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**STATEMENT OF WHY THIS CASE IS NOT OF PUBLIC
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At its core, Appellants' argument is simply that the Court of Appeals erred in reversing the trial court's decision. Article IV, Section 2 of the Ohio Constitution instructs that a judgment of an Ohio Court of Appeals shall serve as the ultimate and final adjudication of cases except those involving constitutional questions, conflict cases, felony cases, cases in which the Court of Appeals has original jurisdiction, and cases of public or great general interest. "Except in these exceptional circumstances, it is abundantly clear that in this jurisdiction a party to litigation has a right to but one appellate review of his cause." *Williamson v. Rubich* (1960), 171 Ohio St. 253, 253-254. (Emphasis added.) In other words, the Ohio Supreme Court is not intended to be just another appellate court reviewing this cause.

The legal issues presented by this case are well established and have no need of modification. Specifically, evidence of liability insurance has no place in the trial of a personal injury case, as it is highly prejudicial and generally irrelevant. A casual or inadvertent reference to such insurance will not always mandate a mistrial. Yet, in especially egregious circumstances, a mistrial is not only warranted, but is necessary to preserve the parties' rights to an unbiased, meaningful determination of their rights and obligations by a jury. In such circumstances, it is an abuse of a trial court's discretion to fail to grant a mistrial.

As it is charged to do, and to which the parties have a right, the appellate court conducted a comprehensive and meaningful review of the applicable law, and applied the well-founded law to the specific facts of this case. And, having done so, the court correctly concluded that appellants' testimony did not represent a mere passing or inconsequential reference to insurance. Instead, the testimony, taken together, created a situation in which the ability to receive a fair and impartial trial was prejudiced beyond repair. Therefore, a mistrial was required.

Simply stated, this is not a case of public or great general interest. There is no novel issue of law or procedure. Rather, it is one that involves facts and circumstances highly specific to this case, which is not conducive to a pronouncement of meaningful guidance by this Court.

STATEMENT OF THE CASE AND FACTS

This is an ordinary case that took an extraordinary turn due to appellants' testimony during trial. First, Mrs. Ockenden testified as follows:

Q: Isn't it true you told Dr. Steiman that 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.) (Emphasis added.)

Immediately upon hearing her remark, the Court did not issue a curative instruction, but merely advised her not to stray from the question posed:

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, p. 101.)

After the exchange between the trial court and the Plaintiff, defense counsel moved for a mistrial. Because it doubted that the jury heard her testimony, as it was "very quick" and "kind of said as an afterthought," the trial court overruled the motion. It is necessary to again note that the trial court obviously heard both the question asked and the answer given or the trial court would not have warned Mrs. Ockenden about straying from the point.

Subsequently, the defense presented the testimony of its only witness, Dr. Steiman. During appellants' rebuttal, Mr. Ockenden compounded the prejudicial nature of his wife's previous testimony with the following statements:

Q: Dr. Steiman has testified. Of course, you heard his testimony a moment ago that he palpated 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.)

Q: You realize his testimony was under oath and you are accusing him of perjury?

A: 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, p. 467.)

At the close of testimony and before instructions were administered to the jury, Appellee renewed his motion for a mistrial. The trial court again denied the motion, but instructed the jury to disregard any reference to insurance. However, the irreparable damage had already been done.

The Tenth District, recognizing that the totality of the appellants' testimony amounted to much more than a mere passing reference to insurance, creating incurable prejudice to Appellee, reversed the trial court. In so doing, the appellate court correctly applied the relevant law while conducting a comprehensive review of the proceedings and reached a well-reasoned decision without overstepping its role as a reviewing court.

ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITION OF LAW

I. Appellants' 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.

It is axiomatic that in an action for damages arising from a defendant's alleged negligence, evidence as to the financial standing of a party is inadmissible. *Hudock v. Youngstown Municipal Ry. Co.* (1956), 164 Ohio St. 493. Correspondingly, it is well established in Ohio jurisprudence that evidence that a person is or is not insured is not properly presented to a jury on the issue of negligence in an action for damages. Ohio Rule of Evidence 411 specifically limits the admissibility of such evidence:

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

Id.

"It cannot be gainsaid that a trial lawyer is treading on dangerous ground and always approaches grounds for a mistrial by the mere mention of insurance when [the] same is not at issue." *White v. The Std. Oil Co.* (1962), 116 Ohio App. 212, 220. This is due to the simple fact that such evidence is highly prejudicial in its ability to improperly influence a jury's finding of liability or damages depending upon the availability of insurance proceeds. See *Piontkowski v. Scott* (1989), 65 Ohio App.3d 4, 7. Thus, the injection of evidence of liability insurance coverage in an action for damages is considered adequate grounds for a mistrial. *Hanna v. Redlin Rubbish Removal, Inc.* (1992), Summit App. No. 15280.

However, it is equally true that not every reference to liability insurance will warrant a mistrial. *Oney v. Needham* (1966), 10 Ohio App.2d 15, 19. For instance, a casual or inadvertent reference to insurance, "where only by conjecture can such reference be said to have anything to do with defendant's insurance and what kind and whose" without more, does not require

termination of a trial. *Id.* In such circumstances, a curative instruction from the court directing the jury to disregard the improper testimony may alleviate its prejudicial impact.

Thus, when evidence of liability insurance is improperly injected into trial, it is incumbent upon a court to carefully and conscientiously consider the totality of the circumstances in determining whether or not such evidence requires a mistrial. There can be no bright line test, as each determination must be made on the specific circumstances of each case. Whereas a passing reference to insurance in general may be cured with a timely instruction, a pointed comment regarding a defendant's status as an insured may be the proverbial bell that once rung cannot be un-rung.

The case-specific nature of the inquiry can be clearly seen by the Tenth District Court of Appeals' decision herein. The court set forth the applicable law found in Evid.R. 411 and addressed in cases such as *Sipniewski v. Leach* (Oct. 4, 1983), Montgomery App. No. 8123, *Hannah*, *supra*, *White*, *supra*, and *Oney*, *supra*. The court then discussed several different cases with scenarios in which evidence of liability insurance surfaced at trial through witness testimony or the commentary of counsel. In so doing, the court noted the different ways in which the prejudicial nature of the testimony was either alleviated or deemed incurable.

Thereafter, the court reviewed the record of the trial and found that the appellants' intentional and improper reference to appellee's insurance, in this specific case, required a mistrial. The court emphasized that not only did Mrs. Ockenden's unsolicited and non-responsive statement identify appellant's status as an insured ("your insurance company"), it directly linked the defendant to his insurance company's allegedly fraudulent action of concocting evidence in the form of expert testimony regarding Mrs. Ockenden's physical condition—the only issue remaining in the case after appellee stipulated to fault.

This is exactly the type of situation that Evid.R. 411 and Ohio law in general contemplate as being so prejudicial as to be inadmissible. Likewise, when considered together with Mr. Ockenden's subsequent characterization of the same expert as lying under oath, i.e., committing perjury, the totality of the circumstances was such that it is impossible to ignore the likelihood of

the jury being improperly influenced. Thus, the Tenth District correctly concluded that the totality of the appellants' testimony created a situation in which a fair trial was no longer possible and which could be cured only by declaring a mistrial. Such a fact specific situation cannot give rise to a case of public or great general interest.

II. Appellants' 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 (sic) 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 stated by the Tenth District herein, there can be no question that the decision of whether to grant a mistrial is within the trial court's discretion. Thus, trial judges are to be granted broad discretion regarding "you-had-to-be-there" situations. However, as noted by the same judge who so dubbed these situations, while "discretion may be broad, it is rarely unlimited." *Metzger v. Al-Ataie*, Gallia App. No. 02CA11, 2003-Ohio-2784, ¶18, Harsha, J., dissenting. Therefore, while a reviewing court may not substitute its own judgment for that of the trial court, it must also independently determine whether the trial court properly exercised its discretion by ensuring that the decision is not unreasonable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

In the instant case, the appellants' statements were not merely "arguably improper," they were inherently prejudicial to appellee's right to a fair and impartial trial. Appellants did not just make a passing reference to insurance, but asserted that the appellee, together with his insurance company, had engaged in misconduct and fraud against them. Accordingly, any "doubt" that the trial judge had regarding whether the jury heard the statements should have been resolved in favor of the appellee, not in favor of the party who inserted the improper testimony into the jury's collective memories. No curative instruction was immediately given; nor was the jury told to disregard the appellants' statements. Instead, with regard to the first comment by Mrs. Ockenden, the trial judge merely instructed her to answer only the specific question asked.

While a trial court has broad discretion, it must be exercised within the bounds of reason. Here, as the appellate court correctly noted, appellants' statements, taken together, were not merely a passing reference to insurance. Instead, they amounted to factual assertions that not only was appellee insured, but his insurer fabricated evidence, i.e., a physical examination of the appellant. Therefore, regardless of whether the statements were afterthoughts or were quickly spoken, any doubt as to whether they reached the jury's ears should have been resolved in favor of the prejudiced party.¹ They were not, which left appellee in a position that precluded the possibility of receiving a fair trial. Such a situation is not within the acceptable spectrum of occurrences or outcomes in a justice system that prides itself on the fair and impartial administration of justice.

It is a reviewing court's responsibility and function to correct situations in which the mistaken exercise of discretion amounts to material prejudice to a party. The appellate court herein did not misappropriate the trial court's role, nor did it fail to give due deference to the trial court's decision. Instead, the Tenth District acted as it is charged to do: it reviewed the specific facts of the case, applied the relevant law, noted the acceptable spectrum of outcomes, and determined that the trial court acted outside of those boundaries in exercising its discretion. While trial judges must be afforded deference, their decisions are not granted unfettered and unassailable preference.

Appellants' arguments seek to simultaneously eviscerate both the well-established jurisprudence of this state that deems evidence of liability insurance irrelevant and prejudicial to a trial of a personal injury action seeking damages, enunciated in the Rules of Evidence as well as case law, and the equally long-standing role of an appellate court in reviewing a trial court's determination regarding the same. In essence, appellants' position requests this Court to both re-write the Rules of Evidence and to re-define the role of appellate courts. Where, such as here,

¹ This is especially true herein, as there can be no doubt that the court heard the offending statement.

the parameters of both are clear, there is simply no need for further review or repeated pronouncements of the law or function of the courts.

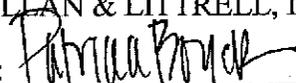
CONCLUSION

The law regarding the admissibility of evidence of a defendant's liability insurance in negligence actions is well defined. The prejudicial nature of such evidence requires that it is admissible in very limited circumstances. Thus, when a plaintiff improperly injects evidence of the defendant's status as an insured into a trial on damages, a mistrial may be warranted. Due to the fact specific nature of an inquiry regarding the necessity of a mistrial, a bright line test is untenable.

Moreover, while a trial court is to be granted broad discretion in determining whether to grant a mistrial, that discretion is not without limits. A reviewing court is charged with ensuring that the trial court exercised that discretion in a reasonable manner such that the parties' right to a fair and impartial trial is not materially prejudiced. Herein, the Tenth District Court of Appeals' did exactly as it is charged to do: it applied the well-established law to the unique and extraordinary facts presented by the specific case. Appellants are merely unhappy with the outcome. Such is not an issue of public or great general interest; it is merely of interest to the individuals involved in the instant litigation. Accordingly, Appellee submits that this case does not present any issues requiring further review, and this Court should decline to exercise its jurisdiction.

Respectfully submitted,

GALLAGHER, GAMS, PRYOR,
TALLAN & LITRELL, L.L.P.

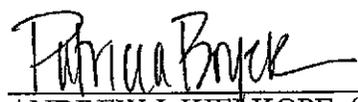
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CERTIFICATE OF SERVICE

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