

IN THE SUPREME COURT OF OHIO

Elevators Mutual Insurance Company,

Appellant,

v.

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

Appellees.

) Supreme Court Case No.

) **09-0321**

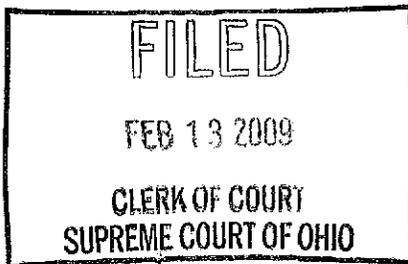
) On Appeal from the
) Sandusky County Court of Appeals
) Sixth Appellate District
) Court of Appeals
) Case No. 08CAS00006

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ELEVATORS MUTUAL INSURANCE COMPANY

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EXPLANATION OF WHY THIS CASE IS A
CASE OF PUBLIC OR GREAT GENERAL INTEREST

Can an insured convicted of arson and insurance fraud still recover the insurance proceeds for the damage caused by the fire he was convicted of setting on the insurance claim for which he was convicted of fraud? In this case, Appellee Richard Heyman was convicted of arson and insurance fraud, and went to prison, for causing the subject fire. Appellees seek to recover insurance proceeds – the very same insurance proceeds that motivated Heyman’s felonious conduct – from the victim of Heyman’s crime, appellant Elevators Mutual Insurance Company. Public policy precludes convicted criminals like Heyman from profiting from their criminal acts.

No one could reasonably dispute that Heyman’s criminal convictions for arson and insurance fraud are relevant to his insurance claim. Thus, the trial court rightfully held that evidence of Heyman’s criminal convictions is admissible, but the Sixth District Court of Appeals reversed that holding in a 2-1 decision. The majority held that Evid. R. 410 and Crim. R. 11(B)(2) prohibit evidence of Heyman’s criminal convictions because he pled no contest.

The majority’s judgment is in direct conflict with this Court’s holding in *State v. Mapes* (1985), 19 Ohio St.3d 108, 111, 484 N.E.2d 140, cert. denied, *Mapes v. Ohio* (1986), 476 U.S. 1178, where this Court unanimously held that “*Crim. R. 11(B)(2)* and *Evid. R. 410* prohibit only the admission of a no contest plea.” Nowhere in *Mapes* did this Court hold that relevant evidence of a criminal conviction is ever inadmissible.

The majority’s judgment also is in direct conflict with the unequivocal terms of Evid. R. 410 and Crim. R. 11(B)(2), both of which prohibit *only* evidence of a no contest plea. Neither rule so much as mentions, much less prohibits, evidence of a criminal conviction under

any circumstances. Moreover, the majority's judgment flies in the face of well-established public policy that prohibits a wrongdoer from profiting from his wrongful conduct.

Simply put, the Sixth District unilaterally and fundamentally altered Crim. R. 11(B)(2) and Evid. R. 410 to prohibit not only evidence of no contest pleas, as the text of those rules expressly and unambiguously provides, but also evidence of criminal convictions following no contest pleas. Not only did the Sixth District rewrite the rules, it held in this case that a convicted criminal can use the newly expanded rules *offensively* to extract money from the victim of his crime.

This Court held long ago, in *Mapes*, that Crim. R. 11(B)(2) and Evid. R. 410 prohibit only the admission of a no contest plea. Courts of Appeals should not be permitted to unilaterally rewrite those rules to prohibit evidence of criminal convictions as well. And even if Evid. R. 410 and Crim. R. 11(B)(2) could be reasonably interpreted to preclude evidence of criminal convictions – which they most certainly cannot – should Ohio law reward convicted criminals by allowing them to use these rules *offensively* to profit from their crimes? The injustice and potential for abuse of such a rule of law is readily apparent. Innocent victims of crime – like Elevators Mutual – would be forced to defend themselves with one hand tied behind their backs.

There is no point to criminalizing arson and insurance fraud if, in the end, the arsonist can use Evid. R. 410 and Crim. R. 11(B)(2) to bilk his insurance company in a subsequent civil case. To prevent such a travesty of justice in this case and others, Elevators Mutual requests that this Court accept jurisdiction in this case.

STATEMENT OF THE CASE AND FACTS

Appellees Richard Heyman and Jan Heyman were the sole shareholders of J. Patrick O'Flaherty's, Inc. Elevators Mutual issued to O'Flaherty's a commercial fire insurance policy that, subject to its terms, conditions, and exclusions, insured O'Flaherty's restaurant in Fremont, Ohio. The Heymans were identified in the policy as "loss payees."

In February 2001, a fire damaged the restaurant and personal property situated therein. O'Flaherty's submitted an insurance claim to Elevators Mutual, seeking payment for damage to the restaurant and its contents. After completing its investigation, Elevators Mutual denied payment and any liability for O'Flaherty's insurance claim.

Richard Heyman was indicted in December 2001, and charged with arson, aggravated arson, and insurance fraud in connection with the fire. He initially pled not guilty. At about the same time, Elevators Mutual commenced this action, seeking a determination that it has no duty to pay Appellees' fraudulent insurance claim. Appellees responded with a counterclaim, asserting not only that Elevators Mutual must pay their insurance claim, but that Elevators Mutual acted in bad faith when it denied coverage for the fire that Heyman ultimately was convicted of setting *for the purpose of defrauding Elevators Mutual*.

This action was set for trial on October 7, 2002. On July 25, 2002, however, Appellees filed a motion to continue the trial, citing Richard Heyman's then-pending criminal case. Appellees argued that a continuance would serve judicial economy because "a finding of guilty in the criminal matter would alleviate a need for trial in this case." The trial court accordingly stayed this action pending the conclusion of Richard Heyman's criminal case.

After litigating his criminal case for over two years, Heyman pled no contest in May 2004 to arson with purpose to defraud (R.C. § 2909.03(A)(2)) and insurance fraud (R.C. § 2913.47(B)(1)). The court accepted Heyman's no contest pleas and, "based upon the proffer of

evidence by the prosecutor,” found Heyman guilty on both counts. Heyman was sentenced to one year in prison for felony insurance fraud and five years of community control for felony arson.

Following Heyman’s convictions for arson and insurance fraud, Elevators Mutual promptly moved for summary judgment in this matter on July 2, 2004. The trial court initially denied Elevators Mutual’s motion for summary judgment, holding that Richard Heyman’s no contest *pleas* in his criminal case may not be used against him in this case. The trial court failed to address at that time the admissibility or preclusive effect of Heyman’s felony *convictions*.

This matter was set for trial on May 30, 2006. Appellees again moved for a continuance, and the trial was ultimately rescheduled for December 3, 2007. In anticipation of trial, Elevators Mutual filed a motion in limine regarding the admissibility of evidence of Richard Heyman’s criminal convictions (as opposed to evidence of Heyman’s no contest pleas). In its “Order and Judgment Entry” journalized on December 4, 2007, the trial court granted Elevators Mutual’s motion in limine, holding that “Elevators Mutual will be permitted to refer to and/or introduce as substantive evidence in its case-in-chief, to refer to during opening statement and closing argument, and to use for purposes of cross-examination, Defendant Richard A. Heyman’s criminal convictions for arson and insurance fraud in connection with the subject fire.”

In light of the ruling on Elevators Mutual’s motion in limine, the trial was cancelled, and the trial court reconsidered Elevators Mutual’s motion for summary judgment. In its “Order and Final Judgment Entry Granting Plaintiff’s Motion for Summary Judgment,” the trial court held that Richard Heyman’s “criminal convictions preclude the insured, Defendant J. Patrick O’Flaherty’s, Inc., from recovering any insurance proceeds for this fire loss.” Reiterating

a prior ruling, the trial court further held that the Heymans as loss payees had no greater rights than O'Flaherty's, and therefore were "also precluded from any recovery as loss payees under the policy." As to Appellees' counterclaims, the trial court held that since "coverage under the policy is precluded, the [Appellees'] counterclaims ... also fail as a matter of law." Thus, the trial court granted summary judgment in favor of Elevators Mutual.

Appellees appealed, and the Sixth District Court of Appeals in a split decision reversed the trial court's ruling as to the admissibility of evidence of Heyman's criminal convictions. Specifically, the Court of Appeals held that Crim. R. 11(B)(2) and Evid. R. 410 prohibit evidence of Heyman's criminal convictions because he was convicted after pleading no contest. (A copy of the Court of Appeals "Decision and Judgment" is attached hereto).

The Sixth District erred in unilaterally and dramatically expanding Crim. R. 11(B)(2) and Evid. R. 410 far beyond their unambiguous terms, which prohibit only evidence of no contest pleas and do not prohibit relevant evidence of criminal convictions under any circumstances. The Sixth District further erred in holding that this matter does not raise questions of public policy, when in fact public policy is central to this matter and demands that a convicted arsonist not be permitted to profit from his crime.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Subject to certain exceptions that do not pertain to the present case, all relevant evidence is admissible. (Evid. R. 402). In an insurance coverage case, an insured's arson and insurance fraud convictions are unquestionably relevant, where the fire for which the insured seeks coverage is the very same fire that the insured was convicted of causing for the purpose of defrauding his insurance company. In the courts below, Appellees provided no basis whatsoever for excluding evidence of such convictions. Instead, Appellees cited rules that prohibit evidence of no contest *pleas*, and suggested that those rules should be construed to prohibit evidence of

criminal convictions as well.¹ The cited rules, however, prohibit *only* evidence of no contest pleas, and do not preclude evidence of criminal convictions following no contest pleas.

Proposition of Law No. 1: Evid. R. 410(A)(2) precludes only evidence of no contest pleas, or equivalent pleas from other jurisdictions, and does not preclude relevant evidence of criminal convictions following no contest pleas.

Evid. R. 410(A)(2) unambiguously precludes *only* evidence of no contest pleas and does not preclude evidence of criminal convictions following no contest pleas:

Evid R 410 Inadmissibility of pleas, offers of pleas, and related statements

(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:

* * *

(2) a plea of no contest or the equivalent plea from another jurisdiction...

Significantly, this rule appears in the “Relevancy” chapter of the Rules of Evidence. Thus, evidence of no contest pleas is inadmissible because the plea itself is not probative as to whether the defendant committed the proscribed act. Certainly, the same cannot be said of evidence of a criminal conviction, which is highly probative (and indeed conclusive) as to whether the defendant committed a criminal act.²

¹ Appellees have acknowledged that the rules do not actually prohibit evidence of criminal convictions. Thus, in the Court of Appeals, they identified as an issue presented for review whether “*the rationale* for excluding evidence of a ‘no contest’ plea [is] equally applicable to the issue of admissibility of a criminal conviction following a ‘no contest’ plea.” Brief of Appellants, p. 1 (italics added).

² The conviction is also more probative than the plea because it follows an actual finding of guilty by the trial judge after examination of proffered evidence and a determination by the court that such evidence is sufficient to meet the elements of the offense charged. *State v. Mazzone*, 2d Dist. No. 18780, 2001-Ohio-1391. Absent such a determination, the defendant (footnote continued ...)

This Court in *Mapes* expressly rejected the notion that Evid. R. 410(A)(2) somehow precludes evidence of a criminal conviction:

Evid. R. 410 prohibit[s] only the admission of a no contest plea... 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. These purposes are not disserved by the admission of a conviction entered upon a no contest plea. [Citations omitted; underscore added].

Mapes, 19 Ohio St.3d at 111. Accordingly, the Court reached the unassailable conclusion that “admitting the evidence of the prior conviction ... was not equivalent to the admission of the no contest plea.” *Id.* See also, *State v. Gurley* (July 8, 1992), 9th Dist. Nos. 15210, 15505, 1992 Ohio App. Lexis 3574, *7 (“the admission into evidence of a prior conviction which is premised upon a no contest plea is not equivalent to the admission of the no contest plea”) (citing *Mapes*); *State Auto. Ins. Co. v. Kerpely* (Bankr. N.D. Ohio 1992), 144 B.R. 66, 68 (“Defendant’s challenging admissibility of the criminal judgment under *Federal Rule of Evidence 410* is specious ... because Plaintiffs rely on a criminal judgment, not a plea, to support their motion”); *Reynolds v. Ohio State Bd. of Examiners of Nursing Home Adm’rs*, 10th Dist. No. 03AP-127, 2003-Ohio-4958, ¶13 (“A distinction exists between the use of a no contest *plea* and the use of the Medicaid fraud *conviction* entered after the no contest plea was given”) (italics in original) (citing *Mapes*).

The Sixth District Court of Appeals itself reached the same conclusion in *Jaros v. Ohio State Bd. of Emergency Med. Serv.*, 6th Dist. No. L-01-1422, 2002-Ohio-2363, ¶21:

would be found not guilty even though he pled no contest. See, *State v. Frye*, 3d Dist. No. 14-07-07, 2007-Ohio-5772 (affirming finding of not guilty following no contest plea); *State v. Gump*, 8th Dist. No. 85693, 2005-Ohio-5689 (same); *State v. Mayfield*, 8th Dist. No. 81924, 2003-Ohio-2312 (same).

We acknowledge that the use of a no contest plea is prohibited in any subsequent civil or criminal proceedings. For example, if appellant had pled no contest and been found not guilty, the no contest plea could not have been utilized by the Board for any reason. In this case, however, it is the conviction, not the no contest plea, which is the basis of the review by the Board. Therefore, the no contest plea is irrelevant for purposes of the Board's authority to revoke appellant's license. [Citation omitted].

See also, *Bivins v. Ohio State Bd. of Emergency Med. Serv.*, 6th Dist. No. E-05-010, 2005-Ohio-5999, ¶4 (“it is the finding of guilty, not the plea, that is the basis of review by the Board”) (citing *Jaros*). Given its prior recognition of the distinction between a no contest plea and a conviction following a no contest plea, the Sixth District's judgment in the present case is baffling.

This Court further held in *Mapes* that Crim. R. 11(B)(2) and Evid. R. 410 “do not prohibit admission of a conviction entered upon [a no contest] plea when such conviction is made relevant by statute.” *Mapes*, 19 Ohio St.3d at 111. The Court of Appeals, disregarding the context in which this statement was made, concluded that evidence of a conviction following a no contest plea is admissible *only* when made relevant by statute. That conclusion, besides being unsupported by the holding in *Mapes*, is illogical. If all relevant evidence is admissible, as stated in Evid. R. 402, it should not matter whether the evidence is made relevant by statute or otherwise.

In the present case, the insured's criminal convictions are made relevant not by statute but by contract – specifically, the subject policy of insurance, which expressly excludes coverage for loss or damage caused by an insured's criminal act:

2. We will not pay for loss or damage caused by or resulting from any of the following:

* * *

- h. Dishonest or *criminal act* 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:
- (1) Acting alone or in collusion with others; or
 - (2) Whether or not occurring during the hours of employment.

(Policy Form CF 497 (6-95)) (italics added). There can be no more relevant evidence of an insured's criminal act than evidence of his criminal convictions.

An analogous situation occurred in *Rose v. Uniroyal Goodrich Tire Co.* (10th Cir. 2000), 219 F. 3d 1216, where Uniroyal fired Rose for violating Uniroyal's Drug-Free Workplace Policy. In Rose's wrongful termination suit, Uniroyal sought to introduce evidence of Rose's conviction for marijuana possession following a no contest plea. Rose sought to suppress such evidence, citing Fed. R. Evid. 410 (which is substantively identical to Ohio Evid. R. 410). The court rejected Rose's attempt to use Evid. R. 410 to suppress evidence of his criminal conviction:

We will not construe either *Rule 410* or the Oklahoma statutes to allow an employee plaintiff to affirmatively prevent an employer from presenting the very evidence used as a basis for its termination decision. Such a result would unfairly hogtie the employer and lead the jury to believe that the employee's termination was groundless.

Rose, 219 F.3d at 1220. Similarly, where a convicted arsonist seeks to profit from his crime by recovering insurance proceeds, suppression of evidence of his criminal convictions would unfairly hogtie the insurer and mislead the jury to believe that the insurer's coverage determination was groundless.

Thus, in the present case, the Court of Appeals erred when it held that Evid. R. 410(A)(2) prohibits evidence of criminal convictions. The rule prohibits only evidence of no contest pleas or equivalent pleas from other jurisdictions.

Proposition of Law No. 2: Crim. R. 11(B)(2) precludes only evidence of no contest pleas, and does not preclude relevant evidence of criminal convictions following no contest pleas.

The Sixth District further held that Crim. R. 11(B)(2) precludes evidence of a criminal conviction following a no contest plea. But Crim. R. 11(B)(2), like Evid. R. 410(A)(2), precludes only evidence of a no contest plea and does not preclude evidence of a subsequent criminal conviction:

Crim R 11 Pleas, rights upon plea

* * *

(B) Effect of guilty or no contest pleas

With reference to the offense or offenses to which the plea is entered:

* * *

(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.

Crim. R. 11(B)(2) expressly prohibits *only* use of the no contest plea and the concomitant admission of the facts alleged in the indictment. See *Mapes*, 19 Ohio St.3d at 111 ("Crim. R. 11(B)(2) and Evid. R. 410 prohibit only the admission of a no contest plea").

In *Steinke v. Allstate Ins. Co.* (1993), 86 Ohio App.3d 798, 621 N.E.2d 1275, the insured pled no contest and was convicted of disorderly conduct in the Auglaize County Municipal Court. In a subsequent civil proceeding arising out of the same incident, Allstate argued that it had no duty to defend or indemnify the insured, citing the insured's criminal conviction and the Allstate policy's "Criminal Acts" exclusion. The trial court granted summary judgment in favor of Allstate. On appeal, the insured argued that the trial court had improperly

considered his criminal conviction. The Third District Court of Appeals rejected that argument and affirmed summary judgment in favor of Allstate:

It 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. The Ohio Supreme Court specifically held in *State v. Mapes (1985)*, 19 Ohio St. 3d 108, 111, 19 OBR 318, 320-321, 484 N.E.2d 140, 143, that “*Crim. R. 11(B)(2)* and *Evid. R. 410* prohibit only the admission of a no contest plea.”

Steinke, 86 Ohio App.3d at 801 (italics in original). See also, *State v. Williams* (Nov. 21, 1997), 2d Dist. No. 16306, 1997 Ohio App. Lexis 6083, *5 (“*Evid. R. 410* ..., as well as *Crim. R. 11(C)*, bars evidence of a defendant’s plea of no contest, not a conviction resulting from it when evidence of the conviction is otherwise admissible”); *Spencer v. Ohio State Liquor Control Comm’n* (Sept. 18, 2001), 10th Dist. No. 01AP-147, 2001 Ohio App. Lexis 4152 (following *Steinke*); *Owner Operators Indep. Drivers Risk Retention Group v. Stafford*, 3d Dist. No. 9-07-46, 2008-Ohio-1347 (criminal conviction following no contest plea was admissible for purpose of establishing intentional act exclusion in automobile liability insurance policy).

Elevators Mutual acknowledges that *Crim. R. 11(B)(2)* prohibits the use of a no contest plea in a subsequent proceeding. But the rule most certainly does not preclude evidence of a criminal conviction following a no contest plea. The Court of Appeals erred when it held to the contrary.

Proposition of Law No. 3: Because public policy prohibits a wrongdoer from profiting from his own wrongful conduct, a convicted arsonist may not recover insurance proceeds for the fire damage that he caused.

This Court has previously held that a wrongdoer may not profit – specifically, by recovering insurance proceeds – from his wrongful conduct:

The well-established policy of the common law is that no one should be allowed to profit from his own wrongful conduct. The maxim *nullus commodum capere potest de injuria sua propria* has

long been applied by courts of law and equity.... Clearly then the common law bars a beneficiary of a life insurance policy from receiving the proceeds of that policy when the beneficiary intentionally and feloniously caused the death of the insured.

Shrader v. Equitable Life Assurance Soc'y (1985), 20 Ohio St.3d 41, 44-45, 485 N.E.2d 1031.

See also, *Cotton v. Morris* (10th Dist. 1995), 104 Ohio App.3d 368, 371, 662 N.E.2d 63 (quoting *Shrader*).

In *Shrader*, this Court recognized that public policy prohibits a killer from recovering life insurance proceeds for the death that he caused. It only stands to reason that public policy prohibits a convicted arsonist from recovering property insurance proceeds for the fire that he caused. As succinctly stated by the Virginia Supreme Court:

To permit a recovery under a policy of fire insurance by one who has been convicted of burning the property insured, would be to disregard the contract, be illogical, would discredit the administration of justice, defy public policy and shock the most unenlightened conscience.

Eagle, Star and British Dominions Ins. Co. v. Heller (Va. 1927), 140 S.E. 314, 323. See also, *Mineo v. Eureka Security Fire & Marine Ins. Co.* (Pa. Super. 1956), 125 A.2d 612, 617 (“why then should [the Commonwealth] 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?”); *Imperial Kosher Catering, Inc. v. Travelers Indem. Co.* (Mich. App. 1977), 252 N.W.2d 509, 510 (“it would be a mockery of justice for our legal processes to be used by convicted felons to profit from their crimes”).

In this case, the insurance policy incorporates public policy by excluding coverage for loss or damage caused by or resulting from an insured’s criminal act. Thus, by reversing the decision of the trial court, the Sixth District failed to recognize not only well-established public policy but also the agreed upon terms of the contract of insurance at issue.

Public policy prohibits a wrongdoer from profiting from his wrongful act. Therefore, public policy prohibits a convicted arsonist and defrauder like Heyman from profiting from his crimes.

CONCLUSION

An insured's criminal convictions for arson and insurance fraud are manifestly relevant to the insured's related claim for insurance coverage. The insured is not entitled to a presumption of innocence simply because he pled no contest. While his no contest pleas are not admissions of guilt, they also do not give the insured a license to pretend that he was not convicted of purposely causing the fire for which he seeks to recover insurance proceeds.

Appellees asserted in the Court of Appeals that Elevators Mutual is attempting "to dramatically and profoundly change the long-standing rule of law in Ohio and in much of the nation." Appellants' Reply Brief, p. 1. Nothing could be further from the truth. Elevators Mutual is simply asking that Evid. R. 410(A)(2) and Crim. R. 11(B)(2) be applied *as written*. The Court of Appeals, on the other hand, unilaterally changed the law when it held that those rules apply to both no contest pleas and criminal convictions, even though neither rule so much as mentions criminal convictions.

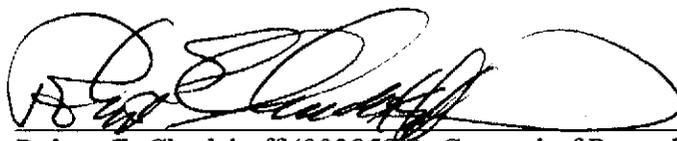
Appellees further asserted in the Court of Appeals that "[t]he primary purpose of a plea of *nolo contendere* or no contest, is to avoid potential future repercussions caused by the admission of liability, particularly, in the arena of potential future civil litigation." Brief of Appellants, p. 17. But this case goes beyond merely avoiding civil *liability* for Heyman's crimes. Appellees seek to use Heyman's no contest plea *offensively*, to *profit* from his criminal conduct by collecting insurance money for the very arson that he was convicted not only of

committing, but committing for the purpose of defrauding Elevators Mutual. The no contest plea was not intended to aid and abet such an unjust result.

There is no sound reason to allow a convicted arsonist to pursue the insurance proceeds that motivated the arson in the first place. Allowing this while preventing the jury from knowing about the felony convictions would be worse. This is especially true where – as here – the insured is found guilty and convicted of *insurance fraud*. That he would be permitted to recover the very insurance proceeds that he was convicted of defrauding from his insurance company is absurd. Well-settled Ohio public policy prohibits wrongdoers and convicted felons from profiting from their wrongful conduct.

For the reasons set forth above, this case involves matters of public or great general interest. Elevators Mutual requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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Certificate Of Service

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**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.

JOURNALIZED
12/31/08 LBR

{¶ 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.

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.

{¶ 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} "* * *

{¶ 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.

{¶ 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

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,

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 * * *."

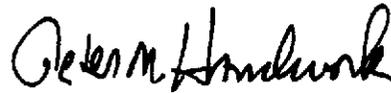
Commercial Property Conditions (A) of the policy provides, "This Coverage Part is subject to the following conditions * * * A. Concealment, Misrepresentation or Fraud[.] This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any 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.

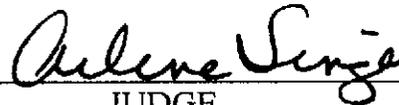
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

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.

{¶ 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.

{¶ 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."

{¶ 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."

{¶ 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

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>.