out of a motor

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vehicle accident that occurred on August 17, 2001, between appellant and Ms. Ockenden. Prior to trial, appellees dismissed the respondeat superior claim and appellant stipulated to liability.

{¶3} The matter proceeded to a jury trial on January 23, 2007, before a magistrate of the common pleas court. During the cross-examination of Ms. Ockenden, the following exchange occurred:

[Appellant's counsel]: Isn't it true you told Dr. Steiman that you were having regular headaches leading up until the time of this accident?

[Witness]: Dr. who?

[Appellant's counsel]: Steiman?

[Witness]: Who? I didn't treat with a Dr. Steiman.

[Appellant's counsel]: But you did see Dr. Steiman, correct?

[Witness]: That was something concocted by your insurance company.

[The Court]: Ma'am, I need you to stick to the question and please do your best to answer the specific question. If you feel like additional facts need to be brought out, that will be your counsel's prerogative when he asks you questions. But this needs to proceed by question and then you answer that specific question, okay?

(Tr. Vol. I at 100-101.)

{¶4} Following this exchange, appellant's counsel requested a recess. After the jury was excused, appellant's counsel made an oral motion for a mistrial based upon the witness's statement that "seeing Dr. Steiman was a concoction of [his] insurance company." Id. at 102.

{¶5} The magistrate denied the motion, stating:

That motion is denied. I don't even – I doubt the jury even heard it. It was kind of said as an afterthought. It was very quick. I almost didn't catch it.

If necessary, I'll give an instruction to the jury. We have a standard instruction. Insurance always comes up in these cases. In more than half of the jury trials I've done, somebody mentions insurance during the trial. It happens all the time. We have a standard instruction to give to the jury to address that.

Id. at 102.

{¶6} The jury returned and the trial continued without any further instructions from the court. Thereafter, Mr. Ockenden testified on rebuttal regarding the testimony of Dr. Steiman, which appellant presented via a videotape deposition. Therein, Dr. Steiman stated he performed various tests on Ms. Ockenden in the presence of her husband Timothy. Regarding the physical examination, Mr. Ockenden testified as follows:

[Appellee's counsel]: Dr. Steiman has testified. Of course, you heard his testimony a moment ago that he palpated areas of her back with pressure that he knew to be 8 pounds per square inch?

[Witness]: That's an absolute lie, because Dr. Steiman did not touch my wife the whole time I was there. * * *

* * *

[Appellee's counsel]: You realize his testimony was under oath and you are accusing him of perjury?

[Witness]: I'm sorry. He lied. He lied about the time he spent with my wife and he lied under oath about what – about the examination.

(Tr. Vol. III at 465-467.)

{¶7} The trial proceeded, and after two days and the close of evidence, as part of the jury instructions, the following was given:

It is a common concern among jurors as to the existence or non-existence of insurance. Some jurors wish to know – some jurors wish to know whether the plaintiff had insurance that paid any of his or her medical bills or whether the defendant was covered by insurance.

In your deliberations, you are not to consider or discuss the issue of whether either party has or had insurance. You are to decide the issues in this case based upon the evidence presented to you, not upon any consideration concerning insurance. In no event may you add to or subtract from any award based on whether either party has or does not have insurance.

Id. at 552-553.

{¶8} On January 26, 2007, the jury returned a verdict in favor of Ms. Ockenden in the amount of \$250,000, and in favor of Mr. Ockenden in the amount of \$50,000. On February 21, 2007, the trial court entered judgment accordingly.

{¶9} This appeal followed, and appellant brings the following single assignment of error for our review:

THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT DOREL GRIGGS A MISTRIAL WHEN PLAINTIFFS DELIBERATELY INJECTED EVIDENCE OF INSURANCE AT TRIAL AND THEN FAILED TO IMMEDIATELY GIVE A CURATIVE INSTRUCTION, THEREBY PREJUDICING THE JURY AND DEFENDANT-APPELLANT GRIGGS' RIGHT TO A FAIR TRIAL.

{¶10} It is appellant's contention that appellees deliberately injected evidence of insurance into the trial in such a manner as to be prejudicial. According to appellant, the circumstances here necessitated a mistrial, or at the very least for the trial court to have given an immediate curative instruction. In response, appellees contend the trial court did not abuse its discretion in failing to grant a mistrial in this instance, and also because appellant failed to request an immediate curative instruction, he waived his right to claim

error on this basis. Further, appellees assert if any error occurred, it was cured when the trial court gave the jury a general instruction to disregard insurance prior to them beginning their deliberations.

{¶11} The decision whether to grant a mistrial is one addressed to the sound discretion of the trial court. *Parker v. Elsass*, Franklin App. No. 01AP-1306, 2002-Ohio-3340 at ¶19, citing *Quellos v. Quellos* (1994), 96 Ohio App.3d 31. This standard of review is based upon the fact that the trial court is in the best position to determine whether the circumstances of the case necessitate the declaration of a mistrial or whether other corrective actions are sufficient. *Id.* A reviewing court may not substitute its judgment for that of the trial court absent an abuse of discretion. *Id.* An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. A mistrial should only be granted where the party seeking the same demonstrates that he or she suffered material prejudice so that a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118.

{¶12} Generally, the question of liability insurance should not be brought into a personal injury case. *Sipniewski v. Leach* (Oct. 4, 1983), Montgomery App. No. 8123.

As provided by Evid.R. 411:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, if controverted, or bias or prejudice of a witness.

{¶13} "[E]vidence of liability insurance is highly prejudicial and is admissible at trial only if directly relevant to an issue at trial[.]" as it may improperly influence a jury with respect to their finding of liability or damages. *Hanna v. Redlin Rubbish Removal, Inc.*, (Apr. 1, 1992), Summit App. No. 15280, quoting *Cook v. Winberry Deli, Inc.* (Sept. 17, 1991), Summit App. No. 14841. Therefore, the introduction of evidence of liability insurance coverage in a personal injury trial is usually grounds for mistrial. *Id.*, citing *White v. The Std. Oil Co.* (1962), 116 Ohio App. 212, 220. However, not every mention of the word "insurance" mandates a mistrial. As this court has stated, "[a] casual and inadvertent reference to insurance in answer to a question asked a witness in a negligence action, which question and answer are indefinite, is not misconduct warranting the termination of the trial, where only by conjecture can such reference be said to have anything to do with defendant's insurance and what kind and whose." *White v. Columbus Green Cabs, Inc.* (Oct. 7, 1982), Franklin App. No. 82AP-313, quoting *Oney v. Needham* (1966), 10 Ohio App.2d 15, paragraph one of the syllabus.

{¶14} In *White*, the plaintiff was injured when a taxicab operated by defendant Johnson and owned by defendant Columbus Green Cabs, Inc., struck the plaintiff and ran over his right ankle. During the trial, there were two references to insurance, and the first reference was as follows:

Q. Did you have any conversation with Mr. Grady Johnson?

A. No. My brother did.

Q. Mr. Johnson said nothing to you at all?

A. I think he said they would take care of it, the cab company, after he backed off of me. I was laying – I think he said

something about don't worry about it, they will take care of it or something like that.

I said, well, the only thing that worries me was they take care of it, somebody's insurance or something like that.

Id.

{¶15} The trial court denied a mistrial at that time, but ordered the jury to disregard the answer. The second reference to liability insurance was the following:

Q. Was not your answer, all I remember is the man I hit said somebody called the police?

A. Right. Because he told me he didn't have, Mr. Herbst didn't have no insurance at the time.

So I called the police. He said, well, hey, somebody else call the police. I didn't know what to believe, whether to believe him or not. I called because he didn't have no insurance at the time.

Q. What did that have to do with anything, whether he had any insurance or not?

A. Because I wanted to get a police report because you can't take his word -- leaving at this time, if he pulled off. That's what he had suggested.

Id.

{¶16} The trial court again overruled a motion for a mistrial. On appeal this court noted that the references to insurance "~~neither inferred nor related to whether defendants had insurance[,]~~" and there was not "any indication of bad faith on plaintiff's part." Id. Because the first reference to insurance was "casual and inadvertent," and the second reference "reflected that defendants did *not* have insurance," this court determined that any reference to insurance was not prejudicial. Id. (Emphasis sic.)

{¶17} In *Sipniewski*, supra, a jury trial was held on the issue of damages arising out of an automobile accident. Insurance was mentioned in the following discourse during the plaintiff's cross-examination:

Q: I noticed Mr. Rudd brought in here and had marked as an exhibit a report from Dr. Koehler, and it has been marked Plaintiff's Exhibit 8. Did you secure that from Dr. Koehler or did someone else to your knowledge?

A: No. I gave that form to him. Allstate Insurance gave me some forms to have the doctors I saw fill out.

Q: When you talk about Allstate Insurance, Allstate is the one that paid for the damage to your car, isn't that correct?

A: Yes.

Q: They paid to replace an oil pan for you, did they not?

A: Yes. They fixed everything that the adjuster saw that needed to be fixed.

Id.

{¶18} The Montgomery Court of Appeals found no prejudicial error in the trial court's admission of the above-described testimony, and stated, "[i]n the present case, appellant unexpectedly brought out the subject of Allstate Insurance during cross-examination and counsel for appellee avoided prejudicial error by confining the topic of insurance to appellant's car repairs." Id.

{¶19} Where a witness's reference to insurance, however, is not inadvertent, prejudice may be found. For example, the Summit County Court of Appeals was faced with a scenario in *Hanna*, supra, wherein the court found that a witness's reference to insurance during his direct examination necessitated a mistrial. In *Hanna*, while acting in the course and scope of employment, the defendant's employee struck plaintiff's

automobile. Liability was not contested and a jury trial ensued on the issue of damages.

During the plaintiff's direct examination, the following exchange took place:

Q. And were there other doctors?

A. She went to see a Dr. Burke on the recommendation of the insurance company.

Id.

{¶20} The defendant immediately requested a mistrial, and the trial court opted to consider it at a later time. The trial court also refused the defendant's request for a curative instruction. Prior to deliberations, the *Hanna* jury was charged as follows:

" * * * there was a reference by a witness to something to do with insurance. You are to disregard any and all reference to insurance. They have no part of a case such as this, if there be any insurance. Your duty is to fairly assess and compensate the Plaintiffs according to the law that I have given you."

Id.

{¶21} The *Hanna* court concluded the plaintiff could have fully and fairly answered the question posed by counsel without any reference to insurance, and the court was not persuaded by plaintiff's argument that no prejudicial error resulted because the disclosure was "unintended." The court noted the trial was limited to a determination of damages only, and therefore, even a minor error could have a substantial impact on the outcome of the case. The court stated:

* * * [T]his situation is especially egregious in light of an announcement by the Hannas' attorney in opening arguments that Joy Hanna had visited a particular doctor upon the request of defense counsel. Richard Hanna's reference to the physician referred by the "insurance company" followed shortly thereafter. A logical inference was therefore permitted

that the defense and the insurer were closely allied, if not one and the same.

Id.

{¶22} Consequently, the appellate court held the trial court's denial of the motion for mistrial was unreasonable, and remanded the matter for a new trial.

{¶23} We now consider the situation contained in the present appeal in view of the restrictions placed by Ohio courts on the introduction of insurance evidence in a personal injury trial. Similar to *Hanna*, supra, the case at bar is one in which no issue existed as to liability and the parties were in contest only over issues of proximate cause and damages. Also analogous to *Hanna* is the fact that Ms. Ockenden's testimony cannot be considered merely a "passing reference" or "casual mention" of the word insurance. Again, Ms. Ockenden's testimony was as follows:

[Appellant's counsel]: Isn't it true you told Dr. Steiman that you were having regular headaches leading up until the time of this accident?

[Witness]: Dr. who?

[Appellant's counsel]: Steiman?

[Witness]: Who? I didn't treat with a Dr. Steiman.

[Appellant's counsel]: But you did see Dr. Steiman, correct?

[Witness]: That was something concocted by your insurance company.

(Tr. Vol. 1 at 100-101.)

{¶24} Further aggravating the matter at hand is that Ms. Ockenden's testimony did not only mention the word "insurance," but directly tied the existence of insurance to the defendant (i.e., "your insurance company"). Furthermore, Ms. Ockenden stated that

her examination by Dr. Steiman was something "concocted" by the defendant's insurance company. Merriam-Webster's Dictionary (1987), 273, defines "concoct" to mean "1: to prepare by combining crude materials 2: Devise, fabricate."

{¶25} In summation, we are confronted with a situation in which the plaintiff has testified: (1) that insurance exists; (2) that the insurance is the defendant's insurance carrier; and (3) that the defendant's insurance carrier "concocted" or fabricated an examination of the plaintiff. Upon review, we find this scenario presents a situation even more prejudicial than that at issue in *Hanna*.

{¶26} An independent medical examination is a *right* of a defending insurance company in a personal injury case. Indeed, any attempt to cure here would require the trial court not only to instruct the jury to disregard the testimony of insurance, but also, to disregard plaintiff's testimony in regard thereto, and further explain that any suggestion by plaintiff that the insurance company's examination was some type of fabricated activity was not accurate and could not be considered as such by the jury. Even then it is likely this scenario could only be remedied via a mistrial because the trial court would then be instructing the jury that plaintiff's testimony in regard to "concocting" an examination was not true. It is difficult to see how a fair and impartial trial for all parties could be resuscitated from this situation, and it certainly could not by the standard insurance instruction.

{¶27} The matter became even more exacerbated when plaintiff's husband added to plaintiff's prejudicial testimony by stating that Dr. Steiman had testified falsely as to the content of his "concocted" examination. While the type and quality of physical examination performed by Dr. Steiman may be a disputed fact and appellees had the

right to rebut Dr. Steiman's testimony, the improper and prejudicial testimony of Ms. Ockenden when combined with the husband's charge that Dr. Steiman had lied, created a situation that could only be cured by a mistrial, as appellant suffered material prejudice such that a fair trial was no longer possible.

{¶28} We recognize the trial court has broad discretion pertaining to whether or not to grant a mistrial, and we note the trial court here was under the impression Ms. Ockenden's reference to insurance was said as an "afterthought," and it was doubtful the jury even heard the testimony. (Tr. Vol. I at 102.) However, we must consider the record as it stands. There was no voir dire of the jurors and the record provides no indication that the jurors did not hear Ms. Ockenden's testimony. Indeed, appellant's counsel immediately moved for a mistrial asserting prejudice beyond repair. Based on the totality of the circumstances, we must conclude that the trial court's denial of appellant's request for a mistrial was unreasonable. Accordingly, we sustain appellant's single assignment of error.

{¶29} For the foregoing reasons, appellant's single assignment of error is sustained, and the judgment of the Franklin County Court of Common Pleas is hereby reversed and this matter is remanded to that court for further proceedings consistent with law and this opinion.

Judgment reversed and cause remanded.

BRYANT and SADLER, JJ., concur.

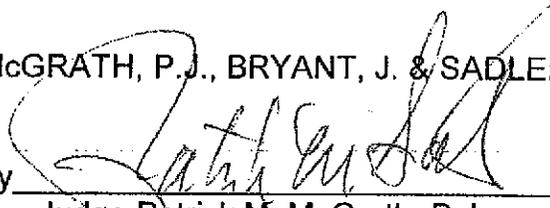
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Marion Ockenden et al., :
 :
 Plaintiffs-Appellees, :
 :
 v. : No. 07AP-235
 : (C.P.C. No. 05CVH-3291)
 :
 Dorel B. Griggs, Jr., : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on May 1, 2008, appellant's single assignment of error is sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs shall be assessed against appellees.

McGRATH, P.J., BRYANT, J. & SADLER, J.

By 
Judge Patrick M. McGrath, P.J.

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