

In the Supreme Court of Ohio

**ELEVATORS MUTUAL INSURANCE
COMPANY**

Plaintiff/Appellee,

v.

**J. PATRICK O'FLAHERTY'S, INC., et
al.**

Defendants/Appellees.

SUPREME COURT CASE NO.:

09-0321

**On appeal from the Sandusky County
Court of Appeals, Sixth Appellate
District**

Court of Appeals Case No.: S-08-006

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT NAMIC INSURANCE COMPANY

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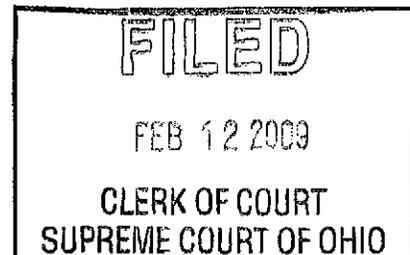


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EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

A divided court of appeals has concluded that an arsonist convicted of torching his own restaurant can exclude evidence of his convictions for arson and insurance fraud in his civil suit against his insurance company to recover damages under his policy of insurance for the very fire he started. In arriving at this startling conclusion, the Sixth District Court of Appeals:

- Misinterpreted Ohio Supreme Court precedent, *State v. Mapes* (1985), 19 Ohio St.3d 108, 484 N.E.2d 140;
- Ignored the language contained in Crim. R. 11 (B)(2) and Evid. R. 410;
- Refused to even consider the overwhelming majority view nationwide allowing evidence of the conviction on the grounds that, as a matter of public policy, “an arsonist ought not to be allowed to profit from the act of arson” (*Elevators Mut. Inc. Co. v. J. Patrick O’Flaherty’s, Inc.*, Sandusky App. No. S-08-006, 2008-Ohio-6946, ¶25); and
- Tried to distinguish a conflicting case directly on point from the Third Appellate District which held that evidence of a policyholder’s criminal conviction following a no contest plea is admissible when made relevant by an exclusion in an insurance contract.

This case arises out of a fire which occurred at a restaurant called J. Patrick O’Flaherty’s. Elevators Mutual Insurance Company issued a Restaurant Commercial Package policy to J. Patrick O’Flaherty’s, Inc. Richard Heyman was president and 50% owner of O’Flaherty’s and his wife was the other 50% owner. The Heymans also owned the building which they leased to O’Flaherty’s. It is undisputed that Richard Heyman, in connection with the fire, pled no contest to felony charges of insurance fraud and arson with purpose to defraud. Richard Heyman was found guilty on both counts and sent to prison.

Plaintiff Elevators Mutual filed this declaratory judgment action, seeking a determination that it has no duty to pay the insurance claim in connection with the fire. The issue in this appeal is

whether Richard Heyman's felony convictions are admissible into evidence to bar coverage under the Elevators Mutual policy.

O'Flaherty's (through its owners Richard and Jan Heyman) argued that evidence of Richard Heyman's felony convictions is rendered inadmissible by Evid. R. 410(A)(2) and Crim. R. 11(B)(2). Evid. R. 410(A)(2) generally excludes "evidence of . . . a plea of no contest or the equivalent plea from another jurisdiction." Crim. R. 11(B)(2) provides that a "plea of no contest . . . shall not be used against the defendant in a subsequent civil or criminal proceeding." Significantly, both rules expressly apply only to the *plea* and neither rule so much as mentions *convictions*.

The Court of Appeals interpreted this Court's decision in *Mapes* to mean that introduction of evidence of a conviction entered upon a plea of no contest is permitted "*only* when a statute makes such introduction specifically relevant to that proceeding." *Elevators*, at ¶29. In so holding, the majority of the appellate court relied upon the following passage from *Mapes*:

Crim. R. 11(B)(2) and *Evid. R. 410* prohibit only the admission of a no contest plea. These rules do not prohibit admission of a conviction entered upon that plea when such conviction is made relevant by statute. The trial court was correct in admitting the evidence of the prior conviction as it was not equivalent to the admission of the no contest plea and it was not introduced by the prosecution for any purpose other than establishing the specification. The purpose of *Evid. R. 410* as it relates to criminal trials is to encourage and protect certain statements made in connection with plea bargaining and to protect the traditional characteristic of the no contest plea which is avoiding the admission of guilt that is inherent in pleas of guilty. See 1 Weissenberger, *Ohio Evidence* (1985) 55, Section 410.1 and Advisory Committee Notes to *Fed. R. Evid. 410*. These purposes are not disserved by the admission of a conviction entered upon a no contest plea.

Mapes, supra 19 Ohio St.3d at 111.

Appellant respectfully submits that the majority of the court of appeals misinterpreted this Court's holding in *Mapes*. The majority ignored this Court's determination that Crim. R. 11(B)(2) and Evid. R. 410 prohibit only the admission of the no contest plea and further ignored this Court's

determination that evidence of a conviction entered upon a no contest plea is not equivalent to admission of the no contest plea itself. Moreover, the appellate court misinterpreted *Mapes* as permitting evidence of a conviction entered upon a plea of no contest “only” when made relevant by statute.

The appellate court’s decision in the present case is in direct conflict with the judgment of the third district court of appeals in *Steinke v. Allstate Ins. Co.* (1993), 86 Ohio App.3d 798, 621 N.E. 2d 1275. The court in *Steinke* held that evidence of a policyholder’s criminal conviction following a no contest plea is admissible when made relevant by an exclusion in the insurance contract:

Contrary to appellant’s assertions, his plea of no contest was not being used as an admission upon the merits of the counterclaim. Rather, ***the resulting criminal conviction*** was being introduced by Allstate to establish that the injuries herein might reasonably be expected to result from the criminal act of the insured, and, thus, relieve Allstate of any duty to cover or defend under the terms of the policy. ***Thus, we find no error in the admission of the criminal conviction for this purpose.***

(Emphasis added.) *Steinke*, 86 Ohio App. 3d at 802. The Third District reached this conclusion because “[i]t is clear that *Crim.R. 11* and *Evid.R. 410* prohibit the use of ‘a plea of no contest,’ not a *conviction* pursuant to a no contest plea.” *Id.* at 801 (Italics original.)

The Third District Court of Appeals concluded that a criminal conviction made relevant by an insurance contract is admissible, even if the conviction followed a no contest plea. But the majority in the court below held that a conviction following a no contest plea is admissible only if made relevant by statute; not if made relevant by the insurance contract. Both the policy in *Steinke* and the policy at issue here exclude coverage for criminal acts. While the Third District in *Steinke* held that an insured’s criminal conviction following a no contest plea is relevant to establish a policy exclusion, the majority of judges in this case reached the exact opposite result. Thus, there is an irreconcilable conflict between the decisions of the Third and Sixth Appellate Districts in their

interpretation of this Court's decision in *Mapes*.

The Third Appellate District in *Bott v. Stephens*, Allen App. No. 1-05-09, 2005-Ohio-3881, again concluded that an insured's conviction may be considered in determining coverage. In *Bott*, the insured was convicted of aggravated vehicular assault as the result of a no contest plea. The court held that, "[t]he only effect of the conviction is that the trial court can take notice that Stephens recklessly caused serious physical harm to another while operating a motor vehicle, R.C. 2903.08." *Id.* at ¶7. The court concluded that the culpable mental state of "recklessness" was insufficient to establish the exclusion for intentional acts. But in the case at bar, Heyman's conviction for arson under R.C. 2909.03(A)(2) is conclusive evidence that he, by means of fire or explosion, knowingly caused or created a substantial risk of physical harm to the insured property *with the purpose to defraud* Elevators Mutual. Likewise, Heyman's conviction for insurance fraud under R.C. 2913.47 (B)(1) is conclusive evidence that he, *with purpose to defraud or knowingly facilitating a fraud*, presented a statement to Elevators Mutual in support of a claim for payment, knowing that the statement was false or deceptive. The trial court correctly gave effect to Heyman's convictions and granted summary judgment in favor of Elevators Mutual.¹

Moreover, the majority opinion in this case specifically refused to discuss the public policy ramifications of its decision. "[A] majority of jurisdictions will not exclude criminal judgments from evidence in a civil suit where the party's motive in bringing the civil suit is to benefit from his

¹ This conflict was recently manifested once gain in the Third District's decision in *Owner Operators Indep. Drivers Risk Retention Group v. Stafford*, Third Dist. No. 9-07-46, 2008-Ohio-1347. In *Stafford* the Third District considered whether the insured's conviction of aggravated vehicular assault following a no contest plea precluded coverage under an automobile liability insurance policy. There was no discussion as to whether the conviction was admissible. The court only considered the issue of whether the conviction necessarily triggered the intentional acts exclusion. The admissibility of the conviction was presumably not at issue because of the Third District's previous rulings in the *Steinke* and *Bott* cases.

criminal act.” *Morin v. Aetna Casualty & Sur. Co.* (R.I. 1984), 478 A.2d 964, 966; *State Farm Mut. Auto. Ins. Co. v. Worthington* (C.A. 8, 1968), 405 F.2d 683, 686 (“The exception to the rule that judicial admissions in criminal cases are not conclusive in subsequent civil proceedings occurs where a party seeks to profit from his own criminal act. The courts in such cases deny recovery as a matter of public policy.”). That majority view is based on the fact that “it would be a mockery of justice for our legal processes to be used by convicted felons to profit from their crimes. To permit such a result is clearly contrary to the public policy of this state.” *Imperial Kosher Catering, Inc. v. Travelers Indem. Co.* (1977), 73 Mich. App. 543, 546; see, also, *Eagle, Star & British Dominions Ins Co v Heller* (1927), 149 Va. 82, 111; *Checkley v. Illinois C. R. Co.* (Ill. 1913), 100 N.E. 942, 944; *Scarborough v. American Nat'l Ins. Co.* (N.C. 1916), 171 N.C. 353, 354-355; *Ritter v. Mutual Life Ins. Co.* (1898), 169 U.S. 139, 153.

Ohio's public policy is no different from that espoused in other jurisdictions nationwide. See, e.g., *Gearing v. Nationwide Ins. Co.* (1996), 665 N.E.2d 1115, 1120. This Court should effectuate this public policy by giving criminal convictions independent legal significance in adjudicating claims arising under a contract of insurance. Accord, *Allstate Insurance Co v. Simansky* (1998), 45 Conn. Supp. 623; *Allstate Ins. Co. v. Schmitt* (1990), 238 N.J. Super. 619, 633; *Century-National Ins. Co. v. Glenn* (2001), 86 Cal. App. 4th 1392, 1397-98. By reversing the decision of the trial court, the Court of Appeals failed to recognize Ohio's public policy as well as the terms of the contract of insurance at issue.

The dissenting Judge was particularly concerned about the public policy of allowing an arsonist to profit from his insurance fraud. The purpose of Evid. R. 410 is to allow a criminal defendant to plead no contest while reserving his right “to defend himself from future civil *liability*”; not to allow him to profit from his own criminal misconduct. (Italics original.) *Walker v. Schaeffer*

(C.A. 6, 1988), 854 F.2d 138, 143.² In *Walker*, the plaintiffs asserted a false arrest claim against two Ohio police officers. The officers sought to introduce evidence of the plaintiffs' criminal convictions, following no contest pleas, to refute the false arrest claim. The plaintiffs objected to the evidence, citing Evid. R. 410. The Sixth Circuit held that plaintiffs could not use Evid. R. 410 to block evidence of their criminal convictions in their false arrest case against the two officers:

We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts [by pleading no contest] which would indicate no civil liability on the part of the arresting police.

Walker, 854 F.2d at 143. See also, *USX Corp. v. Penn Cent. Corp.* (8th Dist. 1999), 137 Ohio App. 3d 19, 27, 738 N.E.2d 13 (“Use of the conviction as a *defense* against a claim by a former criminal defendant is not prohibited”) (Italics original).

A plea of no contest is “an admission of the truth of the facts alleged in the indictment, information, or complaint ***.” Crim. R. 11(B)(2). A plea of no contest should be taken very seriously by the criminal defendant. Rule 410 was intended to protect the criminal defendant from exposing himself to future civil liability. It was never intended to be a windfall for the criminal defendant to facilitate his claims against the very party he was convicted of criminally defrauding.

The majority of the court of appeals acknowledged “numerous foreign cases” that, as a matter of public policy, would not allow an arsonist to profit from his own act of arson. *Elevators* at ¶25. The majority simply decided to ignore these decisions. Appellant NAMIC respectfully urges this

² *Walker* involved Fed. R. Evid. 410, which is substantively identical to Ohio Evid. R. 410. See, Evid. R. 410 Staff Notes (“There is no substantive variation between the Ohio rule and the Federal rule”). Fed. R. Evid. 410, like Ohio Evid. R. 410, prohibits evidence of a no contest plea, but does not prohibit evidence of a conviction following a no contest plea. See, *Kerpely v. State Auto. Ins. Co.* (N.D. Ohio 1992), 144 B.R. 66, 68 (“*Federal Rule of Evidence 410 * * ** is inapplicable herein, however, because Plaintiffs rely on a criminal judgment, not a plea, to support their motion”).

Court to accept jurisdiction to consider this paramount public policy concern in the proper interpretation of Evid. R. 410 and Crim. R. 11.

Mr. Heyman should not be allowed to proceed with his coverage and bad faith claims against Elevator's Mutual in spite of his admission to the truth of the fact that he was guilty of arson and insurance fraud in burning his own building. Fundamental principles of res judicata and equitable estoppel should apply to prevent such a result. This appeal presents the opportunity for this Court to clarify the consequences of such a plea under Evid. R. 410 and Crim. R. 11, and ensure that the law of Ohio is in line with the majority view prohibiting the criminal defendant from profiting from such a plea.

STATEMENT OF THE CASE AND FACTS

Elevator's Mutual Insurance Company ("Elevator's Mutual"), insured the restaurant building owned by J. Patrick O'Flaherty's, Inc. ("O'Flaherty's"). The building was destroyed by an arson fire on February 4, 2001. Richard and Jan Heyman own O'Flaherty's and are listed as Loss Payees on the Elevators Mutual policy. As such, they are entitled to any insurance proceeds payable to O'Flaherty's, the Named Insured.

Richard Heyman set the fire at O'Flaherty's to make money on a fraudulent insurance claim. Upon plea of no contest, he was found guilty and convicted of arson in violation of R.C. 2909.03(A)(2) and insurance fraud in violation of R.C. 2913.47(B)(1).

Elevators Mutual filed the instant declaratory judgment action against Richard Heyman, Jan Heyman, and O'Flaherty's seeking a declaration that no insurance coverage was afforded for the arson fire. The Heymans and O'Flaherty's filed a counterclaim against Elevators Mutual alleging, among other things, punitive damages, "bad faith," "fraud," and "spoilation." Appellant/intervenor NAMIC Insurance Company ("NAMIC") provides professional liability insurance to Elevators

Mutual and, as such, had standing to intervene to protect its interests with respect to coverage for the bad faith claim against its insured. *Howell v. Richardson* (1989), 45 Ohio St. 3d 365.

The trial court ruled, correctly, that the Heymans' and O'Flahertys' counterclaim was barred because Richard Heyman's criminal convictions for arson and insurance fraud were admissible and dispositive of the coverage issue. The trial court granted summary judgement in favor of Elevators Mutual accordingly.

The Heymans and O'Flaherty's appealed and a divided Sixth Appellate District held that “[t]he question here” “is not one of [public] policy, but evidence.” *Elevators* at ¶ 25. The majority held that a conviction based on a no contest plea is admissible “*only* when a statute makes such introduction [of evidence] specifically relevant to the proceeding.” *Id.* at ¶ 29. The majority concluded that Richard Heyman's convictions for arson and insurance fraud were, accordingly, inadmissible because “[w]hat is at issue in this matter is not a statute, but exclusionary provisions in an insurance policy.”³ *Id.* at ¶ 33. But Judge Osowik dissented because Richard Heyman's criminal convictions for arson and insurance fraud were *not* being used against Heyman to hold him civilly liable for the fire; but rather were being used to defend against *his claims* for insurance coverage and bad faith. The dissent was persuaded by the strong public policy preventing a convicted arsonist from profiting by his crime. *Id.* at ¶¶ 49-59.

The Heymans now seek to reap the rewards of Richard Heyman's arson and insurance fraud

³ In the same paragraph of the Court of Appeals majority opinion, the Court states: “We take no position on whether an insurer and an insured may contract to make a prior conviction relevant in a subsequent action on the contract. *In this insurance contract, no such provision appears.*” (Emphasis added.) *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc.*, Sandusky App. No. S-08-006, 2008-Ohio-6946, ¶33. The Elevators Mutual policy, however, specifically excludes coverage “for loss or damage caused by or resulting from any” “criminal act[.]” (Causes of Loss-Special Form, CP 10 30 06 95, at p.2.) And that language was briefed on appeal. That statement by the Court of Appeals is simply incorrect.

by collecting insurance proceeds for the fire set by O'Flaherty's president and co-owner. The Court of Appeals held Richard Heyman's criminal convictions for arson and insurance fraud inadmissible. This Court should accept jurisdiction to make clear that under Ohio law convicted arsonists may not profit from their crime.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

First Proposition of Law: WHERE MADE INDEPENDENTLY RELEVANT BY AN INSURANCE POLICY EXCLUSION, AN INSURED'S CRIMINAL CONVICTION BASED ON A NO CONTEST PLEA IS ADMISSIBLE TO DEFEND AGAINST THE INSURED'S CLAIM FOR INSURANCE COVERAGE FOR DAMAGES RESULTING FROM THE INSURED'S CRIMINAL ACTS. (State v. Mapes (1985), 19 Ohio St.3d 108, explained, Crim.R. 11(B)(2) and Evid.R. 410(A)(2), construed.)

In *State v. Mapes* (1985), 19 Ohio St.3d 108, 111, this Court expressly held that "Crim.R. 11(B)(2) and Evid.R. 410 prohibit only the admission of a no contest plea. * * * These rules do not prohibit the admission of a conviction entered upon [a plea of no contest] when such conviction is made relevant * * *." In fact, "[i]t is clear that Crim.R. 11 and Evid.R. 410 prohibit the use of 'a plea of no contest,' not a conviction pursuant to a no contest plea." *Steinke v. Allstate Ins. Co.* (1993), 86 Ohio App. 3d 798, 802.

The Court of Appeals majority held that "the distinction between a no contest plea and a conviction on that plea is a false dichotomy." *Elevators*, at ¶ 32. But the plea and conviction are not the same. Rather, "[a] defendant who pleads no contest has a substantive right to be acquitted where the State's explanation of the facts and circumstances fails to establish all of the elements of the offense." *State v. Mazzone*, Montgomery App. No. 18780, 2001-Ohio-1391. Therefore, a conviction has independent significance from the plea; it is an independent determination by the Judge that the evidence is sufficient to establish all of the elements of the offense.

"Courts should not be expected to feign ignorance of a criminal conviction which clearly

takes the conduct outside coverage.” *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St. 3d 108, 113. Here, the conviction and not the plea was made independently relevant by the Elevators Mutual insurance policy. The Elevators Mutual policy specifically excludes coverage “for loss or damage caused by or resulting from any” “criminal act[.]” (Causes of Loss-Special Form, CP 10 30 06 95, at p.2.) The Elevators Mutual policy also voids coverage “if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning * * * [a] claim under this Coverage Part.” (Commercial Property Conditions, CP 00 90 07 88).

Numerous courts have held that where, as here, the fact of conviction is made relevant by an insurance policy exclusion the conviction has independent significance and is admissible. See, e.g., *Steinke v. Allstate Ins. Co.* (1993), 86 Ohio App. 3d 798, 802 (“Contrary to appellant’s assertions, his plea of no contest was not being used as an admission upon the merits of the counterclaim. Rather, the resulting criminal conviction was being introduced by Allstate to establish that the injuries herein might reasonably be expected to result from the criminal act of the insured, and, thus, relieve Allstate of any duty to cover or defend under the terms of the policy. Thus, we find no error in the admission of the criminal conviction for this purpose.”)⁴ That is a majority view nationwide. *Morin v. Aetna Casualty & Sur. Co.* (R.I. 1984), 478 A.2d 964, 966 (“A majority of jurisdictions will not exclude criminal judgments from evidence in a civil suit where the party’s motive in bringing the

⁴ Accord *Allstate Insurance Co v. Simansky* (1998), 45 Conn. Supp. 623 (allowing nolo contendere pleas to serve as evidence of the commission of a crime in civil matters that involve “the enforcement of a contractual provision in an insurance policy.”); *Allstate Ins. Co. v. Schmitt* (1990), 238 N.J. Super. 619, 633 (“A judgment of conviction is conclusive evidence of the insured’s guilt. * * * Although a conviction may or may not be conclusive evidence of the underlying facts, it is to be accorded preclusive effect with respect to the insured’s commission of the crime.”); *Century-National Ins. Co. v. Glenn* (2001), 86 Cal. App. 4th 1392, 1397-98 (“The subject [policy] exclusion bars coverage for bodily injury which is the ‘foreseeable result’ of a ‘criminal act’ of the insured.* * * [Therefore, the insured’s] nolo contendere plea has the same effect as a guilty plea for purposes of this action.”).

civil suit is to benefit from his criminal act.”).

Evid. R. 410 prohibits only the use of a “plea of no contest” “against the defendant” in a civil suit. As was correctly stated by Judge Osowik in his dissenting opinion on appeal:

Rule 410 was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil liability. We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the [other party].

Walker v. Schaeffer (C.A. 6, 1988), 854 F.2d 138, 143.

The Elevators Mutual policy excludes coverage for “criminal acts” and voids coverage in the event of insurance “fraud.” Therefore, Richard Heyman's arson and insurance fraud convictions are relevant and admissible to extinguish coverage. Appellant is not relying upon these convictions to establish that Heyman has civil liability but rather to establish the applicability of a policy exclusion. The Court of Appeals incorrectly excluded the use of Richard Heyman's criminal convictions for any purpose. This Court should take jurisdiction to make clear that convictions for arson and insurance fraud are admissible when made relevant by insurance policy exclusions regardless of whether they are based on a jury verdict, guilty plea, or no contest plea.

Second Proposition of Law: OHIO PUBLIC POLICY PRECLUDES AN INSURED FROM OBTAINING REIMBURSEMENT FOR DAMAGE TO PROPERTY WHICH RESULTED FROM THAT INSURED'S INTENTIONAL CRIMINAL ACT. (*Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St. 3d 34, applied.)

Regardless of the existence of applicable insurance policy exclusions, Ohio public policy precludes insurance coverage for those convicted of the arson causing the fire loss. “This court has long recognized that Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts.” *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St. 3d 34, 38. In fact, “it would be a mockery of justice for our legal processes to be used by convicted felons to profit

from their crimes. To permit such a result is clearly contrary to the public policy of this state.” *Imperial Kosher Catering, Inc. v. Travelers Indem. Co.* (1977), 73 Mich. App. 543, 546; *Eagle, Star & British Dominions Ins Co v Heller* (1927), 149 Va 82, 111; *Checkley v. Illinois C. R. Co.* (Ill. 1913), 100 N.E. 942, 944; *Scarborough v. American Nat'l Ins. Co.* (N.C. 1916), 171 N.C. 353, 354-355; *Ritter v. Mutual Life Ins. Co.* (1898), 169 U.S. 139, 153.

Courts allowing evidence of a conviction based on a plea of no contest have done so based on one of two general theories:

Some courts have held that recovery is barred on the basis of "the public interest which requires that the laws against crime be enforced, and that courts aid no man in any effort he may make to benefit from his own violation of them." *Mineo v. Eureka Security Fire & Marine Insurance Co.*, 182 Pa. Super. at 84, 125 A.2d at 617; see *Imperial Kosher Catering, Inc. v. Traveler's Indemnity Co.*, 73 Mich. App. at 545, 252 N.W. 2d at 510. The other theory that has been relied upon is that of collateral estoppel, which prevents the "relitigation of a particular issue or a determinative fact after the party estopped has a full and fair opportunity to present its case in order to promote the policy of ending disputes." *Seattle-First National Bank v. Cannon*, 26 Wash. App. at 927, 615 P.2d at 1320; see *Travelers Insurance Co. v. Thompson*, 281 Minn. 547, 555, 163 N.W.2d 289, 294 (1968).

Morin, 478 A.2d 964, 966.

As to the first theory, the Pennsylvania courts have well summarized the applicable rationale:

This case does not present a question which in our opinion can properly be disposed of by the application of some technical rule of evidence, such as a ruling that the first conviction is hearsay when admitted in the civil action. It is a question which turns upon the principle of estoppel. It is a matter of public policy. It is a matter of recognizing a judgment of a court.

Whether the insureds set the fire or not is a question of fact which has been established beyond a reasonable doubt in a court proceedings. Once this fact has been established, and the Commonwealth, in whose hands rests the maintenance of public policy, has satisfied itself of the fact, why then should it permit its courts to be used by the insured in an effort to obtain reward for the crime which the Commonwealth has already concluded he has committed?

We have here the anomalous situation of the insureds being fined and imprisoned by the Commonwealth for an offense which, through the aid of the

Commonwealth, they are now receiving reward for having committed. There are undoubtedly inconsistencies in the administration of law which cannot always be avoided and some inconsistencies which would be better to endure than to accept the available alternatives, but in a case such as this were this Court, after holding the insureds guilty of setting the fire, now to approve a verdict for the recovery of the damage caused by that fire we would create an inconsistency which would cause disrespect for our courts and legal processes.

Mineo v. Eureka Sec. Fire & Marine Ins. Co. (1956), 182 Pa. Super. 75, 85. Richard Heyman was sentenced to one year in prison for arson and insurance fraud. Thus, his crimes have been established and the State of Ohio "in whose hands rests the maintenance of public policy, has satisfied itself of the fact[.]" After "holding [Richard Heyman] guilty of setting the fire" and sentencing him to prison he now asks the same court "to approve a verdict for the recovery of the damage caused by that fire[.]" That result is barred by Ohio's public policy because allowing a convicted arsonist to benefit from the fire he set, in the very same court that sent him to prison for the arson (and insurance fraud), "would create an inconsistency which would cause disrespect for our courts and legal processes."

As to the second theory, this Court has specifically held that "[u]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating *in any proceeding* except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant * * * on an appeal from that judgment." (Emphasis added.) *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus; *State v. Saxon* (2006), 109 Ohio St. 3d 176, 181.

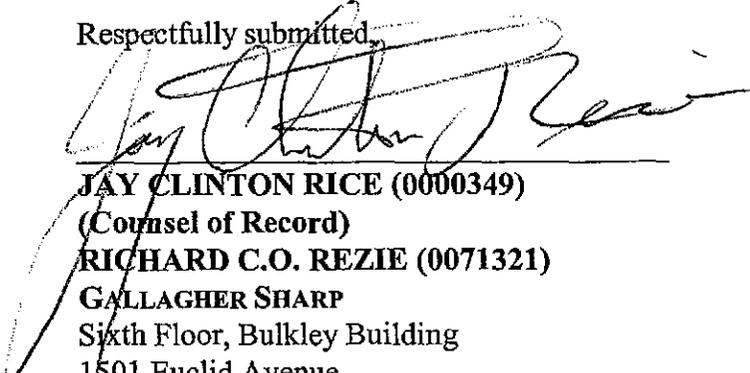
Both rationales are valid under Ohio law and should be expressly recognized by this Court. Richard Heyman was convicted of arson and insurance fraud relative to the same fire for which the company he owns (O'Flaherty's) now seeks insurance coverage. He was incarcerated by the State of Ohio for those crimes. Now he asks the same court in which he was criminally convicted to allow

him to obtain insurance coverage for damage resulting from the very same arson which served as basis for his criminal convictions. As a matter of law based on Ohio public policy, there can be no coverage for the company he owns (O'Flaherty's), or the Loss Payees⁵ under the Elevators Mutual policy (Richard and Jan Heyman). This Court should accept jurisdiction to make clear that Ohio public policy precludes a convicted arsonist from obtaining insurance proceeds for the fire he set.

CONCLUSION

For the forgoing reasons, Appellant/Intervenor NAMIC Insurance Company requests that this Court grant jurisdiction, review this case on the merits, and pass upon the important issues of public and great general interest presented herein.

Respectfully submitted,



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⁵ This is not a situation involving coverage for an "innocent insured." Jan Heyman is a "loss payee" under the Elevators Mutual policy; not an insured. The company she and Richard Heyman own, O'Flaherty's, is the insured. A loss payee has the same rights as the named insured and does not have any independent right to coverage under an insurance policy. Accord *New Jersey Ins. Co. v. Ball* (1929), 119 Ohio St. 550; *Pittsburgh Nat'l Bank v. Motorists Mut. Ins. Co.* (1993), 87 Ohio App. 3d 82, 85. Therefore, the coverage determination as to O'Flaherty's controls coverage as to Richard and Jan Heyman.

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S.

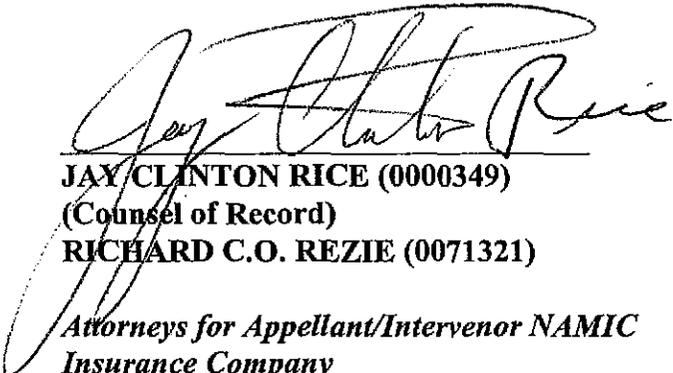
Mail on this 11 day of February, 2009, to:

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APPENDIX

**SANDUSKY COUNTY
COURT OF APPEALS
FILED**

DEC 31 2008

**WARREN P. BROWN
CLERK**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Elevators Mutual Insurance Company

Court of Appeals No. S-08-006

Appellee

Trial Court No. 01-CV-987

v.

J. Patrick O'Flaherty's, Inc., et al.

DECISION AND JUDGMENT

Appellants

Decided: **DEC 31 2008**

* * * * *

Robert E. Chudakoff and Gary S. Greenlee, for appellee Elevators Mutual Insurance Company; D. John Travis, Jay C. Rice and Richard C.O. Rezie, for appellee-intervenor NAMIC Insurance Company.

W. Patrick Murray, James L. Murray and William H. Bartle, for appellants.

* * * * *

SINGER, J.

{¶ 1} Appellants appeal a summary judgment issued to an insurer by the Sandusky County Court of Common Pleas in a dispute over fire coverage. For the reasons that follow, we reverse.

1.

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{¶ 2} Appellants, Richard A. and Jan N. Heyman, are equal shareholders in appellant J. Patrick O'Flaherty's, Inc., a company that operated a restaurant of the same name on the west side of Fremont, Ohio. Appellee, Elevators Mutual Insurance Co., provided a commercial fire insurance policy for this restaurant.

{¶ 3} On February 4, 2001, after the restaurant was closed, a fire started on the second floor, eventually spreading and destroying the entire structure. An investigation by the state fire marshal revealed that the origin of the fire was business records stored on the second floor which had been soaked in paint thinner. An investigator for the state fire marshal ruled the fire to have been caused by arson.

{¶ 4} A further investigation found that appellants were heavily in debt and that they had recently increased the amount of insurance on the property. Moreover, a former employee told investigators that on more than one occasion Richard Heyman had stated that he "would like to burn the place down." Richard Heyman was determined to be the last person to leave the restaurant before the fire. *State v. Heyman*, 6th Dist. No. S-04-016, 2005-Ohio-5565, ¶ 7-8.

{¶ 5} On April 4, 2001, as the investigation was proceeding, appellants filed an insurance claim for their loss under the fire policy issued by appellee. Appellee advanced appellants \$30,000 on the claim under a reservation of rights. Following the investigation of the fire, however, appellee denied the claim. On November 30, 2001, appellee initiated the present action, seeking a declaration that it had no duty to insure under a provision in its policy that barred coverage for an insured's intentional acts.

A00002

Appellee also sought to recover the money it had advanced. On December 7, 2001, appellants were named in an indictment, charging two counts of aggravated arson, simple arson and insurance fraud.

{¶ 6} Both appellants pled not guilty, but following negotiations appellant Richard Heyman agreed to plead no contest to arson and insurance fraud in return for dismissal of the aggravated arson counts and dismissal of the indictment against Jan Heyman.¹ The trial court accepted Richard Heyman's plea, found him guilty on both counts and sentenced him to one year incarceration on the insurance fraud and five years community service on the arson. Richard Heyman's conviction and sentence were affirmed on appeal. Id. at ¶ 19.

{¶ 7} Consideration of the present matter was deferred pending conclusion of the criminal proceeding. Following, on July 2, 2004, appellee moved for summary judgment. Appellants opposed the motion and filed their own cross-motion for summary judgment. The trial court denied both motions.²

¹In the trial court in this matter, Richard Heyman proffered an explanation of his plea, suggesting that he entered the plea because he had little confidence in his appointed lawyer, he sought to avoid the greater penalty of an aggravated arson conviction and he wished to spare his wife from prosecution.

²On April 20, 2007, NAMIC Insurance Company, issuer of appellee Elevators' professional liability and director's and officer's policy intervened in defense to appellants' counterclaim. NAMIC is an appellee and has filed a brief in this matter. Nevertheless, for clarity, we shall refer to appellee Elevators Insurance Company in the singular as NAMIC's arguments are pendant to Elevators'.

{¶ 8} On November 7, 2007, appellee moved in limine that the court determine the admissibility of Richard Heyman's insurance fraud and arson conviction. Appellants opposed admission of the conviction.

{¶ 9} On November 30, 2007, the court ruled that Richard Heyman's conviction could not be introduced at trial as substantive evidence. Citing Evid.R. 410 and Crim.R. 11(B)(2), the trial court concluded that Richard Heyman, " * * * entered this plea with the expectation that it could not be used collaterally against him in a civil case * * *. This well settled practice is best left undisturbed by this court."

{¶ 10} Later, however, the court revisited this decision, concluding that, while the no contest *plea* to arson and insurance fraud were not admissible, the *conviction* for these offenses could be admitted. Since the arson and insurance fraud convictions conclusively established Richard Heyman's culpability, the court continued, he was barred from profiting from his own misdeeds and, because he was president and a principal shareholder in J. Patrick O'Flaherty's, Inc., both he and Jan Heyman were barred from benefiting from these acts. With this, the court granted appellee's motion for summary judgment.

{¶ 11} From this judgment, appellants now bring this appeal, setting forth the following two assignments of error:

{¶ 12} "A. The trial court erred in ruling that evidence of Richard Heyman's criminal convictions after pleas of no contest were admissible.

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{¶ 13} "B. The trial court erred in granting the plaintiff insurer's Motion for Summary Judgment, finding that the criminal convictions following pleas of no contest precluded the insured and/or any of the loss payees from recovering any insurance proceeds from the fire loss in question and that since defendants were barred from recovering any fire insurance proceeds, their counterclaims failed as a matter of law."

{¶ 14} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 15} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C). The evidence supporting a motion for summary judgment must be admissible. Civ.R. 56(E).

{¶ 16} At issue is whether the trial court properly considered Richard Heyman's conviction entered on a no contest plea.

{¶ 17} Crim.R. 11(B)(2) provides:

{¶ 18} "With reference to the offense or offenses to which the plea is entered:

{¶ 19} "* * *

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{¶ 20} "(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and *the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.*" (Emphasis added.)

{¶ 21} In material part, Evid.R. 410 dictates that, "* * * evidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions:

"* * *

{¶ 22} "(2) A plea of no contest or the equivalent plea from another jurisdiction
* * *"

{¶ 23} Appellants insist that these rules mean what they say: a plea of no contest should not be used against a defendant in any subsequent civil proceeding. Since that is exactly what occurred in the present matter, appellants maintain, the trial court erred in considering this inadmissible evidence.

{¶ 24} Appellee disagrees. Citing *State v. Mapes* (1985), 19 Ohio St.3d 108, and derivative cases, appellee insists that, while the no contest *plea* may be inadmissible, the *conviction* that results from the plea is admissible. In this matter, according to appellee, it was the conviction that came into evidence. Since that conviction conclusively established Richard Heyman's guilt in the arson of his restaurant and his fraudulent attempt to collect insurance under appellee's policy, appellee argues that he, the corporation and his spouse are collaterally estopped from relitigating that issue.

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{¶ 25} Appellee cites numerous foreign cases for the proposition that, as a matter of policy, an arsonist ought not to be allowed to profit from the act of arson. The question here, however, is not one of policy, but of evidence. The rule, as articulated in Evid.R. 410 and Crim.R. 11(B)(2), is that "* * * a no contest plea may not be used against the defendant in any subsequent civil or criminal proceeding." 1 Weissenberger, Ohio Evidence (1995) 61, Section 410.3. The sole Ohio exception to the rule was promulgated by the Supreme Court of Ohio in *State v. Mapes*, supra. Id.

{¶ 26} David Mapes killed a bar owner during an after-hours robbery. He was indicted for aggravated murder with a capital specification alleging a prior murder conviction. A jury convicted Mapes of the principal offense. The prior murder specification was tried separately to the bench. The court found Mapes guilty of the specification based on a foreign judgment of conviction for murder entered on the New Jersey equivalent of a no contest plea. Mapes was sentenced to death.

{¶ 27} On appeal, Mapes argued that Crim.R. 11(B)(2) and Evid.R. 401 precluded admission of his conviction entered on a no contest plea. On consideration, the court rejected Mapes' argument, holding "Crim.R. 11(B)(2) and Evid.R. 410 do not preclude admission of a conviction entered upon a no contest plea to prove a prior murder specification under R.C. 2929.04(A)(5)." Id. at paragraph one of the syllabus. In its opinion, the court explained:

{¶ 28} "Crim. R. 11(B)(2) and Evid. R. 410 prohibit only the admission of a no contest plea. These rules do not prohibit the admission of a conviction entered upon that

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plea *when such conviction is made relevant by statute*. The trial court was correct in admitting the evidence of the prior conviction as it was not equivalent to the admission of the no contest plea and it was not introduced by the prosecution for any purpose other than establishing the specification. The purpose of Evid. R. 410 as it relates to criminal trials is to encourage and protect certain statements made in connection with plea bargaining and to protect the traditional characteristic of the no contest plea which is avoiding the admission of guilt that is inherent in pleas of guilty. See 1 Weissenberger, Ohio Evidence (1985) 55, Section 410.1 and Advisory Committee Notes to Fed. R. Evid. 410. These purposes are not disserved by the admission of a conviction entered upon a no contest plea." Id. at 111 (emphasis added).

{¶ 29} Many appellate courts, including this one, have followed *Mapes*, allowing the introduction of convictions entered on no contest pleas into administrative proceedings, but only when a statute makes such introduction specifically relevant to the proceeding. *Spencer v. Ohio St. Liquor Cont. Comm.* (Sept. 18, 2001), 10th Dist. No. 01AP-147 (statute expressly made conviction for illegal sale of liquor ground for license suspension), *Jaros v. Ohio St. Bd. of Emergency Med. Serv.*, 6th Dist. No. L-01-1422, 2002-Ohio-2363, ¶ 17 (Ohio Administrative Code expressly makes conviction of offense involving moral turpitude a ground for revocation of EMT license), *Reynolds v. Ohio St. Bd. of Exam. of Nursing Home Admin.*, 10th Dist. No. 03AP-127, 2003-Ohio-4958, ¶ 16 (Medicaid fraud conviction is an express ground for revocation of administrator's license); but, see, *Wolfe v. Ohio Motor Vehicle Dealers Bd.*, 5th Dist. No. 003CA00231,

A00008

2004-Ohio-122, ¶ 53 (trial court did not abuse discretion in refusing admission of conviction entered on no contest plea). In each of these instances, the conviction on a no contest plea was deemed relevant because of a statute or rule derived from a statute that expressly set a prior conviction as an element of necessary consideration.

{¶ 30} Appellee cites *Steinke v. Allstate Ins. Co.* (1993), 86 Ohio App.3d 798, 801-802 and *Bott v. Stephens*, 3d Dist. No. 1-05-09, 2005-Ohio-3881, ¶ 7, in support of a broader application of *Mapes*. Appellee's reliance on these cases, however, is misplaced. In *Steinke* the court noted that irrespective of the applicability of *Mapes*, the prior conviction was admissible because the opposing party had waived the issue by failing to contemporaneously object to its admission. *Id.* at 802. In *Bott*, at ¶ 8, admissibility of the conviction was not essential to the disposition of the case because the court concluded that, even with the admission of the conviction, a question of fact concerning an insured's mental state precluded summary judgment. Thus, a broader application of *Mapes* in these cases is mere dicta.

{¶ 31} The syllabus rule of *Mapes* is exceptionally narrow. It only goes to the admissibility of a conviction on a no contest plea for the sole purpose of proving a capital specification as provided for in R.C. 2929.04(A)(5). The language in the *Mapes* opinion itself is only slightly broader: "These rules [Evid.R. 410 and Crim.R. 11(B)(2)] do not prohibit the admission of a conviction entered upon [a no contest] plea when such conviction is made relevant by statute." *Mapes* at 111.

{¶ 32} In our view, the distinction between a no contest plea and a conviction on that plea is a false dichotomy. The proper distinction is whether or not the conviction has been made relevant to the later proceeding by statutory provision. Anything less and the rules make the plea and the conviction derived from the plea inadmissible.

{¶ 33} What is at issue in this matter is not a statute, but exclusionary provisions in an insurance policy.³ We take no position on whether an insurer and an insured may contract to make a prior conviction relevant in a subsequent action on the contract. In this insurance contract, no such provision appears. As a result, the rule of *Mapes* does not operate to override Evid.R. 410 and Crim.R. 11(B)(2) and the trial court erred in concluding that it did. Accordingly, appellants' first assignment of error is well-taken. Appellants' second assignment of error concerns the issue preclusion effect of the judgment of conviction and, therefore, is moot.

³Causes of Loss – Special Form (B)(1)(h) of the policy provides, "We will not pay for loss or damage caused directly or indirectly by any of the following * * * Dishonest or criminal acts by you, any of your partners, employees (including leased employees), directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose * * *."

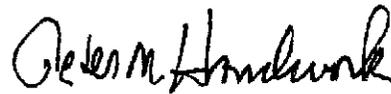
Commercial Property Conditions (A) of the policy provides, "This Coverage Part is subject to the following conditions * * * A. Concealment, Misrepresentation or Fraud[.] This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning: 1. This Coverage Part; 2. This Covered Property; 3. Your interest in the Covered Property; or 4. A claim under this Coverage Part."

{¶ 34} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Sandusky County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.



JUDGE

Arlene Singer, J.

CONCUR.



JUDGE

Thomas J. Osowik, J.,
DISSENTS.

OSOWIK, J.

{¶ 35} I would respectfully dissent and affirm the decision of the court of common pleas that found the no contest pleas and convictions of arson and insurance fraud to be admissible and thereby preclude appellants from claiming insurance proceeds for the fire losses.

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{¶ 36} In this case, it is undisputed that the plaintiff pled no contest to a charge of arson with purpose to defraud in violation of R.C. 2909.03(A)(2) and to insurance fraud, in violation of R.C. 2913.47(B)(1). He was found guilty of both of these charges.

{¶ 37} It is also undisputed that the property involved in the arson was the property covered by the insurance policy which is the subject of this dispute and that the contract of insurance excludes coverage for criminal acts and insurance fraud.

{¶ 38} Despite having pled no contest and subsequently being found guilty and sentenced as a result of these charges, appellant sought payment from his insurer for the losses sustained as a result of the arson of which he was convicted after his no contest plea. The insurance company initiated this declaratory judgment action to determine its rights and obligations under its contract of insurance.

{¶ 39} The resolution of this conflict ultimately hinges upon the impact and consequences of uttering two words in a criminal proceeding: no contest. These three syllables are of some significance in a criminal proceeding, and even the United States Supreme Court has struggled with the concept as to precisely what a defendant does admit when he enters a no contest plea. In *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct.160, 27 L.Ed.2d 162, the court surmised that the no contest plea possibly originated from the early medieval practice by which defendants wishing to avoid imprisonment would seek to make an end of the matter by offering to pay a sum of money to the king. *Id.* at 36, fn. 8.

A00012

{¶ 40} The court further referenced an early 15th century case "in which a defendant did not admit his guilt when he sought such a compromise, but merely 'that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine.'" Id.

{¶ 41} Regardless of the historical origins of the no contest plea, pursuant to Crim.R. 11(B)(2), a no contest plea is "an admission of the truth of the facts alleged in the indictment, information, or complaint * * *."

{¶ 42} In his first assignment of error, appellant argues that his plea of no contest and subsequent conviction to the criminal charges should not be admissible. The United States Sixth Circuit Court of Appeals addressed this precise application of the no contest plea to a similar federal rule. Federal case law that interprets the federal rule, while not controlling, is persuasive. *Myers v. City of Toledo* (2006), 110 Ohio St.3d 218, 221.

{¶ 43} Fed.R.Evid. 410 provides in relevant part:

{¶ 44} "Evidence of a plea of * * * nolo contendere * * * is not admissible in any civil or criminal proceeding against the person who made the plea * * *."

{¶ 45} This language is virtually identical in relevant part to Crim.R. 11(B)(2), with the exception that the plea cannot be used against the person who made the plea as opposed to the Ohio Rule, which limits the application to the defendant.

{¶ 46} Crim.R. 11(B)(2) states in relevant part:

{¶ 47} "* * * and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding."

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{¶ 48} In *Walker v. Schaeffer* (C.A.6, 1988), 854 F.2d 138, the court stated:

{¶ 49} "We do not consider our conclusion to be barred by Fed.R.Evid. 410, which provides that evidence of 'a plea of nolo contendere' is not, 'in any civil or criminal proceeding, admissible against the defendant who made the plea.' This case does not present the kind of situation contemplated by Rule 410: the use of a nolo contendere plea against the pleader in a subsequent civil or criminal action in which he is the *defendant*. See, e.g., *United States v. Manzella*, 782 F.2d 533 (5th Cir.), *cert. denied*, 476 U.S. 1123, 106 S.Ct. 1991, 90 L.Ed.2d 672 (1986) (use of nolo contendere plea to impeach defendant in subsequent criminal prosecution). In this case, on the other hand, the persons who entered prior no-contest pleas are now plaintiffs in a civil action. Accordingly, use of the no-contest plea for estoppel purposes is not 'against the defendant' within the meaning of Fed.R.Evid. 410. This use would be more accurately characterized as 'for' the benefit of the 'new' civil defendants, the police officers.

{¶ 50} "We find a material difference between using the nolo contendere plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission which would preclude liability. Rule 410 was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil *liability*. We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the arresting police."

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{¶ 51} Rule 410 of the Ohio Rules of Evidence is substantially identical to the federal rule. Evid.R. 410 states in relevant part:

{¶ 52} "(A) Except as provided in division (B) of this rule, evidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions:

{¶ 53} "(1) a plea of guilty that later was withdrawn;

{¶ 54} "(2) a plea of no contest or the equivalent plea from another jurisdiction;

{¶ 55} "(3) a plea of guilty in a violations bureau; * * *"

{¶ 56} The court in *Levin v. State Farm Insurance* (E.D.Mi.1990), 735 F.Supp. 236 adopted the *Walker* interpretation of the rule. The facts of that case are identical to the case before the court today. The plaintiff entered a plea of no contest to a criminal charge of arson. Based upon that plea, he was found guilty and sentenced. The plaintiff then sought compensation for fire damage to his home.

{¶ 57} The court was called upon to resolve the sole evidentiary issue of whether the plaintiff's nolo contendere plea may be admitted at trial. The court held that the insurer was not precluded from introducing evidence of the nolo contendere plea in the civil action brought by the individual who offered the nolo contendere plea in the prior criminal case.

{¶ 58} Likewise, I do not believe it to be a logical application of Crim.R. 11(B)(2) if the no contest plea were not admissible in this instance and would circumvent the

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unambiguous language of the rule. I would further suggest that it would be better public policy if Evid.R. 410(A) would be amended to explicitly prevent an individual who pled no contest to criminal charges from excluding evidence of that plea in an action in which the pleader seeks to establish a claim arising out of the crime of which the pleader was convicted. In that manner in future disputes, it would avoid a semantical discussion of the definition of the word *against* and its relationship to the word *defendant*.

{¶ 59} For the foregoing reasons, I would affirm the judgment of the trial court and find both of appellants' assignments of error not well-taken.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
* <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

COURT OF COMMON PLEAS
SANDUSKY COUNTY, OHIO

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ELEVATORS MUTUAL INSURANCE
COMPANY,

Plaintiff

vs.

J. PATRICK O'FLAHERTY'S INC., et al.,

Defendants

) CASE NO. 01-CV-987
)
) JUDGE S.A. YARBROUGH
)
) **ORDER AND FINAL JUDGMENT**
) **ENTRY GRANTING PLAINTIFF'S**
) **MOTION FOR SUMMARY**
) **JUDGMENT**
)

The Court has granted the Motion in Limine filed by Plaintiff Elevators Mutual Insurance Company ("Elevators Mutual") and has held that the criminal convictions (but not the no contest plea) of Defendant Richard Heyman for arson and insurance fraud in connection with the subject fire shall be admissible evidence in this case. In light of this ruling that the criminal convictions are proper evidence before the Court, the Court finds that it is appropriate to reconsider the Plaintiff's previously filed Motion for Summary Judgment. See, Ohio Civ. R. 54(B); and *Al-Marayati v. Cappelletty*, 1999 Ohio App. Lexis 5729 (6th Dist.) ("due to the interlocutory nature of a denial of a motion for summary judgment, a trial court has the authority to *sua sponte* vacate, revise or modify its prior denial." [citing *Peters v. Ashtabula Metro. Hous. Auth.*, 89 Ohio App. 3d 458 (1993)).

In its previous Decision & Entry (dated and Journalized October 6, 2005, and later re-filed April 12, 2006 and re-journalized April 13, 2006, hereafter "Decision & Entry"), the Court (Judge Sargeant) denied the Motion for Summary Judgment filed by Elevators Mutual, but also held as follows:

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The Court now finds the first and third holdings above are inconsistent. Given this Court's granting of the Plaintiff's Motion in Limine that the criminal convictions (not the no contest pleas) are properly admissible, and the undisputed fact that Defendant Richard Heyman was found guilty and convicted of arson and insurance fraud in connection with the subject fire, and that he was President and 50% shareholder of J. Patrick O'Flaherty's, Inc. at the time of the fire, the Court finds as a matter of law that the criminal convictions preclude the insured, Defendant J. Patrick O'Flaherty's, Inc., from recovering any insurance proceeds for this fire loss. The Court maintains its previous judgment that the remaining Defendants, Richard and Jan Heyman (individually), were simple "loss payees" who stood in the shoes of the insured corporation and were subject to the same defenses as, and had no greater rights than the insured corporation. Since the corporation is precluded from recovering, the individual Defendants (Richard and Jan Heyman) are also precluded from any recovery as loss payees under the policy. See, *Pittsburgh Nat'l Bank v. Motorists Mut. Ins. Co.*, 87 Ohio App.3d 82, 85 (Summit City, 1993) (loss payee stands in the shoes of the insured and has no greater right of recovery).

1. "[I]t is settled law in Ohio that a corporation may not benefit by receiving the proceeds of an insurance policy when one of its officers is convicted of the arson associated with the fire. *Forestwood Development Corp. v. All-Star Ins. Co.*, 1978 WL 208443 (Ohio App. 8 Dist. 1978). Therefore, a conviction against Richard Heyman would clearly bar defendant J. Patrick O'Flaherty's, Inc., as the named insured, from recovering under the insurance policy issued by plaintiff." (Decision & Entry at p. 3).
2. "This court finds that Richard and Jan Heyman were at all times simple loss payees under the policy issued by plaintiff, and that they therefore stand in the shoes of the named insured, and are subject to the same potential exclusions and/or defenses for the claim at issue." (Decision & Entry at p. 4).
3. "[I]t is the judgment of this Court that Richard Heyman's no contest plea may not be used collaterally against him in this case." (Decision & Entry at p. 5).

Since the Court finds that coverage under the policy is precluded, the Defendants' counterclaims (all which are dependent upon a finding that the insurance claim was wrongfully denied) also fail as a matter of law. See, *Bullet Trucking, Inc. v. Glen Falls Ins. Co.*, 84 Ohio App.3d 327, 334 (Montgomery Cty. 1992) ("correct in saying that success on the bad faith claim is dependent on success on the contract claim"); *Essad v. Cincinnati Cas. Co.*, 2002-Ohio-2002 at ¶34, 2002 WL 924439 (Mahoning Cty. App.) ("the success of the tort claim hinges on the success of the contract claim"); *Toledo-Lucas County Port Authority v. AXA Marine & Aviation Ins. (UK) Ltd.*, 220 F.Supp.2d 868 (N.D. Ohio 2002) ("Ohio Supreme Court would likely hold that an insured may not maintain a claim of bad faith in the absence of coverage under the policy."); *Bob Schmitt Homes, Inc. v. Cincinnati Ins. Co.*, 2000 WL 218379 (Ohio App. 8th Dist.) (because "[t]he rule announced in *Zoppo [v. Homestead Ins. Co.]*, 71 Ohio St.3d 552 (1994) presupposes that the insured is entitled to coverage in the first instance"... "the initial factual prerequisite to [a bad faith] claim [was] lacking.").

For the foregoing reasons, the Court now finds that Plaintiff's Motion for Summary Judgment is well taken and hereby grants the same. Accordingly, the Court hereby enters final judgment as follows:

1. In favor of Plaintiff Elevators Mutual Insurance Company and against Defendants on Counts I through IV (for declaratory relief) of Plaintiff's Complaint, Counts V, VI and VII of the Complaint having been previously dismissed by Plaintiff, and
2. In favor of Plaintiff Elevators Mutual and against Defendants on Defendants' Counterclaims.

The Court further finds that there is no just reason for delay.

IT IS SO ORDERED.

January 18
Dated: December __, 2007

SA. YARBROUGH

JUDGE SA. YARBROUGH