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 REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

LAW AND ARGUMENT 1

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. 1

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. 1

A. Kincaid Admits That He Lacks Any Evidence For His Out Of Pocket Expense Allegations Thereby Acknowledging His Inability To Meet The Necessary Standing Requirements'. 1

B. Claims For Third Party Coverage Or First Party Coverage, To The Extent They Exist In This Matter, Require The Submission of Separate Claims By Kincaid or An Insured. 7

C. The General Rule That An Insured Is Charged With Knowledge of The Contents of His Insurance Contract Applies Since There Are No Special Circumstances Which Merit Any Other Duty 11

CONCLUSION 14

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Page

Cases

Baughman v. State Farm,
2005-Ohio-6980 (9th Dist.) 11

Café Miami v. Domestic Uniform Rental,
2009-Ohio-6596 (8th Dist.) 5

City of Los Angeles v. Lyons
(1983), 46 U.S. 95, 102, 75 L.Ed.2d 675, 684, 103 S.Ct. 1660 3

Comstock Homes, Inc. v. Edwards,
2009-Ohio-4864 (9th Dist.) 5

Cope v. Metropolitan Life Ins. Co.,
82 Ohio St.3d 426, 1998-Ohio-405 13

Cuyahoga Cty. Bd. Of Commrs. v. State,
112 Ohio St.3d 59, 2006-Ohio-6499 2

Helmick v. Republic-Franklin Ins. Co.
(1988), 39 Ohio St.3d 71 5

In Re: Woodworth,
1992 Ohio App. LEXIS 6269, 8th Dist. No. 63038 (December 10, 1992) 2

League For Preservation of Civil Rights v. Cincinnati
(1940), 64 Ohio App. 195 6

Martin v. Grange,
143 Ohio App.3d 332 (11th Dist. 2001) 11

Mid-American Fire & Casualty Co. v. Heasley,
113 Ohio St.3d 133; 2007-Ohio-1248 ..... 1, 6

N. Canton v. Canton,
114 Ohio St.3d 253, 2007-Ohio-4005 2

Nickschinski v. Century Ins. Co.,
88 Ohio App.3d 185 (8th Dist. 1993) 12

Ohio Contractors Assn. v. Dicking
(1994), 71 Ohio St.3d 318 2

Ohio Farmers Indemnity Co. v. Chames
(1959), 170 Ohio St. 209 1

Preferred Risk Ins. Co. v. Gill
(1987), 30 Ohio St.3d 108 1

State ex rel. Barclays Bank v. Curt of Common Pleas of Hamilton Cty.,
74 Ohio St.3d 536; 1996-Ohio-286 2

State ex rel. Ohio Academy of Trial Lawyers v. Sheward
(1999), 86 Ohio St.3d 451 2

State ex. rel. Consumers League of Ohio v. Ratchford,
8 Ohio App.3d 420 (10th Dist. 1982) 2

Thomas v. Matthews
(1916), 94 Ohio St. 32 ..... 5, 12

Tieman v. University of Cincinnati,
127 Ohio App.3d 312, (10th Dist. 1998) 3

Torres v. State of Cleveland,
2002-Ohio-431 (8th Dist.) 2

Travelers Indemnity Co. v. Cochrane
(1987), 155 Ohio St. 305 1

Wilson v. Ohio Cas. Ins. Co.,
185 Ohio App.3d 276, 2009-Ohio-6798 (1st Dist.) 13

Zoppo v. Homestead Ins. Co.

(1994), 71 Ohio St.3d 552 5

Other Authorities

Corbin on Contracts §37.11 (1999) 6

Ohio Administrative Code §3901-1-54(B) 9

Ohio Administrative Code §3901-1-54(c)(8) 9

Ohio Administrative Code §3901-1-54(F)(3) 10

Ohio Administrative Code §3901-1-54(G)(1) 10

Ohio Administrative Code §3901-1-54(G)(8) 15

Ohio Administrative Code 3901-1-54 E 8

Reinstatement of the Law 2d, Contracts (1981), §§235, 237 and 238 6

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. **Kincaid Admits That He Lacks Any Evidence For His Out Of Pocket Expense Allegations Thereby Acknowledging His Inability To Meet The Necessary Standing Requirements'.**

This matter, as Kincaid knows, is not an insurance "notice" case. On the contrary, the two Propositions of Law accepted by this Court clearly stipulate that the issues for review revolve around the constitutional and common law concepts of "standing" and "ripeness". Specifically, whether an insured-claimant must demonstrate in their pleading that they have "an injury in fact" which supports the requisite conclusion that an "actual controversy" must exist to warrant court intervention to remedy that identifiable and certain injury. *Mid-American Fire & Casualty Co. v. Heasley*, 113 Ohio St.3d 133; 2007-Ohio-1248; *Travelers Indemnity Co. v. Cochrane* (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.

This is not a new concept. An initial inquiry must be made in all legal matters seeking to determine whether the claimant has standing to file their complaint. *Cuyahoga*

Cty. Bd. Of Commrs. v. State, 112 Ohio St.3d 59, 2006-Ohio-6499 at ¶22. If the plaintiff's complaint cannot satisfy the standing requirement, the courts simply do not have jurisdiction to decide the merits of the alleged dispute. *N. Canton v. Canton,* 114 Ohio St.3d 253, 2007-Ohio-4005 at ¶11. The plaintiff, here Kincaid, has the burden to prove that all standing requirements have been met, before he may proceed with his action. *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. All plaintiffs are obligated to demonstrate these conditions in order to state a valid cause of action in Ohio. Why shouldn't Kincaid in his insurance class action?

This constitutional standing question has nothing to do with the insuring agreement's notice provisions; nor does it involve any contractual preconditions to suit. Rather, it is a constitutional principle which mandates that the judicial system only be utilized where parties seek redress for actual injuries and desire to resolve actual, not speculative, hypothetical or manufactured controversies. *State ex rel. Barclays Bank v. Curt of Common Pleas of Hamilton Cty.*, 74 Ohio St.3d 536, 542; 1996-Ohio-286, citing *Fortner v. Thomas (1970), 22 Ohio St.2d 13, 14,* and *O. Const. Art. IV*, Sec. 4(B); See also, *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); *Tieman v. University of Cincinnati*, 127 Ohio

App.3d 312, (10th Dist. 1998), *citing City of Los Angeles v. Lyons* (1983), 46 U.S. 95, 102, 75 L.Ed.2d 675, 684, 103 S.Ct. 1660, 1665.

As Kincaid acknowledges and admits in his Merit Brief, Erie's Third Proposition of Law which focused on the necessity to submit notice of a claim as a precondition for suit was not accepted for review. Nevertheless, Kincaid, for the first 30 pages of his 32 page Merit Brief, belabors this exact "notice issue" attempting to turn the constitutional standing issue into one involving issues of contractual notice. Kincaid is exercising such slight of hand because he has neither an actual controversy nor any injury in fact. Consequently, Kincaid acknowledges that he cannot meet the rigors of the standing test and his Complaint must be dismissed.

Indeed, neither Kincaid nor his counsel have identified, in any way, how his putative class action complaint and the allegations contained therein, establish an actual identifiable injury to Kincaid, or a real justiciable controversy with Erie Insurance. Kincaid incredibly submits that his travel related out of pocket expenses and mailing costs, like postage, can only be detailed, quantified and thereby legitimized through the discovery process because only Erie somehow has proof of these expenses Kincaid allegedly incurred:

> Defendant has fretted that Plaintiff "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." *Defendant's Brief,* p. 8. Plaintiff would have been more than happy to do so, but the filing of the Motion to Dismiss **precluded any discovery from being conducted in this case. Much of the necessary proof is expected to be within Defendant's possession, such as documents and**

> **envelopes indicating that mailing and copying charges were incurred when materials were sent at Defendant's request.** The insurer's files will also likely confirm that Plaintiff was directed to travel to a deposition and other proceedings, for which he is entitled to a mileage reimbursement at standard rates. The policy also provides for "up to $100 a day for actual loss of earning" sustained while attending such judicial proceedings. *Class Action Complaint, Exhibit A, p. 6.*

Appellee Merit Brief p. 12. (**Emphasis added**).

Kincaid wants this Court to believe that only Erie's documents can determine whether Kincaid suffered an actual injury? Apparently, Kincaid doesn't know whether he paid for postage at the post office; missed work; paid for gas or made other expenditures reimbursable; instead he submits only Erie knows? What more is needed to prove that Kincaid's complaint is at a minimum hypothetical and possibly even frivolous?

Moreover, if Kincaid did have real out of pocket expenses reimbursable under the policy, he needed only to have submitted them to Erie for review and payment. See, Supplement at pp. 54-55. Accordingly, Kincaid's three causes of action: Bad Faith, Breach of Contract and request for a Declaratory Judgment are nothing more than purely hypothetical and based on "what ifs" which the judicial system lacks the time and money to entertain.

Notably, Kincaid implicitly acknowledges, since he fails to comment at all, that his bad faith claim is baseless, because Kincaid never submitted a claim or sought coverage for his alleged "travel related expenses, including mileage expenses" and "postage expenses incurred." *See,* Supplement at pages 6-7, ¶¶17-21. Without Erie's unjustified

refusal to honor or pay an insured's claim, which in this matter was never submitted, bad faith cannot exist in the State of Ohio. *See, Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71; *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552.

As to Kincaid's breach of contract claim, he likewise fails to explain how he has standing to assert same. The law of contracts requires that the party seeking damages first have requested that the alleged defendant perform under the contract before the claim is ripe. *Thomas v. Matthews* (1916), 94 Ohio St. 32, syllabus 1; *Comstock Homes, Inc. v. Edwards*, 2009-Ohio-4864 (9th Dist.); *Café Miami v. Domestic Uniform Rental*, 2009-Ohio-6596 (8th Dist.) at ¶12. Kincaid attempts to minimize this breach of contract and standing requirement by stating that requesting Erie to perform under the terms of its insurance contract would require "the performance of a vain act". Appellee Brief page 14. Stated differently, Kincaid baldly **speculates** that if he would have submitted his mileage and postage expenses to Erie, they would have refused to provide coverage.

Obviously, Kincaid's pure speculation is a shrewd attempt to evade the this Court's decision in *Thomas, supra,* as well as the basic contract decisions and treatises which mandate that the party asserting a breach of contract have first tendered their own performance and/or requested the opposing party perform. This fundamental principle of contract law is not imposing any type of condition within the contract. Rather, it is a common law principle that unless performance by one party is self-effectuating by the contracts detailed terms, the party claiming damages must have first offered or requested

that the other party perform under the contract prior to filing a legal action alleging a breach of the contract. See, *Reinstatement of the Law 2d, Contracts* (1981), §§235, 237 and 238. This is certainly true where only the promisee possesses the requisite information necessary for the performance of a contract's term. *Corbin on Contracts* §37.11 (1999).

Finally, with regard to Kincaid's premature declaratory judgment action, he seriously mistakes the importance of this Court's decision in *Mid-American Fire and Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248. This Court's decision in *Heasley* was not limited in anyway to the Scott-Pontzer/Galatis era of insurance jurisprudence. While this Court did observe that it believed a party submitting a "Scott-Pontzer type" claim would be submitting a frivolous action following this Court's decision in *Galatis*, this Court likewise reminded the bench and bar that an actual or lingering threat must be real and present before any cause of action exists under an insurance policy: "[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.* 136, ¶9 citing *League For Preservation of Civil Rights v. Cincinnati* (1940), 64 Ohio App. 195, 197 quoting *Borchard,* Declaratory Judgments (1934) 40. 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/or where the threat to plaintiff's position is remote. Kincaid's class action complaint here exemplifies each of these elements.

Accordingly, as Kincaid has utterly failed to explain how his putative class action complaint meets the constitutional requisites for standing under any of his three causes of action, breach of contract, bad faith and/or declaratory judgment, the Eighth district's decision should be reversed and this Court should adopt the Propositions of Law set forth in Erie's brief.

B. Claims For Third Party Coverage Or First Party Coverage, To The Extent They Exist In This Matter, Require The Submission of Separate Claims By Kincaid or An Insured.

Notwithstanding Kincaid's failure to rebut Erie's constitutional standing argument, a further examination of his Merit Brief is warranted to expose what Kincaid is truly attempting to do with longstanding insurance principles and law.

In this attempt to ignore standing and ripeness doctrines, Kincaid interprets insurance notice concepts in mutually contradictory fashion. First, Kincaid argues that his current class action claim is a "third party coverage" claim under the liability protections of the policy.

> At the risk of overstating the obvious, the instant action is limited to claims for coverage under the liability protections of the policy.

Appellee's Merit Brief at p. 9.

At footnote 2, Kincaid attempts to elucidate on his position:

> As was plainly explained in the pleading, plaintiff had applied for and been approved for 'liability' coverage after he was sued for damages."

Id. at ¶2, 12, and 33.

Normally, one understands a liability policy as one which is designated and intended to protect the insured from third party claims.

The second part of Kincaid's Merit Brief argues, in apparent contradiction to the first argument, that Kincaid qualifies as a "first party claimant":

> Because they are parties to the insurance contracts and 'asserting a right to payment under an insurance policy' the plaintiff qualifies as a 'first party claimant'. (Page 18 of Appellee's Brief).

Based upon this faulty premise, Kincaid then proceeds to argue that, as a "first party claimant", he was entitled to an affirmative explanation from his insurer of all of his pertinent benefits, coverages or other provisions of the insurance contract under which a claim is presented pursuant to Ohio Administrative Code 3901-1-54 E even before he presented a specific claim for his "actual" loss of earnings, postage, etc.

The only way that Kincaid could arguably set forth a valid cause of action in this matter, is if Kincaid could convince this Court that there are two separate, independent and different types of coverage both under the same automobile liability policy: that is, both first party and third party coverages.

However, even if Kincaid were successful in persuading this Court that the Erie liability policy provides both first and third party coverages, then he would have to admit that there would be two separate and independent types of claims. One claim for liability coverage (third-party coverage) wherein the Appellee, Kincaid would tender the defense

to his carrier; and a second and separate independent claim for "supplemental payments" which might be construed to be a first party coverage. Thus, to follow Kincaid's position to its logical ending, he would have to concede that these two separate coverages require Kincaid to submit two separate "claims for coverage".

Here, while Kincaid presented his claim for defense to Erie; he has never presented a separate second coverage claim under the "supplemental payments" for first party coverage. Accordingly, contrary to Kincaid's statement in his Merit Brief, Kincaid has never submitted his alleged second claim for his "actual loss of earnings", postage, etc. to Erie Insurance Company.

Furthermore, if these supplemental coverages are "first party claims", then the question presents whether the Ohio Administrative Code permits a basis for a private cause of action. Clearly, the Code was not intended to provide a private cause of action:

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

Ohio Administrative Code §3901-1-54(B)

Additionally, even if the Code applied, Kincaid does not qualify as a "first party claimant" under the statutory definition of the term:

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

Ohio Administrative Code §3901-1-54(c)(8). (Emphasis added).

Kincaid does not qualify as a "first party claimant", as defined, because he concedes that he never did assert a right to payment under the supplemental payment provision of his insurance policy prior to launching his massive class action suit against Erie Insurance Company.

Assuming *arguendo*, that Kincaid somehow overcomes these significant requirements, he would nonetheless still be required, under the Code upon which he relies, to submit a properly executed proof of loss and document his claim as required by the policy. Erie would then have 21 days after that to decide whether to accept or deny the claim:

> an insurer shall within twenty-one (21) days of the receipt of a properly executed proof of loss, decide whether to accept or deny such claim(s).

Ohio Administrative Code §3901-1-54(G)(1)

Furthermore, Erie would have ten days within which to tender payment if the amount of the claim was determined to be covered and not in dispute. OAC 3901-1-54(G)(6).[1] None of these events occurred. Kincaid simply launched into the filing of a putative class action against Erie Insurance because he apparently feels a class action would be much more lucrative.

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[1] It is interesting that even the Ohio Administrative Code anticipates this situation by providing that an insurer is not obligated to respond within any timeframe to any communication between the claimant and the insurer where suit has already been filed. Ohio Administrative Code §3901-1-54(F)(3).

C. The General Rule That An Insured Is Charged With Knowledge of The Contents of His Insurance Contract Applies Since There Are No Special Circumstances Which Merit Any Other Duty.

The third part of Kincaid's Merit Brief addresses his assertion that he has submitted a "breach of fiduciary duty claim". See, Appellee Merit Brief, pp. 21-28. In this section, Kincaid confuses the "duty of good faith" with a "fiduciary duty". While an insurer has a duty of good faith which requires the insurer to act with good faith at all times with respect to its own insured, that is a wholly different standard from a "fiduciary duty". Neither an insurance company nor its agent is ordinarily, or as a general rule, imposed with a heightened fiduciary duty obligation to an insured except in a circumstance where "both parties understand that a special trust or confidence has been reposed". In other words, the insurance company does not owe a fiduciary duty to the insured because the insurance company is not an agent or trustee acting for or on behalf of the insured, absent special circumstances.

Furthermore, the Appellee improperly invokes the "assumed duty doctrine" as announced in the case of *Baughman v. State Farm,* 2005-Ohio-6980, at ¶¶41-48 (9th Dist.), *Martin v. Grange*, 143 Ohio App.3d 332 (11th Dist. 2001), and *Thomas v. Nationwide Ins. Co.,* 117 Ohio App.3d 502, 520-522, 2008-Ohio-3662, (8th Dist.). These cases identified "special circumstances" as basis for involving a higher duty. However, Kincaid has not

provided any "special circumstances" in this matter which would give rise to either a fiduciary duty or a "assumed duty doctrine".

Indeed, Kincaid acknowledges and recognizes that the "general rule" is that an insured is charged with knowledge of the contents of his insurance contract. See, Appellee's Merit Brief at p. 26; *Nickschinski v. Century Ins. Co.*, 88 Ohio App.3d 185, 195 (8th Dist. 1993). Kincaid attempts to invoke an "exception to the general rule" (at p. 27 of Appellee's Merit Brief) but fails to establish facts or circumstances which would give rise to such an exception under either the *Baughman* or the *Martin* or the *Thomas v. Nationwide* cases.

Notably, in contrast to *Baughman*, *supra* and *Martin*, *supra,* there was no special undertaking by Erie in this matter, with "promotional advertising", or "soothing representations". Furthermore, there was no waiver of policy conditions by the insurance agent or the insurer, as there was in the *Thomas*, *supra.* Thus, the invocations of "fiduciary duty" or "assumed duty doctrine" or "waiver" under these three case authorities have no application to this case because there are no facts which would support such a doctrine imposing a greater duty upon an insurer. According, these decisions are inapposite.

Finally, Appellee invokes and relies upon the Ohio Administrative Code to buttress this fiduciary duty argument; however the case law generally does not support Kincaid's musings.[2]

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[2] The only decision which Kincaid cites for the proposition that the Administrative Code

Simply, the general rule in *Nickschinski, supra* applies: an insured is charged with knowledge of the contents of his insurance contract. If there were any question or doubt of the continuing validity of that rule, such was recently dispelled:

> Only when an insurer is notified that the insured has a claim under the UM/UIM provisions of a policy must the insurer inform the insured of the limitations.
>
> Accordingly, we hold that where the insurer has been made aware that an insured has a potential claim under a policy providing UM/UIM coverage, the insurer must inform the insured of any applicable limitations period contained in the policy. The insurer's duty may be fulfilled by providing the insured with a copy of the policy or by any other means reasonably calculated to apprise the insured of his rights under the policy.

Wilson v. Ohio Cas. Ins. Co., 185 Ohio App.3d 276, 281, 2009-Ohio-6798 (1st Dist.). (Emphasis added).

Accordingly, the general rule in Ohio does not impose a fiduciary duty or a heightened duty of good faith beyond providing the insured with a copy of the policy. Therefore, Kincaid has no cause of action, no standing, and is otherwise not entitled to assert a claim under either the common law or the Ohio Administrative Code for breach of contract, bad faith, or a class action for punitive damages.

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would apply to this class action is *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405. However, that case is clearly distinguishable since it involves a claim by an insured against a life insurer. A life insurer issues only one type of coverage, ie., "first party" coverage. Life insurers never issue "third party liability coverage". Therefore, this decision is not applicable.

CONCLUSION

Kincaid has conceded, both directly and indirectly, that he has never made a request for payment. Through this concession, Kincaid implicitly admits that he has no "standing" to file an action for breach of contract much less a class action asserting bad faith. Further, this concession also demonstrates that he has not met the requirement of an "actual injury" and/or a "justicable controversy" to meet the requirements under Ohio's Constitution to bring an action for declaratory judgment. Accordingly, the Eighth District's decision and judgment should be reversed.

Moreover, whether this Court ultimately views the claim for "supplemental benefits" as a "first party coverage" or "third party coverage", Kincaid or similarly situated insureds should not be permitted to engage in a "legalistic shell game". If it is a "third party coverage" claim under the liability policy, then the insured is charged with notice of his rights when the insurer delivers his insurance policy to him. He has the corresponding duty to read his own policy and, if he wishes to submit a claim, he must do so affirmatively. Failure to submit a claim eliminates the basis for either a cause of action for breach of contract, bad faith, or a declaratory judgment. An insurer has no higher duty to inform him of all of his rights and benefits under the liability section of his policy.

On the other hand, if his claim is truly a "first party coverage" claim, then the Ohio Administrative Code itself requires that a separate independent claim be presented, along with the proof of loss before an insurer has any obligation to inform the insured of his rights and benefits under the policy. (See the definition for "first party claimant" under Ohio Administrative Code §3901-1-54(G)(8)). Therefore, until a separate second claim has been presented to Erie Insurance Company, there was no obligation or duty under the Ohio Administrative Code for Erie to inform Kincaid or any insured of all benefits that might accrue.

This distinction between first and third party claims is basic. It pervades all of the case law issued in Ohio to date. Until now, there has been a clear understanding and interpretation of those two different types of coverage. Only now when the Appellee assaults these well established principles, does the issue become confused. This Court should not permit these principles to be so confused, nor to create any new or greater duties than already existed in Ohio case law and statutory amendments and/or the Ohio Administrative Code.

Finally, there is no basis for any claim of bad faith or breach of fiduciary duty because there is no basis for an exception to the general rule that the insurer's duty is fulfilled by providing the insured a copy of the policy until and unless the insurer is actually placed on actual notice of specific claims for first party benefits. It is undisputed that Erie received no such notice.

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 21st day of June, 2010, to the following:

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