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In the Supreme Court of Ohio

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*ESTATE OF TIMOTHY J. OEDING, J & R EQUIPMENT AND STORING  
AND AUTO-OWNERS INSURANCE COMPANY*

**Defendants-Appellants**

v.

*DAVID FRALEY dba FRALEY TRUCKING,*

**Plaintiff-Appellee**

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**ON DISCRETIONARY APPEAL FROM THE  
COURT OF APPEALS, TWELFTH APPELLATE DISTRICT  
BUTLER COUNTY, OHIO  
CASE No. CA 2011-09-0180**

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**MEMORANDUM IN SUPPORT  
OF JURISDICTION**

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JAMES P. NOLAN, II (0055401)  
**SMITH, ROLFES & SKAVDAHL, Co., LPA**  
600 Vine Street, Suite 2600  
Cincinnati, Ohio 45202  
Tel: (513) 579-0080  
Fax: (513) 579-0222  
E-Mail: [jnolan@smithrolfes.com](mailto:jnolan@smithrolfes.com)

*Counsel for Defendants-Appellants,  
Estate of Timothy J. Oeding, J & R Equipment  
and Storing and Auto-Owners Insurance  
Company*

CHRISTOPHER J. PAGAN (0062751)  
**REPPER, PAGAN, COOK, LTD.**  
1501 First Avenue  
Middletown, Ohio 45044  
Tel: (513) 424-1823  
Fax: (513) 424-3135  
E-Mail: [cpagan@cinci.rr.com](mailto:cpagan@cinci.rr.com)

*Counsel for Plaintiff-Appellee,  
David Fraley dba Fraley Trucking*

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I.

**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The decision of the Twelfth District to impute the actions of an insurer to its out-of-state insureds for purposes of establishing personal jurisdiction over them is a matter of first impression before this Court and greatly expands upon this Court's previous decisions imputing actions of an insurer to an insured under very limited circumstances. This Court has never imputed an insurer's actions for the purpose of establishing personal jurisdiction against out-of-state defendants who have no contacts whatsoever with Ohio.

If permitted to stand, the Twelfth District's decision will have a significantly broad and problematic impact across the state. The decision provides authority for Ohio courts to exercise personal jurisdiction over a party with no contact at all within the state at any time, simply because of the actions of that party's insurance company, over which the party does not and cannot exert any control. This expansion of the reach of Ohio courts over non-Ohio residents based on the acts of their insurers will likely result in a widespread increase in the number of out-of-state parties subject to Ohio courts. The fact that many insurance companies operate within a number of states increases the ultimate impact of this decision.

In this case, the actions of the insurer, Auto-Owners Insurance Company ("Auto-Owners"), which the Twelfth District imputed to Auto-Owners' insureds, J&R Equipment and Storing ("J&R") and the Estate of Timothy J. Oeding ("Oeding Estate"), are so common for an insurance company to engage in that there is a significant likelihood Ohio courts will be inundated with claims against out-of-state parties with no contacts in Ohio. The specific actions Auto-Owners undertook in this case were to: 1) place a hold on a vehicle in Indiana while it investigated an Indiana accident, and 2) negotiate with an Ohio resident from an Indiana claim

office. In considering those actions separately, neither was significant enough to satisfy due process requirements or specific enough to limit the broad reach of the Twelfth District's decision. Even when considering the actions together, they are general activities in which many insurance companies engage on a routine basis. Therefore, the impact of the decision could subject anyone with insurance coverage in any other state to jurisdiction in the courts of Ohio, regardless of where the individual resides or the underlying incident occurs.

This is an unprecedented decision, even when looking to decisions outside of Ohio. Courts in other states and jurisdictions under limited circumstances have imputed the actions of an insurer on an insured, but Appellants could not find a single instance where that was done for purposes of establishing personal jurisdiction over a party not otherwise subject to the jurisdiction of the court.

This case also presents a substantial constitutional question concerning whether imputing an insurer's actions to an insured for purposes of establishing personal jurisdiction violates due process requirements. Ohio's Long Arm Statute, R.C. §2307.382(A)(1), and the Due Process Clause of the Fourteenth Amendment of the United States Constitution mandate that a court exercise personal jurisdiction only if the defendant has sufficient minimum contacts with the state so that summoning the party to Ohio would not offend the "traditional notions of fair play and substantial justice." *Internatl. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945); *Goldstein v. Christiansen*, 70 Ohio St.3d at 237, 638 N.E.2d 541, 545 (1994); *Natl. City Commercial Capital Corp. v. All About Limousines Corp.*, 12th Dist. No. CA2005-08-226, 2009-Ohio-1159, ¶ 33. The "constitutional touchstone" is whether the nonresident defendant purposely established contacts in the forum state such that the defendant should reasonably anticipate being haled into court in that state, and that those contacts were not "random," "fortuitous," or

“attenuated.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-475, 105 S.Ct. 2174 (1985); *Natl. City* at ¶ 32.

Under the facts of this matter, minimum contacts are not established and the constitutional concerns for due process are not satisfied. In the underlying action, there is no evidence of J&R or the Oeding Estate personally transacting business in Ohio. J&R and the Oeding Estate did nothing to create a substantial connection with Ohio, nor did they engage in substantial activities or create continuing obligations in Ohio. Mr. Oeding was an Indiana resident who had a motor vehicle accident in Indiana. J&R is an Indiana company, which purchased a policy of insurance from an Indiana insurer. When its Indiana employee caused a motor vehicle accident in Indiana, J&R submitted its claim to its Indiana insurer. Mr. Fraley’s damaged property was stored in Indiana while the accident and his claims were being investigated in Indiana. J&R and the Oeding Estate have done nothing to purposely avail themselves of the benefits and protections offered by the laws of Ohio. Rather, the only way contact could be found with Ohio was through limited and routine actions by Auto-Owners. In short, their alleged “contact” with Ohio, such as it is, is the kind of random and attenuated contact which cannot survive due process scrutiny.

This case presents the ideal vehicle for this Court to address this matter of first impression, namely whether the actions of an insurer can be imputed to an out-of-state insured for purposes of establishing personal jurisdiction. Otherwise, if the Twelfth District decision is allowed to stand, it will so broadly expand the reach of Ohio courts for personal jurisdiction purposes that it would violate the *International Shoe*, *supra*, notions of fair play and substantial justice. It is critically important this Court provide direction on whether an insurer’s actions

may be imputed against an out-of-state insured to establish personal jurisdiction over the insured, taking into account the constitutional implications of this jurisdictional issue.

## II.

### STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee, David Fraley dba Fraley Trucking (“Fraley”), alleges that on November 17, 2008, while in Spencer County, Indiana, Timothy J. Oeding, in the course and scope of his employment, negligently drove a vehicle owned by J&R into a truck owned by Mr. Fraley. At all times relevant herein, Mr. Oeding and his employer, J&R, were residents of Indiana, and J&R was insured by Auto-Owners, also located in Indiana. Mr. Oeding died as a result of injuries sustained in the collision and his estate is named as a party in this matter. The accident also caused physical damage to Mr. Fraley’s truck and physical injury to Mr. Fraley’s employee-driver, Craig Farler.

As Auto-Owners investigated the cause of the accident, Auto-Owners requested an investigative hold be placed on the damaged Fraley vehicle. During the course of the investigation, Mr. Fraley’s damaged truck was held in Indiana. Mr. Fraley contends the collision caused intangible loss to his business in that, during the five months Auto-Owners asked that the truck be held for investigation, he was unable to re-let the truck, causing him financial loss.

Following its investigation, Auto-Owners made payment to Mr. Fraley for the physical damage to the Fraley truck. Auto-Owners also settled the claim for Mr. Farler’s injuries. The parties were unable to reach an agreement on Mr. Fraley’s claim for loss of use of his tractor-trailer, so that is the only remaining claim. Mr. Fraley filed his Complaint in the Court of Common Pleas of Butler County, Ohio, on November 16, 2010, alleging several causes of action, including a claim for damages for indirect economic loss.

The Defendants-Appellants were served at their Indiana addresses. Fraley did not include any allegations in the Complaint that either Mr. Oeding or J&R transacted business in Ohio, or had substantial contacts in Ohio. There are also no allegations that any division of Auto-Owners, other than the one served in Indiana, is associated with Mr. Fraley's claim. The only connections the Oeding Estate, J&R or Auto-Owners is alleged to have with Ohio are Auto-Owners' registration with the Ohio Department of Insurance and the mere fact that Auto-Owners contacted Mr. Fraley while he was in Ohio in an effort to negotiate settlement of his claims and held his truck in Indiana pending its investigation.

On December 22, 2010, Defendants-Appellants filed a Motion to Dismiss the Complaint pursuant to Civil Rule 12(B)(2) for lack of personal jurisdiction over the Defendants. On August 30, 2011, the trial court granted the Motion to Dismiss, finding that it could not assert personal jurisdiction over the out-of-state Defendants, J&R and the Oeding Estate, and that Fraley was barred from maintaining an action directly against Auto-Owners because he had not yet obtained a judgment against its insureds.

Mr. Fraley timely appealed the decision before The Twelfth District Court of Appeals. The Court of Appeals issued its Opinion on October 15, 2012, finding that the actions of Auto-Owners in placing a hold on the Fraley vehicle located in Indiana, negotiating with Fraley while he was in Ohio and having a license to operate in Ohio, could be imputed to its insureds, J&R and the Oeding Estate. The Twelfth District reversed the decision of the trial court granting the motion to dismiss for lack of personal jurisdiction and remanded the case for further proceedings.

This timely Appeal now follows that decision.

### III.

#### ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law No. 1: The conduct of an insurer cannot be imputed to its out-of-state insured for purposes of establishing personal jurisdiction.**

**A. Neither Ohio's Long Arm Statute, RC §2307.382(A)(1), nor Civil Rule 4.3 confer jurisdiction over the out-of-state insureds, J&R and the Oeding Estate.**

Ohio's long-arm statute, R.C. §2307.382(A)(1), enumerates nine (9) specific acts that give rise to personal jurisdiction over a non-resident defendant. *Kauffman Racing Equip., LLC v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551 at ¶¶29-34. Civil Rule 4.3 mirrors Ohio's long-arm statute and allows service of process on non-resident parties under certain circumstances. *Id.* at ¶¶35-40. "Determining whether an Ohio trial court has personal jurisdiction over a non-resident defendant involves a two-step analysis: (1) whether the long-arm statute and the applicable rule of civil procedure confer jurisdiction and, if so, (2) whether the exercise of jurisdiction would deprive the non-resident defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution." *Kauffman* at ¶28 (citing *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183-184).

The Twelfth District in this instance found personal jurisdiction against Appellants J&R and the Oeding Estate solely by imputing the actions of their insurer to them. The Twelfth District itself confirmed the issue of whether the actions of an insurer can be imputed to the insured for the purpose of determining personal jurisdiction is an issue of first impression in Ohio. (Appendix A, page 4 at ¶ 9).

Ohio courts have stated that it is a "long-standing principle" that "the relationship between the insurer and the insured is purely contractual in nature." *Pilkington N. Am., Inc. v.*

*Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, ¶ 23, citing *Nationwide Mut. Ins. Co. v. Marsh*, 15 Ohio St.3d 107, 109 (1984). There have been certain instances where the Court has imputed actions of an insurer against the insured, but those instances have been both rare and very limited in nature. None of those decisions have gone so far as the Twelfth District decision in either expanding the reach of Ohio courts outside the state or impacting a party's constitutionally protected rights to due process.

In *Peyko v. Frederick*, 25 Ohio St.3d 164 (1986), the sole issue before the Court was “whether a plaintiff may have access through discovery to the ‘claims file’ of the defendant’s insurer, when the plaintiff, having obtained a judgment against the defendant, files a motion for prejudgment interest on the amount of that judgment...” *Peyko* at 166. The Court was not addressing an issue of a constitutionally protected right. In fact, although the Court decided the claims file could be produced to evaluate an award of prejudgment interest, that decision did not and does not stand for the position that the actions of an insurer can be imputed against an insured entirely and without limitation. Rather, the decision is limited to circumstances where a defendant, *already subject to the Court’s jurisdiction and without any objection to that jurisdiction*, could have the amount of prejudgment interest awarded against it impacted by the insurer’s actions. That scenario is vastly different than the one present in this matter, where imputing the insurer’s actions led to the establishment of personal jurisdiction over parties where no such jurisdiction previously existed. The *Peyko* decision impacts the amount of a monetary award against an in-state defendant, whereas the decision in this matter impacts the constitutionally protected rights of the non-Ohio resident Appellants.

In *Griffey v. Rajan*, 33 Ohio St.3d 75 (1987), the Court found the insured responsible for the insurer’s failure to file an Answer to a Complaint against him in a timely fashion. The Court

considered the relationship between an insured and his voluntarily selected carrier to be similar to that between an individual and his voluntarily selected attorney. The Court reasoned an insured was responsible for selecting his insurance carrier and could not avoid the consequences of that carrier's actions. This line of reasoning in *Griffey* does not support the Twelfth District's decision here because, in no circumstance where a party was denying personal jurisdiction, would his attorney's presence before a court be sufficient to satisfy due process requirements against him and subject him to the court's jurisdiction. In addition, and even more importantly, the issue in *Griffey* was not one of such importance as a constitutionally protected right of due process, but instead one of whether inexcusable neglect by an insurance carrier could be imputed to the carrier's insured. The impact of the finding that the acts of the insurer in that circumstance could be imputed was further limited in that the Court considered the insured himself had committed inexcusable neglect in failing to follow-up and confirm his carrier took appropriate action and filed an Answer on his behalf.

Both the issue and impact of the decision in this matter are fundamentally different from those before the Court in *Griffey*. Here, the insureds would not have been subject to the jurisdiction of the Court by their own actions and did not themselves fail to act. Further, this is not a circumstance where the insureds should be held responsible for the failure to act of their insurer, as no such failure is alleged. The impact of the *Griffey* decision was to hold a defendant, *already subject to the court's jurisdiction*, responsible for his own actions and those of his insurer. The impact here would be to confer personal jurisdiction against out-of-state residents *not* already subject to the court's jurisdiction. The *Griffey* decision simply does not support a conclusion that personal jurisdiction may be established against an out-of-state party based on the failure to act of its insurer.

Not only do the cases referenced by the Twelfth District not support its jurisdictional holding, there is no authority within Ohio supportive of the expansion of instances where an insurer's actions may be imputed against an insured or of the imputation being done to satisfy personal jurisdiction requirements. Similarly, no authority was cited from any other state supporting this expansive reach of jurisdiction by the Twelfth District. The expansion is violative of the ever important principles of fair play and substantial justice that safeguard individuals against the burden of potentially being subject to the laws of states within which they have no contact at all. The decision also violates the due process protection of the sovereignty interests of states. This matter, being one of first impression in this Court, provides the Court the opportunity to clarify the instances where imputation may occur and to protect constitutionally protected due process principles from being impacted by any such imputation of action of an insurer against its insured.

**B. The exercise of jurisdiction over the out-of-state insureds would deprive J&R and the Oeding Estate of the right to due process under the Fourteenth Amendment to the United States Constitution.**

The Due Process Clause of the Fourteenth Amendment of the United States Constitution mandates that a court exercise personal jurisdiction only if the defendant has sufficient minimum contacts with the state so that summoning the party to Ohio would not offend the "traditional notions of fair play and substantial justice." *Internatl. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945); *Goldstein v. Christiansen*, 70 Ohio St.3d at 237; *Natl. City Commercial Capital Corp. v. All About Limousines Corp.*, 12th Dist. No. CA2005-08-226, 2009-Ohio-1159, ¶ 33.

The Ohio Supreme Court has noted the concept of minimum contacts for purposes of establishing personal jurisdiction over out-of-state residents serves two functions. *See U.S.*

*Sprint, supra*, 68 Ohio St.3d at 186. First, it protects the nonresident defendant “against the burdens of litigating in a distant or inconvenient forum.” *Id.*, citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Second, it ensures the states do not encroach on each other’s sovereign interests. *Id.* “Once minimum contacts are established, a court may balance several factors to determine if exercising jurisdiction would offend fair play and substantial justice.” *Dobos v. Dobos*, 179 Ohio App.3d 173, 2008-Ohio-5665, ¶ 14 (12th Dist.). These factors include the burden on the defendant, the interest of the forum state in adjudicating the dispute, the plaintiff’s interest in convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of several states in furthering substantive social policies. *Kentucky Oaks Mall Co. v. Mitchell’s Formal Wear, Inc.*, 53 Ohio St.3d at 77, citing *Burger King* at 477.

The Twelfth District decision improperly found minimum contacts against the insureds, J&R and the Oeding Estate, by imputing the actions of the insurer, Auto-Owners, notwithstanding the constitutional implications. The specific actions taken by Auto-Owners imputed to J&R and the Oeding Estate were not significant enough to satisfy due process requirements of minimum contacts or specific enough to limit the broad reach of the Twelfth District’s decision.

Many insurance companies conduct business in a number of states. At times, insurers may place a hold on vehicles pending their investigation of an accident. A claims office operating in one state may attempt to resolve claims by contacting individuals in other states. Those actions are so commonly utilized by insurance companies that it would be difficult to find a carrier that has not engaged in them. The ultimate impact for personal jurisdiction of Ohio courts over out-of-state parties could be monumental. For example, applying the Twelfth

District's decision to a hypothetical fact pattern, an Ohio court could assert personal jurisdiction over a California resident involved in an accident in California where the California resident was the driver, solely because the California resident's insurance company held a damaged vehicle in California and engaged in settlement discussions with the injured party or his representative in Ohio. In that scenario, the California resident would have to travel over 2,000 miles to defend an action in Ohio based on an accident that occurred in California. While not all cases would involve such a distance, the hypothetical scenario presents a legitimate possibility that could be repeated often with residents of many states if the Twelfth District's decision stands.

Although Appellants here are residents of the neighboring state of Indiana, the Twelfth District decision is not limited to out-of-state residents of neighboring states. The subsequent burden on non-Ohio residents found to be subject to an Ohio court's jurisdiction based solely on this decision could be significant. In addition, the impact on the sovereignty interests of states having jurisdiction over their own residents would also be significant. In applying the aforementioned factors to evaluate whether the application of personal jurisdiction over Appellants J&R and the Oeding Estate offend fair play and substantial justice, it is clear the exercise of jurisdiction does offend those principles. The burden on non-Ohio resident defendants would be significant, the sovereign interests of states would be impacted negatively and the judicial system's interest in obtaining the most efficient resolution of controversies would not be met.

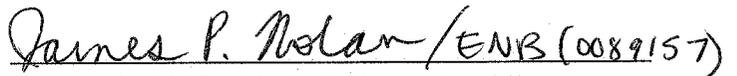
Thus, the decision in this case to impute the actions of the insurer against its out-of-state insureds violates due process requirements, greatly expands the reach of Ohio courts over non-residents and presents an issue upon which this court could provide much needed clarification.

IV.

**CONCLUSION**

This case involves matters of public and great general interest and a substantial constitutional question concerning the personal jurisdiction requirements in Ohio's Long Arm Statute, R.C. §2307.382(A)(1), and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Appellants respectfully request that this Court accept jurisdiction in this case and clarify the limitations of personal jurisdiction, a principle with inherent constitutional implications.

Respectfully submitted,

 James P. Nolan / ENB (0089157)

JAMES P. NOLAN, II, ESQ. (0055401)

**SMITH, ROLFES & SKAVDAHL**

**COMPANY, LPA**

Tel: (513) 579-0080

Fax: (513) 579-0222 - Fax

E-Mail: [jnolan@smithrolfes.com](mailto:jnolan@smithrolfes.com)

*ATTORNEY FOR APPELLANTS*

**CERTIFICATE OF SERVICE**

A true copy of the foregoing *Memorandum In Support of Jurisdiction* was sent by United States Mail, postage prepaid, this 28 day of November, 2012 upon:

Christopher J. Pagan, Esq. (0062751)  
REPPER, PAGAN, COOK, LTD.  
1501 First Avenue  
Middletown, Ohio 45044

***ATTORNEY FOR APPELLEE***

James P. Nolan/EWB(0089157)  
James P. Nolan, II, Esq. (0055401)

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**APPENDIX "A"**

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{¶ 2} In late 2008, a collision occurred whereby Oeding, who was driving a motor vehicle while in the scope of his employment with J&R, hit a tractor-trailer owned by Fraley. This collision occurred in Spencer County, Indiana. Oeding and J&R are residents of Indiana, while Fraley is a resident of Ohio. The collision resulted in the death of Oeding, injury to the driver of Fraley's tractor-trailer, and damage to Fraley's tractor-trailer. Auto-Owners, the insurer of J&R and Oeding, conducted an investigation to determine liability. As a part of the investigation, Auto-Owners placed a hold on Fraley's tractor-trailer. This hold lasted approximately five months.

{¶ 3} On November 16, 2010, Fraley filed a complaint in the Butler County Court of Common Pleas against J&R, Oeding, and Auto-Owners alleging several causes of action, including negligence that resulted in personal injury to Fraley's driver and property damage to Fraley's tractor-trailer. The complaint also included a claim for the intangible economic loss of use of Fraley's tractor-trailer because the hold prevented him from leasing the tractor-trailer as a part of his business, which is located in Butler County, Ohio. In response to the complaint, appellees filed a motion to dismiss pursuant to Civ.R. 12(B)(2) for lack of personal jurisdiction.

{¶ 4} Prior to the trial court ruling on the motion to dismiss, the investigation conducted by Auto-Owners concluded that J&R's employee was responsible for causing the collision. Subsequently, Auto-Owners made payment to Fraley for injuries sustained by Fraley's driver and the physical damage to Fraley's tractor-trailer. However, the parties were unable to reach an agreement on the amount to be paid to Fraley as compensation for the economic loss of use of his tractor-trailer.

{¶ 5} Following the settlement of the majority of claims, the motion to dismiss was pending for Fraley's remaining claim for the loss of economic use of his tractor-trailer. In opposition to the motion to dismiss, Fraley contended that the trial court had personal

jurisdiction, because Auto-Owners, as an agent of J&R, transacted business in Ohio, caused tortious injury in Ohio, and had a license to do business in Ohio. Nevertheless, the trial court found that it could not assert personal jurisdiction over an out-of-state defendant solely because its insurance company did business in the injured party's state. Furthermore, the trial court found that Fraley was barred from maintaining an action directly against Auto-Owners as the insurer because he had not yet obtained a judgment against J&R and Oeding, the insured. The trial court granted the motion to dismiss for lack of personal jurisdiction.

{¶ 6} Fraley now appeals from the trial court's decision granting the motion to dismiss, and raises one assignment of error for review.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS.

{¶ 9} On appeal, Fraley argues that he should be able to maintain a direct action against Auto-Owners. However, he concedes that a third party is precluded from initiating a direct action against an insurer without first obtaining a judgment against the insured on the basis of R.C. 3929.06 and *Peyko v. Frederick*, 25 Ohio St.3d 164 (1986).<sup>1</sup> Consequently, we need only address Fraley's argument that due process and Ohio's long-arm statute, R.C. 2307.382, allow the trial court to assert personal jurisdiction over J&R and Oeding. In order for his argument to be persuasive, because there is no indication that J&R or Oeding themselves had any contact with Ohio, the actions of Auto-Owners, as the insurer of J&R and

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1. R.C. 3929.06 specifically states that it "does not authorize the commencement of a civil action against an insurer until a court enters the final judgment \* \* \* in the distinct civil action for damages between the plaintiff and an *insured tortfeasor*." (Emphasis added.) *Peyko* states that an insurer may be liable to the insured if a judgment against the insured was entered on the basis of the insurer's conduct. *Id.* at fn. 1. However, *Peyko* considered the issue of whether there was a good faith effort on the part of the insurer to settle a claim. *Id.* at 166. Consequently, we do not see how R.C. 3929.06 and *Peyko* preclude a direct action against an insurer when the insurer itself is the tortfeasor outside of the tort of bad faith. *But see Intercity Auto Sales, Inc. v. Evans*, 8th Dist. No.95778, 2011-Ohio-1378 (finding a third party precluded from initiating a direct action against the insurer without first obtaining a judgment against the insured when the insurer was the alleged tortfeasor and the third party failed to cite any authority allowing such an action). We also find it worth noting that J&R and Oeding seek protection from a direct lawsuit initiated by Fraley based on this Ohio statute.

Oeding, must be imputed to them. Fraley asserts that because the Ohio Supreme Court has imputed the actions (or inactions) of the insurer to the insured in other instances, the actions of the insurer should be imputed to the insured for the purpose of determining personal jurisdiction. See *Griffey v. Rajan*, 33 Ohio St.3d 75, 77-78 (1987); *Peyko*. It appears that whether the actions of an insurer can be imputed to the insured for the purpose of determining personal jurisdiction is an issue of first impression in Ohio.

{¶ 10} Ohio courts have stated that it is a "long-standing principle" that "the relationship between the insurer and the insured is purely contractual in nature." *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, ¶ 23, citing *Nationwide Mut. Ins. Co. v. Marsh*, 15 Ohio St.3d 107, 109 (1984). Despite defining the relationship as contractual, there are some instances where the insurer's conduct has been imputed to the insured. *Griffey*; *Peyko*; see also *Marks v. Allstate Ins. Co.*, 153 Ohio App.3d 378, 2003-Ohio-4043 (5th Dist.) (finding negotiations conducted by an insurer on the behalf of the insured created new rights and obligations between the insured and the third party). Furthermore, the Ohio Supreme Court has stated that it resists "the temptation to let [the] determination of whether [the insurer's] neglect is imputable to [the insured] rest upon a mechanical labeling of the relationship between an insurer and its insured." *Griffey* at 77-78.

{¶ 11} For example, in *Griffey*, in discussing whether an insured is responsible for the inaction of the insurer for purposes of a Civ.R. 60(B)(1) motion for relief from a default judgment on the basis of excusable neglect, the Ohio Supreme Court found that the insured was responsible for the insurer's neglect. *Id.* at 78. The court rationalized that similar to an attorney-client relationship, the insured has an opportunity to choose his insurer. *Id.* Both have a contractual relationship with a client, handle litigation for the client, and assume an obligation to third parties interested in the matter. *Id.* Consequently, the court found that the failure of the insurer to file an answer on behalf of the insured was imputable to the insured.

*Id.*

{¶ 12} Similarly, in *Peyko v. Frederick*, 25 Ohio St.3d 164, the Ohio Supreme Court stated that "[t]he defendant's insurer conducts the pretrial negotiations and litigation and approves any offers of settlement-*all* in the defendant's name and for the defendant's benefit." (Emphasis sic.) *Id.* at 166. The court concluded that while the insured is ultimately responsible for any payment of prejudgment interest, the insured has a cause of action against the insurer if the insurer's actions were the basis for the award. *Id.* at fn. 1.

{¶ 13} The above cases indicate that Ohio courts have imputed the actions of the insurer to the insured in certain instances, which we now extend for the purpose of determining personal jurisdiction in this case. J&R had the opportunity to choose Auto-Owners as its insurer. Auto-Owners also assumed an obligation to Fraley, a third party. Furthermore, Auto-Owners conducted negotiations on behalf of J&R and Oeding and for their benefit. Under the facts and circumstances of this case, we find that the actions of Auto-Owners may be imputed to J&R and Oeding for the purpose of establishing personal jurisdiction.

{¶ 14} Having found the actions of Auto-Owners to be imputable to J&R and Oeding, before determining whether these actions were sufficient to establish personal jurisdiction, we will discuss the standard of review for the trial court's grant of a motion to dismiss. We review a trial court's judgment granting a motion to dismiss for lack of personal jurisdiction *de novo*. *Buflod v. Von Wilhendorf, LLC*, 12th Dist. No. CA2006-02-022, 2007-Ohio-347, ¶ 10. If the court determines its jurisdiction without an evidentiary hearing, the plaintiff must only make a *prima facie* demonstration that the trial court has personal jurisdiction over the defendant. *Giachetti v. Holmes*, 14 Ohio App.3d 306, 307 (8th Dist.1984). A *prima facie* showing is made where the plaintiff produces sufficient evidence to allow reasonable minds to conclude that the trial court has personal jurisdiction over the defendant. *Id.*; *Buflod* at ¶

10. "In making this determination, a trial court must 'view allegations in the pleadings and the documentary evidence in a light most favorable' to the plaintiff and resolve 'all reasonable competing inferences' in favor of the plaintiff." *Bufflod* at ¶ 10, quoting *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 236 (1994).

{¶ 15} To find that personal jurisdiction exists over a non-resident defendant, a trial court must complete a two-step analysis. First, the trial court must determine whether the defendant's conduct falls within Ohio's long-arm statute, R.C. 2307.382. *Dahlhausen v. Aldred*, 187 Ohio App.3d 536, 2010-Ohio-2172, ¶ 22 (12th Dist.); *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73, 75 (1990). Second, if it does, the trial court must determine whether granting jurisdiction would deprive the defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution. *Dahlhausen* at ¶ 22; *Kentucky Oaks Mall* at 75.

{¶ 16} The applicable portion of Ohio's long-arm statute provides:

A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

\* \* \*

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state \* \* \*.

R.C. 2307.382(A).

{¶ 17} We recognize that the mere fact an injury worsens in Ohio that initially occurred in another state does not permit personal jurisdiction to exist under R.C. 2307.382(A)(4). *Robinson v. Koch Refining Co.*, 10th Dist. No. 98AP900, 1999 WL 394512, \*4. We also acknowledge that "the tort of conversion generally occurs where and when the actual injury takes place and not at the place of the economic consequences of the injury[.]" *State ex rel.*

*Toma v. Corrigan*, 92 Ohio St.3d 589, 593 (2001). *E.g. Cycles, Ltd. v. W.J. Digby, Inc.*, 889 F.2d 612, 619 (5th Cir.1989). However, in some instances, Ohio courts have found jurisdiction to exist in Ohio where economic injury occurs in Ohio. *E.g. Toma v. Toma*, 8th Dist. No.82118, 2003-Ohio-4344 (finding personal jurisdiction to exist when the actions of a joint account holder injured an Ohio resident by depriving the Ohio resident of her funds and depleting the assets of her Ohio estate even though the joint account holder's conduct took place in Oklahoma and funds were located in Florida accounts); *Herbruck v. LaJolla Capital*, 9th Dist. No. 19586, 2000 WL 1420282, \*3 (Sept. 27, 2000) (finding personal jurisdiction to exist when defendant allegedly committed conversion, fraud, and civil conspiracy outside of Ohio, all while knowing that the stock involved was of an Ohio corporation and injury was likely to occur in Ohio). Furthermore, "there *is* a duty to avoid intangible economic loss or losses to others that *do arise* from tangible physical harm to persons and tangible things." (Emphasis sic.) *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 73 Ohio St.3d 609, 615 (1995).

{¶ 18} In analyzing whether J&R and Oeding by virtue of their agent Auto-Owners caused tortious injury in Ohio under R.C. 2307.382(A)(4), we consider the rationale of *Price v. Wheeling Dollar Sav. and Trust*, 9 Ohio App.3d 315 (12th Dist.1983). In *Price*, the complaint alleged that an employee of a West Virginia company, while in West Virginia, spoke maliciously regarding real estate located in West Virginia to prospective purchasers. *Id.* at 318. As a result, the prospective purchasers breached their contract with sellers of the real estate. *Id.* The sellers were residents of Ohio and physically in Ohio when the tortious conduct occurred. *Id.* We found that while the tortious conduct occurred in West Virginia, economic injury occurred in Ohio. *Id.* Additionally, the complaint alleged that the West Virginia corporation was licensed to do business in Ohio. *Id.* We found that the West Virginia corporation having a license to conduct business in Ohio was evidence that it actually

conducted business in Ohio. *Id.*

{¶ 19} In this case, the initial accident occurred in Indiana between Oeding and Fraley that caused physical injury to Fraley's employee driver and physical injury to Fraley's tractor-trailer. Auto-Owners had a duty to prevent intangible economic loss arising out of the physical injury to Fraley's driver and physical harm to Fraley's tractor-trailer. Nevertheless, Auto-Owners' affirmative act of placing a hold on Fraley's tractor-trailer allegedly caused economic injury to Fraley, a resident of Ohio who was in Ohio at the time of the hold. This occurred while, according to Fraley's affidavit, Auto-Owners directed correspondence and calls to Fraley and his attorney in Ohio to resolve the claim. Arguably, Auto-Owners knew Fraley was located in Ohio and that its affirmative act would likely cause injury in Ohio. Furthermore, Fraley alleges that Auto-Owners has an insurance license from the Ohio Department of Insurance authorizing it to transact business in this state, supporting the fact that it does conduct business in Ohio. In viewing the complaint and other documentary evidence in Fraley's favor, because injury to Fraley occurred in Ohio and Auto-Owners conducts business in Ohio, Auto-Owners falls under the umbrella of Ohio's long-arm statute. In turn, by virtue of the actions of Auto-Owners, J&R and Oeding are also within the purview of Ohio's long-arm statute.

{¶ 20} In addition to comporting with Ohio's long-arm statute, we must analyze whether granting the trial court jurisdiction would deprive J&R and Oeding due process of law. The Due Process Clause of the Fourteenth Amendment mandates that a court exercise jurisdiction only if the defendant has sufficient minimum contacts with the state so that summoning the party to Ohio would not offend the "traditional notions of fair play and substantial justice." *Internatl. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945); *Goldstein v. Christiansen*, 70 Ohio St.3d at 237; *Natl. City Commercial Capital Corp. v. All About Limousines Corp.*, 12th Dist. No. CA2005-08-226, 2009-Ohio-1159, ¶ 33. The

"constitutional touchstone" is whether the nonresident defendant purposely established contacts in the forum state such that the defendant should reasonably anticipate being haled into court in that state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-475, 105 S.Ct. 2174 (1985); *Natl. City* at ¶ 32.

{¶ 21} Once minimum contacts are established, a court may balance several factors to determine if exercising jurisdiction would offend fair play and substantial justice. *Dobos v. Dobos*, 179 Ohio App.3d 173, 2008-Ohio-5665, ¶ 14 (12th Dist.). These factors include the burden on the defendant, the interest of the forum state in adjudicating the dispute, the plaintiff's interest in convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of several states in furthering substantive social policies. *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d at 77, citing *Burger King* at 477. "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Dobos* at ¶ 14, quoting *Burger King* at 476-477.

{¶ 22} We have previously held that having a license to do business in Ohio is, *per se*, sufficient evidence to conclude that an out-of-state corporation had necessary minimum contacts with Ohio. *Price v. Wheeling Dollar Sav. and Trust*, 9 Ohio App.3d at 319; *contra Speck v. Mut. Serv. Life Ins. Co.*, 65 Ohio App.3d 812 (8th Dist. 1990). In addition, in some instances, minimum contacts can be established regarding the insured solely by the actions of the insurer negotiating on his behalf in the forum state. See *Univ. of S. Alabama v. S. Farm Bur. Cas. Ins. Co.*, S.D.Ala. No. CA 05-00275-C, 2005 WL 1840238 (July 27, 2005).

{¶ 23} Regarding this specific litigation, Fraley alleged that Auto-Owners holds an insurance license from the Ohio Department of Insurance authorizing it to transact business in this state. Furthermore, Fraley contended that Auto-Owners directed correspondence and calls to him and his attorney in Ohio over a period of months. The complaint alleged several

causes of action, including negligence on the part of Oeding resulting in personal injury to Fraley's driver and property damage to Fraley's tractor-trailer, and intangible economic loss. It is undisputed that the claims relating to the personal injury to the employee and physical damage to the tractor-trailer have all been resolved, indicating Auto-Owners negotiated on behalf of J&R and Oeding and for their benefit. Construing these facts in Fraley's favor, we find that J&R and Oeding, by virtue of the actions of Auto-Owners, had sufficient minimum contacts with Ohio to comport with due process.

{¶ 24} Additionally, "traditional notions of fair play and substantial justice" support jurisdiction. Appellees will not be greatly burdened by having to come to Ohio to defend Fraley's suit given the close proximity of the states and the availability of modern transportation and communication. *See Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d at 78 (given a company's extensive operations and choice to place a store in a neighboring state, it was not unreasonable to for the corporation to defend itself in Ohio given the modern means of transportation and communication). Further, Ohio has a significant interest in adjudicating a lawsuit involving one of its residents who alleges he was injured in Ohio as a result of the actions of appellees. Fraley also has an interest in obtaining effective relief in Ohio because he was injured in Ohio. In addition, proceeding in Ohio will arguably further the public policy of R.C. 3929.06 of barring direct actions against insurers without first obtaining a judgment against the insured.

{¶ 25} When viewing the allegations in the complaint and other documentary evidence in Fraley's favor, we find that reasonable minds can conclude that the trial court has personal jurisdiction over J&R and Oeding by virtue of the actions of Auto-Owners. In reaching this determination, we note that the affirmative act of Auto-Owners placing a hold on Fraley's tractor-trailer is imputable to J&R and Oeding because J&R had an opportunity to choose its insurer and Auto-Owners acted on the behalf of J&R and Oeding and for their benefit. Under

the particular facts and circumstances of this case, we find the trial court erred in granting the motion to dismiss. Consequently, Fraley's sole assignment of error is sustained.

{¶ 26} Judgment reversed and cause remanded.

HENDRICKSON, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

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**APPENDIX "B"**

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FILED  
2012 OCT 15 PM 3:02  
MARY L. SWAIN  
BUTLER COUNTY  
CLERK OF COURTS

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

DAVID FRALEY d.b.a. FRALEY  
TRUCKING,

Plaintiff-Appellant,

- vs -

ESTATE OF TIMOTHY J. OEDING  
Deceased, et al.,

Defendants-Appellees.

CASE NO. CA2011-09-180

JUDGMENT ENTRY

FILED BUTLER CO.  
COURT OF APPEALS

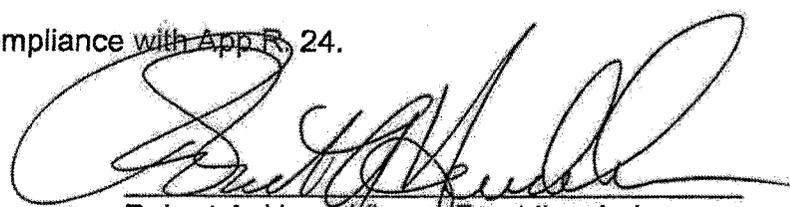
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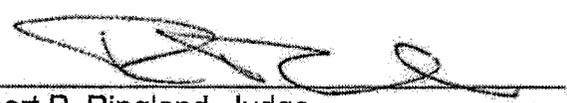
MARY L. SWAIN  
CLERK OF COURTS

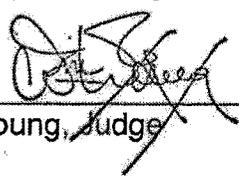
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

  
Robert A. Hendrickson, Presiding Judge

  
Robert P. Ringland, Judge

  
William W. Young, Judge

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.