

**Supreme Court Case No. 12-1994
In the Supreme Court of Ohio**

**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

**On Discretionary Appeal from the Court of Appeals, Twelfth Appellate District, Butler
County, Ohio Case No. CA 2011-09-0180**

**BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS, IN
SUPPORT OF DEFENDANT-APPELLANTS, ESTATE OF TIMOTHY J. OEDING, J & R
EQUIPMENT AND STORING AND AUTO-OWNERS INSURANCE COMPANY**

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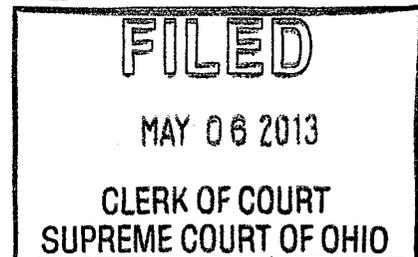
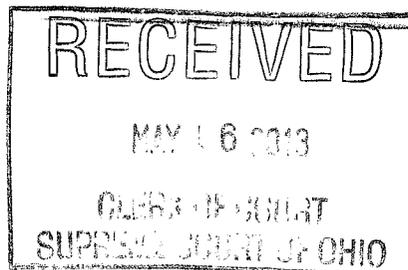


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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil trial Attorneys (“OACTA”) is an organization of more than 500 attorneys, corporate executives, and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. The legal question presented in this case directly concerns OACTA and its members because of the widespread Ohio litigation that may result if this Court was to adopt the decision of the Twelfth District Court of Appeals and hold that an insured is subject to personal jurisdiction in any state where his insurer has permission to do business and a claimant resides, regardless of his own minimum contacts with the state.

Personal jurisdiction is governed by both state statute and federal Constitutional protections as a matter of due process. The analysis and conclusions of the Twelfth District undermine both branches of this due process by enormously expanding personal jurisdiction in cases where insurance is present, in effect, making personal jurisdiction over people or businesses with insurance cases obsolete. In particular, the determination of the Court of Appeals in this matter allows personal jurisdiction over a person or business with insurance conceivably in any state in the country.

In their merit brief, Appellants, Estate of Timothy Oeding, J & R Equipment and Storing and Auto-Owners Insurance Company correctly argue that neither the requirements of the Ohio Long-Arm Statute, Ohio Revised Code §2307.382, nor the United States Constitution’s Fourteenth Amendment due process protections have been met with regard to Oeding or J & R. The expansive conclusion reached by the Twelfth District should be reversed.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

OACTA incorporates by reference the Statement of the Case and Statement of Facts set forth in the Defendants-Appellants, Estate of Timothy J. Oeding, J&R Equipment and Storage and Auto-Owners Insurance Company's Merit Brief.

LAW AND ARGUMENT

Proposition of Law: The Conduct of an Insurer Cannot Be Imputed to its Out-Of-State Insured for Purposes of Establishing Personal Jurisdiction Over the Insured in Ohio.

- A. Plaintiff-Appellee failed to demonstrate that personal jurisdiction over the Estate of Timothy J. Oeding or J & R Equipment and Storing Existed Under Either the Ohio Long-Arm Statute or Constitutional Parameters

The evaluation of personal jurisdiction is a two-step process. First, it must be determined whether the requirements of Ohio's "Long-Arm Statute," Ohio Revised Code §2307.382(A)(1) and Ohio Rule of Civil Procedure 4.3 are met. Second, it must be determined whether the exercise of personal jurisdiction over the defendant comports with due process under the Fourteenth Amendment of the United States Constitution. *U.S. Sprint Communications v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 183-184 (1994); *Goldstein v. Christiansen*, 70 Ohio St.3d 232, n. 1, 1994-Ohio-229.

The Due Process Clause protects an individual's liberty interest in not being subject to binding judgments of a forum with which he has established no meaningful "contacts, ties or relations." *Burger King, Corp. v. Rudzewicz*, 471 U.S. 462, 471-472 (1985), citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). The Court in *Burger King* further noted that by requiring "fair warning" to a defendant that his conduct may subject him to jurisdiction in a forum state, the predictability requirement of due process is satisfied and "fair warning" is met

when an individual “purposefully directed” his activities at residents of the forum state. *Id.* at p. 472.

The United States Supreme Court requires the non-resident create a “*substantial connection*” with the forum state to be subject to personal jurisdiction. *Burger King*, *supra*, at p. 475, (emphasis added). The relevant constitutional touchstone is whether the non-resident defendant purposefully established “minimum contacts” in the forum state, here, Ohio. Purposeful establishment requires contact significant enough the defendant has created continuing obligations between himself and the resident(s) of the forum state. *Burger King*, *supra*, at pp.478-479. Generally, communications by mail, email, or fax alone do not establish minimum contacts with a forum state sufficient to support personal jurisdiction in Ohio. *Epic Communications v. ANS Connect*, No. 90364, 2008-Ohio-3548, ¶6 (8th Dist.) The United States Supreme Court has also held that the mere foreseeability of injury in another state is also insufficient to establish personal jurisdiction. *Burger King*, *supra*, at p. 474, citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

In the present matter, the Twelfth District Court of Appeals reversed the trial court’s determination and found that personal jurisdiction existed over the Estate of Timothy J. Oeding and J & R Equipment and Storing by imputing the post-accident conduct of their insurer. No other court in Ohio, the federal district courts in Ohio, the Sixth Circuit, or, as far as counsel can tell, in any jurisdiction in the country has ever reached such an expansive conclusion. While there have been specific situations in which the actions of an insurer, as an agent, have been imputed to an insured, as a principal, none have involved the basic existence of personal jurisdiction.

The approach used by the Twelfth District Court of Appeals is an improper analysis of personal jurisdiction. Moreover, as discussed in Section B, it effectively destroys the requirement of personal jurisdiction in any case where insurance exists.

Under the Ohio Long-Arm Statute, a court is directed to look to the actions of the individual defendant to determine whether there is a basis for personal jurisdiction. Under Ohio Rev. Code §2307.382(A)(1)-(9), conduct that could support personal jurisdiction includes:

- Transacting business in this state;
- Contracting to provide services or goods in this state;
- Causing tortious injury by an act or omission in this state;
- Causing tortious injury in this state by an act or omission outside the 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;
- Causing injury to any person in this state by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume or be affected by such goods in this state, provided that he also 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;
- Causing tortious injury to any person in this state by any act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
- Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity;
- Having an interest in, using or possessing real property in this state;
- Contracting to insure any person, property or risk located within this state at the time of contracting.

To establish personal jurisdiction in this circumstance, the court must look to the underlying incident or conduct and not subsequent actions to determine if minimum contacts exist.¹ See, *Burger King*, supra, at p. 475, 476. The tortious conduct at issue in this case is the

¹ There is no contention that the court had general personal jurisdiction over Oeding and J & R (borne of regular and systematic conduct availing the defendant of jurisdiction for any matter within the forum); rather, the arguments

negligence of Timothy J. Oeding in causing an automobile accident in Spencer County, Indiana. It was that accident that caused the personal injury and property damage claims that were settled before suit. That same accident that damaged the Appellee's commercial truck is also the basis for the "intangible economic loss" claims in the complaint based on Appellee's loss of use of that truck.

Without the Spencer County, Indiana automobile accident, there would be no loss of use claim. Therefore, it is the Spencer County, Indiana accident and the surrounding facts existing at the time of that accident that must be examined to determine whether the long-arm statute, as well as due process, is met. *Brunner*, supra, at pp. 465-466, (concluding, based on *Goldstein*, supra, that the Ohio Long-Arm Statute required a proximate cause relationship between the plaintiff's tort claim and the defendant's conduct in Ohio and that this was a "tighter fit" than that required by due process); *Burger King*, supra, at p. 476 (plaintiff's claims must arise from or relate to defendant's forum-related activity); *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1075 (9th Cir. 2000), (plaintiff must show that he would not have suffered injury "but for" the defendant's forum-related conduct); Cf., *Queen City Terminals, Inc. v. Gen. Am. Trans. Corp.*, 73 Ohio St.3d 609, 1995-Ohio- 285 (to recover indirect economic damages in a negligence action, plaintiff must prove they arose from tangible physical injury to persons or property). In this situation, it is plain that the statute is not met.

The facts for the personal jurisdiction analysis are undisputed:

- The automobile accident occurred in Indiana.

below and the decision of the court of appeals appear to be based on a specific personal jurisdiction premise (i.e., related to this specific accident and claimed injuries). See, *Brunner v. Hampson*, 441 F.3d 457, 463 (6th Cir. 2006).

- Defendants Oeding and J & R were residents of Indiana and did not regularly or “persistently” transact business in Ohio, contract in Ohio or “derive substantial revenue” from this state.
- No business of the insureds in Ohio gave rise to the economic loss claim.
- There is no allegation the underlying accident was intentional or purposeful to an Ohio resident.
- There was no contact between Oeding and J & R and the State of Ohio outside this accident in Indiana with an Ohio resident.
- Moreover, Auto-Owners insured Oeding and J & R under a contract of insurance issued in Indiana. Following the accident at issue, the claim was handled by an Auto-Owners representative in Indiana.
- Neither Oeding nor J & R had any contact with Appellee or performed any act within Ohio following the accident.

Notwithstanding these undisputed facts, and in direct contradiction to the United States Supreme Court’s instruction that “jurisdiction is proper, however, only where the contacts proximately result from actions by defendant *himself* that create a “substantial connection” with the forum state, *Burger King*, supra, at p. 475, citing, *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957), emphasis in original, the Twelfth District Court of Appeals exercised personal jurisdiction over Oeding and J & R by imputing post-accident acts of their insurance company to them.

In *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), the United States Supreme Court also expressly recognized that the “unilateral activity of those who claim some relationship with a non-resident defendant *cannot* satisfy the requirement of contact with the forum state.” (Emphasis added). This is precisely what the Twelfth District’s decision does – uses the unilateral activity of the defendants’ insurer to satisfy the required contacts with Ohio. As noted, this approach has been specifically rejected.

Moreover, there is no basis to impute Auto-Owners' conduct to the insureds in this case. While under Ohio law Auto-Owners may under some limited circumstances be considered an "agent" of its insureds for actions occurring after the accident, it is not and was not an "agent" whose acts caused or contributed to the tort to establish personal jurisdiction over Oeding or J & R. In other words, the acts of Auto-Owners did not cause the accident that gave rise to the alleged injuries. Auto-Owners does not participate in its insureds' business. Auto-Owners may have communicated with plaintiff Fraley pursuant to its contractual duties to J & R and Oeding after this accident, but that did not cause or create the negligence that is the object of consideration for personal jurisdiction analysis.² A "back door" approach considering conduct occurring only after the underlying tort and after the accrual of any injury or damage at issue cannot serve to demonstrate or support personal jurisdiction over the insureds for the initial accident. This would be like creating jurisdiction over one construction contractor who caused damage to a piece of property located out of state (over whom personal jurisdiction does not otherwise exist) simply because another contractor for whom personal jurisdiction does exist performs the repair work. This is illogical and untenable.

Properly focusing on the *insureds'* actions, there were no minimum contacts alleged or established with Ohio. Likewise, regardless whether Auto-Owners had "minimum contacts" with Ohio by virtue of being authorized to do business in Ohio as well as in Indiana and communicating with a plaintiff in Ohio pursuant to its contractual duties under an Indiana insurance policy, those contacts cannot establish personal jurisdiction *over the insureds* for their negligence occurring in another state.

² The underlying claims directly against Auto-Owners asserted in the complaint were dismissed by the trial court and were not appealed by plaintiff. Those claims and any jurisdictional issues related thereto are consequently not at issue.

Appellants properly noted that there have been no cases that have imputed the conduct of an insurer to an individual insured for purposes of establishing personal jurisdiction. The Ohio cases in which an insurer's conduct has been imputed to an insured defendant have arisen in situations only where jurisdiction was already established or was at least uncontested and involved situations over which the insurer contractually reserved the right to control the process of litigation on behalf of the insured (filing an answer, negotiations during litigation). In contrast, the insureds in this case did not waive or delegate the choice or establishment of personal jurisdiction, contractually or otherwise, to their insurer, Auto-Owners. Based on the facts relevant to personal jurisdiction, it is indisputable that no such personal jurisdiction existed under either the Ohio Long-Arm Statute, §2307.382, or the Fourteenth Amendment. The court of appeals' decision should therefore be reversed.

B. The Twelfth District Court of Appeals' Expansion of Personal Jurisdiction to Insureds on the Basis that their Insurer is Subject to Jurisdiction Should Be Rejected as Destroying any Requirement for Personal Jurisdiction in Insured Losses.

Besides improperly imputing an insurer's action to find personal jurisdiction against its insureds, the result of the Twelfth District Court of Appeals' decision in this case is to effectively eliminate the due process protection of requiring personal jurisdiction in cases to which an insurance policy applies. A significant majority of automobile liability insurance companies do business in multiple states, and a large number do business nationwide. Applying the Twelfth District's broad rationale, in any insured situation arising outside of Ohio but involving an Ohio claimant, if the defendant's insurer is authorized to do business in Ohio and communicates, in any way with the claimant, personal jurisdiction would exist in Ohio for a subsequent suit against the insured in contravention of the "notions of fair play and substantial justice". See, *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000).

The conclusion reached by the Twelfth District is expansive. This would not only expose innumerable insured persons and entities to suits in a jurisdiction probably inconvenient and certainly never contemplated but would also open the floodgates of litigation in Ohio and encourage forum shopping in contravention of both state statute and Constitutional due process protections.

Under the analysis used by the Twelfth District, the following scenario could be routine. Person A, a retired schoolteacher, is a lifelong resident of Alaska. She has never left the state. She is involved in a car accident in Alaska with Person B, a tourist from Ohio. Person A obtained an insurance policy through her local agent in Alaska with a company authorized to do business in Alaska that is also authorized to do business in Ohio. The insurer thereafter begins negotiations by phone and email with Person B and is able to resolve the property damage claim but not the bodily injury claim arising from the same tort. Person B files suit in Ohio against Person A for the bodily injury. Applying the reasoning of the Court of Appeals, Person A is subject to personal jurisdiction in Ohio and must defend here notwithstanding the complete absence of statutory or constitutional minimum contacts with the State.

Of course the opposite would also be true. Should Person B, an Ohio resident, become involved in a similar accident in Ohio, this time with Person C, a resident of New Mexico, as long as Person B's insurer also be authorized to do business in New Mexico, Person B must appear there to defend any suit filed by Person C in his own home state for claims not resolved with the insurer.

It is not realistic to expect that when a person seeks insurance that he is going to make his choice based upon the states in which the potential insurer is authorized to do business.³ Cf., *McGee v. Int'l Life Ins. Co.*, supra, at p. 273, (“These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant state in order to hold it legally accountable”). However, this is what the Court of Appeals’ decision requires if an insured wants to avoid being hauled into court in remote jurisdictions with which it had no other contact.

The argument has been raised that due process is met because the defendants reside in the state “next door” to Ohio and not across country. However, there is no such parameter established in the analysis or conclusion reached by the Court of Appeals. Regardless of geography, the expansive approach espoused inconveniences individual insureds and potentially puts their personal assets at risk in remote jurisdictions where they never “purposely availed” themselves or even contemplated in violation of both state statute and federal Constitutional due process guarantees.⁴

No other court in the country has applied such an analysis to personal jurisdiction. In fact, at least a few have looked at analogous jurisdictional situations and held the opposite. In *Kirchen v. Orth*, 390 F.Supp. 313 (E.D. Wis. 1975), also an automobile accident case where the plaintiff sought to establish personal jurisdiction over the insured defendant based upon the subsequent conduct of the defendant’s automobile liability insurer, the Eastern District Court of Wisconsin, sitting in diversity, rejected that contention. The court expressly found that where an

³ This approach as well suggests additional administrative regulatory overhead that would develop – such as mandatory disclosures by insurers of those states in which they are authorized to do business, updated yearly since it might change, to be signed and acknowledged when an insured purchases and subsequently renews a policy.

⁴ The geographic argument also opens the door to the question “how far is too far?” In this case, it was Spencer County in Indiana, which is located in the southern part of Indiana – what if the accident had occurred in Gary, Indiana near Chicago, which is much further away? Would personal jurisdiction still exist in Butler County, Ohio? Determinations like these would lead to unnecessary and much expanded application of judicial resources.

insured has no right to control the manner, means or place of settlement negotiation that an insurer has exclusively reserved to itself, and the principal purpose of the insurer's negotiations is to protect its own contingent liability, there is no agency relationship between the insurer and insured and there can be no imputation of the insurer's acts for purposes of personal jurisdiction over the insured. *Kirchen* at p. 317. More particularly, the court recognized that where an insured has no control over the place or manner of settlement negotiations to subject him to personal jurisdiction and potential excess personal liability wherever the insurer chooses to conduct negotiations would offend due process. *Id.* This is consistent with the interpretation of due process requiring minimum contacts by a person who has "willfully associated [himself] with the forum." *Id.*

The analysis in *Kirchen* is instructive here. Oeding and J & R did not at any point "willfully associate [themselves]" with a forum in Ohio. All of their relevant contacts were with Indiana, not Ohio. There is no suggestion they even knew that Auto-Owners was authorized to do business in Ohio. Further, negotiations by Auto-Owners by phone, email or letter originating in Indiana after the underlying accident are nothing that Oeding or J & R directed or chose, because this conduct was contractually reserved to Auto-Owners. Further, as recognized by the court in *Kirchen*, an insurer's control of the settlement and litigation process for which it is paying under its policy with the insured is not a gratuitous or benevolent gesture, but a prudent business decision involving the allocation of its own resources. As such, those type of decisions are generally not permitted to the insured.⁵

⁵ Of course, there may be particular policies or types of policies that may alter these rights contractually, but that is not the situation at issue here and, even if it was, there is no differentiation or distinction made by the Twelfth District's decision below between such contractual rights. All insureds are treated identically under its rationale.

As in *Kirchen*, the premise offered to support personal jurisdiction, imputing an insurer's post-accident conduct to its insured is fatally flawed and violates due process. Additionally, this approach does little other than inconvenience insureds, encourage forum shopping and open the floodgates to both litigation and regulatory burdens. The court of appeals' decision in this matter should be reversed.

Also, in *Georgia Insurers Insolvency Pool v. Brewer*, 602 So.2d 1264 (1992), the Florida Supreme Court likewise rejected finding personal jurisdiction in Florida over the Georgia Pool by imputing the conduct of or Florida's jurisdiction over the insolvent insurer member of that pool. The court held that the Pool had insufficient independent contacts with Florida to support personal jurisdiction. The court found that this was not a "pure agent-principal relationship" because the obligations of the Georgia Pool were not co-extensive with the underlying member's obligations, but instead were restricted to specific circumstances. *Id.* at p. 1267. In particular, the court found that it was required to analyze the personal jurisdiction over the Georgia Pool separately and independently from that of the insolvent member, based upon the United Supreme Court's holding in *Hanson v. Denckla*, *supra*, and *Kulko v. Superior Court*, 436 U.S. 84 (1978). *Id.*

More pointedly to the present situation, the Florida Supreme Court in *Brewer* held:

Insurers do not limit their contractual obligations to territorial boundaries. If statutory guarantors are required to litigate in every forum where a covered insurer's risks lie, statutory insurance guaranty funds would be subject to the possibility of claims and suits in numerous jurisdictions. While these funds could raise their assessments to cover the costs of litigating in foreign fora, the expense of obtaining counsel and litigating in other states could be cost-prohibitive and could impede the states' shared social purpose to protect their residents from the insolvency of their insurers. Instead of serving their purpose in providing efficient and effective relief to their state residents, these statutory guarantors would be expending their resources litigating in the courts of other states.

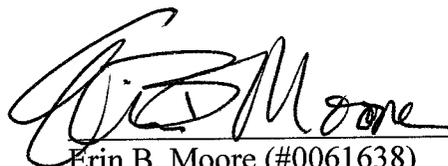
Brewer at p. 1269.

The rationale applied by the Florida Supreme Court quoted above applies as well in this situation. It is well known that insurers do not limit their policies to state territorial boundaries. If the insureds under those policies are forced to litigate in any forum where the insurer may cover a risk, as noted above, they would be subject to the possibility of claims and suits in numerous jurisdictions. This would increase costs and burdens then on *both* the insured and the insurer to the detriment of the liability insurance system and precepts and due process. The expenses, and thus the anticipated costs of liability insurance, would rise to meet the requirement of defending in foreign jurisdictions and individual insureds would also face increased exposure and expense in defending their personal assets from liability in foreign realms. These burdens contravene the precepts of “fair play and substantial justice.”

CONCLUSION

The Court of Appeals’ decision exercising personal jurisdiction established over individual defendants with no contacts to Ohio based upon after the fact conduct of an insurer separately authorized to do business in Ohio was improperly reached and is not soundly based in law or policy. It is a conclusion ripe for abuse and burden on both insurers and their insureds. The Twelfth District Court of Appeals’ decision should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This hereby certifies that all counsel of record have been served by regular United States mail, postage prepaid, and electronic mail this 3rd day of May, 2013.

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