

ORIGINAL

IN THE SUPREME COURT OF OHIO

Elevators Mutual Insurance Company, et al.)	Case No. 09-0321
)	
Appellants,)	
)	
v.)	On Appeal from the
)	Sandusky County Court of Appeals
J. Patrick O'Flaherty's, Inc., et al.,)	Sixth Appellate District
)	
Appellees.)	

REPLY BRIEF OF APPELLANT ELEVATORS MUTUAL INSURANCE COMPANY

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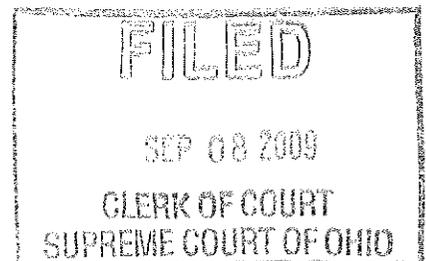


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I. Appellees Virtually Ignore The Central Issue Of Admissibility: Heyman's Convictions Are Admissible, Regardless Of Whether They Should Be Preclusive

The central issue in this appeal is whether Evid. R. 410 and Crim. R. 11(B)(2) prohibit evidence of Appellee Richard Heyman's felony convictions for arson and insurance fraud. Elevators Mutual contends that nothing in Evid. R. 410 or in Crim. R. 11(B)(2) prohibits the admission of such evidence, so long as the evidence is relevant, and that the Court of Appeals erred by holding to the contrary. Elevators Mutual relies primarily on this Court's decision 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 held:

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. [Citations omitted].

Appellees virtually ignore this issue in their merit brief.¹ Instead, Appellees focus almost entirely on an argument that Elevators Mutual *did not make* in its principal brief, specifically that evidence of a conviction following a no contest plea should be deemed to constitute collateral estoppel rather than constituting merely admissible evidence. Thus, at pp. 19-20 of their brief, Appellees assert:

¹ Appellees contend that the issue before the Court is "how a court may properly determine that a litigant is, in fact, an arsonist." (Appellees' Merit Brief, p. 5). Whether Richard Heyman is an arsonist was the central issue in his criminal case, where the court determined that he *is* an arsonist (and a defrauder) and sent him to prison. Heyman appealed, but the Court of Appeals found "... upon our own independent review of the record, we find no other grounds for a meritorious appeal. This appeal is therefore found to be wholly frivolous." *State v. Heyman*, 6th Dist. No. S-04-016, 2005-Ohio-5565, ¶19.

[C]ourts have been reluctant to apply the doctrine of collateral estoppel when an issue has not been actually litigated. When a conviction is based on a no contest plea, there is no actual litigation of the facts. Consequently, a conviction following a no contest plea should not be admissible in a subsequent civil proceeding.

Appellees' argument is a non sequitur, because admissibility and collateral estoppel are two separate issues. The central issue in this appeal is whether evidence of Richard Heyman's felony convictions is *admissible*. Whether that evidence should also constitute collateral estoppel is a separate issue entirely. The fact that evidence of Heyman's convictions may not, by itself, constitute collateral estoppel does not mean that such evidence is not *admissible*.

II. Appellees' "Parade Of Horrors" Has Not Occurred In The 24 Years Since Mapes Held That Convictions Following No Contest Pleas Are Admissible If Relevant

This fundamental flaw in Appellees' argument also manifests itself in Appellees' contention that allowing evidence, in a subsequent civil action, of a conviction following a no contest plea is somehow contrary to public policy and will create chaos in the criminal courts. Appellees contend that "the no contest plea will be eliminated from the court system in any instance where a potential civil case may follow" and that "municipal courts will be overwhelmed with trials." (Appellees' Merit Brief, p. 24). The purported reasons why criminal defendants supposedly will not enter such pleas (*Id.*) are all predicated on the premise that any conviction following a no contest plea will constitute collateral estoppel. The issue in this case, however, is simply whether such a conviction shall continue to be *admissible evidence* in a subsequent civil proceeding.

Appellees note that criminal defendants enter no contest pleas for a variety of reasons, including to avoid the publicity, expense, emotional turmoil, uncertainty, and damage to

reputation associated with a criminal trial. (Appellees' Merit Brief, p. 23). None of these motivations for pleading no contest is undermined by the fact that a resulting conviction will be admissible in a subsequent proceeding. Thus, Appellees' assertion that criminal defendants "will not plead no contest to a charge, if the conviction is admissible in a subsequent civil case" (Appellees' Merit Brief, p. 5) is unconvincing.

After all, such a conviction, where relevant, has long been admissible in a subsequent civil proceeding, a fact that Appellees overlook. This Court concluded, back in 1985, that allowing evidence of such convictions is not contrary to public policy or to any evidentiary rules. *State v. Mapes* (1985), 19 Ohio St.3d 108, 484 N.E.2d 140. Appellees also ignore the fact that, in the 24 years since *Mapes* was decided, chaos has not reigned in Ohio's courts. Criminal defendants have continued to plead no contest, and municipal courts have not been "overwhelmed with trials" because of defendants refusing to plead no contest.

Moreover, if criminal defendants eschew the no contest plea, how will they plead? Their alternatives are extremely limited: guilty, not guilty, and not guilty by reason of insanity. (Crim. R. 11(A)). If the defendant pleads guilty, he will almost certainly be convicted, and he will have made an admission that he could have avoided by pleading no contest. If he pleads not guilty, he will face all of the difficulties noted by Appellees that he could avoid by pleading no contest: publicity, expense, emotional turmoil, uncertainty, and damage to reputation. If he pleads not guilty by reason of insanity, he will face all of these difficulties plus the stigma and burden of an insanity defense.

Clearly, then, the no contest plea has been and will remain the best option for many criminal defendants. The fact that a resulting conviction, if relevant, is admissible in a subsequent civil proceeding does not diminish the no contest plea's appeal.

III. *Mapes* Held That Convictions Following No Contest Pleas Are Admissible If Relevant, But Did Not Limit “Relevance” Only To Convictions Made Relevant By Statute And Nothing Else

Adopting the Court of Appeals’ misinterpretation of *Mapes* – i.e., that the admissibility of a conviction following a no contest plea depends on “whether or not the conviction has been made relevant to the later proceeding by statutory provision” – Appellees assert that *Mapes* “clearly stands for the proposition that a no contest plea conviction will not be allowed in evidence of a civil case except when the conviction is made relevant by statute.” (Appellees’ Merit Brief, p. 27). This assertion is wrong. As pointed out in Elevators Mutual’s principal brief (pp. 7-8), the majority in the Court of Appeals reached its erroneous conclusion by misinterpreting the phrase “when such conviction is made relevant by statute.” *Mapes*, 19 Ohio St.3d at 111. According to the majority, this statement means that a conviction following a no contest plea is admissible *only* if the conviction is made relevant by statute.

But in *Mapes*, this Court merely recognized that evidence of a criminal conviction is not necessarily relevant in every case. Rather, the offerer of the conviction must show that the conviction is relevant. In *Mapes*, the defendant’s prior conviction for murder (in another state) was held to be relevant in a death penalty hearing because an Ohio statute (R.C. 2929.04) allows imposition of the death penalty for aggravated murder if, “[p]rior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing or attempt to kill another.” Therefore, under that statute, evidence of *Mapes*’ prior conviction was relevant and therefore admissible in the death penalty hearing.

Accordingly, this Court held in *Mapes* that nothing in Crim. R. 11(B)(2) and Evid. R. 410 prevents a conviction entered after a no contest plea (or any other conviction) from being admissible under R.C. 2929.04. The key to that holding, however, was not that the particular conviction at issue in that case was “made relevant by statute,” but that Crim. R.

11(B)(2) and Evid. R. 410 “prohibit only the admission of a no-contest *plea*” and the admission of “evidence of the prior *conviction* ... was not equivalent to the admission of the no contest plea.” *Mapes*, 19 Ohio St.3d at 111. *Mapes* does not stand for the proposition – nor is there any logical reason to conclude – that a conviction following a no contest plea that is “made relevant” in a particular case other than “by statute” must be deemed inadmissible under Evid. R. 410. Nor is there any logical reason for this Court to now do what Appellees are asking it to do, which is to restrict the admissibility of convictions following no contest pleas to cases where evidence of a conviction is “made relevant” by statute, but bar such evidence from cases where it is made relevant under principles of common law, by contract, or by administrative regulation.

The Court of Appeals majority itself acknowledged that the purported limitation to “made relevant by statute” is not consistent with the case law. See, for example, paragraph 29 where the majority cited cases in which evidence of prior convictions was made relevant by “a rule derived from a statute,” and paragraph 33 where the majority stated that it was taking “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.” (Docket No. 23, ¶¶29, 33; Appx. 14, 15).

In fact, evidence of Richard Heyman’s felony convictions is undeniably “made relevant” by the terms of the Elevators Mutual policy. The policy expressly excludes coverage for loss or damage caused by any “dishonest or criminal act by you, any of your partners, 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.” (Form CF 497, pp. 1-2; Appx. 55-56; Supp. 24-25). Heyman was convicted in the prior criminal case of committing arson for the purpose of

defrauding Elevators Mutual. Arson and insurance fraud are unquestionably dishonest and/or criminal acts, and therefore Richard Heyman's felony convictions are manifestly relevant to the "dishonest or criminal" acts exclusion. Thus, the Court of Appeals majority's suggestion that Heyman's convictions are not relevant to any policy provision is factually incorrect.

Nor do any of the cases cited by Appellees at pp. 28-31 of their Brief support their argument. Appellees inexplicably assert that the Court of Appeals "properly applied *Mapes*" in *Young v. Gorski*, 6th Dist. No. L-03-1243, 2004-Ohio-1325, and *Frank v. Simon*, 6th Dist. No. L-06-1185, 2007-Ohio-1324. In fact, neither *Young* nor *Frank* mentions *Mapes*, neither case involved a no contest plea, and neither case addressed the admissibility of a criminal conviction. In short, neither case is remotely related to *Mapes*. Appellees' assertion that those cases "properly applied" *Mapes* is baffling.

Similarly, Appellees cite *Western Reserve Group v. Hartman*, 9th Dist. No. 04CA008451, 2004-Ohio-6083, and *Robinson v. Springfield Local Sch. Dist. Bd. of Educ.*, 9th Dist. No. 20606, 2002-Ohio-1382, for the proposition that "[a] no contest plea/conviction is not admissible in evidence in a subsequent civil case where the issue was not actually litigated." (Appellees' Merit Brief, p. 31). Neither *Hartman* nor *Robinson*, however, involved a no contest plea, a criminal conviction, or the admissibility of such a conviction in a subsequent civil case. Appellees' reliance on those cases is likewise puzzling.

Appellees also purportedly rely upon *Lichon v. American Universal Ins. Co.* (Mich. 1990), 459 N.W.2d 288, 299, where the Michigan Supreme Court held "that neither a plea of nolo contendere nor a conviction based thereon prevents the person who entered the plea from maintaining innocence in subsequent civil litigation...." Significantly, the *Lichon* court did

not hold that evidence of Lichon's criminal conviction was inadmissible.² Similarly, in *Song v. Cigna Property & Cas. Ins. Co.*, 2002 Cal. App. Unpub. Lexis 6636, the court noted that a no contest plea not only is admissible in a subsequent proceeding under California law, but it carries the same legal effect as a guilty plea.³

Appellees cite all of these cases – *Young, Frank, Hartman, Robinson, Lichon*, and *Song* – to rebut an argument that Elevators Mutual did not make in its principal brief – i.e., that a criminal conviction following a no contest plea collaterally estops the criminal defendant from asserting his innocence in a subsequent civil proceeding. Not one of the cited cases addresses the central issue in this appeal, which is the *admissibility* of evidence of such a conviction.

Relevant cases exist, however, including *Steinke v. Allstate Ins. Co.* (3rd Dist. 1993), 86 Ohio App.3d 798, 621 N.E.2d 1275, and *State v. Williams* (Nov. 21, 1997), 2nd Dist. No. 16306, 1997 Ohio App. Lexis 6083, and they all support the admissibility of a conviction following a no contest plea. In *Steinke*, the insured pled no contest and was convicted of disorderly conduct in the Auglaize County Municipal Court. In a subsequent civil proceeding, Allstate argued that it had no duty to defend or indemnify the insured, citing the insured's

² The Michigan Supreme Court subsequently disavowed *Lichon* in *Monat v. State Farm Ins. Co.* (Mich. 2004), 677 N.W.2d 843. And one year after *Lichon*, Michigan changed its Rules of Evidence regarding the admissibility of *nolo contendere* pleas. Specifically, Michigan Evid. R. 410 was amended to permit evidence of the *nolo contendere* plea itself “to support a defense against a claim asserted by the person who entered the plea.” Thus, where a convicted arsonist asserts a claim for insurance proceeds, the revised rule allows his insurer to introduce not only evidence of his criminal conviction, but also evidence of his *nolo contendere* plea.

³ In a separate lawsuit involving a different insurance company but arising out of the same fire, another panel of the California Court of Appeals rejected Mrs. Song's attempt to collaterally attack Mr. Song's *guilty* plea. *Low v. Golden Eagle Ins. Co.*, 2002 Cal. App. Unpub. Lexis 4120, *7. Evidently, the California courts were unable to agree on whether Mr. Song pled guilty or no contest, much less the effect of his plea. That disagreement could explain why these inconsistent cases were both designated unpublished and not citable.

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 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). Appellees suggest without discussion that *Steinke* is distinguishable and/or was wrongly decided (Appellees' Merit Brief, p. 32), but *Steinke* is directly on point and entirely consistent with *Mapes*.

In *Williams*, the court held that *Evid. R. 410* and *Crim. R. 11* do not prohibit evidence of a conviction following a no contest plea:

We do not agree with the trial court that evidence of Williams' conviction is barred by *Evid. R. 410*. That Rule, as well as *Crim. R. 11(C)* [sic], bars evidence of a defendant's plea of no contest, not a conviction resulting from it when evidence of the conviction is otherwise admissible.

Williams, *5. Appellees argue that the "critical issue" in *Williams* "was not the admission of a conviction following a no contest plea but whether the arrest was unlawful." (Appellees' Merit Brief, p. 33). Whether the admissibility of the conviction was the "critical issue" in *Williams* is beside the point. The threshold issue in *Williams*, and the central issue in the present appeal, was whether *Evid. R. 410* and/or *Crim. R. 11* prohibit evidence of the conviction. The *Williams* court unequivocally held that *Evid. R. 410* and *Crim. R. 11* preclude only "evidence of a defendant's plea of no contest, not a conviction resulting from it when evidence of the conviction is otherwise admissible." Thus, Appellees' assertion that "[t]here is no actual conflict between the

appellate decision in *Williams, supra*, and the appellate decision in the case at bar” is simply wrong. And, in *Williams*, the conviction was not made relevant by any statute.

IV. Evid. R. 410 and Crim. R. 11(B)(2) Apply Only To No Contest Pleas, And Do Not Prohibit Evidence Of Criminal Convictions

Appellees complain that the trial court gave “no explanation as to why a criminal conviction following a no contest plea should be admissible when the no contest plea, itself, is inadmissible.” (Appellees’ Merit Brief, p. 4). The explanation is simple – because it is the law as set forth by this Court in *Mapes*. This Court explained in *Mapes* that “admitting the evidence of the prior conviction ... was not equivalent to the admission of the no contest plea.” Thus, while two rules – Evid. R. 410 and Crim. R. 11(B)(2) – preclude evidence of the pleas, there are no rules barring evidence of the convictions.

Appellees further assert that “there is no rationale for excluding a no contest plea which is not applicable to a conviction following a no contest plea.” (Id.). That is simply not the case. As noted in Crim. R. 11(B)(2), a plea of no contest “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.”⁴ Thus, evidence of Richard Heyman’s no contest pleas would constitute an *admission* by Heyman of the facts set forth in the indictment against him for insurance fraud (R.C. 2913.47(B)(1)) and arson with purpose to defraud (R.C. §2909.02(A)(2)).

⁴ Indeed, while Elevators Mutual never sought to offer the plea, Heyman’s no contest plea itself might be admissible in this case because it was offered not against Heyman, but against O’Flaherty’s. Crim. R. 11(B)(2) and Evid. R. 410 prohibit *only* the use of a no contest plea *against the defendant making the plea*. Nothing in those rules prohibits the use of a no contest plea against a party *other* than the defendant making the plea. Thus, use of such evidence against O’Flaherty’s is not barred by either Crim. R. 11(B)(2) or Evid. R. 410.

Heyman's convictions, on the other hand, do not constitute admissions on his part. But his convictions are evidence that he was convicted of two felonies in connection with the fire that is at issue in the present case, and such evidence is relevant to the "dishonest or criminal" acts exclusion. Thus, the rationale behind excluding evidence of no contest pleas – i.e., permitting the criminal defendant to avoid admitting the facts set forth in the indictment – does not apply to evidence of the conviction.

Appellees seem to believe that Richard Heyman's mere incantation of the words "no contest" should somehow insulate him from the repercussions of his criminal conduct. That is not the purpose of the no contest plea. The plea permits a criminal defendant to avoid an *admission* of inculpatory facts, but it does not permit him to pretend in a subsequent proceeding that he was not convicted.

V. **Heyman's Felony Convictions For Arson And Insurance Fraud Are Undeniably "Made Relevant" By The "Dishonest Or Criminal" Act Exclusion In The Elevators Mutual Policy**

Appellees do not – indeed, cannot – dispute that Heyman's felony convictions are relevant to the "dishonest or criminal" act exclusion. Rather, they argue that no provision in the Elevators Mutual policy expressly provides that the convictions are *admissible*:

Since there was no language in the insurance policy addressing the admissibility of a conviction following a no contest plea or whether such a conviction would bar coverage, the Court of Appeals declined to take a position on whether an insurer and an insured may contract to make a prior conviction following a no contest plea admissible in a subsequent civil action or an absolute bar to a subsequent civil action.

* * *

Appellees ... submit that the Elevators Mutual policy in question contains no language addressing the issue of the admissibility of a conviction following a no contest plea. Consequently, the Court of Appeals' analysis was correct.

(Appellees' Merit Brief, p. 39).

Thus, according to Appellees, it is not enough that the Elevators Mutual policy contains a provision that makes Richard Heyman's felony convictions manifestly relevant. According to Appellees, in order for evidence of Heyman's convictions to be admissible, the Elevators Mutual policy must contain a provision stating that a conviction is admissible. But the admissibility of evidence is not determined by the terms of a private contract. The rules of evidence determine admissibility, and as stated in Evid. R. 402, subject to certain exceptions not applicable here, *all relevant evidence is admissible*.

Moreover, even the statute in *Mapes* did not provide that the conviction was admissible. Rather, it is the relevance of the convictions – to the statute in *Mapes*, and to the “dishonest or criminal” act exclusion here – that makes the convictions admissible.

VI. Public Policy Prohibits One Convicted Of Arson And Insurance Fraud From Recovering The Insurance Proceeds For The Fire And Insurance Claim On Which He Was Convicted

The secondary issue in this appeal is whether public policy prohibits a convicted arsonist from recovering, directly or indirectly, insurance proceeds in connection with the fire that he was convicted of causing for the purpose of defrauding his insurance company. Elevators Mutual addressed this issue, and cited several cases, at pp. 17-18 of its principal brief.

Of the cases cited by Elevators Mutual, Appellees take issue only with *Mineo v. Eureka Sec. Fire & Marine Ins. Co.* (Pa. Super. 1956), 125 A.2d 612. But *Mineo* is directly on point. There, as in the present case, the insured was convicted of burning his insured restaurant. The conviction was admitted into evidence in the subsequent insurance case, but the jury nonetheless returned a verdict against the insurers. The appellate court, vacating that judgment and granting judgment non obstante veredicto in favor of the insurers, held that “when one is convicted of a felony and subsequently attempts to benefit from the commission, the record of

his guilt should be a bar to his recovery.” *Mineo*, 125 A.2d at 618. The court explained that the sole basis for this rule is public policy:

This rule is founded upon 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. The rule is enforced upon the ground of public policy alone and not out of consideration for the defendant to whom the advantage is incidental.

Mineo, 125 A.2d at 617.

Appellees imply that Elevators Mutual cited *Mineo* on the issue of admissibility (Appellees’ Merit Brief, p. 36), but that is not the case. *Mineo* did not involve a no contest plea and the admissibility of the insured’s conviction was not at issue. Elevators Mutual cited *Mineo* for the proposition that *public policy* prohibits a convicted arsonist from recovering insurance proceeds in connection with the fire that he was convicted of causing. *Mineo* unquestionably supports that proposition. And, in the context of public policy, Heyman’s felony convictions are not diminished because they followed no contest pleas. The law does not recognize “degrees” of convictions on the basis of the underlying plea.

In this context, Appellees analogize the present case to a situation where a driver is convicted of running a red light and causing an accident. (Appellees’ Merit Brief, p. 24). They assert that, if Elevators Mutual prevails, “[a]ny no contest plea which results in conviction will be determinative of liability” in a subsequent tort case brought by the other driver. (Id.).

But Elevators Mutual’s public policy argument and Appellees’ red light analogy involve two entirely different scenarios. Public policy does and should prohibit a convicted arsonist from *profiting* by his criminal conduct. On the other hand, the defendant driver in Appellees’ example is not seeking to profit or recover; he is merely attempting to defend himself. Thus, the public policy that precludes Appellees’ recovery here has no application whatsoever to

Appellees' red light scenario. Moreover, the driver's negligent conduct is a far cry from the intentional, reprehensible act of arson for the purpose of defrauding an insurance company. Thus, unlike Heyman's arson and insurance fraud convictions, Appellees' "analogy" does not implicate public policy.

VII. The Arson And Insurance Fraud Committed By Heyman, O'Flaherty's President And 50% Shareholder, Is Imputed To O'Flaherty's

At pages 18-20 of its principal brief, Elevators Mutual pointed out that the law is clear that arson or fraud by an officer or shareholder of a corporation is imputed to the corporation and precludes the corporation from recovering the insurance proceeds for the fire. Appellees do not deny this. Instead, Appellees advance the totally irrelevant assertion that a corporation is not "automatically barred from receiving the proceeds of an insurance policy when one of its officers is *accused* of deliberately (or in this case is alleged to have deliberately set the fire) setting the fire which causes the loss." (Appellees' Merit Brief, p. 41) (*italics added*). This argument is irrelevant because in this case, Richard Heyman was not merely "accused" of deliberately setting the fire at O'Flaherty's. Rather, Heyman – the president and half owner of O'Flaherty's – was *convicted* of arson and insurance fraud, served time in prison as a consequence, and now seeks to recover the insurance proceeds.

In its principal brief, Elevator Mutual cited *Forrestwood Development Corp. v. All-Star Ins. Corp.* (June 1, 1978), 8th Dist. No. 37186, 1978 Ohio App. Lexis 10419, *10, where four of the corporation's six shareholders had conspired to set the fire, and the court held that "the corporation was accountable for the fire." Appellees argue that *Forrestwood* is distinguishable, since the four shareholders in that case owned 80% of the corporate stock, while Richard Heyman owned only 50% of O'Flaherty's stock. Appellees cite no cases holding that a

fire caused by a 50% shareholder is not imputed to the corporation, nor do they mention the remaining cases cited in Elevators Mutual's principal brief, including:

- *Blitch Ford, Inc. v. MIC Property and Casualty Ins. Corp.* (M.D. Ga. 2000), 90 F. Supp.2d 1377, where arson committed by a 49% shareholder was imputed to the corporation.
- *State Auto Property and Casualty Ins. Co. v. St. Louis Supermarket #3, Inc.* (Jan. 5, 2006), E.D. Mo. No. 4:04cv1358, 2006 U.S. Dist. Lexis 240, where a 50% shareholder's arson was imputed to the insured corporation.
- *K&T Enters., Inc. v. Zurich Ins. Co.* (6th Cir. 1996), 97 F.3d 171, where arson committed by a 50% shareholder was imputed to the corporation.

The fact that the prosecutor dropped the criminal charges against Jan Heyman as part of Richard Heyman's plea agreement is immaterial. The material fact is that the arson committed by Richard Heyman – O'Flaherty's president and a 50% shareholder in the corporation – is imputed to the corporation.

VIII. Jan Heyman Is A Mere Loss Payee Who "Stands In The Shoes Of" O'Flaherty's

At pp. 21-22 of its principal brief, Elevators Mutual explained that if the named insured (O'Flaherty's) is barred from recovery as a consequence of Richard Heyman's wrongful acts, so too are the "loss payees," Jan Heyman and Richard Heyman. In this regard, Elevators Mutual cited a host of cases holding that a loss payee "stands in the shoes" of the named insured and may recover only if the insured can recover, most notably *Pittsburgh Nat'l. Bank v. Motorists Mut. Ins. Co.* (9th Dist. 1993), 87 Ohio App.3d 82, 85, 621 N.E.2d 875:

[T]he simple mortgage clause ... typically states that the proceeds of the policy shall be paid first to the mortgagee *as his interest may appear*. Under such a clause, the mortgagee is simply an appointee of the insured, and its right of recovery is only as great as that of the insured. Notably, under a simple mortgage clause, *anything that would void the policy in the hands of the mortgagor likewise voids it as to the mortgagee*. [Italics added; citations omitted].

The “Loss Payable” provision at issue, excerpted at p. 21 of Elevators Mutual’s principal brief, is most certainly a “simple” loss payable clause⁵ because it provides that the loss payees shall be paid “as interests may appear.” Accordingly, Jan Heyman “is simply an appointee of the insured” – i.e., O’Flaherty’s – and her “right of recovery is only as great as that of the insured.” Since O’Flaherty’s is not entitled to recover under the Elevators Mutual policy, neither is Jan Heyman.

Appellees argue, however, that the “loss payable” clause should be required to expressly state that a loss payee stands in the shoes of the insured. (Appellees’ Merit Brief, p. 43). No “loss payable” clause in any insurance policy ever says that. Rather, the rule that a loss payee’s rights are no greater than those of the named insured has been developed by the courts and is now a rule of long standing. See, *Couch on Insurance 3d*, §65:15 (“Under a simple loss-payable or open-mortgage clause, the mortgagee is simply an appointee to receive the insurance fund recoverable in case of loss to the extent of his or her interest, and his or her right of recovery is no greater than the right of the mortgagor”).

⁵ Inexplicably, in this connection, Appellees excerpt a portion of a different, inapplicable provision – the “Lender’s Loss Payable” provision. (Appellees’ Merit Brief, pp. 45-46). The Elevators Mutual policy unambiguously provides, however, that the “Loss Payable” provision – not the “Lender’s Loss Payable” provision – applies. (Appx. 51; Supp. 7). This is not surprising, since the Heymans are not “lenders.” Thus, Appellees’ lengthy discussion of Jan Heyman’s purported rights under the “Lender’s Loss Payable” provision (Appellees’ Merit Brief, pp. 45-46) is irrelevant.

Appellees further assert that Richard and Jan Heyman have separate interests under the Elevators Mutual policy. (Appellees' Merit Brief, p. 44). Regardless, that is irrelevant. Jan Heyman stands in the shoes of O'Flaherty's, and for the reasons set forth above and in Elevators Mutual's principal brief, O'Flaherty's is not entitled to recover under the Elevators Mutual policy. Thus, Jan Heyman, likewise, is not entitled to recover.

IX. The "Innocent Spouse" Cases Are Not Analogous

Appellees' argument to the contrary notwithstanding, the present case is *not* "analogous to the so-called 'innocent spouse' cases." (Appellees' Merit Brief, p. 44). In the "innocent spouse" cases, the innocent spouse is herself a named insured under the policy and has her own independent rights as an insured. Therefore, she is subject only to defenses that relate to her own conduct. Unlike a "loss payee," her rights are not derivative of the rights of a named insured.

As Appellees' acknowledge, the innocent spouse cases involve spouses who are co-insureds. (Id.). In the present case, Richard and Jan Heyman are not insureds at all – they are loss payees who stand in the shoes of, and have no greater rights than, the insured (O'Flaherty's). Again, *Blich Ford*, supra, 90 F. Supp. 2d at 1381, is illustrative:

Blich Ford suggests that Brett Blich's fraud cannot defeat the insurance coverage because of the interest of innocent persons. For this, Blich Ford relies on what it describes as Georgia's doctrine of innocent co-insureds....

The simple fact is that there are no co-insureds in the case sub judice. As Blich Ford has repeatedly stressed in its pleadings, there is only one named insured in this case; Blich Ford, Inc.

Likewise, in the present case, O'Flaherty's is the only named insured. Jan Heyman is not an insured, and therefore cannot be a co-insured. Thus, the "innocent spouse" or "innocent co-insured" doctrine simply does not apply.

Moreover, by its express terms, the Elevators Mutual policy eliminates the “innocent spouse” doctrine. Specifically, fraud committed by *any* insured voids the policy as to all insureds:

A. CONCEALMENT, MISREPRESENTATION OR FRAUD

This Coverage part is void in any case of fraud by you as it relates to the 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. The Covered Property;
3. Your interest in the Covered Property; or
4. A claim under this Coverage Part.

(Form CF 189 (7-88); Supp. 11) (emphasis added). Richard Heyman’s fraud is imputed to O’Flaherty’s, and such fraud voids the policy as to all insureds. That would include Jan Heyman even if she were an insured, which she is not. See, *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St. 3d 287, 291, 699 N.E.2d 507 (adopting “contract principles” approach; innocent co-insured barred from recovering where insurance contract imposes joint obligations on insureds, such as fraud clause voiding policy for acts of “any insured”).

X. **Conclusion**

Elevators Mutual is not asking the Court to “dramatically and profoundly change the long-standing rule of law in Ohio,” as Appellees allege. (Appellces’ Merit Brief, p. 1). To the contrary, Elevators Mutual is asking the Court to *affirm* the long-standing rule that a conviction following a no contest plea, if relevant, is admissible in a subsequent civil proceeding.

Elevators Mutual is also asking the Court to uphold long-standing Ohio public policy that a convicted felon not be permitted to profit from his crime – particularly at the expense of his *victim*.

For the reasons set forth above and in Elevators Mutual’s principal brief, appellant Elevators Mutual Insurance Company respectfully requests that the holding of the Sixth District Court of Appeals be reversed, and that the trial court’s Final Judgment Entry granting summary judgment in favor of Elevators Mutual and against Appellees be reinstated in all respects.

Respectfully submitted,



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