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ORIGINAL

No. 2009-0321

In the Supreme Court of Ohio

ELEVATORS MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

&

NAMIC INSURANCE COMPANY,

Intervenor-Appellant,

v.

J. PATRICK O'FLAHERTY'S, INC, et al.,

Defendants-Appellees.

DISCRETIONARY APPEAL FROM THE SIXTH APPELLATE DISTRICT,
SANDUSKY COUNTY, APP. № S-08-006

REPLY BRIEF OF APPELLANT NAMIC INSURANCE COMPANY

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REBUTTAL ARGUMENT

Appellee Richard Heyman was convicted of arson and insurance fraud for "torching" his company's financially distressed restaurant. He was sentenced to one year in prison for his crimes. Nevertheless, he is now suing his restaurant's insurance company seeking coverage and "bad faith" damages for the very fire he was convicted of setting from the same insurance company he was convicted of defrauding.

Appellees (the Heymans and O'Flaherty's, Inc.) argue that Evid. R. 410 and Crim. R. 11 prohibit admission of Richard Heyman's convictions for arson and insurance fraud as a defense to their claims because he pled "no contest" rather than "guilty." Evid. R. 410 and Crim. R. 11 actually state that a "plea of no contest" is inadmissable "against the defendant." These rules should not be construed to mean that a "***conviction***" based on a plea of "no contest" is inadmissible against the convicted criminal when he assumes the role of ***plaintiff*** seeking to profit from his crimes.

The Elevators Mutual policy excludes coverage for damages resulting from "criminal acts." Richard Heyman's convictions for arson and insurance fraud are certainly relevant and admissible evidence that the fire damage at issue resulted from criminal acts. Indeed, these convictions bar coverage as a matter of law. *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St. 3d 108, 115.

Finally, Ohio public policy supports Appellants' position that a convicted arsonist should not be allowed to profit from his crime. The Sixth District Court of Appeals, after affirming Heyman's criminal convictions four years ago, has now allowed him to obtain a verdict for the recovery of damages caused by the fire. To allow a convicted arsonist to benefit from the fire he set, in the very same court that sent him to prison for the arson (and insurance fraud), "would create an inconsistency which would cause disrespect for our courts and legal processes." *Mineo v. Eureka Sec. Fire & Marine Ins. Co.* (1956), 182 Pa. Super. 75, 85; accord, *Gearing v. Nationwide Ins. Co.*(1996), 76

Ohio St. 3d 34, 38. As a matter of public policy, Appellees should be estopped from pursuing such claims in disregard of the final judgment of conviction. *State v. Perry* (1967), 10 Ohio St. 2d 175. Indeed, Appellees' argument, taken to its logical conclusion, could actually be used to prevent Elevators Mutual from introducing evidence of Heyman's arson and insurance fraud as reasonable justification of its continued refusal to honor their claims for coverage.

Appellants Elevators Mutual and NAMIC submit that Evid. R. 410 and Crim. R. 11 prohibit only the use of a plea of "no contest" ***against*** the defendant in a subsequent civil suit. The United States Sixth Circuit Court of Appeals correctly interpreted the corresponding federal rule of evidence as follows:

> Rule 410 was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil liability. We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the [other party].

Walker v. Schaeffer (C.A. 6, 1988), 854 F. 2d 138, 143.

A. APPELLEES' LENGTHY RECITATION OF UNSUPPORTED FACTS IS IRRELEVANT.

Appellees' statement of facts is largely irrelevant and unsupported by evidence in the record. For instance, at page 4 of their brief, Appellees claim that "the prosecutor recognized the total weakness of his case and give him [Richard Heyman] a plea bargain which one could hardly turn down." This assertion is not supported by anything in the record. And if the prosecutor's case was so weak, then why did Richard Heyman agree to a plea which landed him in prison? Appellees' 19 page statement of facts is replete with such baseless assertions. But they are irrelevant. As addressed next, the only relevant facts are: 1) Richard Heyman's criminal convictions for arson and insurance fraud; and 2) Elevators Mutual's policy conditions and exclusions prohibiting coverage for such criminal acts.

B. EVID.R. 410 AND CRIM.R. 11 DO NOT BAR ADMISSION OF EVIDENCE OF CRIMINAL CONVICTIONS FOR ARSON AND INSURANCE FRAUD BASED ON A PLEA OF NO CONTEST WHERE: 1) THE CONVICTED ARSONIST IS SEEKING TO RECOVER DAMAGES FOR THE FIRE HE SET; AND 2) THE INSURANCE POLICY SPECIFICALLY MAKES THE ARSONIST'S CONVICTIONS RELEVANT BY BARRING COVERAGE FOR DAMAGES RESULTING FROM"CRIMINAL ACTS" AND FOR MISREPRESENTATIONS CONCERNING A CLAIM.

Appellees assert that "appellant insurers have taken snippets from out-of-state cases to create an argument which would totally change the long-standing rule of law in Ohio." (Appellees Brief at 34.)[1] Quite the contrary, it is the Appellees who are attempting to change long-standing Ohio law by using "snippets" concerning pleas of nolo contendere even though Ohio law does not recognize such a plea. Appellees equate a plea of nolo contendere with a plea of no contest under Ohio law. But they are not the same. The United States Supreme Court set forth the history and meaning of a plea of nolo contendere in *N.C. v. Alford* (1970), 400 U.S. 25, 36, fn. 8:

> Throughout its history, that is, the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed. Rule Crim. Proc. 11 preserves this distinction in its requirement that a court cannot accept a guilty plea "unless it is satisfied that there is a factual basis for the plea"; ***there is no similar requirement for pleas of nolo contendere, since it was thought desirable to permit defendants to plead nolo without making any inquiry into their actual guilt.*** See Notes of Advisory Committee to Rule 11.

(Emphasis added.) Under Ohio law, however, a plea of "no contest" is "an admission of the truth of the facts alleged in the indictment, information, or complaint * * *." Crim. R. 11(B)(2). And under Ohio law a "defendant who pleads no contest has a substantive right to be acquitted where the

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[1] Appellees claim that Appellant NAMIC's quotation of *Olsen v. Correiro* (C.A. 1, 1999), 189 F.3d 52, 63-4, misleadingly omits a key sentence. (Appellees' Brief at 34.) But Appellant devoted over a full page of its Merit Brief (pp. 19-20) to a lengthy quote from *Olsen* in which the Court held a conviction resulting from a nolo contendere plea is admissible where "used to show nothing more than the fact of a valid sentence and conviction." *Olsen*, 189 F.3d at 61. Here, just as in *Olsen*, the Elevators Mutual policy gives the fact of conviction independent significance by excluding damages resulting from the "criminal act" of an insured.

State's explanation of the facts and circumstances fails to establish all of the elements of the offense." *State v. Mazzone*, Montgomery App. No. 18780, 2001-Ohio-1391. Thus, it is Appellees' "snippets" which are irrelevant. A plea of nolo contendere does not admit the facts alleged in the indictment but a plea of no contest under Ohio law does.[2]

A no contest plea under Ohio law is more similar to a guilty plea or a conviction after trial than a nolo contendere plea under the general common law.[3] This Court's holding in *State v. Mapes* (1985), 19 Ohio St.3d 108, 111, is in line with the substantive effect of a no contest plea under Ohio law. As this Court held in *Mapes*: "It is clear that Crim.R. 11 and Evid.R. 410 prohibit the use of 'a plea of no contest,' not a conviction pursuant to a no contest plea" because that conviction is a separate substantive determination under Ohio law based on the criminal defendant's admission of the facts alleged in the indictment. Accord, *Steinke v. Allstate Ins. Co.* (1993), 86 Ohio App. 3d 798,

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[2] See, e.g., *Olsen v. Correiro* (C.A. 1, 1999) , 189 F.3d 52, 60 ("in most jurisdictions, including Massachusetts, a nolo plea is not a factual admission that the pleader committed a crime. Rather, it is a statement of unwillingness to contest the government's charges and an acceptance of the punishment that would be meted out to a guilty person."); *Federal Deposit Ins. Corp. v. Cloonan* (1948), 165 Kan. 68, 91 ("Technically, a plea of nolo contendere does not admit the allegations of the charge, but merely says that defendant does not choose to defend.")

[3] Appellees accuse Appellant NAMIC of relying on cases which analyze the "preclusive effect of a criminal conviction following, not a no contest plea, but a jury trial." (Appellees' Brief at 35.) The cases Appellees question were cited for their analysis of issues beyond the basis of the defendant's conviction such as public policy, the majority rule nationwide, or the absence of valid distinction between a guilty plea and a nolo contendere plea. *Mineo v. Eureka Sec. Fire & Marine Ins. Co.* (1956), 182 Pa. Super. 75, 85 ("This case does not present a question which in our opinion can properly be disposed of by the application of some technical rule of evidence * * *. It is a question which turns upon the principle of estoppel. It is a matter of public policy. It is a matter of recognizing a judgment of a court."); *Sokoloff v. Saxbe* (C.A. 2, 1974), 501 F.2d 571, 574-575 ("There is no valid distinction between a judgment of conviction based on a plea of 'nolo contendere' and such judgment entered after a plea of 'guilty.'"); *Morin v. Aetna Casualty & Sur. Co.* (R.I. 1984), 478 A.2d 964, 966 ("A majority of jurisdictions will not exclude criminal judgments from evidence in a civil suit where the party's motive in bringing the civil suit is to benefit from his criminal act.").

802; *Owner Operators Indep. Drivers Risk Retention Group v. Stafford*, Third Dist. No. 9-07-46, 2008-Ohio-1347; *Reynolds v. Ohio State Bd. of Examiners of Nursing Home Adm'rs*, Franklin App. No. 03AP-127, 2003-Ohio-4958, ¶13-16; *Jaros v. Ohio St. Bd. of Emergency Med. Serv.*, Lucas App. No. L-01-1422, 2002-Ohio-2363. Thus, where a conviction based on a no contest plea has independent legal significance, the conviction is admissible. See, e.g., *Steinke* at 802.

Appellees admit that the Elevators Mutual policy does contain a "'criminal acts exclusion.'" (Appellees' Brief at 39-40.) They accordingly also admit that the Court of Appeals erred in stating that:

> We take no position on whether an insurer and an insured may contract to make a prior conviction ***relevant*** in a subsequent action on the contract. ***In this insurance contract, no such provision appears.***

(Emphasis added.) *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc.*, Sandusky App. No. S-08-006, 2008-Ohio-6946, ¶33, Appx. at A 16. Rather, Appellees claim that the Elevators Mutual policy contains no "language addressing the issue of the admissibility of a conviction following a no contest plea." (Appellees' Brief at 40.) But in *State v. Mapes* (1985), 19 Ohio St.3d 108, 111, this Court expressly held that Crim.R. 11(B)(2) and Evid.R. 410 "do not prohibit the admission of a conviction entered upon [a plea of no contest] when such conviction is made relevant by statute." This Court recognized in *Mapes* that a conviction based on a no contest plea is admissible when given by statute independent legal significance from the underlying plea. Similarly, by excluding coverage for "criminal acts," the Elevators Mutual policy contractually made Richard Heyman's criminal convictions independently significant, and thus admissible, on the issue of coverage. Accord, *Steinke* at 801-2 ("It is clear that Crim.R. 11 and Evid.R. 410 prohibit the use of 'a plea of no contest,' not a *conviction* pursuant to a no contest plea."); *Allstate Insurance Co. v. Simansky* (1998), 45 Conn. Supp. 623, 628 (allowing even a nolo contendere plea to serve as evidence of the

commission of a crime in civil matters that involve "the enforcement of a contractual provision in an insurance policy."); *Allstate Ins. Co. v. Schmitt* (1990), 238 N.J. Super. 619, 633 ("A judgment of conviction is conclusive evidence of the insured's guilt. * * * Although a conviction may or may not be conclusive evidence of the underlying facts, it is to be accorded preclusive effect with respect to the insured's commission of the crime."); *Century-National Ins. Co. v. Glenn* (2001), 86 Cal. App. 4th 1392, 1397-98 ("The subject [policy] exclusion bars coverage for bodily injury which is the 'foreseeable result' of a 'criminal act' of the insured.* * * [Therefore, the insured's] nolo contendere plea has the same effect as a guilty plea for purposes of this action."). This Court should recognize that bedrock principle of American jurisprudence.

C. EVID.R. 410 AND CRIM.R. 11 DO NOT PROHIBIT THE ADMISSION OF EVIDENCE OF CONVICTIONS FOR ARSON AND INSURANCE FRAUD WHEN RAISED DEFENSIVELY AGAINST CLAIMS BROUGHT BY THE CONVICTED CRIMINAL SEEKING INSURANCE COVERAGE FOR DAMAGES RESULTING FROM HIS CRIMINAL ACTS BECAUSE SUCH COVERAGE IS NOT PERMITTED BY OHIO PUBLIC POLICY.

No one in this case is arguing that a no contest plea should be admissible to prove a criminal defendant's civil liability. However, a criminal conviction resulting from such plea is admissible when the convicted criminal seeks to impose liability for his criminal acts on another. That is why both Evid.R. 410 and Crim.R. 11 state that a "plea of no contest" may not be used "***against*** the defendant" in any subsequent civil proceeding. (Emphasis added.) If those rules applied to admissibility generally, then they would simply state that the plea is "not admissible" or "not admissible for any purpose." These rules were never intended to prohibit the use of a conviction ***against*** the convicted arsonist when seeking coverage as a ***plaintiff***[4] for the damages caused by his

[4] "[A] pleading is judged, not by its title or form alone, but essentially by the subject-matter it contains. If the title is not descriptive of the subject-matter, it is the latter that determines the character of the pleading. Substance prevails over form." *Wagner v. Long* (1937), 133 Ohio St. 41, 47, overruled on other grounds, *Klein v. Bendix-Westinghouse Automotive Air Break Co.* (1968), 13

own arson and insurance fraud.

The hypothetical proffered by Appellees in support of their argument is nonsensical. Appellees' argument is as follows: 1) One person recklessly drives his car into a tree; 2) twenty minutes later, an intoxicated driver veers off the road and recklessly causes his vehicle to slam into the first vehicle; 3) both drivers plead no contest to traffic violations arising from the accidents; and 4) the first driver sues the second driver. Appellees claim that the insurers would contend the first person's conviction for reckless operation is admissible, but that the second person's convictions for driving under the influence and reckless operation are not admissible, and such a result is not "fair." (Appellees' Brief at 25-26.) But the first person's conviction would be irrelevant and therefore inadmissable under Evid.R. 402 . . . unless he were trying to sue the innocent tree. Moreover, the first person's plea would be inadmissable in a suit by the "tree"[5] (the landowner) ***against*** the first person for damages under Evid.R. 410. Appellees' hypothetical shows that even after considerable thought and deliberation they can conceive of no unfair result from Appellants' interpretation of Evid.R. 410 and Crim.R. 11.

A more apt hypothetical is suggested by the very facts of this case. If an adjoining landowner sued Richard Heyman for setting the fire, then Richard Heyman's convictions would not be admissible ***against*** him in that action. But when Richard Heyman is suing for coverage and bad faith damages caused by his arson, his convictions for arson and insurance fraud are not being used to impose liability on Richard Heyman and are admissible. Appellees would have this Court hold that

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Ohio St.2d 85.

[5] *Fisher v. Lowe* (1983), 122 Mich. App. 418, 419 (affirming the entry of summary judgement in favor of the defendant and noting that "We thought that we would never see A suit to compensate a tree.").

even though the arsonist admitted all the facts in the indictment[6] and was then criminally convicted based on an independent finding by the Judge, he can still sue to recover damages for the fire he set. See Crim.R. 11(B)(2). Worse, Appellees are apparently asserting that an insured's conviction following a no contest plea is not even admissible to establish that the insurer had "reasonable justification" for denying the claim. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552, 555. That is the antithesis of Ohio's public policy as enunciated by this Court: "This court has long recognized that Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts." *Gearing v. Nationwide Ins. Co.*(1996), 76 Ohio St. 3d 34, 38. It also "would be a mockery of justice for our legal processes to be used by convicted felons to profit from their crimes. To permit such a result is clearly contrary to the public policy of this state." *Imperial Kosher Catering, Inc. v. Travelers Indem. Co.* (1977), 73 Mich. App. 543, 546.

Appellees claim that public policy and stare decisis mandate the exclusion of a no contest plea in subsequent civil litigation. They claim that their position presents sound public policy because "Appellee, Richard Heyman, has always denied his guilt in this matter." (Appellee Brief at 23.) Richard Heyman did ***not*** deny is guilt. He pled "no contest" which is "an admission of the truth of the facts alleged in the indictment, information, or complaint * * *." Crim. R. 11(B)(2). He was so advised by his own attorney and the Court before making the plea. Now he claims that he "always denied his guilt in this matter." That is simply false.

Appellees next proffer a parade of "horribles." (Appellees' Brief at pp. 20-28.) They claim

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[6] Richard Heyman pled no contest to charges of arson in violation of R.C. 2909.03(A)(2) and insurance fraud in violation of R.C. 2913.47(B)(1). He therefore acknowledged that he knowingly caused a substantial risk of physical harm to property "with ***purpose to defraud***" and that he presented to Elevators Mutual a statement in support of coverage "***knowing*** that the statement" "is ***false or deceptive***" "with ***purpose to defraud*** or knowing that the person is facilitating a fraud[.]" (Emphasis added.) R.C. 2909.03(A)(2); R.C. 2913.47(B)(1).

that the plea of no contest will be rendered "meaningless" and useless. (Id. at 20.) They claim that trial courts will be "overwhelmed" with trials of the "thousands of potential plea deals [which] will evaporate." (Id. at 24-5.) Not true. First, by statute, a plea of no contest to a misdemeanor is not an admission of any fact at issue in the criminal charge. R.C. 2937.07. Second, criminal defendants will still plead no contest sure in their knowledge that it cannot be used against them to establish civil liability. But criminal defendants who intend to sue their victim for damages will be precluded from doing so. That is what the law has always been and should remain.

Appellees further claim they "relied" upon the so-called "long-standing rule" that a criminal defendant may plead no contest and then pursue a civil damages claim against his victim. (Id. at 21.) They claim that Appellants seek to change that rule of law and pull the "proverbial rug" from under the feet of Appellees. (Id. at 22.) Of course, Appellees offer no citations to authority in support of this supposed "long-standing rule" of law. Rather, the only authorities are to the contrary and no one could have (reasonably) relied on the law being as Appellees claim. See, e.g., *Steinke v. Allstate Ins. Co.* (1993), 86 Ohio App. 3d 798, 802; *Walker v. Schaeffer* (C.A. 6, 1988), 854 F. 2d 138, 143.

Finally, Appellees provide a list of reasons why public policy supposedly supports the inadmissability of a no contest plea even when the criminal defendant is suing his victim for damages. Appellees claim that avoidance of "publicity" persuades "politicians" to plead no contest. (Appellees' Brief at 23.) The best "publicity" is an acquittal--a no contest plea to an offense serious enough to generate publicity would still end any political career. Appellees further claim that criminal defendants plead no contest to avoid the "enormous costs" and length of time "waiting for a criminal trial." (Id.) Of course, the Constitutions of the United States and Ohio require that a defendant: 1) be provided a defense at no cost (including an attorney and necessary expert

witnesses); and 2) be brought quickly to trial. Sixth Amendment to the United States Constitution. Appellees also argue that defendants plead no contest and go to prison to "protect" their "health and family reputation" and avoid "emotional turmoil." (Appellees' Brief at 23.) A prison term avoids none of these consequences even if based on a no contest plea. Appellees' arguments are specious.

Richard Heyman pled no contest to arson and insurance fraud and is now suing Elevators Mutual for the very coverage he was ***convicted*** of attempting to fraudulently obtain by arson. His convictions were affirmed on appeal. *State v. Heyman* (Oct. 14, 2005), Sandusky App. No. S-04-016, 2005-Ohio-5565. Richard Heyman's prior convictions are both admissible and binding.

D. RES JUDICATA GENERALLY BARS ANY COLLATERAL CHALLENGE TO A CRIMINAL CONVICTION--EVEN ONE BASED ON A NO CONTEST PLEA. EVID.R. 410 AND CRIM.R. 11 CARVE OUT A NARROW EXCEPTION TO THAT GENERAL RULE WHICH IS ONLY RELEVANT WHEN THE CONVICTION IS BEING USED *AGAINST* THE CONVICT TO ESTABLISH CIVIL LIABILITY.

Appellees cite to several cases on pages 27 through 33 of their Merit Brief for the proposition that the "Sixth District Court of Appeals Correctly Applied *Mapes*." The cases they cite, however, ***never mention*** this Court's holding in *State v. Mapes* (1985), 19 Ohio St.3d 108. Rather, these cases appear to be addressed to the application of res judicata. But none of them support Appellees' argument that res judicata does not apply here.[7] *Young v. Gorski*, Lucas App. No. L-03-1243, 2004-Ohio-1325, ¶12 (holding that a Bureau of Workers Compensation administrative ruling is res judicata despite the appellant's voluntary dismissal of that action because "[a]ppellant cannot be

[7] Appellees' reliance on *Lichon v. American Universal Ins. Co.* (1990), 435 Mich. 408, is even more perplexing. First, *Lichon* analyzed a nolo contendere plea under common law where "it merely communicates to the court that the criminal defendant does not wish to contest the state's accusations and will acquiesce in the imposition of punishment." Id. at 418. Second, the Michigan Supreme Court has since recognized that *Lichon* "was in error" and has "now expand[e]d the exceptions to the requirement of mutuality of estoppel to encompass" the circumstances set forth in *Lichon*. *Monat v. State Farm Ins. Co.* (2004), 469 Mich. 679, 688 & fn. 6.

permitted to waive the adverse finding of one case when another party or cause of action appears more opportunistic."); *Frank v. Simon*, Lucas App. No. L-06-1185 2007-Ohio-1324, ¶¶ 14-16 ("Thus, contrary to appellants' assertions, an issue conclusively determined in a criminal case may have preclusive effect in a later civil case."); *W. Reserve Group v. Vicki L. Hartman*, Lorain App. No. 04CA008451, 2004-Ohio-6083, ¶4 (holding that res judicata does not flow from a prior civil action which was never tried, but rather, settled and dismissed); *Robinson v. Springfield Local Sch. Dist. Bd. of Educ.*, Summit App. No. 20606, 2002-Ohio-1382, ¶42 (holding that res judicata does not apply as to issues which were never addressed in an administrative hearing).

Appellant NAMIC agrees that collateral estoppel does not flow from a prior civil case resolved by settlement where the record of that case does not contain any information concerning the settlement or what, if any, conclusion was reached. (See Appellees' Brief at 31, citing *Hartman*, 2004-Ohio-6083.) But in a plea of no contest the criminal defendant has admitted to the truth of the facts alleged in the indictment. Crim.R. 11(B)(2).

It is well settled that res judicata applies "where a court of competent jurisdiction renders a final judgment on the merits of a case and, thereby, bars the same parties or their privities from relitigating issues that were raised or ***could have been raised*** in the prior case." (Emphasis added.) *Voinovich v. Ferguson* (1992), 63 Ohio St.3d 198; *Holzemer v. Urbanski* (1999), 86 Ohio St.3d 129, 133, quoting *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67. Thus, a conviction based on such a no contest plea is res judicata if the defendant attempts to collaterally attack it in subsequent civil action (such as a petition for post conviction relief). *State v. Pickens*, Cuyahoga App. No. 91924, 2009-Ohio-1791, ¶6; *State v. Perry* (1967), 10 Ohio St. 2d 175, paragraphs six through nine of the syllabus. It does not matter whether the defendant litigated the essential elements of the crimes to which he pled no contest–he ***could have.***

Appellees argue that public policy supports their position because a no contest plea is not "actually litigated" and Richard Heyman did not have "an opportunity to litigate" his criminal conviction. (Appellees' Brief at 23-34.) But he did have the opportunity to litigate the criminal proceedings brought against him. He could have simply pled "not guilty." Ironically, Appellees' flawed logic would result in even a guilty plea being afforded no res judicata protection.

By pleading no contest, Richard Heyman admitted the truth of the allegations in the criminal complaint against him. Crim. R. 11(B)(2). The issue here is not whether res judicata applies–it does. The issue presented here is whether Evid R. 410 and Crim.R. 11 render Richard Heyman's convictions inadmissable despite res judicata, and they do not because his convictions are not being used ***against*** him to establish civil liability.

E. THERE ARE NO "INNOCENT INSUREDS" IN THIS CASE. RICHARD HEYMAN AND O'FLAHERTY'S ARE NOT "INNOCENT" AND NEITHER RICHARD NOR JAN HEYMAN ARE EVEN "INSUREDS" UNDER THE ELEVATORS MUTUAL POLICY.

J. Patrick O'Flaherty's, Inc. is afforded no coverage because its owner set the fire. And Jan Heyman is not covered because she is a bare loss payee with no rights beyond those of the named insured, J. Patrick O'Flaherty's, Inc. If Appellees are correct that Richard Heyman's convictions are inadmissable to defend against his claims as plaintiff, then they are still admissible against J. Patrick O'Flaherty's, Inc. which is the ***only insured*** under the Elevators Mutual policy. And, because Jan and Richard Heyman are bare loss payees, if J. Patrick O'Flaherty's, Inc. is not entitled to coverage then neither are they.

1. The arson fire at J. Patrick O'Flaherty's, Inc.'s restaurant excludes coverage for the corporate named insured because the fire was set by the corporation's president and 50% shareholder.

The trial court correctly denied coverage to O'Flaherty's because "it is settled law in Ohio that a corporation may not benefit by receiving the proceeds of an insurance policy when one of its

officers is convicted of the arson associated with the fire." (Jan. 25, 2008 Order and Final Judgment Entry at p. 2.) Appellees now claim that although Richard Heyman was O'Flaherty's president and 50% shareholder, there is no evidence that he controlled the corporation or that any other shareholders were involved with him in a conspiracy to set the arson fire. On almost identical facts, Appellees' flawed argument was fully analyzed and rejected by the United States Court of Appeals for the Sixth Circuit in *K & T Enterprises v. Zurich Ins. Co.* (C.A. 6, 1996), 97 F.3d 171, 178. The Court reasoned:

> It makes little sense to craft a rule that requires an insurance company to demonstrate that an arsonist completely controlled a corporation before allowing the insurance company to deny the corporation the right to collect on a fire insurance policy. First, it will be extremely difficult for any insurance company to demonstrate that an arsonist had complete control over a corporation. * * * Second, such a rule would encourage some corporate officers deliberately to remain blissfully ignorant of any plans for arson by other corporate officers. Third, such a rule gives an incentive to a financially-distressed corporation plotting arson of the corporate property to disperse control, or perhaps create formal titles giving the impression of dispersed control, in order to insure that fire insurance proceeds can be collected later. Fourth, and most distressingly, by making it more difficult for insurance companies to deny liability in cases of arson, it is clear that the ultimate effect of this rule would be to encourage arson for profit.

K & T Enterprises, at 178. The Court reasoned that requiring an insurer to establish complete control of the corporation by the arsonist would increase the "potential for moral hazard problems." Id. And the Court could find "no reason to encourage" arson which would only serve to increase "premiums that law-abiding insureds must pay" due to the increased risk. The Court accordingly held that sufficient control is shown "when the arsonist, who is the president and sole officer of the corporation, as well as a 50% shareholder, is married to the other 50% shareholder and the couple is neither divorced nor separated and conduct the day-to-day operations of the corporation jointly." Id. at 179.

Appellees attempt to distinguish *Forrestwood Dev. Corp. v. All-Star Ins. Corp.* (June 1,

1978), Cuyahoga App. No. 37186, 1978 Ohio App. LEXIS 10419, at *9-10, which held that the corporation was accountable for arson by "four shareholders representing 80 percent of the stock [who also] made all management decisions." But the holding of *Forrestwood Dev. Corp.* was not limited to those facts. Rather, the court found that evidence to be "sufficient * * * to support a determination that the corporation was accountable for the fire." *Forrestwood* at *10. It did not hold that a 50% ownership interest was insufficient.

Under Ohio law, coverage is barred by "evidence that the insured participated in the burning of the property to obtain the insurance proceeds either by personally setting the fire or having someone else set it for him." *Caserta v. Allstate Ins. Co.* (1983), 14 Ohio App. 3d 167, 171. As this Court has previously held, "[i]t is well-established in Ohio that a corporation can act only through its officers and agents, and the knowledge of the officers of a corporation is at once the knowledge of the corporation." *Arcanum Nat'l Bank v. Hessler* (1982), 69 Ohio St. 2d 549, 557. Thus, coverage is barred where an insured corporation, acting through one of its officers and owners, intentionally burns its own premises in an attempt to obtain insurance coverage.

Ohio law is the same as recognized in *K & T Enterprises* by the Sixth Circuit. *Forrestwood Dev. Corp. v. All-Star Ins. Corp.* (June 1, 1978), Cuyahoga App. No. 37186, 1978 Ohio App. LEXIS 10419, at *9-10; *Caserta v. Allstate Ins. Co.* (1983), 14 Ohio App. 3d 167, 171; *Arcanum Nat'l Bank v. Hessler* (1982), 69 Ohio St. 2d 549, 557. This is the law nationwide.[8] Appellees' argument to

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[8] Accord *Mississippi Lofts, Inc. v. Lexington Ins. Co.* (C.A. 8, 1988), 841 F.2d 251, 253-54; *Cora Pub, Inc. v. Continental Cas. Co.* (C.A. 5, 1980), 619 F.2d 482, 486; *Vicksburg Furniture Mfg., Ltd. v. Aetna Cas. and Surety Co.* (C.A. 5, 1980), 625 F.2d 1167, 1170; *Continental Ins. Co. v. Gustav's Stable Club, Inc.* (1982), 211 Neb. 1; *United Gratiot Furniture Mart, Inc. v. Michigan Basic Property Ins. Association* (1987), 159 Mich. App. 94; *K&T Enterprises, Inc. v. Zurich Ins. Co.* (C.A. 6, 1996), 97 F.3d 171; *Capitol Indem. Corp. v. Evolution, Inc.*(D.N.D. 2003), 293 F. Supp. 2d 1067, 1073 (citing and analyzing authorities nationwide).

the contrary is illogical, contrary to well-settled Ohio law, contrary to well-established law nationwide and would only serve to encourage arson resulting in increased premiums for law-abiding insureds. It should accordingly be rejected by this Court.

2. Jan Heyman is not an "innocent insured" because she is not an "insured" in the first place. She is a bare loss payee and, as such, stands in the shoes of the named insured corporation in seeking coverage. Because the corporation is not entitled to coverage, neither is she.

Appellees last argue that Jan Heyman was an "innocent insured"[9] and, therefore, should be allowed to collect the insurance proceeds regardless of whether Richard Heyman intentionally set the fire. Appellees' argument fails because Jan Heyman was not an insured. She was a bare loss payee who stands in the shoes of the named insured J. Patrick O'Flaherty's, Inc. Because J. Patrick O'Flaherty's, Inc. is entitled to no coverage (for the reasons addressed above), nether is its loss payee, Jan Heyman.

First, Appellees rely upon the wrong policy language. They confusingly and improperly jumble language from the "Loss Payable" clause, the "Lender's Loss Payable" clause, and the "Contract of Sale" clause of the Loss Payable Provisions endorsement; but these clauses are mutually exclusive and only one applies. (Appx. at 13.) The Loss Payable Provisions endorsement reads as follows:

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[9] Appellees assert at page 42, footnote 2, of their brief that because the charges against Jan Haymen were dropped it has been established that she played no role in, and had no knowledge of, her husband's arson and insurance fraud. But "evidence of non-prosecution 'is of very limited probative value in showing that there was no arson because of the higher burden of persuasion in a criminal case'" and "'a prosecutor's decision not to prosecute and a jury's decision to acquit in a criminal trial are based on different criteria than apply in a civil proceeding.'" *Firenze Imps., Inc. v. Cincinnati Ins. Co.*, Mahoning App. No. 00 CA 262, 2002-Ohio-1559, ¶¶ 9-12. The fact that Richard Heyman pled no contest to criminal charges which must be proved beyond a reasonable doubt is much more indicative of guilt than a decision by the prosecutor to drop the charges is indicative of innocense.

The following is added to the LOSS PAYMENT loss Condition, ***as indicated in the Declarations*** or by an "X" in the Schedule:

B. LOSS PAYABLE

For Covered Property in which both you and a Loss Payee shown the Schedule or in the Declarations have an insurable interest, we will:

1. Adjust losses with you; and

2. Pay any claim for loss or damage jointly to you and the Loss Payee, **as *interests may appear***.

C. LENDER'S LOSS PAYABLE

* * *

D. CONTRACT OF SALE

* * *

(Emphasis added.) (Appx. 13-14.) The Policy Declarations state that the "Loss Payable" provision applies to Richard and Jan Heyman ***and not*** the "Lender's Loss Payable" or "Contract of Sale" provisions. (Appx. at 7-8.) This is stated ***three*** times in the declarations.

Appellees now claim a policy ambiguity to rely on language from the inapplicable "Lender's Loss Payable" and "Contract of Sale" provisions. But there is no ambiguity. The Declarations state that the "Loss Payable" provision applies. And the other two provisions upon which Appellees rely are irrelevant by their terms. It is undisputed that no Appellee is a "lender" and that the property at issue was not under a "contract of sale." Those provisions are inapplicable.

Second, the applicable Loss Payable language is ***not*** the typical Standard Mortgage Clause (also known as the Union Mortgage Clause or New York Mortgage Clause) which expressly states that: "Denial of a claim will not apply to a valid claim of the mortgagee * * * ."[10] The Loss Payable provision at issue here ***does not*** provide that the Loss Payee can recover regardless of, or independent of, any criminal act of the Named Insured or applicable policy conditions and exclusions. Rather, it provides that Elevators Mutual will pay "any claim for loss or damage jointly

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[10] Under the Standard Mortgage clause there is coverage for "innocent mortgagees." See, e.g., *Ohio Farmers' Ins. Co. v. Hull* (1932), 45 Ohio App. 166, 170; *Hall v. Franklin Fire Ins. Co.* (1948), 149 Ohio St. 216.

to you and the Loss Payee, ***as interests may appear***." (Emphasis added.) (Appx. 13-14.) Thus, the provision is considered a "simple" or "open" Loss Payable provision.[11]

Appellees' attempt on page 43 of their Merit Brief to characterize *Pittsburgh Nat'l Bank v. Motorists Mut. Ins. Co.* (1993), 87 Ohio App. 3d 82, as supporting their position lacks merit. In *Pittsburgh Nat'l Bank*, the loss payable clause was a Standard Mortgage clause reading: "This insurance covering the interest of the loss payee shall not become invalid because of your fraudulent acts or omissions unless the loss results from your conversion, secretion or embezzlement of your covered auto." The Court recounted the applicable law as follows:

> There are generally two types of loss payable clauses found in insurance contracts. The first, the simple mortgage clause, typically states that the proceeds of the policy shall be paid first to the mortgagee as his interest may appear. Under such a clause, the mortgagee is simply an appointee of the insured, and its right of recovery is only as great as that of the insured. Notably, under a simple mortgage clause, anything that would void the policy in the hands of the mortgagor likewise voids it as to the mortgagee.
>
> The protection provided the mortgagee under the second type of loss payable clause, the standard mortgage clause, is broader. Such a clause states, in effect, that coverage for the mortgagee will not be invalidated by any act or neglect of the insured. Generally, this type of clause is considered to constitute a separate contract between the insurer and the mortgagee.

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[11] Accord *Pittsburgh Nat'l Bank v. Motorists Mut. Ins. Co.* (1993), 87 Ohio App. 3d 82, 85 ("To resolve this issue, we must first determine the type of loss payable clause which is contained in the policy. There are generally two types of loss payable clauses found in insurance contracts. The first, the simple mortgage clause, typically states that the proceeds of the policy shall be paid first to the mortgagee as his interest may appear. Under such a clause, the mortgagee is simply an appointee of the insured, and its right of recovery is only as great as that of the insured. Notably, under a simple mortgage clause, anything that would void the policy in the hands of the mortgagor likewise voids it as to the mortgagee."); *Westhaven Group, LLC v. Auto-Owners Ins. Co.* (Sept. 22, 2006), N.D. Ohio No. 3:05 CV 7350, 2006 U.S. Dist. LEXIS 68321 ("There are generally two types of loss payable clauses found in insurance contracts. The first, the simple mortgage clause, typically states that the proceeds of the policy shall be paid first to the mortgagee as its interest may appear. Under such a clause, the mortgagee is simply an appointee of the insured and its right of recovery is only as great as that of the insured. The second type of loss payable clause is the standard mortgage clause. This clause is broader and effectively states that coverage will not be invalidated by any act or neglect of the insured.").

(Citations omitted.) The clause at issue in *Pittsburgh Nat'l Bank* was of the "second type" whereas the clause at issue in this action is of the first type.

Under Ohio law, a loss payee under such a simple loss payable clause is afforded no greater rights than the named insured. Accord *New Jersey Ins. Co. v. Ball* (1929), 119 Ohio St. 550, paragraph two of the syllabus; *Pittsburgh Nat'l Bank v. Motorists Mut. Ins. Co.* (1993), 87 Ohio App. 3d 82, 85. That is also the law nationwide.[12] Appellees attempt to avoid these well-established rules of law by arguing that this case is analogous to the "innocent spouse" cases. However, this Court's holding in *Wagner v. Midwestern Indemnity Company* (1998), 83 Ohio St.3d 287, 1998-Ohio-101, affirmed that, "the innocent spouse rule can be contractually nullified by the terms of the insurance contract and, in this case, the wording of the contract specifically negated the innocent spouse rule." Id. at 290-291. The insurance contract in *Wagner* stated that along with the Named Insured "[t]he term 'you' or 'your' in this policy means * * * Your spouse if you are an individual proprietor." In the case at bar, the Elevators Mutual policy provides that "[t]hroughout this policy the words 'you' and 'your' refer to the Named Insured down in the declarations." (Coverage Form CP 00 10 06 95 Building and Personal Property Coverage Form at p. 1). The ***only named insured*** in the declarations is J. Patrick O'Flaherty's, Inc. There are no additional insureds under the "Commercial Property" coverage part. Thus, Richard and Jan Heyman are ***not even insureds***.

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[12] Accord *Wells Fargo Bank International Corp. v. London S.S. Owners' Mut. Ins. Asso.* (S.D.N.Y. 1976), 408 F. Supp. 626, 630; *Vargas v. Nautilus Ins. Co.* (1991), 248 Kan. 881, paragraph two of the syllabus; *Bast v. Capitol Indem. Corp.* (Minn. Ct. App. 1997), 562 N.W.2d 24, 27; *Van Buren v. St. Joseph County Village Fire Insurance Co.* (1874), 28 Mich. 398; *J.C. Wyckoff & Assoc., Inc. v. Standard Fire Ins. Co.* (C.A. 6, 1991), 936 F.2d 1474, 1493; *Community National Bank of Pontiac v. Michigan Basic Property Ins. Assn.* (1987), 159 Mich. App. 510; *Liberty Mut. Fire Ins. Co. v. Kahlaid, Inc.* (N.J. Super. App. Div. 1985), 489 A.2d 1231; *Gallant v. Lake States Mut. Ins. Co.* (1985), 142 Mich. App. 183; *Fred v. Pacific Indemnity Co.* (1972), 53 Hawaii 384; *Wharen v. Markle Banking & Trust Co.* (1941), 145 Pa. Super. 99.

Further, the Elevators Mutual Policy ***voids coverage*** "if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning * * *A claim under this Coverage Part." (Appx. at 11.) As addressed above, Richard Heyman was the president and 50% shareholder of the insured corporation. His acts were the corporation's acts and he was convicted of arson for the purpose of insurance fraud. The Elevators Mutual Policy also excludes coverage for damages resulting from any "criminal act by you, any of your partners, ***employees*** (including leased employees), directors, trustees, ***authorized representatives or anyone to whom you entrust the property for any purpose***." (Emphasis added.) (Appx. at 24-5.) Coverage is accordingly excluded even if Jan Heyman were more than a bare loss payee–which she is not.

3. The corporate named insured, J. Patrick O'Flaherty's, Inc., is not "the defendant who made the plea" and, therefore, Richard Heyman's convictions are admissible to defend against the corporation's claims for coverage and bad faith. Richard and Jan Heyman are not insureds under the policy, but rather bare loss payees who are not entitled to coverage because the corporate named insured is not entitled to coverage.

Evid.R. 410(A) specifically states that a plea of no contest is not admissible "against the defendant who made the plea." Crim.R. 11(B) similarly states that the plea is inadmissable only against "the defendant" in the criminal proceeding.

Appellees claim that Richard Heyman's criminal convictions are inadmissable in defense of his claims against Elevators Mutual. But even if that were true, his convictions are admissible to defend against the claims of the corporate named insured, J. Patrick O'Flaherty's, Inc., because: 1) J. Patrick O'Flaherty's, Inc. was not "the defendant who made the plea,"[13] Evid.R. 410(A); and 2) Richard Heyman was its president and 50% shareholder. Thus, coverage for J. Patrick O'Flaherty's,

[13] The language of Evid.R. 410(A) highlights the absurdity of Appellees' arguments. Under Appellees' theory, the only party able to sue for recovery would be the convicted arsonist!

Inc. is barred. And because Richard and Jan Heyman are bare loss payees under the Elevators Mutual policy they are likewise not entitled to coverage.

CONCLUSION

For all the forgoing reasons, as well as those argued by co-appellant Elevators Mutual, NAMIC Insurance Company respectfully asks that this Court reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant NAMIC Insurance Company has been sent via regular U.S. Mail postage prepaid this 3rd day of September, 2009 to the following:

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