ORIGINAL

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

REPLY 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 CO.

Erin B. Moore (0061638)
Green & Green, Lawyers
109 N. Main Street, Suite 800
Dayton, Ohio 45402
Tel. 937.224.3333
Fax 937.224.4311
E-Mail ebmoore@green-law.com
Counsel for Amicus Curiae,
Ohio Association of Civil Trial Attorneys

Christopher J. Pagan (0062751)
Repper, Pagan, Cook, Ltd.
1501 First Ave
Middletown, Ohio 45044
Tel. 513.424.1823
Fax 513.424.3135
E-Mail cpagan@cinci.rr.com
Counsel for Plaintiff-Appellee
David Fraley dba Fraley Trucking

James P. Nolan, II (055401)
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
Counsel for Defendants-Appellants
Estate of Timothy J. Oeding, J & R Equipment
And Storing and Auto-Owners Insurance Company

FILED
JUN 21 2013
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUN 21 2013
CLERK OF COURT
SUPREME COURT OF OHIO

GREEN & GREEN LAWYERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

LAW AND ARGUMENT.....1

The Conduct of an Insurer Cannot Be Imputed to its Out-Of-State Insured for Purposes of Establishing Personal Jurisdiction

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.....1

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 Obviating any Requirement for Personal Jurisdiction in Insured Losses.....7

CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

TABLE OF AUTHORITIES

Cases

Burger King, Corp. v. Rudzewicz, 471 U.S. 462, 471-472 (1985).....2, 3

Calphalon Corp. v. Rowlette, 228 F.3d 718, 721 (6th Cir. 2000).....7

Georgia Insurers Insolvency Pool v. Brewer, 602 So.2d 1264 (1992).....9

Hanson v. Denckla, 357 U.S. 235, 253 (1958).....4

Kirchen v. Orth, 390 F.Supp. 313 (E.D. Wis. 1975).....8-9

Statutes and Rules

Ohio Revised Code §2307.382..... 2, 4, 8

LAW AND ARGUMENT

The Ohio Association of Civil Trial Attorneys, in continued support of Appellants, the Estate of Timothy J. Oeding, J & R Equipment and Storing and Auto-Owners Insurance Company, submits this brief reply to point out critical errors in Appellee, David Fraley dba Fraley Trucking's ("Fraley") arguments and analysis in this case. First, Fraley fails to recognize that the jurisdictional analysis is foundational and separate from any analysis of the tort claim pled. Second, Fraley avoids any discussion of the paramount constitutional and public policy issues raised by his position and the lower court's decision.

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

Fraley's arguments to this court put the "cart before the horse" in terms of analyzing jurisdiction. Fraley argues that because Auto-Owners acted as Oeding's agent regarding certain claim resolution actions ***separate from and subsequent to the underlying tort***, and because Auto-Owners may be subject to jurisdiction in Ohio, then Oeding and J & R must also be subject to jurisdiction in Ohio for claims arising out of the underlying accident. This argument wholly ignores the fact that (a) Auto-Owners was not involved in the underlying tort, a vehicle accident occurring in Indiana between Oeding, an Indiana resident working for J & R, an Indiana company, and Fraley's truck; (b) that the ***vehicle accident*** and the parties involved in the vehicle accident are who and what are the subject of a jurisdictional analysis, and (c) that the direct claims attempted against Auto-Owners were properly dismissed against Auto-Owners by the trial court and are not presently on appeal. In short, this matter does not present a question of whether there may be jurisdiction over Auto-Owners should there have been viable claims against Auto-

Owners, but whether there is jurisdiction over Oeding and J & R for the accident proximately causing Fraley's alleged damages.

The Constitutional exercise of personal jurisdiction must be based upon the facts presented by the ***underlying tort*** and the ***parties involved in the underlying tort***, not what an insurance company does (or does not do) later. See, *Burger King*, supra, at p. 475, 476. The tortious conduct giving rise to this case is the negligence of Oeding, an Indiana resident employed by an Indiana company, J & R, 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. That accident and those parties are the foundational facts for the analysis of personal jurisdiction under governing Constitutional precepts.

Fraley does not make any argument that Oeding or J & R themselves are subject to personal jurisdiction in Ohio under either the Ohio Long-Arm Statute, Ohio Revised Code §2307.382(A)(1), or the Fourteenth Amendment of the United States Constitution. The only argument that Fraley makes is that actions of Oeding and J & R's insurer, Auto-Owners, in attempting to resolve the accident-related claims after-the-fact somehow created jurisdiction over them because, arguably Auto-Owners might be subject to jurisdiction in Ohio under appropriate circumstances.[1] Fraley spends his entire brief arguing that the few actions of a company not involved in the tort at issue in the complaint should create jurisdiction over the non-resident parties actually involved.

[1] Notably, the Auto-Owners office involved in this matter is also located in Indiana. Auto-Owners itself is a Michigan corporation, a fact of public record of which this court may take judicial notice. Auto-Owners is permitted by the State of Ohio to do business in Ohio, but this matter involves neither an Ohio accident nor an Ohio insured.

As previously noted, the Due Process Clause of the Fourteenth Amendment 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). Appropriate connection with the form state must arise from situations where there is ***fair warning*** to a defendant that his conduct may subject him to jurisdiction in a forum state, which is generated by the defendant's ***purposefully directing*** activities at residents of the forum state and that the connection must be a ***substantial connection*** in order to subject an individual to personal jurisdiction. *Burger King,* supra, at p. 472, 475, (emphasis added). This has been summed up as requiring "minimum contacts" ***by the defendant(s)*** with the forum state. Plaintiff's claims must also ***arise from or relate to a defendant's forum-related activity***. *Burger King*, supra at p. 476.

Minimum contacts do not exist between ***Oeding*** and ***J & R*** and Ohio and Fraley does not argue that they do. Fraley skips that inconvenient truth, ignoring Constitutional mandates for due process. The Ohio cases relied upon by Fraley are based upon situations ***where there is no dispute that jurisdiction properly existed over the individual defendants*** before the issue of an insurer's agency arose. Fraley cites *Peyko v. Fredrick*, 25 Ohio St.3d 164, 495 N.E.2d 918 (1986), *Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122 (1987) and *Marks v. Allstate Ins. Co.*, 153 Ohio App.3d 378, 2003-Ohio-4043, 794 N.E. 2d 129 as Ohio law in support of his argument, however, in both those cases the underlying tort occurred in Ohio and the defendants involved in the torts resided in Ohio, in addition to their insurers being authorized to do business in Ohio. There was no issue of personal jurisdiction over the defendants at stake. These cases are inapposite to the present matter.

The conclusion of the Twelfth District Court of Appeals and the arguments of Fraley present improper analyses of personal jurisdiction. Such a position as taken by the Court of Appeals and by Fraley effectively destroys the requirement of personal jurisdiction in any case where insurance exists.

As previously noted, in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), the United States Supreme Court 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. Since this approach has been specifically rejected, it cannot serve as a viable basis for personal jurisdiction in this case. Fraley fails to address the United States Supreme Court's holding in *Hanson*.

Fraley cites *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154 (5th Cir. 1983), in support of its agency arguments regarding jurisdiction. However, reliance on *Hargrave* is misplaced. First, aside from being an out of state, out of federal circuit case, it addresses an entirely different relationship – that of a parent company and a subsidiary – with regard to whether the parent may be subjected to jurisdiction in a forum where only the subsidiary resides. This case, in contrast, involves the contractual relationship of an insurer and insured where all the tort-related activities and the insureds were located in Indiana, not Ohio.

Second, the court in *Hargrave* recognized that so long as the parent and subsidiary maintained separate and distinct corporate existences and the parent did not control "internal business operations and affairs of the subsidiary in order to fuse the two for jurisdictional

purposes" then no jurisdiction would lie over the parent in the foreign forum. Id. at 1160. Here, again in contrast, there is no dispute and no allegation that Auto-Owners did ***not*** control the internal business and affairs of J & R, its insured. Auto-Owners and J & R are merely parties to a contract of insurance, not closely related businesses.

Third, the court in *Hargrave* did not find the parent in that case to be an alter ego and did not find personal jurisdiction over the foreign parent company. Thus, Fraley's citation to *Hargrave* is inapposite and does not support the imputation of Auto-Owners' post-accident claims resolution communications or conduct to Oeding or J & R for purposes of a jurisdictional analysis.

Fraley's reliance on *Magnecomp Corp. v. Athene Co.*, 209 Cal.App.3d 526, 257 Cal.Rptr. 278, (1989), is equally misplaced. The situation in *Magnecomp* is, once again, distinguishable in the first instance because it does not involve an insurer-insured relationship. Second, it is distinguishable from the present situation because in *Magnecomp*, the acts of the agent ***constituted*** the tort on which jurisdiction was based – not subsequent acts of an insurer.[2] The case before the court in *Magnecomp* involved the theft of trade secrets by the agent, who maintained a business address, business cards and title as an active consultant for the foreign corporation who obtained the trade secrets within the scope of his agency. The agent then sold the stolen trade secrets to the foreign company. The tort in that case was the theft of the trade secrets. The court found jurisdiction existed over the foreign company because it had jurisdiction over the tortfeasor, the agent/consultant who committed the underlying tort.

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[2] The same is true of the situations presented in the other out-of-state, out-of-circuit cases cited by Fraley: *Aircraft Guaranty Co. v. Strato-Lift, Inc.*, 974 F.Supp. 468 (E.D. Pa. 1997) (breach of contract that was the subject of the complaint directly involved the agent of foreign buyer and buyer had assigned its rights to agent); *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476 (3rd Cir. 1993), (breach of contract with Pennsylvania resident by foreign company represented by California agent was the subject of the complaint).

Here, the tort on which jurisdiction is based is the underlying vehicle accident that gave rise to the damages sought by Fraley. Distinguishable from *Magnecomp*, supra, the court did not have personal jurisdiction over the tortfeasor(s), Oeding and/or J & R, who were Indiana residents, acting in Indiana, only. Moreover, this is not a situation like *Magnecomp* where the foreign corporation was in another country, which effectively insulated it from direct action by plaintiffs in that case. Instead, here, Oeding and J & R would properly be subject to jurisdiction for the underlying accident and proximately resulting damages ***in Indiana***, just not in Ohio.

There is no basis to impute Auto-Owners' conduct to the insureds in this case for purposes of jurisdictional analysis as Fraley argues and the Twelfth District did. 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***. 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. Neither J & R nor Oeding controlled the conduct of Auto-Owners' investigation or communications after this accident, which were rights reserved by contract to Auto-Owners. While Fraley may not have been satisfied with Auto-Owners' communications or investigation, Auto-Owners did not cause the underlying accident which was the proximate cause of his alleged damages. 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 Oeding and J & R for the initial accident.

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.

Fraley wholly fails to address the sweeping constitutional impairment of due process that would result from destroying the requirement for personal jurisdiction in situations where liability insurance applies or the enormous burden the Court of Appeals' rule would impose on insurers and courts as well as insured defendants. Ignoring the undue and irrational burden does not mean it does not or would not exist, however.

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. 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 same would be true in reverse as well. Neither Fraley nor the Twelfth District Court of Appeals' decision acknowledges this direct and proximate effect.

To endorse the conclusion reached by the Twelfth District would expose innumerable insured persons and entities to suits in inconvenient jurisdictions never contemplated and would open the floodgates of litigation in Ohio and encourage forum shopping in contravention of both

state statute and Constitutional due process protections. This cannot be the end this Court desires or supports.

As previously noted, it is unrealistic to expect a person seeking insurance to make his choice based upon the states in which the potential insurer is authorized to do business. 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. If this approach was adopted, in addition to the forum shopping problem, the inconvenient forum problem and the unanticipated forum problem, an administrative and regulatory burden would also develop. In order to permit a person seeking insurance to make an informed choice, regulations would have to be developed and enforced requiring appropriate disclosures of the jurisdictions in which insurers were headquartered, incorporated, and authorized to do business of any sort. This data and disclosure would have to be routinely updated as these factors are commonly in flux as companies merge, close, or buy others in the insurance business. Relatedly, any and all affiliated companies and businesses would also need to be regularly disclosed and those disclosures updated in the event that those entities might provide a different forum into which an insured could be haled for suit related to an insured claim. This is, frankly, untenable.

Fraley's attempt to distinguish *Kirchen v. Orth*, 390 F.Supp. 313 (E.D. Wis. 1975), previously cited, fails. The analysis applied in *Kirchen* is precisely the analysis applicable to this situation. *Kirchen* 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 court properly rejected that contention and found that where an 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 same factors presented in *Kirchen* exist in this case and lead to the same logical conclusion – that no personal jurisdiction existed over Oeding and Fraley in this case. Fraley, as with his other arguments, avoids discussion of the jurisdictional analysis and attempts to deflect the argument to his dissatisfaction with the claim handling subsequent to the tort at issue. This approach is backwards and unsupported by the law and particularly Due Process. Additionally, this approach does little other than inconvenience insureds, encourage forum shopping and open the floodgates to both litigation and regulatory burdens.

It is well known that insurers do not limit their policies to state territorial boundaries. See, *Georgia Insurers Insolvency Pool v. Brewer*, 602 So.2d 1264 (1992). Although also attempting to distinguish this case previously cited by both Appellants and OACTA, Fraley ignores this primary thrust of the court's decision in *Brewer*, quoted in OACTA's previous brief at p. 12. It is exactly the burdens and problems identified in *Brewer* that are posed by the Twelfth District's decision in this case. If the insureds are forced to litigate in any forum where the insurer may cover a risk, they would be subject to the possibility of claims and suits in potentially every jurisdiction in the country, depending on their insurer's scope of business. This

would increase costs and burdens then on *both* the insured and the insurer to the detriment of the liability insurance system as well as violate Constitutionally-guaranteed Due Process. The expenses, and thus the anticipated costs of liability insurance, would necessarily have to 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 Twelfth District Court of Appeals' decision exercising personal jurisdiction 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 improper and is not soundly based in law or policy. It is a conclusion ripe for abuse and burden on both insurers and their insureds as well as the judicial system. The Twelfth District Court of Appeals' decision should be reversed.

Respectfully submitted,

Erin B. Moore (#0061638)
Counsel for Amicus Curiae
Ohio Association of Civil Trial Attorneys

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 20th day of June, 2013.

Erin B. Moore