

IN THE SUPREME COURT OF OHIO

Andrew J. Art, Successor Guardian :  
of the Person and Estate of :  
Katherine A. Guzay, et al., :

Plaintiffs. : Case No. 11-1108

Ohio Casualty Insurance Company, :

Plaintiff-Appellee, :

-vs- :

Butler Wick & Co., Inc., et al., :

Defendant-Appellant. :

On Appeal from the  
Franklin County Court of Appeals,  
Tenth Appellate District

Court of Appeals  
Case No. 10AP-747

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**APPELLEE OHIO CASUALTY INSURANCE COMPANY'S  
MEMORANDUM IN RESPONSE TO APPELLANT AND  
THIRD-PARTY PLAINTIFF BUTLER WICK & CO., INC.'S  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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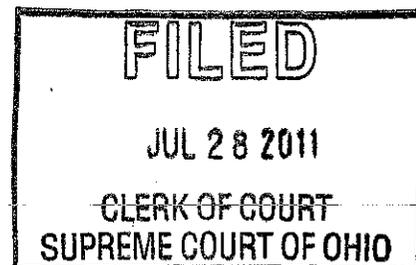
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## **EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

This case does not warrant discretionary review because it does not raise any “question of public or great general interest.” On the contrary, Appellant Butler Wick & Co., Inc.’s (Butler Wick) Memorandum in Support of Jurisdiction is based upon an equitable argument and factual circumstances that are unique to a single case. This dispute arises out of an unusual series of events that occurred more than thirteen years ago, in December 1997, and a “pilot program” for the ACATS System, a computerized system for the paperless transfer of customer accounts between commercial brokerage firms developed by Third-Party Defendant National Financial Services (NFS). One of the purposes of a “pilot program” is to test a system for flaws in real world operation. Unfortunately in this case, the test revealed flaws in the ACATS System that the dishonest manager of a now defunct brokerage firm, Eisner Securities (Eisner), was able to exploit to obtain custody and control over the entire brokerage account of a mentally disabled ward of the Franklin County Probate Court.

More importantly, the argument that R.C. §2109.50 should not apply to Butler Wick under the unique facts properly in the Record in this case has been subject to *de novo* review by the Tenth District Court of Appeals twice, and the Tenth District Court of Appeals has unanimously rejected Appellant’s argument twice. In *Art v. Erwin* (2009), 183 Ohio App.3d 651, 659, 2009-Ohio-4306, ¶19, the Tenth District rejected the contention that R.C. §2109.50 does not apply to Butler Wick’s conduct:

In our view, the second amended complaint in this case states a claim against Butler for concealment pursuant to R.C. Chapter 2950 [sic]. It contains allegations that Butler improperly transferred the ward’s assets to someone

without authority to receive the assets. **Where a surety alleges that a financial institution conveyed away a ward's assets to another person, without proper authorization to do so, the action "falls squarely within the ambit of R.C. 2109.50 and the exclusive jurisdiction of the Probate Division."** *Ohio Farmers Ins. Co. v. Huntington Natl. Bank* (Sept. 28, 2000), 8<sup>th</sup> Dist. No. 76303, 2000 WL 1434036. (Emphasis added.)

Butler Wick did not seek review of the Tenth District's 2009 opinion, and upon remand to the Probate Court, the opinion became the law of this case. The law of the case doctrine provides that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3-4.

Contrary to Butler Wick's unsupported speculation that the opinion of the Court of Appeals rejecting Butler Wick's equitable arguments in this case will cripple Ohio commerce by imposing great unintended financial burdens upon Ohio stockbrokers, the most recent Court of Appeals' opinion merely applies the plain text of R.C. §2109.50, *et seq.* and a consistent line of prior appellate precedent to the unique facts of a case that has been subject to *de novo* review by six different judges of the Tenth District Court of Appeals. The Tenth District's opinion does not create new law or impose any new burdens upon stockbrokers doing business in Ohio. The opinion merely enforces the plain text of R.C. §2109.50, *et seq.*, a remedy that has been a part of Ohio statutory law since before the Revised Code became effective in 1953.

#### **STATEMENT OF THE CASE AND RELEVANT FACTS**

Contrary to Butler Wick's assertion that the undisputed material facts properly in the Record establish that "Butler Wick acted lawfully at all times", the Record is clear –

Butler Wick had no legal right or authority to transfer custody and control of Katherine Guzay's (Guzay) brokerage account through the ACATS "pilot program" to the custody and control of NFS, or Joseph Erwin and Eisner, or Davis Erwin, as Guardian. The plain fact is that the Tenth District's opinion correctly rejected the premise of Butler Wick's argument that Davis Erwin "was authorized to take possession of the transferred estate assets". The undisputed facts in the Record refute Butler Wick's contention that Butler Wick transferred Guzay's account to a person or entity authorized by Ohio law to receive such transfer.

This is a "concealment action" that was filed in the Franklin County Probate Court on August 21, 2001, by the Second Successor Guardian of Guzay, not Ohio Casualty Insurance Company (Ohio Casualty). The Complaint asserts that Butler Wick is liable under R.C. §2109.50 and §2109.52 for transferring custody of assets from Guzay's brokerage account to Eisner Securities without having received authorization from Guzay, as owner of the account, from a person holding a power of attorney, or from the Franklin County Probate Court. The initial sentence of R.C. §2109.50 places upon Butler Wick the burden of proving that it had authority to "convey away" the Guzay account to someone other than its customer, Ms. Guzay:

Upon complaint made to the probate court . . . by a person interested in such trust estate . . . against any person suspected of having . . . conveyed away . . . any moneys, chattels, or choses in action of such estate, said court shall by citation . . . compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint.

~~R.C. §2109.52 states:~~

When passing on a complaint made under section 2109.50 of the Revised Code, the probate court shall determine . . . whether the person accused [Butler Wick] is guilty of having . . . conveyed away . . . moneys, chattels, or choses in

action of the trust estate. If such person is found guilty, the probate court shall assess the amount of damages to be recovered . . .

The material undisputed facts are that on November 5, 1993, Guzay established a brokerage account with Butler Wick. Under the terms of Butler Wick's standard agreement and Ohio law, Butler Wick had a duty to safeguard the assets in Guzay's account. Yet, Butler Wick admits that, in December 1997 and January 1998, acting under the terms of a June 28, 1996 "TIF Immobilization Pilot Program Agreement" with NFS, Butler Wick used NFS's ACATS System to electronically transfer Guzay's entire brokerage account to Eisner. More importantly, Butler Wick concedes that it acted without receiving any instructions from Guzay, the holder of a valid power of attorney, or an order from a Probate Court.

NFS developed the ACATS System to expedite the transfer of the custody of brokerage accounts between member brokers. The ACATS System was designed to eliminate the need for legal documents signed by account holders or any direct communication between a transferring broker, like Butler Wick, and its customers or their legal representatives. By agreeing to participate in the ACATS System, Butler Wick relinquished its right and abandoned its duty to review any documents purporting to authorize the transfer of custody of assets being held by Butler Wick for its customers, like Guzay.

Under the agreement between Butler Wick and NFS, upon receipt of an electronic request for transfer of an account, Butler Wick must do so without taking any action to verify the validity or legality of the requested transfer. Butler Wick is contractually limited to matching the customer name and account number on the

request. Thus, by agreeing to participate in the ACATS System, Butler Wick voluntarily assumed the risk that if a transfer turned out not to be properly authorized under Ohio law, Butler Wick could be held liable. In order to induce Butler Wick to participate in the paperless ACATS System, Third-Party Defendant NFS agreed to indemnify Butler Wick from any loss resulting from Butler Wick's failure to obtain a written document authorizing the transfer of custody to another broker.

It was in this context that in October 1997, Guzay, a 54-year old school teacher, sustained serious brain injuries in an automobile accident that rendered her mentally incompetent to manage her own affairs. Davis Erwin was Guzay's daughter and closest living relative. But, at the time of her mother's accident, Davis Erwin was pregnant with her first child, who was born a few days after the accident.

Davis Erwin was married to Joseph Erwin, the Manager of the local office of Eisner. Although he appeared to be a successful investment advisor, Joseph Erwin was secretly using his position with Eisner to steal money from his clients through the operation of a fraudulent "Ponzi scheme." His embezzlement scheme began in May, 1997 – six months before his mother-in-law's accident. Between May and October 1997, Joseph Erwin embezzled \$140,000 from the accounts of five Eisner customers. After Guzay's accident, Joseph Erwin secretly misused his position and the ACATS System to obtain custody and control of Guzay's Butler Wick account for use in his "Ponzi scheme." By October, 2000, when his scheme was discovered, he had stolen nearly \$2.8 million. *United States v. Erwin*, Case No. GR2-01-012 (S.D. Ohio 2001).

On November 14, 1997, while Guzay was in a Franklin County hospital recovering from her injuries, Davis Erwin's attorney filed an Application with the Probate

Court seeking an order declaring Guzay mentally incompetent and appointing Davis Erwin as Guardian of Guzay's person and estate. However, Davis Erwin's appointment was not a foregone conclusion. After meeting with Guzay and her doctors, the Court's investigator recommended against the appointment of a Guardian.

On December 9, 1997, the day before the Court's investigator issued a report recommending against the appointment, Joseph Erwin fraudulently misused the ACATS System to obtain custody and control over his mother-in-law's Butler Wick account – something that could not have been accomplished without the anonymity provided by the ACATS System. The Eisner account statements show that an ACATS order was placed on December 9, 1997, three days before the scheduled hearing on Davis Erwin's appointment. The corresponding Butler Wick statement shows that Butler Wick received a \$50 ACATS termination fee on December 10, 1997.

There is no evidence that Joseph Erwin or any other person, including Davis Erwin, contacted Butler Wick to request that Guzay's account be transferred to Eisner. Instead, Joseph Erwin sent a fraudulent electronic ACATS System request. Because the request was made through the ACATS System, Butler Wick did not, and could not, review any documents authorizing the transfer. Under the ACATS System, only Eisner was supposed to have a copy of the Transfer Initiation Form (TIF) in its records.

The fraudulent ACATS System request that Butler Wick received stated that the Butler Wick account that was in Katherine Guzay's name alone was to be transferred into an account at Eisner titled "Katherine Guzay C/O Davis Erwin". Even though under the ACATS System, Butler Wick had a duty to review the request to verify that the customer name on the request matched Butler Wick's records, Butler Wick failed to

perform this duty. The name on Butler Wick's account was "Katherine Guzay" only, whereas the name of the account to which the assets were to be transferred was "Katherine Guzay C/O Davis Erwin". The Court of Appeals held this "should have alerted Butler Wick to the existence of a guardianship."

On December 12, 1997, Davis Erwin was appointed Guardian. She was issued Ohio's standard Letters of Guardianship as required by this Court's rules. The plain text of the Letters limit a Guardian's authority to take custody and control of their Ward's property and warn financial institutions not to transfer any property to a guardian without first receiving an order from a Probate Court:

**NOTICE TO FINANCIAL INSTITUTIONS**

Funds being held in the name of the within-named Ward shall not be released to the Guardian without a Court order directing release of a specific fund and amounts thereof.

As a financial institution doing business in Ohio, Butler Wick was, or should have been, familiar with the laws of Ohio governing the transfer of the control of the assets of a customer to a third party, such as the holder of a durable power of attorney or a court-appointed guardian. Rather than fulfilling its responsibility to safeguard Guzay's account, by agreeing to participate in the ACATS "pilot program", Butler Wick agreed not to perform its duties in exchange for a promise of indemnity from Third-Party Defendant NFS.

**ARGUMENT OPPOSING PROPOSITIONS OF LAW**

**Response to Proposition of Law No. 1: The Ohio Concealment Statute imposes strict liability.**

R.C. §2109.50 provides that an interested party may file a complaint in the

probate court “against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate”. A party is liable under R.C. §2109.50 if it improperly conveyed away an estate asset. *Goldberg v. Maloney*, 111 Ohio St.3d 211, 2006-Ohio-5485, ¶35, quoting *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 407.

The Court of Appeals’ discussion in the opinions in *In re Estate of Popp* (1994), 94 Ohio App.3d 640, and *Rinehart v. Bank One, Columbus, N.A.* (1998), 125 Ohio App.3d 719, 728, explained that a financial institution, like Butler Wick, can be held liable under R.C. §2109.50 even if the transfer is made to an authorized person:

A financial institution that conveys money in its possession to an unauthorized individual comes within the provisions of R.C. 2109.50. *In re Estate of Popp* (1994), 94 Ohio App.3d 640, 646, 641 N.E.2d 739, 742-743, jurisdictional motion overruled (1994), 70 Ohio St.3d 1446, 639 N.E.2d 114. **A logical extension of this rule is that a financial institution that conveys funds to an authorized person but under circumstances giving rise to liability to the estate would also fall within the ambit of R.C. 2109.50.** (Emphasis added.)

*Rinehart*, 125 Ohio App.3d at 728. See also, *Art v. Erwin* (2009), 183 Ohio App.3d 651, 2009-Ohio-4306, ¶15.

As Butler Wick’s Memorandum admits, the well-established elements needed to prove an improper conveyance were set forth in *Popp*:

Thus, in a proceeding against a financial institution under R.C. 2109.50 for wrongful conveyance, it must first be established that there was a conveyance, **made to a wrong party**, after which all that is required is to show by a preponderance of evidence that the money belonged to the decedent; it is not necessary to establish that the conveyance was made with a fraudulent or criminal intent. (Emphasis added.)

*Popp*, 94 Ohio App.3d at 647.

The Tenth District properly concluded that each of the three elements of liability

set forth in *Popp* are established by the undisputed facts in the Record. Butler Wick concedes that it conveyed away assets belonging to a guardianship estate. More importantly, there is no basis in law or fact upon which a court could conclude that NFS, Eisner, Joseph Erwin or Davis Erwin were authorized by the Probate Court “to take possession” of assets in Guzay’s Butler Wick account. The Tenth District made the same finding concerning the elements in a previous appeal taken by Butler Wick. *Art* at ¶19.

As held in the *Popp* opinion, the transferor’s mistake, whether it was in relying on forged documents or in assuming that the transferee had possession of the necessary documents, is not a defense in an R.C. §2109.50 proceeding:

In the instant case, [the bank] has never denied conveying money belonging to the estate to a wrong party. Its argument is a defense of mistake, which we have stated does not absolve it from liability. Therefore, since there remains no genuine issue of fact to go to the trier of fact, summary judgment is appropriate. See *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E. 2d 798.

*Popp*, 94 Ohio App.3d at 649.

This Court has repeatedly held that ignorance of the law is not a defense in either civil or criminal cases, even where the application of the rule may appear harsh. See *State v. Parker* (1994), 68 Ohio St.3d 283, 286 (“Moreover, it is well settled that one is presumed to know the law, and that includes traffic regulations as well.”); *State v. Pinkney* (1988), 36 Ohio St.3d 190, 198 (“It is an ancient maxim that all are conclusively presumed to know the law.”); *Ouzts v. Maloney* (1952), 157 Ohio St. 537, 548 (“Such a determination must rest upon the maxim that all are conclusively presumed to know the law.”). Butler Wick is charged with knowing, and complying with, the law governing its

business of acting as the custodian of the assets in its customers' brokerage accounts.

The undisputed fact is that the Record contains no court order authorizing Butler Wick to deliver Guzay's assets to Davis Erwin or anyone else, and Butler Wick has never contended otherwise. On the contrary, the undisputed facts in the Record establish that Butler Wick "conveyed away" Guzay's account based upon a mistaken assumption of law – that Davis Erwin or NFS or Eisner had been authorized by Guzay, personally, by a duly-authorized person acting under a valid power of attorney, or by a court-appointed guardian acting under an order from the Probate Court that had been delivered to NFS and/or Eisner.

It is undisputed that Butler Wick was mistaken. Neither Eisner nor NFS had any such power of attorney or court order. Consequently, the transfer was not "properly authorized", and the Tenth District correctly held that R.C. §2109.52 and the law of the case, as stated in the Court of Appeal's opinion in *Art v. Erwin*, imposed liability upon Butler Wick. Although Butler Wick criticizes R.C. §2109.50, *et seq.*, as unreasonably imposing strict liability on financial institutions, this Court has frequently upheld the application of strict liability to the handling of public and private trust funds as a matter of sound public policy. *Cordray v. Internat'l Prep. School*, 128 Ohio St.3d 50, 2010-Ohio-6136.

**Response to Proposition of Law No. 2: Davis Erwin did not have the authority to ratify the transfer.**

This Court has held that the authority to ratify an agent's action is limited to a person who had the legal authority to take the action:

In short, any contract that an individual, or body corporate or politic, may lawfully make, they may lawfully ratify and adopt, when made in their name without authority; and when adopted, it has its effect from the time it was made, and the same effect as though no agent had intervened.

*State v. Exec. of Buttles* (1854), 3 Ohio St. 309, 323. In other words, an agent cannot ratify the agent's own unauthorized act.

Under these principles, Davis Erwin had no authority to direct Butler Wick to "convey away" her mother's brokerage account to Eisner. As of December 12, 1997, the date of Davis Erwin's appointment as Guardian, the only person who could "properly authorize" the transfer of Guzay's Butler Wick account to NFS and/or Eisner was the Franklin County Probate Judge, acting as superior guardian through a court order. The Rules of Superintendence of the Supreme Court of Ohio adopted the standard Letters of Guardianship form issued to Davis Erwin. (Rules of Sup. 51.) The Letters of Guardianship issued to Davis Erwin states:

**NOTICE TO FINANCIAL INSTITUTIONS**

Funds being held in the name of the within-named Ward shall not be released to the Guardian without a Court order directing release of a specific fund and amounts thereof.

The purpose of this requirement is clear – through this process, the Court is informed of the nature and amount of the ward's assets that are subject to the Court's jurisdiction as superior guardian. Following the procedure mandated by the Rules of Superintendence is central to the Court's role as superior guardian. See R.C. §2111.50. The *Art* opinion, citing *In re Guardianship of Hollins*, 114 Ohio St.3d 434, 2007-Ohio-4555, 872 N.E.2d 1214, ¶17, describes the Probate Court's powers and duties as superior guardian:

In addition to the general grant of jurisdiction found in R.C. 2101.24, probate courts are granted authority over guardians in all respects. The probate courts serve as superior guardians, with the ultimate authority to approve and direct the actions of guardians subject to their jurisdiction.

*Art*, 183 Ohio App. 3d at 663, 2009-Ohio-4306, at ¶ 32, footnote 1.

Butler Wick's argument ignores the fact that under Ohio law, Davis Erwin did not have the authority to direct the transfer of assets from Butler Wick to Eisner. This is made clear by the plain text of Ohio's standard Letters of Guardianship. Only a probate court can issue an order authorizing the transfer of estate assets from a non-guardianship account to a guardianship account. Davis Erwin's only authority with regard to any account in the name of "Katherine Guzay" held at Butler Wick was to determine the nature and amount of the assets and report them to the Probate Court. At that point, it would have been within the discretion of the Probate Court to determine whether the account should remain in Butler Wick's custody and control or whether the assets in the account Guzay had established with Butler Wick should be transferred to a different court-approved custodian. Moreover, even if Davis Erwin had suggested that her mother's assets be entrusted to her husband's custody at Eisner, such request would have probably been denied because of the obvious conflict of interest and potential for self-dealing.

Further, Butler Wick's arguments regarding the scope of Davis Erwin's authority as Guardian are irrelevant, "red herring" arguments. Ohio Casualty has proven, and Butler Wick has admitted, that Butler Wick has no knowledge of who directed the transfer. It makes no difference whether it was Joseph Erwin, Davis Erwin or a person off the street who directed the transfer. None of them had authority to do so, and the

ACATS transfer order was never ratified by the Probate Court. On the contrary, the Franklin County Probate Court specifically authorized Ohio Casualty to pursue this action originally filed by Andrew Art, as Guzey's Successor Guardian, against Butler Wick.

**Response to Proposition of Law No. 3: Appellant Butler Wick was not authorized to transfer assets.**

Ohio's standard Letters of Guardianship that were issued to Davis Erwin in this case, as mandated by Civ. R. 73(H) and Rules of Sup. 51, state:

**NOTICE TO FINANCIAL INSTITUTIONS**

Funds being held in the name of the within-named Ward shall not be released to the Guardian without a Court order directing release of a specific fund and amounts thereof.

Butler Wick does not dispute that the Letters of Guardianship appointing all fiduciaries in Ohio contain this Notice. Because the form is the standard form proscribed by the Ohio Supreme Court, Butler Wick and all financial institutions doing business in Ohio are on notice that they cannot properly transfer their clients' property to a fiduciary until they receive a court order directing such transfer.

Yet, Butler Wick argues that the standard Letters of Guardianship required by the Ohio Supreme Court is just a form and that it can be ignored without subjecting Butler Wick to liability under R.C. §2109.50. Butler Wick cites two cases, *Proctor v. Blank*, 11<sup>th</sup> Dist. No. 2005-T-0027, 2006-Ohio-2386, and *In re: Guardianship of Brady*, 8<sup>th</sup> Dist. Nos. 84517 and 84743, 2005-Ohio-287. Neither case is applicable.

In this case, there is no issue of form over substance. There was no error or non-standard form with the court order. The issue in this case is whether the Letters of

Guardianship issued to Davis Erwin authorized her to direct Butler Wick to transfer Guzay's account to Eisner or whether Butler Wick violated Ohio law by failing to require Eisner to produce a court order directing Butler Wick to transfer Guzay's account to Eisner. The undisputed fact is that Butler Wick transferred the Guzay account assets to Eisner "without a Court order directing release of a specific fund and amounts thereof." Butler Wick cites *Proctor* and *Brady* without citing any substantive law that is inconsistent with the standard order form maintained by the Supreme Court or providing substantive justification for Butler Wick's conduct in "conveying away" the Guzay account.

**Response to Proposition of Law No. 4: Application of the Appellate Court decision will not change Ohio commerce and is the public policy enacted by the Legislature.**

Contrary to Butler Wick's prediction that the financial system would be crippled, nothing in the financial system changes as a result of the Court of Appeals' opinion. Financial institutions have *always* had a duty to verify the authority of their customers' requests. However, Butler Wick signed up as a participant in the ACATS pilot program. By reason of its participation in the ACATS System, Butler Wick assumed the business risk that the other participants in the electronic transfer system would act honestly and follow the procedures required by their agreement and Ohio law. By participating in the ACATS System, Butler Wick delegated that duty to verify to entities such as NFS and Eisner, and Appellant Butler Wick entered into indemnity agreements with them for when they failed to properly verify the transactions.

Thus, the real dispute regarding who should bear the loss resulting from Joseph

Erwin's fraudulent misuse of the ACATS System is between Butler Wick and NFS as set forth in Butler Wick's Third-Party Complaint. However, Butler Wick and NFS have agreed that their dispute must be resolved by arbitration as provided by NFS's standard contract governing the ACATS System. There are issues between them as to who failed to verify the authority of the request through the ACATS System.

Despite Butler Wick's assertion that this case presents questions of public or great general interest, in the eleven years since Joseph Erwin's scheme was discovered, no other similar reported case has made its way through the courts of Ohio. In this era of increasing sophisticated cyber-crime in which a person's life savings can be lost in a millisecond without their knowledge or fault, sound public policy requires increased – not diminished – safeguards as advocated by Butler Wick.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was served on this 28<sup>th</sup> day of July,

2011 by regular U. S. Mail, postage prepaid, upon the following:

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