

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Defendants-Appellants,

-vs-

DAVID FRALEY dba
FRALEY TRUCKING

Plaintiff-Appellee.

* On appeal from the
* Butler County Court of Appeals,
* Twelfth Appellate District
* Court of Appeals
*
* Case No. CA2011-09-0180
*
* Supreme Court Case No. 12-1994
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MEMORANDUM OF APPELLEE DAVID FRALEY dba FRALEY TRUCKING IN
OPPOSITION TO JURISDICTION

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STATEMENT OF APPELLEE'S POSITION AS TO WHETHER A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED, OR WHETHER THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

Oeding was employed by J&R in Indiana. He operated a J&R vehicle in the course of employment while intoxicated, colliding with a tractor-trailer owned by Fraley. The collision occurred in Indiana. The damage was substantial. Oeding died and Fraley's tractor-trailer was destroyed.

Auto Owners insured J&R and Oeding. An Auto Owners adjuster placed a 5-month hold on Fraley's tractor-trailer as part of an investigation. This hold aided Auto Owners' determination of liability.

Fraley's trucking business is located in Butler County, Ohio. Because of Auto Owners' hold, Fraley lost the use of the tractor-trailer for hauling goods. His economic damage for lost contracts approximated \$100,000 during the 5-month hold.

Fraley sued for intangible economic damages in Butler County, Ohio. The trial court dismissed Fraley's claim against J&R and Oeding for want of personal jurisdiction; and it dismissed the claim against Auto Owners because R.C. 3929.06 bars direct actions against insurers.

The Twelfth District reversed. Opinion, ¶ 1.

It imputed Auto Owners' 5-month hold on Fraley's tractor-trailer to J&R and Oeding for personal-jurisdiction purposes. Id. at ¶¶ 9-13.

Given this, it then held that Ohio's long-arm statute conferred jurisdiction because: (i) J&R controlled the decision to insure with Auto Owners; (ii) that Auto Owners' hold caused injuries that arose in Ohio; (iii) that Ohio law imposed

a duty upon Auto Owners to avoid the intangible economic losses that Fraley suffered; (iv) that Auto Owners knew that Fraley's business was located in Ohio when it placed its hold; (v) that it was foreseeable that the hold would cause injuries in Ohio; and (vi) that Auto Owners possessed an Ohio insurance license. Id. at ¶¶ 14-19.

Finally, it held that subjecting J&R and Oeding to jurisdiction in Ohio satisfied the minimum-contacts test. It reasoned that: (i) Auto Owners availed itself of the Ohio marketplace and its laws when it secured an Ohio license; (ii) that it specifically sought and obtained protection under Ohio law when it received immunity from direct suit under R.C. 3929.06; (iii) that Indiana's proximity to Ohio lessened the litigation burdens; and (iv) that Ohio maintained an interest in providing a forum to its citizen, Fraley, to adjudicate his claim. Id. at ¶¶ 20-26.

J&R and Oeding ask this court to take this case. J&R MISJ, *passim*. But it should not.

The law for personal jurisdiction is well settled and fact based. There are two elements and the Twelfth District applied those two elements. Opinion, ¶¶ 14-26. First, Ohio's long-arm statute is applied to the facts. If the long-arm statute is satisfied, the minimum-contacts test is applied to the facts. Neither party disputed these standards. And there is no conflict in Ohio law about the use of these standards for this case or any personal-jurisdiction case.

In addition, well-settled law imputes the acts of an *agent* or *representative* to an out-of-state defendant for purposes of personal jurisdiction. R.C.

2307.382(A), R.C. 2307.381; *Barile v. University of Virginia*, 2 Ohio App.3d 233, 441 N.E.2d 608 (8th Dist. 1981), syllabus; *Trujillo v. Williams*, 465 F.3d 1210, 1222, Fn. 13 (10th Cir. 2006)(collecting cases); Restatement (Third) of Agency, § 5.03 (2006); 3 Am.Jur.2d Agency, § 275.

This is the rub of J&R's argument. It advocates for a small exception to the imputation rule for an insurer's actions investigating a tort claim for its insured in the context of personal jurisdiction. But there is no good reason for this court to do so.

First, the instant facts are rare. How often does an out-of-state defendant's insurer place a long hold on a tractor-trailer, causing intangible economic injury to an Ohio business in Ohio? This court should not waste limited resources on a nonrecurring legal issue.

Second, the Twelfth District's decision is well reasoned. The appellate court began from the undisputed premise that the acts of an agent or representative impute to the out-of-state defendant for personal-jurisdiction purposes. It then observed that this court has twice used agency principles to impute the actions of an insurer to an insured in the litigation context. *Peyko v. Frederick*, 25 Ohio St.3d 164, 167, Fn. 1 (1986); and *Griffey v. Rajan*, 33 Ohio St.3d 75 (1987). *Peyko's* holding that an insurer's bad-faith negotiation during pretrial litigation imputes to the insured under the prejudgment interest statute is roughly analogous with this case. Both involve imputation where the insured is made liable to a third party for an insurer's actions. So it was reasonable to deduce, as the appellate court did, that an insurer operates as an *agent* or

representative, within the meaning of R.C. 2307.381 and .382, when it places a hold on an Ohioans property during an investigation into liability on behalf of a non-resident insured.

But even if the appellate court was wrong, this court restricts its discretionary docket to settling inter-district conflicts and resolving disputes of the highest import. Taking this case would involve error correction only.

Fourth, the General Assembly sets policy. It intentionally used the elastic terms *agent* and *representative* for the imputation portions of the long-arm statutes. R.C. 2307.382(A), R.C. 2307.381. These terms reflect the General Assembly's intent for a broad imputation policy so that Ohio courts are empowered to promote Ohio's laws to the maximum extent. In contrast, no words in these statutes reflect the intent to exempt the imputation of an insurer's acts to its insured for personal-jurisdiction purposes. If J&R is right, and a small exception to the Ohio's broad imputation language is the appropriate policy, it is the General Assembly's province to legislate those changes. This court should not.

Fifth, J&R fails to cite even one case that stands for its stated proposition that, "[t]he conduct of an insurer cannot be imputed to its out-of-state insured for purposes of establishing personal jurisdiction." J&R MISJ, pp. 6. And there are none. This shows up that our case involves unique and nonrecurring facts, and undermines J&R's forecasting of doom for civil defendants if the Twelfth District's decision stands.

Finally, J&R acknowledges that the minimum-contacts test, "**** balance[s] several factors to determine if exercising jurisdiction would offend fair play and substantial justice." J&R MISJ, pp. 10. That the Twelfth District balanced the factors in a manner that disappointed Appellants is not a good reason for this court to take the case. The balancing of factors involves fact-based judging that is case specific. But, again, this court avoids accepting cases for its discretionary docket that turn on how factors are identified, weighed, and applied to unique facts.

ARGUMENT CONTRA TO APPELLANTS' PROPOSITIONS OF LAW

Appellant J&R and Oeding's Proposition of Law No. I:

The conduct of an insurer cannot be imputed to its out-of-state insured for purposes of establishing personal jurisdiction.

J&R is right when it asserts that, "[t]he Twelfth District in this instance found personal jurisdiction against Appellant J&R and the Oeding Estate solely by imputing the actions of their insurer to them." J&R MISJ, pp. 6. But J&R is wrong to ignore that Ohio's long-arm statute explicitly permits that imputation. Thus, R.C. 2307.382(A) states, in pertinent part, that, "[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 following circumstances]." In turn, R.C. 2307.381 states, in pertinent part, that, "[a]s used in sections 2307.381 [2307.38.1] to 2307.385 [2307.38.5], inclusive, of the Revised Code, "person" includes an individual, his executor, administrator, *or other personal representative*, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this state."

In the instant case, the Twelfth District considered whether Auto Owners' acted in the capacity of an agent or representative for J&R and Oeding, within the meaning of R.C. 2307.381 and .382, for purposes of personal jurisdiction. It concluded that the facts permitted that characterization: Auto Owners held Fraley's tractor-trailer in the course of defending a potential claim against J&R and Oeding. And it concluded that the law permitted that characterization: this court has applied agency principles to the insurer/insured relationship in the context of litigation and liability.

In contrast, J&R fails to address the agency and representative language in the long-arm statutes. It fails to supply one case that supports its proposition that, "[t]he conduct of an insurer cannot be imputed to its out-of-state insured for purposes of establishing personal jurisdiction." J&R MISJ, pp. 6. And it fails to argue why the facts cannot support the Twelfth's characterization of agency action by Auto Owners on behalf of J&R and Oeding.

Appellant J & R and Oeding's Proposition of Law No. II:

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 Twelfth District determined facts that showed Auto Owners' minimum contacts with Ohio—all of which were imputed to J&R and Oeding for personal-jurisdiction purposes. Auto Owners possessed an Ohio insurance license. It placed its hold on Fraley's tractor-trailer in Indiana knowing it could injure Fraley's business in Ohio. And it corresponded with Fraley's lawyer in Ohio to

resolve the claim—succeeding in resolving the sub-claims regarding injury to Fraley's driver and property damage to the tractor-trailer. Opinion, at ¶¶ 14-19

The Twelfth District also identified factors that showed that Ohio's exercise of jurisdiction over J&R and Oeding comported with fair play and substantial justice. It observed that J&R controlled the decision to contract with Auto Owners for insurance protection. It noted that J&R's litigation burden was mollified by the close proximity between Indiana and Ohio, and by the availability of modern transportation and communication. And it noted that Ohio's public policy—as reflected by muscular long-arm statute and R.C. 3929.06 (the bar against direct actions against insurers)—would be advanced by Ohio jurisdiction in this case, allowing Fraley to recover from J&R and Oeding for intangible economic injury occurring in Ohio. *Id.* at ¶¶ 20-25.

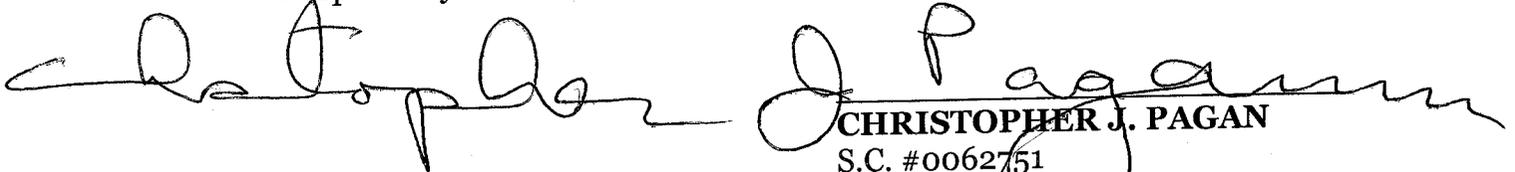
In contrast, J&R fails to argue that these factors are themselves invalid. It fails to supply a case involving these or very similar factors that were weighed and applied to arrive at the opposite conclusion. Instead, it merely offers different factors, assigns them more weight, and ignores the dispositive factors used by the Twelfth District. And it fails to offer any solution to the problem that arises if J&R's legal position herein is accepted. That is, if J&R and Oeding are beyond the jurisdiction of Ohio courts, and if R.C. 3929.06 bars a direct action against Auto Owners for placing a 5-month hold on Fraley's tractor-trailer, what remedy is available? Oeding drove while intoxicated and the Auto Owners' adjuster seized the tractor-trailer for 5-months. Real harm occurred and the Twelfth District was right to permit Fraley's suit to proceed.

CONCLUSION

For these reasons, Fraley requests that this court refuse to accept jurisdiction in this case.

To the court, the instant Memorandum In Opposition is

Respectfully submitted,

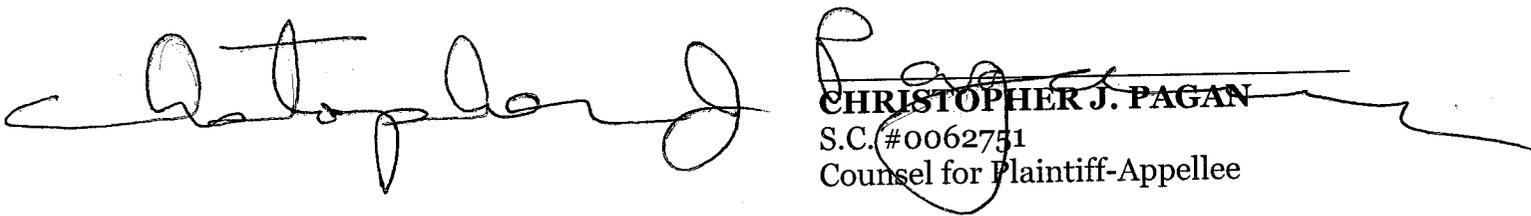


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been mailed to James P. Nolan, II, Smith, Rolfes & Skaydahl, Co., LPA, 600 Vine Street, Suite 2600, Cincinnati, OH 45202 on this 27 day of December, 2012.



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