

ORIGINAL

SUPREME COURT OF OHIO

CASE NO. 09-1936

DON B. KINCAID, JR., ET. AL.
PLAINTIFF-APPELLEE,

v.

ERIE INSURANCE COMPANY,
DEFENDANT-APPELLANT

On Appeal from the Court of Appeals
Eighth Appellate District
Cuyahoga County, Ohio
Case No. CA 08 092101

**DEFENDANT-APPELLANT ERIE INSURANCE COMPANY'S
MERIT BRIEF**

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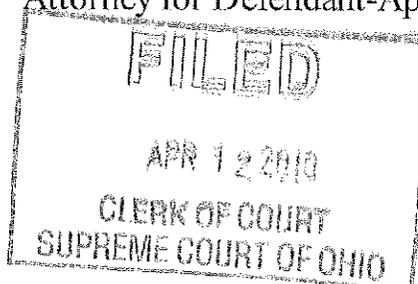


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STATEMENT OF THE FACTS

In 2001, Appellee, Donald B. Kincaid, was involved in an accident where his vehicle struck an individual riding on a bicycle. See, Supplement at p. 5, ¶11. Mr. Kincaid was sued for this accident in 2003. *Id.* at ¶12. Appellant, Erie Insurance Company, pursuant to a third party liability insurance contract it had with Kincaid, provided attorneys to defend the action on Kincaid's behalf. *Id.* In October, 2004, that matter was settled and dismissed after Erie agreed to indemnify Kincaid for his alleged negligence pursuant to the insurance contract. See, Supplement at p.6, ¶15.

In this matter, Kincaid alleges in a putative class action complaint, that during this representation from 2003 to 2004, he incurred "travel related expenses, including mileage expenses" for attending a deposition; and "postage expenses incurred" for mailing legal notices to Erie. See, Supplement at pp.6-7, ¶¶17-21.

Kincaid's action alleges that these expenses are covered under the insurance contract's "Additional Payments" provision for costs and expenses related to Erie's defense of liability claims and representation of him and the putative class members in separate litigation. See, Supplement at p.6, ¶16. The policy provides reimbursement coverage, but only for actual expenses incurred:

ADDITIONAL PAYMENTS

We will make the following payments in addition to the limit of protection:

* * *

5. reasonable expenses anyone we protect may incur at our request to help us investigate or defend a claim or suit. This includes up to \$100 a day for actual loss of earnings.

7. reasonable costs for first aid to other people and animals at the time of an accident involving an auto we insure.

8. reasonable lawyers' fees up to \$50 which anyone we protect incurs because of arrest, resulting from an accident involving an auto we insure.

See, Supplement at p.29.

Significantly, Kincaid never presented these claims to Erie Insurance Company for consideration and Erie never denied payment. These alleged expenses, which are not quantified or delineated, were never presented or submitted to Erie and Erie never had the opportunity to determine if they were covered under the insurance contract. Instead, Kincaid filed a class action complaint asserting claims for bad faith, breach of contract and seeking a declaration that coverage existed for these types of expenses.

Notably, Kincaid's complaint does not alleged that Erie refused to pay or denied coverage of any type to Kincaid before filing this action. Rather, Kincaid independently decided, through counsel, to file a class action complaint rather than submit his alleged coverage claim for postage and mileage to Erie for review and possible payment.

Because Appellant never submitted to Erie, at any time, any claim or evidence of travel-related expenses, mileage expenses, postage, or other expenses, he has no justiciable

claim nor entitlement under the insurance contract, and no standing to file this class action complaint.

Accordingly, on May 8, 2008, Erie filed a Motion for Judgment on the Pleadings. Kincaid opposed the motion and Erie filed a reply. On September 9, 2008, the Trial Court granted Erie's Motion for Judgment on the Pleadings.

On September 9, 2009, the Eighth District Court of Appeals reversed and held, without examining the constitutional standing requirement, that Kincaid's class action complaint could proceed on claims for breach of contract, bad faith and declaratory relief.¹

¹ Seven other identical matters are currently pending in Ohio: *Negron v. Nationwide Property And Casualty Insurance Co.*, No. CV-08-650310 (Cuyahoga C.P.) (filed February 7, 2008); *Cika v. Progressive Preferred Ins. Co.*, No. CV-08-653115 (Cuyahoga C.P.) (filed March 6, 2008); *Gallo v. Westfield Nat. Ins. Co.*, No. CV-08-652376 (Cuyahoga C.P.) (filed February 28, 2008); *Johnson v. GEICO Gen. Ins. Co.*, No. 08-80740-CIV-MARRA (S.D. Fla.) (filed July 8, 2008); *Kavouras v. Allstate Ins. Co.*, No. CV-08-649018 (Cuyahoga C.P.) (filed January 28, 2008) (The *Kavouras v. Allstate* case was subsequently removed to federal court, Case No. 08-571 (N.D. Ohio).); *Hosey v. State Farm Mut. Auto.*, No. CV-08-656919 (Cuyahoga C.P.) (filed April 15, 2008); *Lycan v. Lumbermens Mutual Cas. Co.*, No. CV-07-644127 (Cuyahoga C.P.) (filed December 10, 2007).

LAW AND ARGUMENT

- I. **Proposition of Law No. I: An Insured Lacks Standing To File An Action Against His Insurer For Coverage Under An Insurance Policy Where The Claimant Has Not Presented A Claim For A Loss Potentially Covered By Such Policy And Where The Claimant Has Failed To Even Present Notice To The Insurer Of The Alleged Loss.**

- II. **Proposition of Law No. II: Courts Will Not Issue Advisory Opinions On Whether An Insured Is Entitled to Coverage Under An Insurance Policy Where No Loss Has been Set Forth And Where No Claim Was Made To The Insurer For Payment.**
 - A. **Ohio Law Requires That a Party Suffer an Injury In Fact Before a Complaint May Be Filed For Common Law Claims Such As an Insurer's Alleged Breach of Contract or Bad Faith.**

The jurisdiction of the courts is limited to cases and controversies. *See, O. Const. Art. IV, Sec. 4(B)*. The judiciary and its court system is where parties, with truly adverse legal interests and actual controversies, not simply mere disagreements, are resolved:

The Constitution of Ohio sets forth the basic limitation on the jurisdiction of the common pleas courts. *Section 4(B), Article IV of the Ohio Constitution* vest the common pleas courts with "such original jurisdiction over all justiciable matters * * * as may be provided by law." This court, in interpreting Section 4(B), Article IV, has declared the following:

"It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and render judgments which can be carried into effect." *Fortner v. Thomas (1970), 22 Ohio St.2d 13, 14*. Actual controversies are presented only when the plaintiff sues an adverse party. This means not merely a party in sharp and acrimonious disagreement with the plaintiff, but a party from whose adverse conduct or adverse property interest the plaintiff properly claims the protection of the law. Thus, we hold that the presence of a disagreement, however sharp and acrimonious it may be, is insufficient to create an actual controversy if the parties to the action do not

have adverse legal interest. Cf. *Diamond v. Charles* (1986), 476 U.S. 54, 62, 106 S. Ct. 1697, 1703, 90 L.Ed.2d 48, 57.

State ex rel. Bardays Bank v. Curt of Common Pleas of Hamilton Cty., 74 Ohio St.3d 536, 542; 1996-Ohio-286.

Standing is the threshold requirement which must be addressed prior to any determination on the merits of a party's alleged legal claims. *Mid-American Fire & Casualty Co. v. Haxley*, 113 Ohio St.3d 133; 2007-Ohio-1248; *Travelers Indemnity Co. v. Cochran* (1987), 155 Ohio St. 305; *Ohio Farmers Indemnity Co. v. Chames* (1959), 170 Ohio St. 209; *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108. The burden to prove standing is borne by the party seeking redress. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469, citing *Ohio Contractors Assn. v. Dicking* (1994), 71 Ohio St.3d 318, 320. This claimant must prove that they have met the constitutional prerequisites to enter the courthouse doors by establishing that they have real and actual justiciable controversy to bring forth the litigation and utilize the judiciary. *Id.*

In accord with this Court's basic standing principles, the United States Supreme Court has explained that there are three elements of the constitutional minimum for standing:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third,

it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife (1992), 504 U.S. 555, 560-561.

The purpose and policy supporting the basic idea that an individual have appropriate standing before initiating litigation is derived from the fundamental guiding principles of a judicial system. In a democratic system of government, individual's must have a real and actual controversy, as well as an injury in fact, necessitating the judiciary's power and function:

It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies. The extension of this principle includes enactments of the General Assembly.

Fortner v. Thomas (1970), 22 Ohio St.2d 13, 14.

Thus, standing has been defined by this Court as "a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024 at ¶27, citing *Black's Law Dictionary* (8th Ed. 2004), 1442. Whether a party properly has standing before a court questions whether the individual "has alleged such a personal stake in the outcome of the controversy, as to insure that the dispute sought to be adjudicated will be presented in an adversary context and in the form historically viewed as capable of judicial resolution." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451 at 469; *Middletown v. Ferguson*

(1986), 25 Ohio St.3d 71, 75; *State ex. rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, 64

Establishing this personal stake as well as an actual controversy further requires a plaintiff to "demonstrate an *injury in fact*, which requires a showing that the party has suffered or will suffer a specific injury." (Emphasis in original). *Ahrns v. SVA Communications Corp.*, 2001-Ohio-2284 (3rd Dist.) at ¶2 *quoting In Re: Estate of York*, 133 Ohio App.3d 234, 241 (12th Dist. 1999), *quoting Eng Technicians Assn. v. Ohio Dept. of Transp.*, 72 Ohio App.3d 106, 110-111 (10th Dist. 1991). Such injury in fact must be actual and not abstract or a suspected injury. *Torres v. State of Cleveland*, 2002-Ohio-431 (8th Dist.) at ¶26; *State ex. rel. Consumers League of Ohio v. Ratchford*, 8 Ohio App.3d 420 (10th Dist. 1982); *In Re Woodworth*, 1992 Ohio App. LEXIS 6269, 8th Dist. No. 63038 (December 10, 1992). Moreover, "a plaintiff's injury cannot be merely speculative." *Tienan v. University of Cincinnati*, 127 Ohio App.3d 312, (10th Dist. 1998), *quoting City of Los Angeles v. Lyons* (1983), 46 U.S. 95, 102, 75 L.Ed.2d 675, 684, 103 S.Ct. 1660, 1665. Finally, a litigant's mere allegation that an injury has occurred, is insufficient to establish standing. *Id.*; *Torres, supra.* at ¶26.

In the case *sub judice*, Kincaid and his putative class action complaint fails to meet the requisite common law standing requirement. Notably absent from Kincaid's class action complaint is any allegation that Kincaid ever presented a claim for any of the above delineated expenses or costs. Furthermore, and more importantly, there is no allegation

that Kincaid ever demanded that Erie reimburse him for any such cost or expense. In fact, to date, Kincaid has still not submitted a claim for a payment, provided any documentation of an alleged claim, or even a detailed description of any amounts he incurred.

In other words, Kincaid asserts that Erie has breached a contract and acted in bad faith even though Kincaid never presented a claim or asked for coverage or payment for his alleged expenses. Without having presented a claim or demanded that Erie provide coverage for his alleged expenses and costs, Kincaid lacks constitutional standing and his class action complaint must be dismissed.

The primary and fundamental element of any insurance related bad faith claim is the insurers unjustified refusal to honor or pay an insured's claim. *See, e.g., Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71; *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552. It necessarily follows that if the insured has not submitted a claim or a request for coverage, the necessary preliminary condition for a bad faith claim does not exist as a matter of law.

Similarly, a breach of contract claim likewise mandates that the party seeking damages have first requested that the alleged defendant have performed under the contract before their claim for breach is ripe. *Thomas v. Matthews* (1916), 94 Ohio St. 32, *Syllabus* 1 (“Where a plaintiff seeks to recover damages for breach of contract, the burden is upon him to show either substantial performance or tender of performance of the

conditions to be performed.”); *Comstock Homes, Inc. v. Edwards*, 2009-Ohio-4864 (9th Dist.); *Café Miami v. Domestic Uniform Rental*, 2009-Ohio-6596 (8th Dist.) at 12; See, also, 8 *Corbin on Contracts*, §37.11 (1999)(if only the promise possesses information necessary for performance of a contract term, “notice to the promisor is, by construction of law, a condition of the promisor’s duty to perform”). Stated differently, a party cannot be in breach where its performance was not demanded.

Accordingly, it is *illogical* to believe that an insurer could have engaged in bad faith practices or have breached its obligations where the insured neither filed a claim nor sought coverage in the first instance. Nonetheless, this illogical result is precisely what the Eighth District’s decision in this case mandates:

While it may seem illogical that an insurer is required to pay for expenses that the insured never notified the company about, we are required to interpret the contract as written and we find no notice requirement in the insurance policy in regard to additional [expense reimbursement] payments. Simply put, the terms of the contract are plain and unambiguous; there is no notice requirement for additional [expense reimbursement] payments under the policy.

Kincaid v. Erie, 2009-Ohio-4372 (8th Dist.) at ¶20 (emphasis added).

The Eight District failed to consider how its illogical conclusion violated basic principles of standing, bad faith principles and the law of breach of contract. Other jurisdictions have not been so shortsighted to these basic precepts in dealing with identical class action complaints.

In *Edwards v. Prudential Prop. & Cas. Co* 814 A. 2d 1115, 357 N.J. Super. 196 (N.J. App. 2003), cert. denied 176 N.J. 278, 822, A.2d 608 (2003), the Superior Court of New Jersey had occasion to review whether an insurer has an affirmative obligation to reimburse its insured's for litigation related expenses where the insured never submitted a claim for those expenses. As in the case *sub judice*, the plaintiff filed a class action complaint for bad faith and breach of contract. In soundly rejecting these claims the Superior Court of New Jersey held and explained:

Plaintiffs' breach of contract claim is also legally deficient. The Compensation Provisions state that defendants "will pay" the insured's expenses, subject to limitations not implicated here. This duty to "pay" under the provisions clearly presupposes a request or demand for payment and the presentation of facts supporting the claim before the insurers have a duty to reimburse. **The insured's obligation to make such a claim is both logical and necessary to trigger the insurer's duty to reimburse.** See 8 *Corbin on Contracts*, 37.11 (1999)(if only the promise possesses information necessary for performance of a contract term, "notice to the promisor is, by construction of law, a condition of the promisor's duty to perform"). **For whatever reason, in this case plaintiffs have chosen not to make any claim for reimbursement under the policy.**

We have considered plaintiffs' additional argument that defendants acted in bad faith and are satisfied the issues are not sufficient to warrant discussion in a written opinion.

357 N.J. Super. at 204, 205, 814 A.2d at 1120 (emphasis added).

Similarly, in *Cochran v. State Farm Mut. Auto. Ins. Co.*, 2003 WL 25485811, No. 2002-CV-54540 (Ga. Super. 2003), the Georgia Superior Court held that an insurer did not

breach the insurance contract because the plaintiff insured failed to make a request for reimbursement first:

Defendant [insurer] would have no way of knowing whether or not an insured was entitled to wage reimbursement unless the insured provided them with documentation and/or information regarding such. Since Defendant did not have the necessary information with which to perform under the provisions of the policy, **it necessarily follows that plaintiff had to actually make a claim for reimbursement in order for Defendant to perform.**

* * *

Defendant's duty to reimburse....presupposes a request or demand for payment by Plaintiff and the presentation of the facts supporting his claim *before* Defendant had a duty to reimburse. **Because Plaintiff did not make a request for payment or present any documentation supporting his claim for reimbursement, the Court determines that Defendant did not breach the insurance contract.**

Id. (emphasis added).

These two decisions correctly analyze the issues and place the burden where it belongs, upon the individual seeking reimbursement and coverage. This Court should reach the same result. Put simply, Ohio Law does not support the filing of a bad faith or breach of contract action where the litigant has neither demanded performance under the contract nor submitted an insurance claim under the contract. Indeed, under these circumstances, which cannot be disputed here, neither Kincaid nor any other similarly situated litigant has been actually injured. Therefore, Kincaid and like individuals lack the requisite legal standing.

B. A Justiciable Controversy and Cognizable Injury Must Exist to Have Standing Under The Declaratory Judgment Act, R.C. 2721.02 et seq.

Although the common law requirements for standing may not be met, a litigant can have the requisite standing under a statute. See, eg. *Middletown v. Ferguson* (1986), 25 Ohio St.3d 71, 75. Here, Kincaid has advanced a cause of action under the Declaratory Judgment Act, R.C. §2721.02 *et seq.* A declaratory judgment action is a creation of statute for which a cause of action was not found to exist in the common law. *Ohio Farmers Ins Co v. Heisel* (1944), 143 Ohio St. 519, 521. The Act's purpose is to settle justiciable questions regarding legal documents and provide the parties relief from any uncertainty regarding those documents and the legal relationship stemming therefrom. *Travelers Indemnity Co. v. Cochrane* (1951), 155 Ohio St. 305, 312; *Ohio Farmers Indemnity Co. v. Chames* (1959), 170 Ohio St. 209; *Carron v. Carron* (1988), 40 Ohio St.3d 75; *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108.

A declaratory judgment action is justiciable where the statute's requirements for such an action are met. The filing of a lawsuit cannot, in and of itself create a justiciable controversy. Rather, the justiciable controversy, and a cognizable injury, must exist at the time the lawsuit is filed. *State ex. Rel. Consumers League of Ohio v. Ratchford*, 8 Ohio App.3d 420, 424 (6th Dist. 1982); *Vermillion Teacher's Assoc. v. Vermillion Local School Dist. Bd of Edu.*, 98 Ohio App.3d 524, 530 (6th Dist. 1994); *Capital Tool Co. v. Great Lakes Tooling Inc.*, 2005-

Ohio-5141 at 9-10 (8th Dist); *Swartz v. Price*, 1996 Ohio App. Lexis 178, Sixth Dist. No. L-95-120 (January 16, 1996).

Specifically, R.C. §2721.03 provides litigants the statutory right to ask a court for a determination as to their insuring obligation under an insurance contract:

Subject to Division (B) of Section 2721.03 of the Revised Code, any person interested under a deed, will or written contract or other writing constituting a contract * * * may have determined any question of construction or validity arising in the instrument, constitution provision, statutory rule, ordinance, resolution, contract, or franchise, and obtain a declaration of rights, status, or other legal relations under it. * * *

The statute's plain and unambiguous language permits the filing of an action by any person interested under a contract to eliminate any uncertainty the parties may have:

The declaratory judgment act is a salutary, remedial measure and should be liberally construed and applied, but, as in the instant case it does not require a court to render a futile judgment that 'would not terminate' any 'uncertainty or controversy' whatsoever.

Walker v. Walker (1936), 132 Ohio St. 137, 139; *Sessions v. Skelton* (1955), 163 Ohio St. 409, syllabus.

In so holding, this Court held that a declaratory judgment action should be dismissed where such a judgment would not terminate uncertainty or a controversy.

Walker, supra, at 406; *Raczewski v. Keating* (1943), 141 Ohio St. 489, 488.

In keeping with the long-standing tradition that a court does not render advisory opinions, Ohio law allows the filing of a declaratory judgment only to decide "an actual controversy, the resolution of which will confer certain rights or status upon the litigants."

Carron v. Carron (1988), 40 Ohio St.3d 75, 79. Not every conceivable controversy is an actual one.

More recently, in *Mid-American Fire & Casualty Co. v. Heasley*, 113 Ohio St.3d 133; 2007-Ohio-1248, this Court specifically determined that an insurance company lacked standing to file a declaratory judgment action to determine the rights of the parties under its contract unless a present and real justiciable controversy existed. *Mid-American Fire & Casualty Co. v. Heasley*, 113 Ohio St.3d 133; 2007-Ohio-1248 at 136; ¶¶8-9. Therein, this Court reaffirmed its prior decisions that a declaratory judgment action's purpose is to determine "uncertain or disputed obligations quickly and conclusively, and to achieve that end, the declaratory judgment statutes are to be construed liberally." *Id.* at 136, ¶8 citing *Ohio Farmers Indemn. Co. v. Chames* (1959), 170 Ohio St. 209, 213. Certainly, this requirement applies equally to the insured as well as the insurer. That is an insured must also be obligated to meet the same standing burden.

This Court repeatedly and consistently reaffirmed the long standing tradition that courts are barred from rendering advisory opinions. A court's declaration should only be issued if the order would decide "an actual controversy, the resolution of which will confer certain rights or status upon the litigants." *Heasley*, supra at 136, ¶9 citing *Carron v. Carron* (1988), 40 Ohio St.3d 75, 79. "[T]he danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events * * * and the threat to his position must be actual and genuine and not merely possible or remote." *Id.* citing

League For Preservation of Civil Rights v. Cincinnati (1940), 64 Ohio App. 195, 197 quoting *Borchard*, Declaratory Judgments (1934) 40.

Therefore, following *Heasley*, and consistent with this Court's prior decisions, a plaintiff lacks standing where there is no present danger or dilemma; a claim is contingent on the happening of a hypothetical future event and where the threat to plaintiff's position is remote. Kincaid's class action complaint here exemplifies each of these elements. There is no present danger or dilemma facing Kincaid. He has neither submitted nor requested that Erie pay any actual expenses he allegedly incurred while represented during his 2003 litigation. Should Kincaid ever decide to submit a claim for those alleged expenses or costs, and provided Erie denied coverage for those expenses, then and only then, would Kincaid have a present danger or dilemma. Indeed, until those future hypothetical events occur, there is simply no justiciable controversy to be litigated.

C. Kincaid Is Not Permitted To Rely Upon Ohio's Administrative Code § 3901-1-54(E)(1), Ohio Unfair Claims Practices, to Cure The Standing Defect.

1. The Code and Ohio Law Prohibits Its Utilization As the Basis For Constitutional Standing Since It Expressly Prohibits A Private Right of Action.

Kincaid, throughout the Trial Court and Appellate proceedings, has thus far attempted to argue that OAC §3901-1-54(E)(1) in some way bolsters his standing to assert either his breach of contract or bad faith causes of action. Because Ohio's Administrative

Code does not create a private right of action and explicitly states that it shall not be used to even imply a cause of action, Kincaid's arguments must be rejected.

Ohio Law has consistently held that Ohio's Administrative Code does not provide for private rights of action. See, e.g. *Furr v. State Farm Mut.*, 128 Ohio App.3d 607, 616-617(6th Dist., 1998), *Strack v. Westfield Ins. Co.*, 33 Ohio App.3d 336 (9th Dist. 1986); *Ehwert v. Private Life Ins. Co.*, 77 Ohio App.3d 529 (1st Dist. 1991); *Price v. Dylan*, 2008-Ohio-1178 (7th Dist.); *Griffith v. Buckeye Union Ins. Co.*, 1987 Ohio App. LEXIS 8971, 10th. Dist. No. 86AP-1063 (Sept. 29, 1987); *Kimpel v. Dairyfarm Leasing*, 1987 Ohio App. LEXIS 5476, 6th Dist. No. WMS-86-8 (Jan. 9, 1987); *Orra v. Ohio Fair Plan*, 1988 Ohio App. LEXIS 1102, 6th Dist. No. L-87-233 (March 31, 1988); and *Liabson v. CNA Ins. Co.*, 1999 Ohio App. LEXIS 2137, 1st Dist. No. C-980736 (May 14, 1999).

Moreover, the Code specifically limits its application and bars its use as a vehicle to obtain standing in the courts:

Nothing in this rule shall be construed to *create or imply* a **private cause of action** for violation of this rule.

See, OAC §3901-1-54(B) (emphasis added).

Since the Ohio case law as well as the Code itself rejects the notion of a private cause of action and in fact bars same, Kincaid cannot rely on the Code as a mechanism to create or meet his constitutional standing requirement.

2. The Code Does Not Require An Insurer to Inform Its Insureds of Potential Coverage Claims Before A Claim Has Been Presented.

Kincaid will also attempt to contend that OAC §3901-1-54(E)(1) affirmatively requires an insurer to identify and inform its insureds of potential coverage claims they may have under an insurance policy. As set forth, OAC §3901-1-54(E)(1) provides:

An insurer shall fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance contract under which a claim is presented.

An insurer's obligation to disclose the terms of insurance coverage is fully satisfied when the insurer supplies its insured with a copy of the insurance contract. *Ohio Farmers' Ins. Co. v. Todino* (1924), 111 Ohio St. 274, 278; *Ohio Farmers' Ins. Co. v. Titus* (1910), 82 Ohio St. 161, 171. There is no duty on the insurer to inform a claimant of potential benefits under a policy. 17 *Couch on Insurance* 3rd, §238.24 (2000). Rather, an insured has a duty to examine the coverage provided to him and is charged with knowledge of the contents of his own insurance policy. See *Fry v. Walters & Peck Agency*, 141 Ohio App.3d 303, 312 (6th Dist. 2001). See also, 13 *Couch on Insurance* 3rd, §186.1 (2007).

There is no claim in this matter that Erie failed to provide Kincaid with a copy of his insurance contract. Instead, Kincaid ignores his own obligation to read his insurance contract. This is as troubling and disingenuous as his filing a class action complaint seeking coverage *before* he even asks his insurer to review his alleged coverage claim.

It is notable that the Superior Court of New Jersey declined to adopt Kincaid's theories in *Edwards v. Prudential Prop. & Cas. Co.*, 814 A.2d 1115, 357 N.J. Super. 196 (N.J. App. 2003), *cert. denied* 822 A.2d 608 (2003), discussed *infra*. New Jersey's Administrative Code §11:2-17.5, is the same as the Ohio Administrative Code §3901-1-54(E)(1) upon which Kincaid bases his claim for standing. It states:

[n]o insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

Despite this code provision, the New Jersey Superior Court concluded that an insurance company's duty of disclosure and good faith does not obligate the insurer to affirmatively do anything more than provide its insured with a copy of the insurance contract:

Insurance companies have an obligation to supply insureds with a copy of their policy. **However, we have been cited no authority for the proposition that a duty exists to make the insured aware of specific provisions after the policy has been received.**

* * * *

Here, there is no claim of fraud or misrepresentation on defendant's part. Moreover, the Compensation Provisions are hardly ambiguous; they alert the insured in clear and certain terms of their entitlement to reimbursement. **In the circumstances, defendants' failure to alert plaintiffs to reimbursement benefits can hardly be deemed a breach of an implied covenant of good faith and fair dealing.**

Id. at 1120 (Internal citations omitted)(Emphasis added).

3. Under OAC §3901-1-54(E)(1), A Party Must Make A Claim Before Any Duty Arises.

OAC §3901-1-54(E)(1) specific language states that the duty to disclose applies to “claimants”:

An insurer shall fully disclose to first party **claimants** all pertinent benefits, coverages or other provisions of an insurance contract under which a claim is presented.

A “first party claimant,” is defined as:

any individual...**asserting a right to payment** under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by the policy or contract.

OAC §3901-1-54(C)(8).

The Code then sets forth a procedure for the claimant to assert the right to payment. It requires the “claimant” to submit a “properly executed proof(s) of loss” which is defined as “a document from the claimant that provides sufficient information from which the insurer can determine the existence and the amount of the claim.” OAC §3901-1-54(G)(1) Thereafter, the insurer would have twenty-one (21) days to “decide whether to accept or deny such claim(s).” *Id.* The procedure is noteworthy because it provides the insurer the opportunity to review the claimant’s coverage request, presumably before litigation would be initiated. Any other reading would make these Code sections and its procedure superfluous.

Edwards v. Prudential Property and Cas. Co., supra, is likewise persuasive on this final point. The *Edwards* Court held that the duty to reimburse litigation expenses under an insurance policy "clearly presupposes a request or a demand for payment and the presentation of facts supporting the claim before the insurers have a duty to reimburse". The *Edwards* court reached this conclusion even though New Jersey has the **same** requirements in its insurance regulations for first party coverage claims as those contained in OAC §3901-1-54(E)(1). It bears repeating that New Jersey's Administrative Code §11:2-17.5, like Ohio Administrative Code §3901-1-54(E)(1), based on Regulation 5(a) of the National Association of Insurance Commissions Model Unfair Property/ Casualty Claims Settlement Practices. N.J.A.C. §11:2-17.5 states that

no insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

This language, which imposes the same obligation as OAC §3901-1-54(E)(1), did not prevent the *Edwards* court from upholding judgment on the pleadings in favor of the insurance company based on the fact that the insured had "chosen not to make any claim for reimbursement under the policy" prior to filing suit. 814 A.2d at 1120-21. *Cf. Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1044 (7th Cir. 2007) ("there is nothing in the policy to suggest that upon receipt of a claim seeking reimbursement of one cost . . . the insurer must determine and inform the insured of any additional entitlement that the

policy might confer on her, just in case its customers don't bother to read their insurance policies when they file claims under them").

Accordingly, under Ohio's Administrative Code upon which Kincaid relies, when the Code is read as a whole, the person for whom the insurer owes a duty is the person who submits a claim, with appropriate documentation, asserting a right to payment under the insurance contract. In other words, the Code's duty is expressly limited to individuals *who have sought payment*. It logically follows that there is no duty owed until such claim has been asserted.

CONCLUSION

Ohio Law does not support the filing of a bad faith or breach of contract action where the litigant has neither demanded performance under the contract nor submitted an insurance claim under the contract. Indeed, under these circumstances, which cannot be disputed here, neither Kincaid nor any other similarly situated litigant has been actually injured.

Frankly, following this Court's decision in *Mid-American Fire & Casualty Co. v. Heasley*, 113 Ohio St.3d 133; 2007-Ohio-1248 and consistent with this Court's prior decisions, a plaintiff lacks standing where there is no present danger or dilemma; a claim is contingent on the happening of a hypothetical future event and where the threat to plaintiff's position is remote. Kincaid's class action complaint here exemplifies each of

these elements. There is no present danger or dilemma facing Kincaid. Therefore, Kincaid and like individuals lack the requisite legal standing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing true and correct copies thereof, in sealed envelopes, postage fully prepaid and by depositing same in the U.S. mail on this 12th day of April, 2010, to the following:

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ORIGINAL

IN THE SUPREME COURT OF OHIO

DON B. KINCAID, JR. et al.,)	CASE NO.	09-1936
)		
Plaintiff- Appellees,)	On Appeal from the	
)	Court of Appeals,	
v.)	Eighth Appellate District	
)	Court of Appeals CA 08 092101	
ERIE INSURANCE COMPANY,)	Cuyahoga County Common Pleas,	
et al.,)		
)		
Appellants.)		

NOTICE OF APPEAL

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Attorney for Appellant

FILED
OCT 23 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Defendant-Appellant, The Erie Insurance Company, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Case No. CA 08 092101 on September 9, 2009.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing true and correct copies thereof, in sealed envelopes, postage fully prepaid and by depositing same in the U.S. mail on this 23RD day of October, 2009, to the following:

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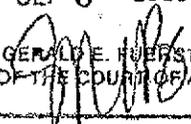
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

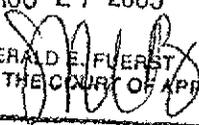
**FILED AND JOURNALIZED
PER APP. R. 22(E)**

SEP 09 2009


GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

AUG 27 2009


GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DE

NOTICE: MAIL TO COUNSEL
FOR ALL PARTIAL-COURT STAYERS

LARRY A. JONES, J.:

Plaintiff-appellant, Don Kincaid, Jr. ("Kincaid"), appeals the judgment of the trial court granting defendant-appellee's, Erie Insurance Company's ("Erie"), motion for judgment on the pleadings. Finding some merit to the appeal, we affirm in part and reverse in part.

In 2005, Kincaid was involved in an accident in which his car struck a bicyclist. Erie, Kincaid's insurance agency, provided for his defense when the injured party filed suit. The parties eventually settled the lawsuit.

In 2008, Kincaid filed a class action lawsuit against Erie, alleging that the insurer failed to reimburse him for expenses due under his insurance policy. Kincaid alleged that he incurred expenses, such as copy charges, postage, transportation, parking costs, and missed time from work, at the request of Erie and/or the attorneys hired by Erie to represent him. Kincaid sought class certification with respect to all of Erie's insureds that were insured since February 1993 who were covered under similar policies and entitled to such payments. Kincaid alleged claims for breach of contract, bad faith, and breach of the covenant of good faith and fair dealing, unjust enrichment, and sought declaratory relief.

Erie filed both an answer and amended answer to the complaint. Erie then filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C), which

Kincaid opposed. In its motion for judgment on the pleadings, Erie argued it had no affirmative duty to notify its insureds that they would be entitled to reimbursement for expenses, that proposed class members never filed claims with Erie requesting payment for their expenses, and that Kincaid has no standing to sue Erie because he never provided any proof for loss or request for reimbursement. In addition to Kincaid filing his motion opposing the insurer's motion for judgment on the pleadings, he also moved to supplement any deficiencies in his complaint.

At issue is the portion of the insurance policy covering "Liability Protection." Under the subsection titled "Additional Payments," the policy states, in pertinent part:

"We will make the following payments in addition to the limit of protection:

"* * *

"5. Reasonable expenses anyone we protect may incur at our request to help us investigate or defend a claim or suit. This includes up to \$100 a day for actual loss of earnings."

The trial court granted Erie's motion, without opinion, and dismissed the case.

Kincaid now appeals, raising two assignments of error for our review. In his first assignment of error, Kincaid argues that the trial court erred in dismissing the case. In the second assignment of error, Kincaid argues that the trial court erred in denying his motion to file an amended complaint.

Motion for Judgment on the Pleadings

Civ.R. 12(C) provides that “[a]fter the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings.”

We review de novo the common pleas court's decision to grant judgment on the pleadings. *Thomas v. Byrd-Bennett*, Cuyahoga App. No. 79930, 2001-Ohio-4160, citing *Drozeck v. Lawyers Title Ins. Co.* (2000), 140 Ohio App.3d 816, 820, 749 N.E.2d 775. Under Civ.R. 12(C), “dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.” *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 1996-Ohio-459, 664 N.E.2d 931. Thus, the granting of a judgment on the pleadings is only appropriate where the plaintiff has failed to allege a set of facts which, if true, would establish the defendant's liability. *Walters v. First Natl. Bank of Newark* (1982), 69 Ohio St.2d 677, 433 N.E.2d 608; *Siemientkowski v. State Farm Ins. Co.*, Cuyahoga App. No. 85323, 2005-Ohio-4295.

The granting of a Civ.R. 12(C) motion requires the court to determine that the movant is entitled to judgment as a matter of law and may only be granted when no material factual issues exist. *Id.*; *Burnside v. Leimbach* (1991), 71 Ohio

App.3d 399, 594 N.E.2d 60. The determination of a motion for judgment on the pleadings is limited solely to the allegations in the pleadings and any writings attached to the pleadings. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 165, 297 N.E.2d 113.

Count I: Breach of Contract

In Count I of his class action complaint, Kincaid alleges that he and other purported class members entered into a standard form motor vehicle insurance policy with Erie that required Erie to reimburse them for loss of earnings and travel-related expenses due to attendance at conferences, depositions, arbitrations, mediations, hearings or trial at the insurer's request. Kincaid and the purported class members allege that Erie breached the terms of the standard policy contracts by failing in its alleged promise to reimburse them for their expenses.

Erie responds that Kincaid failed to state a cognizable claim for relief because he did not provide proper notice to the company of his alleged expenses and has not shown that he had actually incurred any expenses as a result of Erie's representation of him in the lawsuit. Therefore, Erie claims, its duty to perform was never triggered. Erie does not dispute that it owes its insureds any expenses they incur at its request; instead, the insurer asserts that it was never properly notified of the expenses because the purported class members never

In *Kavouras v. Allstate Ins. Co.* (N.D. Ohio 2008), No. 1:08 CV 571, a federal district court decision cited to in *Gallo*, the district court found that an insured satisfied the liberal notice pleading requirements set forth in Fed.Civ.R. 8 when the insured provided the insurance company with notice of his claim and the grounds upon which it rested. In *Kavouras*, the insurers argued that the plaintiffs failed to comply with the notice provisions by failing to properly notify the companies of their expenses and thus failed to comply with conditions precedent to the contracts. The court held that under Fed.Civ.R. 9(c), the plaintiffs' general averment that all conditions precedent have been satisfied was sufficient at an early stage of the litigation. *Id.*; see, also, *Johnson v. Geico* (S.D. Fla. 2008), No. 08-80740-CIV-MARRA.

In both *Gallo* and *Kavouras*, the courts dismissed the complaints under Civ.R.12(B)(6). In reviewing whether a motion to dismiss under Civ.R. 12(B)(6) should be granted, the court accepts as true all factual allegations in the complaint and cannot resort to evidence outside the complaint to support the dismissal. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753; *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 667, 1995-Ohio-295, 653 N.E.2d 1186. It must appear beyond doubt that the plaintiff can prove no set of facts entitling him or her to relief. *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 1995-Ohio-187, 649 N.E.2d 182.

A Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion, and the same de novo standard of review is applied to both motions. *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App.3d 160, 163, 644 N.E.2d 731. Unlike a court's review of a motion to dismiss pursuant to Civ.R. 12(B)(6), when reviewing a motion for judgment on the pleadings, a court may look to both parties' pleadings, but must construe the evidence in a light most favorable to the non-moving party. Thus, when reviewing a Civ.R. 12(C) motion, the trial court's inquiry is broadened to include consideration of the material allegations in the defendant's pleadings, but the court is still restricted from consideration of evidentiary materials. See *Conant v. Johnson* (1964), 1 Ohio App.2d 133, 135, 204 N.E.2d 100. Similar to a review of a Civ.R. 12(B)(6) motion, the trial court must accept material allegations in the pleadings and all reasonable inferences as true. *Gawloski* at 163.

When the language in a contract is reasonably susceptible to more than one interpretation, the meaning of the ambiguous language is a question of fact. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 474 N.E.2d 271. If no ambiguity exists, however, the terms of the contract must simply be applied without resorting to methods of construction and interpretation. *Buckeye Check Cashing, Inc. v. Madison*, Cuyahoga App. No. 90861, 2008-Ohio-5124. The Ohio Supreme Court has held that if a contract is

clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined and a court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties. *Id.*, citing *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146.

In this case, Kincaid alleged in his complaint that he incurred expenses at Erie's request because he was required to attend a deposition and missed time from work. He further averred that he met all conditions precedent to Erie's payment obligations. Erie responds that Kincaid failed to provide notice as required by the insurance policy. Our review of the insurance policy, which was attached to Kincaid's complaint, shows no requirement that Kincaid notify Erie in any particular way or within a certain time frame to recover incurred expenses. While it may seem illogical that an insurer is required to pay for expenses that the insured never notified the company about, we are required to interpret the contract as written and we find no notice requirement in the insurance policy in regard to additional payments. Simply put, the terms of the contract are plain and unambiguous; there is no notice requirement for additional payments under the policy.¹ Moreover, it is well settled that in the insurance

¹ We find that it is premature to discuss whether Erie had an affirmative duty to tell insurers about the "additional payments" benefit.

context, ambiguities are construed in favor of the insured. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 224, 2003-Ohio-5849, 797 N.E.2d 1256.

Erie also argues that there is no allegation that Kincaid incurred any expenses. We disagree and find that the complaint properly alleges a loss; whether Kincaid is determined to have actually incurred expenses is a question of material fact best determined through discovery.

Therefore, in construing the facts in a light most favorable to Kincaid and other purported class members, the trial court erred in dismissing his breach of contract claim.

Count II: Bad Faith and Breach of the Covenant of Good Faith and Fair Dealing

Under Ohio law, because a fiduciary relationship exists in the context of insurance contracts, the insurer has a duty to act in good faith in handling the claims of the insured. *Gallo*, citing *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 275, 452 N.E.2d 1315. Therefore, insureds may pursue a bad faith tort claim against their insurers. *Id.*

Erie asserts that Kincaid's claim fails because he did not allege that the companies ever received a request for reimbursement from him or the putative class members. Such a request, Erie argues, is a necessary prerequisite to it being held liable for a claim of a bad faith refusal to reimburse.

Based on the same reasoning as Count I, we find that Kincaid's averment that he fulfilled all conditions precedent is sufficient at this stage of the litigation. Accordingly, the trial court erred in dismissing Kincaid's count for bad faith and breach of covenant of good faith and fair dealing.

Count III: Unjust Enrichment/Quantum Meruit

In Ohio, unjust enrichment occurs when a person "has and retains money or benefits which in justice and equity belong to another." *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 273, 286, 2005-Ohio-4985, 834 N.E.2d 791. Restitution is available as a remedy for unjust enrichment when the following factors are established: (1) a benefit is conferred by a plaintiff on a defendant; (2) the defendant knows about the benefit; and (3) the defendant retains the benefit under circumstances where it is unjust to do so without payment. *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183, 465 N.E.2d 1298.

Unjust enrichment operates in the absence of an express contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another. *F & L Ctr. Co. v. H. Goodman, Inc.*, Cuyahoga App. No. 83503, 2004-Ohio-5856, citing *University Hosps. of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 130, 2002-Ohio-3748, 772 N.E.2d 105. Importantly, unjust enrichment cannot exist where there is a valid and enforceable written contract. *Id.*

As Kincaid concedes in his notice of supplemental authority filed with this court, no party disputes the existence of an underlying insurance contract governing the issues in this case. It is the enforceability of the provisions of the standard form contract that are at issue in this case. Kincaid further concedes that Ohio law precludes a claim for unjust enrichment; thus, the trial court's decision to dismiss this count is affirmed. See *Gallo* and *Kavouras*.

Count IV: Declaratory Relief

In *Kavouras*, the court found that the insureds' claim for declaratory relief was in reality a claim for relief and not a cause of action; therefore, the court could only consider the request for relief if the insureds prevail on their substantive claims. See *Gallo*.

In *Gallo*, the court found that, aside from a few exceptions, a court errs in dismissing a request for declaratory relief in the complaint at the pleadings stage, especially when it is unclear whether the plaintiff would prevail on her claims. See, also, R.C. 2721.07. We agree with the courts' reasoning in these two cases, and find that the trial court also erred in dismissing this count.

Accordingly, the first assignment of error is sustained as it relates to Counts I, II, and IV of the complaint and affirmed as to count III.

In the second assignment of error, Kincaid argues that the trial court abused its discretion in denying him an opportunity to amend his complaint to

correct the pleading deficiencies identified by the court. The court never stated what, if any, specific pleading deficiencies it found because the court dismissed the case without opinion. Nevertheless, we need not consider whether the court abused its discretion; based on the disposition of the first assignment of error, we find the second assigned error now moot.

Therefore, the second assignment of error is overruled.

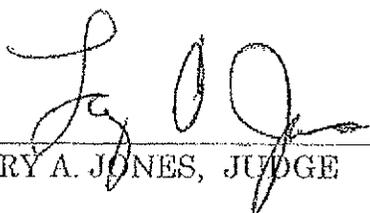
Accordingly, judgment is affirmed in part and reversed in part.

It is ordered that appellant and appellee split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



LARRY A. JONES, JUDGE

MARY J. BOYLE, P.J., and
JAMES J. SWEENEY, J., CONCUR