ORIGINAL

Nº 2012-1994

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

REPLY BRIEF OF APPELLANTS

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I. STATEMENT OF FACTS

While Appellee Fraley adopted the majority of facts contained in Appellants' Brief, he referenced an additional issue Appellants will briefly address. Appellee's reference to Mr. Oeding's level of intoxication while driving is both irrelevant and a misstatement of the record. In his Affidavit, Fraley asserted Oeding was under the influence of drugs at the time of the collision. See, Fraley Affidavit, ¶6. The record is void of any evidence Oeding was intoxicated.

II. 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.

As explained more fully below, the Twelfth District's decision is violative of due process limitations of the exercise of personal jurisdiction by an Ohio court over an out-of-state defendant and has significant negative implications if it is affirmed. Outside of his reference to a case which the lower court cited on its own in reaching its decision, Appellee did not cite to a single case in Ohio or elsewhere standing for the proposition that the conduct of an insurer can be imputed to its insured for purposes of establishing personal jurisdiction.

A. Ohio's Long-Arm Statute R.C. § 2307.382 and Civil Rule 4.3(A) do not operate to support the lower court's finding of personal jurisdiction over the out-of-state defendants in this matter.

Application of the relevant provisions of the long-arm statute and civil rules to the facts of this case would not apply to establish personal jurisdiction against J&R and the Oeding Estate. Fraley argues the lower court correctly imputed the actions of their insurer against them to establish personal jurisdiction and claims such imputation is not controversial. He bases that argument on cases involving either unrelated relationships between parent corporations and their alter egos or subsidiaries and cases with contracted consultants acting for foreign defendants who

would not otherwise be subject to the jurisdiction of any court in the United States. See, e.g., *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983); *Magnecomp Corp. v. Athene Co.*, 209 Cal.App.3d 526, 257 Cal.Rptr. 278 (1989). The circumstances in those cases are very different than those in this case where there is no parent/alter ego/subsidiary relationship and J&R and the Oeding Estate are Indiana residents, the underlying tort took place in Indiana, and Fraley could assert his claim in Indiana.

B. An insurer is not an agent for its out-of-state insureds for purposes of establishing personal jurisdiction over them where the insureds do not have sufficient contacts of their own with Ohio.

The Court of Appeals determined the long-arm statute permits personal jurisdiction over the out-of-state insured, J&R, based on its insurer's actions, which caused tortious injury in Ohio. Fraley argues that Auto-Owners was properly designated the agent of its insured for purposes of establishing personal jurisdiction, and that its actions, as the insurer, would further impute to J&R to satisfy the requirement of regularly conducting or soliciting business in Ohio.

1. Auto-Owners' actions should not be imputed to its insured for purposes of establishing personal jurisdiction.

Appellee argues the lower court properly relied on three cases as supportive of its finding to impute the insurer's actions to the insureds. *See Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122 (1987); *Peyko v. Frederick*, 25 Ohio St.3d 164, 495 N.E.2d 918 (1986); and *Marks v. Allstate Insurance Company*, 153 Ohio App.3d 378, 2003-Ohio-4043, 794 N.E.2d 129. However, as explained more fully in Appellants' merit brief, none of those cases are persuasive as to the issue of paramount concern here, the constitutional implications of the court exercising jurisdiction over out-of-state residents based solely on the actions of their insurer. In each of the cases the lower court referenced and Appellee cites, the defendants were already properly before

the court and subject to the court's jurisdiction. Thus, the imputation of the insurer's actions to them had no constitutional implications. In fact, not one of those cases provided a situation where the court's imputation of the insurer's actions to the insured was done for purposes of establishing personal jurisdiction over an out-of-state insured.

Fraley argues the litigation conduct of the insurer can and should be imputed to its insured to account for injury done in the insured's name, but that argument is counterintuitive. Fraley Brief, p.4. First, in this instance, the investigative hold on the Fraley vehicle took place outside of litigation, before Fraley filed suit against Appellants. Moreover, Fraley initially filed suit against Auto-Owners directly due to the placement of the investigative hold. Fraley now conveniently argues that act was done in the insured's name and, as such, he should have the ability to raise the claim because the insurer is immune from the direct action. However, he only makes this argument after he conceded in briefing before the lower court that he could assert no cause of action directly against Auto-Owners. The record is well established all other claims related to this vehicular accident were resolved such that this claim related to the investigative hold is the only one remaining. Fraley's attempt to reposition his argument that the hold was placed on J&R's account is misplaced and should not be well-taken as he chose to file suit in Ohio, leading to the jurisdictional issues he now faces.

Despite Fraley's assertions to the contrary, it is not logical to impute the actions of an insurer to an insured to establish personal jurisdiction, an issue of constitutional importance, simply because an insurer's actions may be imputed to its insured for much less significant purposes. To do so, as the lower court has by its decision, signifies a giant leap that violates due process principles. If this imputation to satisfy personal jurisdiction was such a logical next step,

as Appellee proposes, one must question why historically this Court and the highest courts in other states across the country have never done so.

Fraley attempts to distinguish two cases cited by Appellants as supportive of his argument. Fraley argues *Kirchen v. Orth*, 390 F. Supp. 313 (E.D. Wis. 1975) supports the lower court's decision to impute the actions of Auto-Owners to its insureds for purposes of personal jurisdiction. However, the case supports Appellants' position in a number of ways. First, the *Kirchen* court refused to impute the actions of the insurer to its insured for purposes of establishing personal jurisdiction, even where the insurer conducted settlement activity within the forum state. By contrast, Fraley does not allege the telephone calls Auto-Owners made for settlement purposes were placed in Ohio, but that they were made to him and his counsel in Ohio. Second, despite Appelle's claims to the contrary, the relevant provisions of the Wisconsin long-arm statute did include reference to conduct of others "on behalf of the defendant." Wis. Stat. § 262.05. As such, the Wisconsin court did consider whether the actions of the insurer on behalf of the defendant would satisfy the long arm statute, and found they did not. Third, the *Kirchen* court's decision to find personal jurisdiction over the insurer itself is irrelevant to the issue before this court, as Fraley himself conceded he has no direct action against Auto-Owners. Finally, Fraley misconstrues this Court's prior statement as to the similar argument of insureds' lack of control over their insurer's settlement activity. The argument was not rejected outright as Fraley claims but, instead, the Court resisted the temptation to let the determination of whether the insurer's neglect is imputable "rest upon a mechanical labeling of the relationship between an insurer and its insured." *Griffey, supra*, at 78. Interestingly, this mechanical labeling is precisely

what Fraley would like the Court to rely upon in deciding Auto-Owners was an agent for its insureds and, therefore, its actions are imputable to establish personal jurisdiction over them.

Appellee also cites the court's decision in *Georgia Insurers Insolvency Pool v. Brewer*, 602 So.2d 1264 (1992), as somehow supportive of his argument despite the holding clearly supporting Appellants' position that personal jurisdiction should not extend to out of state defendants based solely on the conduct of another. The *Brewer* decision, in finding the pool did not have sufficient contacts to be subject to the Florida court's jurisdiction, supports the general proposition that a party must have minimum contacts with a state to satisfy due process requirements. Fraley's argument as to the language in Footnote 6 of the *Brewer* decision does not consider the minimum contacts by a principal necessary for due process to be satisfied, even where an agency relationship is present.

2. The long arm statute is not satisfied because J&R does not regularly conduct business in Ohio.

Fraley asserts Appellants' argument that the insured itself must have been the one to regularly conduct or solicit business in Ohio to satisfy the second prong of the relevant provision of the long arm statute is merely a parsing of words. The statute states in relevant part:

> *(A) 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) (Emphasis added).

The statute specifically states a court may exercise personal jurisdiction over a person who acts to cause injury, directly or by an agent. Such jurisdiction is only possible where "he" (the person) regularly does or solicits business in this state. The legislature included reference to the agent in discussing the act causing injury, but only addressed the person when setting forth the requirement that the person regularly do or solicit business in Ohio. Applying that plain language of the statute to the facts of this matter, it is apparent the legislature's intent was to allow the acts of an agent, arguably Auto-Owners here, that caused an injury to satisfy the first prong of the provision as to J&R. But, before jurisdiction over the person, J&R, may be exercised, the legislature requires a finding that J&R did or solicited business in Ohio. There is not a single iota of evidence in the record to support a finding J&R did or solicited any type of business in Ohio.

To support his argument, Fraley relies on holdings in two cases with a key legal distinction to the present matter: the non-resident defendants in those cases are international entities that would not otherwise be subject to the jurisdiction of any court in the country if the actions of the agent were not imputed to them. *See Aircraft Guaranty Co. v. Strato-Lift, Inc.*, 74 F.Supp. 468, 473 (E.D. Pa. 1997); *Grand Entertainment Group., Ltd., v. Star Media Sales, Inc.*, 988 F.2d 476, 483 (3rd Cir. 1993). In those instances, the consideration of the notions of fair play and substantial justice is entirely different from the consideration here, where Fraley, who the record establishes at the very least conducts business in Indiana to the extent his truck was operating there on the date of the accident, could have filed suit in Indiana against the defendants, all of whom he served at their Indiana addresses.

C. Auto-Owners would not be a personal representative of Appellants within the meaning of the Long-Arm Statute or Civil Rule 4.3(A) for purposes of satisfying due process requirements for personal jurisdiction.

In his brief, Fraley argues the legislative intent behind the long-arm statute is for maximum reach over non-resident defendants but he fails to reference the constitutional due process limitations on that reach. He argues Auto-Owners qualified as a personal representative of the Appellants and contends the legislature's intent would be satisfied with a finding that personal jurisdiction exists over the out-of-state Appellants due to Auto-Owners' actions as their personal representative. It is long-standing principle in Ohio courts 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). It does not logically follow that an insurer having a contractual relationship with its insured would then somehow qualify as that insured's personal representative.

Appellee is correct in that the term "other personal representative" is not defined in the Code but he provided the improper standard for the term's definition. Where a term is undefined, it will be given its "plain and ordinary" meaning. *May v. Lubinski*, 9th Dist. No. 26528, 2013-Ohio-2173, ¶13. Whether or not the reading of a phrase can be considered plain and ordinary depends upon the utility of the phrase in the rest of jurisprudence. One is to look to the meaning of the term on its face. See *United States v. Turner*, 465 F.3d 667, 671 (6th Cir.2006) and *Chrysler Corp. v. Comm'r of Internal Revenue*, 436 F.3d 644, 654 (6th Cir.2006). But, "[i]t is a fundamental canon of statutory construction that the words of a statute must be

read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury,* 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989).

Appellants could not locate a single case to support Appellee's proposition that an insurer acted as its insured's personal representative for purposes of satisfying due process requirements in establishing personal jurisdiction over the out-of-state insured. Notably, Appellee himself did not reference any such case to support his argument. Instead, applying the "plain and ordinary" meaning of the term "other personal representative" to the facts of this matter, it is clear Auto-Owners did not serve as Appellants' personal representative.

A "personal representative" is most commonly present in instances of wrongful death actions. In such cases, a personal representative is an individual who serves as a nominal representative of the deceased for the exclusive benefit of the decedent's survivors. R.C. § 2125.02. Such claims are brought in the name of the personal representative on behalf of the other individual. *Wood v. Shepard* (1988), 38 Ohio St.3d 86, 89, 526 N.E.2d 1089, 1092.

Auto-Owners does not satisfy that plain and ordinary application of the term "personal representative" here. In this case, Fraley brought an action directly against Auto-Owners, making Auto-Owners a party to the action. It does not stand in place of J&R or the Oeding Estate for this litigation. By contract, the Oeding Estate is acting as the "personal representative" for Mr. Oeding, who died as a result of the underlying automobile accident.

Despite his attempts to create an additional avenue of personal jurisdiction over the out-of-state Appellants via this argument, application of the plain and ordinary meaning of the term "other personal representative" to this matter establishes Auto-Owners was not acting as, and would not be considered, the personal representative of the Appellants. Appellee's argument is

simply an attempt to create a basis for personal jurisdiction over these out-of-state defendants where there is none.

D. Even under agency principles, Auto-Owners' contacts with Plaintiff in Ohio to settle claims on behalf of J&R and the Oeding Estate are insufficient to satisfy due process requirements for personal jurisdiction over them.

Assuming for the sake of argument Auto-Owners could be an "agent" for its insureds J&R and the Oeding Estate, Auto-Owners still did not have sufficient conduct "in this state" on behalf of J&R and the Oeding Estate to satisfy the provision of the long arm statute requiring J&R and the Oeding Estate regularly did or solicited business in Ohio. Because Auto-Owners' conduct on behalf of its insureds as an "agent" are insufficient to satisfy the applicable provisions of the long arm statute, it would not be satisfied to allow for a finding of personal jurisdiction over the insureds.

In his brief, Fraley mischaracterizes Appellants' argument referencing Auto-Owners' actions in Ohio specific to J&R and the Oeding Estate as indicative of a misstatement of the record. In this argument, Appellants were not attempting to identify the entirety of Auto-Owners' actions in Ohio. Rather, they focused on those actions taken in Ohio on behalf of J&R and the Oeding Estate, which the record establishes included only making telephone calls and sending correspondence to Fraley and his attorney in Ohio. Appellants focus on those specific actions because, applying an agency theory, only those specific actions conducted by Auto-Owners on behalf of J&R, presumably the principal, would be relevant for purposes of establishing whether those actions, even if imputed to J&R, would satisfy the long arm statute. Whether or not Auto-Owners is licensed to conduct business in Ohio or writes other business in Ohio is irrelevant to the issue of whether its actions **on behalf of** J&R and the Oeding Estate, as

their "agent" as Appellee alleges, establish the insureds have sufficient contacts to satisfy the long arm statute and due process requirements for personal jurisdiction.

When considered together, Auto-Owners' actions in Ohio are insufficient to satisfy constitutional protections of due process. In fact, Fraley himself sued the Indiana entity of Auto-Owners, not one in Ohio. Further, Fraley never alleged Auto-Owners' calls were made within Ohio. Rather, Auto-Owners made calls to Ohio but the act of placing the calls was done outside of Ohio. The only actions of Auto-Owners on behalf of J&R and the Oeding Estate were the phone calls and written correspondence that are insufficient to establish sufficient contacts with Ohio on their behalf. Courts in this state have previously determined those exact types of contact are insufficient to confer personal jurisdiction over out-of-state defendants. *See Friedman v. Speiser, Krause & Madole, P.C.*, 56 Ohio App.3d 11 (Ohio App. 8 Dist. 1988); *Rabiroads v. DFK Leasing Company, Inc.*, 68 F. Supp.2d 850 (N.D. Ohio 1999).

Appellee relies on the decision in *University of South Alabama v. Mississippi Farm Bureau*, E.D. Alabama No. CA05-00257-C, 2005 Lexus 48084 (27 July 2005), which the lower court referenced in its opinion, to support his argument that the lower court was correct to impute Auto-Owners' actions to its insureds. First, this holding is from outside of this jurisdiction and does not apply Ohio law or consider the applicable provisions of Ohio's long arm statute. More importantly, the facts of the case are distinguishable from those present here and support the proposition of law asserted by Appellants. In *Alabama*, the court considered a personal jurisdiction issue where there was a direct cause of action against the insurer for its own tortious actions in failing to consider a hospital lien in settling a claim for injuries occurring in an accident in a different state. In so doing, the insurer acted contrary to an Alabama statute which

addressed consideration of liens and had significant contact with the forum state on behalf of its insured. By contract, no such statute as to Auto-Owners' settlement activity is present here. In fact, as Fraley himself conceded, he has no direct cause of action against Auto-Owners for its conduct. Fraley's only remedy for his claim is an action against J&R and Oeding Estate, whereas the hospital plaintiff in *Alabama* already had the ability to maintain a direct action against the insurer. In addition, as established above, Auto-Owners did not conduct significant conduct on behalf of its insureds, making only telephone calls and sending correspondence to Ohio.

Based on the factual differences, the factors the *Alabama* court considered in deciding to impute the insurer's actions to the insured were entirely different than those present here. Fraley argues Appellants' statement that his injuries are unrelated to Auto-Owners' settlement activity is false and that his injuries are precisely a result of Auto-Owners' settlement activity in placing a hold on his truck. However, the record establishes the investigative hold predated the filing of Fraley's lawsuit in this matter, as Fraley includes in his Complaint his claim for alleged economic loss of use of the truck. See Complaint, ¶8-9. The settlement of the majority of Fraley's claims occurred after the hold took place. Whereas in *Alabama* the plaintiff's alleged injury came as a direct result of the settlement activity in the forum state, here Fraley's only remaining claim relates to the investigative hold on his truck which he admits occurred outside of Ohio. Fraley Brief, p. 1. Based on those significant factual differences, the *Alabama* court's decision to impute the insurer's actions to its insured is not persuasive of Fraley's argument that the lower court was correct in doing so here, under an entirely different fact pattern.

E. The fair play factors to be considered under the due process requirements of the Fourteenth Amendment to the United States Constitution are not satisfied and personal jurisdiction over these out of state Defendants is a violation of those constitutionally protected rights.

Fraley argues that Appellants failed to cite and apply the fair play factors that are considered when evaluating a due process claim against personal jurisdiction. An application of those factors is clearly supportive of the position of Appellants that the lower court's action in imputing the insurer's conduct against Appellants for purposes of establishing personal jurisdiction is in violation of traditional notions of fair play and substantive justice.

After 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 – 5655, ¶14 (12th Dist. 2008). These factors include the burden on the defendant and the forum state's interest in adjudicating the dispute, as well as the plaintiff's interest in obtaining convenient and effective relief. *Columbus Showcase Co. v. CEE Contracting, Inc.* (1992), 75 Ohio App.3d 559, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

Applying those factors here, each weighs in favor of Appellants' position. While the burden on J&R and Oeding Estate might not be overly extensive in defending these claims in a neighboring state, this Court must consider the effect of the lower court's decision and its implications of financial and time burdens for out-of-state defendants from states hundreds of miles away from Ohio in being subjected to the jurisdiction of an Ohio court solely because of the actions of their insurers. In this instance, Ohio's interest in adjudicating the issue is not strong, especially when considering that Ohio does not even provide a direct cause of action

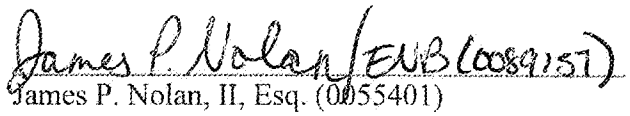
against the insurer for the actions from which Fraley alleges injury. Fraley, who operated a trucking business and made deliveries to Indiana, clearly transacted business in Indiana and could have sued the defendants in Indiana. Fraley asks this Court to accommodate his desire to pursue his claims in Ohio based on an "agency" theory in such a manner that greatly expands upon the out-of-state insureds' constitutionally protected rights to due process.

Despite Fraley's attempts to minimize the impact of the lower court's decision, its broad reach cannot be overstated. If the decision stands, citizens of states from across the country who have never even been to Ohio would be subject to the jurisdiction of Ohio courts based on the minimal actions of their insurers and in violation of their constitutionally protected rights to due process.

III. CONCLUSION

Based on the foregoing, Appellants J&R, Oeding Estate and Auto-Owners respectfully request the Court to reverse the decision of the Twelfth District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 21st day of June, 2013, via U.S. mail, postage prepaid, upon the following:

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