[Cite as *Fraley v. Estate of Oeding*, 2012-Ohio-4770.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

DAVID FRALEY d.b.a. FRALEY TRUCKING,	:	
	:	CASE NO. CA2011-09-180
Plaintiff-Appellant,	:	O P I N I O N
- vs -	:	10/15/2012
ESTATE OF TIMOTHY J. OEDING, Deceased, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-11-4658

Repper, Pagan, Cook, Ltd., Christopher J. Pagan, 1501 First Avenue, Middletown, Ohio 45044, for plaintiff-appellant

Smith, Rolfes & Skavdahl Company, LPA, James P. Nolan II, 600 Vine Street, Suite 2600, Cincinnati, Ohio 45202, for defendants-appellees, Estate of Timothy J. Oeding, J&R Equip. & Storing, and Auto Owners Ins.

RINGLAND, J.

{¶ 1} Plaintiff-appellant, David Fraley d.b.a. Fraley Trucking ("Fraley"), appeals from a decision of the Butler County Court of Common Pleas dismissing his action against defendants-appellees, the Estate of Timothy J. Oeding ("Oeding"), J&R Equipment and Storing ("J&R"), and Auto-Owners Insurance Company ("Auto-Owners"), for lack of personal jurisdiction. For the reasons outlined below, we reverse the trial court.

{¶ 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).[1] 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

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 tortfeaser 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 tortfeaser 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." *Buflod* 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.'" *Dobo*s 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.