**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 2020-1260**

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**LTF 55 PROPERTIES, LTD; GARDA ARCH FAB, LLC,**
**Plaintiff-Appellees,**

**-vs-**

**CHARTER OAK FIRE INSURANCE COMPANY,**
**Defendant-Appellant,**

**and**

**PROFAC, INC.; CBIZ INSURANCE SERVICES,**
**Defendants.**

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**ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT,**
**CUYAHOGA COUNTY, CASE NO. CA-19-108956**

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# PLAINTIFF-APPELLEES' MEMORANDUM OPPOSING JURISDICTION

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## STATEMENT OF WHY THIS CASE PRESENTS NO ISSUES OF PUBLIC OR GREAT GENERAL IMPORTANCE

When stripped of all its hyperbole and bombast, the Memorandum in Support of Jurisdiction of Appellant-Defendant-Charter Oak Fire Insurance Company ("Defendant's Memo.") fails to identify any unsettled legal issue that is deserving of Supreme Court review. The simple truth is that there was never any disagreement below over the judicial standards governing the claim for fire loss insurance coverage that had been brought by Plaintiff-Appellees, LTF 55 Properties, Ltd. ("LTF") and Garda Arch Fab, LLC ("Garda"), against Defendant-Appellant, The Charter Oak Fire Insurance Company ("Charter Oak"). Their disagreements instead arose strictly from the relevant factual circumstances, which the Eighth Judicial District found could not be resolved through summary judgment. Defendant will still have every opportunity, of course, to defend its handling of the claim at trial.

Before turning to the supposed issues of "public and great general interest" that Defendant Charter Oak has manufactured, it is important to note at the outset that not one of the five Propositions of Law is ripe for review. None of them take issue with the Eighth District's alternative justification for reversal, which was that an abuse of discretion had been committed when Plaintiffs' Motion to Compel Discovery had been denied as moot shortly after summary judgment was granted. *LTF 55 Properties, Ltd. v. Charter Oak Fire Ins. Co.*, 8th Dist. Cuyahoga No. 108956, 2020-Ohio-4294, ¶ 99-111. Defendant is no longer denying that the Motion had been timely and properly filed, and sought discovery bearing directly upon pivotal matters lying at the heart of the insurer's demand for judgment as a matter of law. The appropriateness of summary judgment therefore cannot be considered until the discovery dispute is resolved on remand and Plaintiffs are permitted to introduce whatever additional materials and information are produced by Defendant Charter Oak in response to the trial court's ruling. *See, e.g.*,

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*Countrywide Home Loans Servicing, L.P. v. Stultz*, 161 Ohio App.3d 829, 2005-Ohio-3282, 832 N.E.2d 125, ¶ 17 (10th Dist.); *Smith v. Klein*, 23 Ohio App.3d 146, 151, 492 N.E.2d 852 (8th Dist.1985). In all likelihood, the evidentiary record will be considerably more developed once that process is completed compared to the record that is presently before this Court. For this reason alone, entertaining the seriously premature Propositions of Law at this time will inevitably result in an advisory opinion. *Armco, Inc. v. Pub. Util. Comm.*, 69 Ohio St.2d 401, 406, 433 N.E.2d 923 (1982) ("it is well-settled that this court does not indulge itself in advisory opinions").

To be sure, however, there is no merit to any of the Propositions of Law. As will be developed in the remainder of this Memorandum, the appellate court justifiably determined that triable issues of fact had been established on the questions of whether prompt notice of the fire loss claim had been reported, whether the insurer had been prejudiced by any unreasonable delay, and whether the claim had been handled in bad-faith. Given that Defendant Charter Oak had been relying in large part upon inapplicable Michigan authorities, this ruling was hardly surprising. Ohio's jurisprudence in this regard has been well developed, and fact-intensive questions abound in this particular case that can be resolved only at trial. No issues of public and great general importance are thus at stake in these proceedings.

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## STATEMENT OF THE CASE AND FACTS

### I. THE PRELIMINARY PROCEEDINGS

This action for insurance coverage and bad-faith was commenced in the Cuyahoga County Court of Common Pleas on October 12, 2018. *Case No. CV-17-905321.* The Complaint alleged that Plaintiff LTF was the owner of commercial real estate located in Cleveland, Ohio (the "Property"). *R. 1, Plaintiff's Complaint, ¶ 3.* A section of the building was leased to Plaintiff Garda. *Id., ¶ 5.* Plaintiffs were engaged in a business venture at

the time with Defendant Profac, Inc., d.b.a. Merritt Woodwork ("Merritt/Profac"). This company was the Named Insured under a Charter Oak Commercial Insurance Policy covering the Property, which also included Plaintiffs LTF and Garda as additional insureds. *Id., ¶ 9-12*. Defendant CBIZ Insurance Services was the agent/broker that arranged for the placement of the coverage. *Id., ¶ 8, 10*. The "Deluxe Property" policy specifically covered damage and destruction caused by smoke and fire. *Id., ¶ 12*. Such insurance benefits were sought by Plaintiffs, and eventually denied, after a blaze destroyed a substantial portion of the Property on October 19, 2016. *Id., ¶ 14-16, 22-23*.

Before any meaningful discovery could be conducted, Defendant Charter Oak filed a Motion for Summary Judgment on January 11, 2019. ("Defendant's "S.J. Motion"). *R. 16*. The insurer relied in large part upon the affidavits of its own representatives, particularly, Adjuster Scott Rembiesa ("Rembiesa"). Defendant assured all concerned: "The controlling and irrefutable record evidence will not change with further discovery[.]" *Id., p. 19*.

Plaintiffs nevertheless filed a Motion on February 11, 2019, seeking additional time to conclude discovery before furnishing a response. *R. 24*. Defendant Charter Oak vigorously opposed this seemingly unobjectionable request and demanded that the trial judge require Plaintiffs "to file a Response to Charter Oak's Motion for Summary Judgment forthwith." *R. 29, Defendant The Charter Oak Fire Insurance Company's Opposition to Plaintiffs' Motion for Extension of Time to Respond and Brief in Support filed February 18, 2019, p. 1*. She declined to do so and granted Plaintiffs leave until June 11, 2019, to oppose the insurer's motion. *See R. 30, Journal Entry filed February 20, 2019*.

Plaintiffs were thus able to depose Adjuster Rembiesa on May 30, 2019. In the affidavit that had been attached to the demand for summary judgment, the Charter Oak

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employee had represented that he was testifying from his "personal knowledge[.]" *Defendants' S.J. Motion, Exhibit 3, ¶ 2*. But during his deposition, he disclosed that he had actually obtained most of his information second-hand from various company employees, who had also been relying in large part upon what they had been told by others. *R. 37, Deposition of Scott Lawrence Rembiesa filed June 11, 2019 ("Rembiesa Depo."), pp. 37, 47, 49, 51, 59-60, 72, 116, 118, 154.*

On June 10, 2019, Plaintiffs' counsel sent a letter to Defendant Charter Oak's attorney acknowledging the receipt of certain discovery responses and observing that several items were missing. *R. 46, Plaintiffs' Motion to Compel Discovery filed July 16, 2019 ("Plaintiffs' Mtn. Compel"), Apx. 0002*. He also requested an opportunity to depose the employees who had been identified by Adjustor Rembiesa during his deposition as the sources of information he was relying upon in denying the claim. *Id.* Following a number of back-and-forth exchanges, the insurer's counsel confirmed on July 11, 2019, that no further discovery would be provided to Plaintiffs. *Id., 0003.*

## II. THE SUMMARY JUDGMENT RESPONSE

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While the discovery dispute was still developing, Plaintiffs complied with the Court's extended deadline by submitting their Memorandum in Opposition to Defendant Charter Oak Insurance Company's Motion for Summary Judgment on June 11, 2019 ("Plaintiffs' S.J. Memo."). *R. 38.* Even though Defendant Charter Oak was refusing to produce the remaining witnesses and information that had been requested following Adjuster Rembiesa's deposition, the following relevant facts were established.

Frank Tombazzi ("Tombazzi") is a co-owner of Plaintiff LTF and a co-manager of Plaintiff Garda. *Sworn Statement of Frank Tombazzi taken October 17, 2017 ("Tombazzi*

*Stmnt."), pp. 7-8.*[1] LTF owns the Property located at 1873 East 55th Street, Cleveland, Ohio. *Id., p. 8.* Garda rents a portion of the commercial building and is engaged in the business of architectural metal fabricating. *Id., pp. 9-10.* One of the other tenants is NEO Contractors, which was owned by Brian Petruccielli ("Petruccielli"). *Id., p. 44.*

In the Fall of 2015, Plaintiffs LTF and Garda entered into a Letter of Intent with Defendant Merritt/Profac. *Tombazzi Stmnt., 11-12.* An arrangement was contemplated in which Merritt/Profac would assume the management of, and would eventually purchase, LTF and Garda. *Id.* As the negotiations progressed, an agreement was reached in the Summer of 2016 that Merritt/Profac would provide insurance coverage for the Property. *Id., p. 13.* On July 29, 2016, Tombazzi was notified that his companies had been included on the Charter Oak policy. *Id., p. 13.* Michael Perry ("Perry") of Defendant CBIZ was the Merritt/Profac insurance agent, and he had handled the insurance coverage arrangement. *Id., pp. 13-14.*

At approximately 9:00 p.m. on October 19, 2016, Tombazzi received a report from their security company of a fire in their building. *Tombazzi Stmnt., p. 20.* He dropped what he was doing, and he rushed to the scene. *Id., pp. 21-22.* When he arrived, the Cleveland City Firefighters had already extinguished the blaze and were in the process of leaving. *Id., pp. 31-32.* The facility was still filled with smoke. *Id., p. 31.* The fire was concentrated in NEO Consulting's rental space, which had been soaked with water by the fire fighters. *Id., pp. 32-33.* The fire department had to hack their way through an overhead door, breaking a large window in order to access the flames. *Id., pp. 32-33.* In the process they had "made quite a mess." *Id., p. 32.*

The Cleveland Fire Department prepared a report that was devoid of any findings

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[1] A copy of Frank Tombazzi's sworn statement was attached as Exhibit 2 to Defendant Charter Oak's Motion for Summary Judgment.

of arson or other intentional wrongdoing. *Plaintiff's S.J. Memo., Apx. 00086-90.*[2] According to the narrative statement that was provided, a pickup truck had been found on fire inside the Property. *Id., p. 3.* The owner of the business, Petruccielli, explained that he had been working on the truck plow's battery system earlier that evening before he left for the night. *Id.* A second report was later prepared, which concluded:

> Pick up truck on fire inside of 5608 Hough Ave. Owner said he was working on plow battery system earlier that day. Truck fire did light fire damage to building. Mostly smoke and water damage.

*Id., 00093.*[3]

Later that evening, arrangements were made for a local fire-restoration contractor, Yanesh Brothers, to seal up the overhead door and window with plywood. *Tombazzi Stmnt., pp. 23-24, 32-34.* The immediate concern was to prevent anyone from entering during the night. *Id., p. 34.* The next day, Yanesh Brothers began to pump out the water, set up dehydration fans, and provide temporary lighting. *Id., p. 35.* For roughly a week, the company provided standard fire-restoration services. *Id., pp. 38-39.*

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The tenant, NEO Contractors, was covered under a policy that had been issued by Grange Insurance Company ("Grange"). *Tombazzi Stmnt., p. 43; Defendant's S.J. Motion, Exhibit 3-C.* This insurer was immediately notified of the fire loss. *Tombazzi Stmnt., p. 43.*

Tombazzi had appreciated that Plaintiffs were included as additional insureds under Merritt/Profac's policy with Charter Oak. *Tombazzi Stmnt, pp. 14-17.* Five days after the incident, Tombazzi sent an email to Michael Merritt ("Merritt") advising him of the fire. *Id., p. 102; Defendant's S.J. Motion, Exhibit 1, Plaintiff's Exhibit 3, p. 1.* He knew

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[2] This report was marked as Plaintiff's Exhibit 4 during the Rembiesa's deposition, *Rembiesa Depo., pp. 25-26.*

[3] This exhibit was identified as Plaintiff's Exhibit 5 during Rembiesa's deposition. *Rembiesa Depo., pp. 25-28.*

that Merritt "was going to be upset about it," and the full extent of the damage had not yet been determined. *Tombazzi Stmnt., p. 102*. The decision was made to just advise Merritt of the incident and let him determine whether to initiate another insurance claim with Charter Oak. *Id., pp. 102-103*. Merritt's company (Defendant Merritt/Profac) had been, after all, paying the premiums for the Charter Oak coverage. *Id., p. 103*. Tombazzi and his partners did not want to "go above and beyond Michael's head." *Id*.

Tombazzi's concerns for Merritt's reaction were not unfounded. Four minutes after the e-mail was sent, Merritt responded:

> Please do not talk to anybody – Keith and Nick are on the way down. You are not to contact anyone – this is MY issue [as] it is MY insurance. My agent is advised and they will dispatch [an] adjuster. (Emphasis sic.)

*Defendant's S.J. Motion, Exhibit 1, Plaintiff's Exhibit 3, p. 2*. The acquisition negotiations between Plaintiffs and Merritt/Profac eventually broke down and the companies entered "a divorce[.]" *Tombazzi Stmnt., pp. 49-50*. A Termination Agreement and Release to facilitate the separation was executed between them on October 26, 2016. *Answer of Defendant Profac, Inc., filed December 18, 2018, Exhibit A*.

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Significantly for purposes of the instant action, Grange had hired EFI Global to investigate Plaintiffs' fire loss claim through the policy that had been issued to the tenant. *Rembiesa Depo., pp. 52-53, 135*. By all appearances, the insurer was satisfied with the investigator's findings and paid Plaintiffs the limits of available coverage in the amount of $100,000.00. *Plaintiffs' S.J. Memo., Exhibit B, Apx. 0004*. Notably, Charter Oak's policy specifically allowed the insureds to enter settlements with their tenants releasing all claims. *Rembiesa Depo., p. 105-106*.

By January 2017, it became apparent that the value of the property damage suffered in the fire substantially exceed that which had been covered by Grange's $100,000.00 policy limits payment. *Tombazzi Stmnt., 104-105*. Plaintiffs were still

hesitant to directly notify Charter Oak of the claim given Merritt's "this is MY issue" warning and the rift that had developed with Merritt/Profac. *Id., pp. 106-107; Defendant's S.J. Motion, Exhibit 1, Plaintiff's Exhibit 3, p. 1.* There were also "tax issues" that Tombazzi was hoping Merritt would still satisfy as previously agreed. *Tombazzi Stmnt., p. 106*. But once that matter was resolved and it became clear that Merritt would not be reporting the claim, Tombazzi issued formal notice of the fire loss claim directly to Defendant Charter Oak on March 23, 2017. *Rembiesa Depo., pp. 30-31.*

In response to the report, Adjuster Rembiesa was assigned to the claim. *Rembiesa Depo., pp. 24-25, 36*. He confirmed that an insurance inspector, Joey Wilson-Schoenefeldt ("Schoenefeldt"), was able to inspect the Property. *Id., pp. 36, 54*. She also obtained at least one of the Cleveland Fire Department Reports. *Id., pp. 28-29*.

Adjuster Rembiesa spoke with a Grange representative on May 3, 2017, who shared his theory regarding the cause of the fire and offered to provide the information to the Charter Oak investigator if there were any follow-up communications. *Rembiesa Depo., pp. 62-63*. Charter Oak had used EFI Global's investigative services in the past and found the company to be reliable. *Id., pp. 52-53, 64-65*. Rembiesa has acknowledged that it would have been beneficial to have been able to review the EFI Global Report while investigating the Plaintiffs' claim. *Id., pp. 52-53*. But by all appearances, neither Charter Oak's investigator, Schoenefeldt, nor any of the insurer's other employees ever bothered to obtain those findings from Grange. *Id., p. 145*. Nor was any request made for the sixty-five photos that had been taken shortly after the incident of Petruccielli's truck and the surrounding area where the fire had started. *Id., pp. 145, 150-151*.

During the same period, Adjuster Rembiesa had been communicating frequently with Michael Perry ("Perry"), who worked for Merritt/Profac's insurance agent, Defendant CBIZ. *Rembiesa Depo., pp. 139-140; Tombazzi Stmnt., pp. 13-14*. Perry had

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been insisting on behalf of Merritt/Profac that Plaintiffs' claim should be denied. *Rembiesa Depo., p. 140*. Rembiesa did not recall receiving communications like this previously. *Id., p. 141.* On at least one occasion, Perry threated Charter Oak with litigation of his own. *Id.*

Roughly nine months after Tombazzi had gone over Merritt's head and reported the fire damage claim to Charter Oak, a decision was issued on December 20, 2017, denying coverage. *Defendant's S.J. Motion, Exhibit 3-E.* Tombazzi sent an email asking for reconsideration but the original determination was upheld. *Rembiesa Depo., pp. 163-164.*

## III. THE TRIAL COURT'S RULING AND THE APPEAL

When the parties finally reached an impasse with respect to the remaining discovery due from Defendant Charter Oak, Plaintiffs submitted their Motion to Compel Discovery on July 16, 2019. Attached to that filing was an affidavit from counsel authenticating the parties' relevant correspondences and confirming that depositions and information were being withheld that Plaintiffs needed to fully respond to the pending summary judgment motion. *Plaintiffs' Mtn. Compel., Apx. 0001.* In Defendant Charter Oak's Opposition to Plaintiffs' Motion to Compel Discovery that followed on July 22, 2019, the insurer continued to furnish empty assurances that none of the witnesses who Plaintiffs wanted to depose, nor the records they wanted to review, would produce any new or helpful information. *R. 49.*

Four days later, on August 2, 2019, Judge Deborah Turner granted Defendant Charter Oak's Motion for Summary Judgment in its entirety. *R. 51.* In a ruling issued three days later, Plaintiffs' Motion to Compel Discovery was "denied as moot." *R. 52.*

Since all pending claims against Defendant Charter Oak had been terminated, Plaintiff commenced the instant interlocutory appeal on August 30, 2019. *R. 54.*

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Following briefing and oral argument, the Eighth Judicial District unanimously reversed the trial court on twos eparate grounds: (1) triable issues of fact were established in the evidentiary record over both Plaintiffs' entitlement to coverage as well as potential bad-faith liability and (2) an abuse of discretion had been committed when summary judgment was granted before Plaintiffs' Motion to Compel Discovery was resolved. *LTF 55 Properties*, 2020-Ohio-4294, at ¶ 45-111.

Defendant Charter Oak now seeks further review in this Court of the Eighth District's opinion.

## ARGUMENT

In an effort to pique this Court's interest in this relatively routine insurance coverage dispute, Defendant Charter Oak has devised five Propositions of Law. None of them merit this Court's time and attention.

### PROPOSITION OF LAW NO. 1: WHERE AN INSURED ADMITTEDLY, KNOWINGLY AND DELIBERATELY WITHHOLDS NOTICE OF PROPERTY DAMAGE FROM ITS INSURER JUST TO PROTECT ITS OWN BUSINESS INTERESTS, DURING WHICH DELAY THERE IS UNDISPUTED SPOLIATION OF EVIDENCE, THAT INSURED HAS BREACHED THE NOTICE OF LOSS CONDITION AS A MATTER OF LAW

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While Defendant's First Proposition of Law may be legally accurate, it has no application in the instant case. The repeated assertions that Plaintiffs "**admittedly, knowingly, and deliberately**" withheld notice are simply inaccurate, and could be easily rejected by reasonable jurors. (Emphasis sic.) *Defendant's Memo., p. 8.* As the Eighth District correctly observed, the fact-finders could conclude from even the incomplete evidentiary record that Tombazzi justifiably relied upon the assurances of the primary policyholder, Merritt/Profac, that the fire-loss claim was being handled, and understandably waited until it became apparent that the initial Grange payment was going to be insufficient to fully cover the restoration costs. *LTF 55 Properties,* 2020-Ohio-

4294, at ¶ 59-60. As Adjuster Rembiesa himself had conceded, Defendant Charter Oak has approved claims with delayed notice longer than that which was experienced in this case. *Rembiesa Depo., p. 85-86.*

The Eighth District's unerring ruling faithfully adheres to Ohio's legal precedents. In *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, a majority of this Court refused "to establish a rule in this case that a delay in notice of a particular length of time is unreasonable in all cases." *Id.* at ¶ 93. An important consideration in *Ferrando* was the fact that the claimants were not the "named insureds" who had purchased the policy, and they were therefore unaware of its existence. *Id.* at ¶ 95. The majority explained:

> Courts have generally held that where an additional insured's ignorance of coverage is understandable, and where notice is given promptly after the additional insured becomes aware of possible coverage, even a long period of delay is excusable ***.

*Id.* at ¶ 98, quoting LIABILITY INSURANCE: TIMELINESS OF NOTICE OF ACCIDENT BY ADDITIONAL INSURED, 47 A.L.R.3d 199, 202, Section 2[a], 1973 WL 33743 (1973); *see also Shirley v. Republic-Franklin Ins. Co.*, 5th Dist. Stark No. 2002CA222, 2003-Ohio-5369, ¶ 12-13. An analogous situation is presented here in that it took several months for Tombazzi to appreciate that: (1) Merritt was not handling the issue, as represented in his e-mail of October 24, 2016, and (2) the restoration costs were going to substantially exceed the Grange policy-limits payment of $100,000. *See Ungur v. Buckeye Union Ins. Co.*, 8th Dist. Cuyahoga No. 81208, 2003-Ohio-2044, ¶ 27 (five-year delay in furnishing notice to insurer could be found to be excusable); *see Allen v. CNA,* 10th Dist. Franklin No. 02AP-1249, 2003-Ohio-4689, ¶ 14 (five-year delay); *Bales v. Buckeye Union Ins. Co.*, 10th Dist. Franklin No. 02AP-870, 2003-Ohio-1523, ¶ 14 (six-and-one-half-year delay).

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**PROPOSITION OF LAW NO. 2: NOTICE OF A FIRE LOSS TO A CO-INSURED IS NOT NOTICE TO THE INSURER AS REQUIRED BY THE POLICY AND THEREFORE CANNOT**

**CREATE AN ISSUE OF FACT AS TO THE REASONABLENESS OF AN INSURED'S CHOICE NOT TO PROMPTLY NOTIFY ITS PROPERTY INSURER OF THE LOSS**

Once again, Defendant Charter Oak is proposing a Proposition of Law that is divorced from the realities of this case. Far from suggesting that notice to a co-insured is tantamount to notice to the insurer, the panel below had simply identified Merritt's assurances that the claim was being handled as a factor for consideration in determining reasonableness. *LTF 55 Properties,* 2020-Ohio-4294, at ¶ 59-60. Perhaps a more important factor, which Defendant continually glosses over, is that Plaintiffs themselves submitted a formal notice of claim to the carrier less than six months following the fire. It is certainly significant that every Ohio authority that Defendant was touting involved significantly longer delays than that, leading the Eighth District to concluded that the insurer had provided "no basis for us to find as a matter of law that a five-month delay was unreasonable." *LTF 55 Properties*, 2020-Ohio-4294, at ¶ 67. Any carrier that feels that such a brief "delay" is intolerable in all instances is certainly free to incorporate specific time-limits into their policies. For whatever reason, the instant Defendant declined to do so, and only required the notice to be "prompt."

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**PROPOSITION OF LAW NO. 3: THE *FERRANDO* PRESUMPTIVE PREJUDICE INQUIRY IS INAPPLICABLE WHERE THERE IS UNDISPUTED SPOLIATION OF EVIDENCE CAUSING ACTUAL PREJUDICE TO THE INSURER BEFORE NOTICE OF A LOSS WAS EVER GIVEN**

As with the first two Propositions of Law, there is no point in accepting the third one since this is not a case involving an "undisputed spoliation of evidence[.]" Not only did Plaintiff never agree that anything significant was lost during the post-fire clean-up and repair of the Property, but the only meaningful "proof" that the insurer ever offered in this regard was the affidavit of loyal Adjuster Rembiesa. However, the Eighth District

has held that the most significant portions of this sworn statement were based upon hearsay, and thus cannot not be considered. *LTF 55 Properties,* 2020-Ohio-4924, at ¶ 89. Since none of the Propositions of Law directly challenge this evidentiary ruling, this issue has been conclusively conceded by Defendant Charter Oak.

Based upon the admissible evidence that was introduced during the prematurely terminated summary judgment proceedings, the notion that Defendant was somehow prejudiced by a "spoliation" of evidence is implausible. As previously noted, the Cleveland Fire Department had thoroughly investigated the incident and prepared a report which was never disputed. *Rembiesa Depo., pp. 24-29 and Exhibits 4 and 5.* And undoubtedly by design, Defendant's misguided jurisdictional memorandum never mentions that Grange had quickly arranged for EFI Global to investigate the cause of the fire and examine the Property. *Id., pp. 52-53, 135.* As Adjuster Rembiesa conceded during his deposition, a Grange representative had shared their origin and cause theory with him on May 3, 2017, and assured him that additional information could be provided through follow-up communications. *Id., pp. 62-63.* Rembiesa thus learned early on that an issue with the electrical ground to the truck battery had been identified, which he certainly viewed as a possible cause for the fire. *Id.* This was enough to trigger coverage under the Charter Oak policy:

> Q. Would you agree that if, in fact, the cause of this fire was what Grange determined it to be, which was the wire – ground wire for the battery in the truck, again, if you agree with that, that that would be a covered loss under this Charter Oak policy?
>
> A. Yes. (Emphasis added.)

*Id., pp. 127-128.*

Adjuster Rembiesa further confirmed that Defendant Charter Oak had utilized and relied upon EFI Global's expertise in the past and acknowledged the investigator's report

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would have been "beneficial" to review. *Rembiesa Depo., pp. 52-53*. But seven months after Plaintiffs formally requested coverage, the insurer proceeded to deny the claim without bothering to either obtain EFI Global's findings or the numerous photographs that had been taken of Petruccielli's truck and the scene surrounding where the fire started. *Id., pp. 145, 149-150*. Given all this reliable investigatory information that was readily available to Defendant, it is implausible that any prejudice could have been suffered by any real delay in reporting the claim.

**PROPOSITION OF LAW NO. 4: EVEN WHERE A PRESUMPTION OF PREJUDICE ARISES BECAUSE OF AN INSURED'S UNREASONABLY LATE NOTICE, IT IS THE *INSURED'S* BURDEN TO REBUT THE PRESUMPTION, NOT THE INSURER'S BURDEN TO PROVE IT WAS UNABLE TO UNDO THE PREJUDICIAL EFFECT OF THE INSURED'S CONDUCT PRIOR TO PROVIDING NOTICE**

In this particular case, the Fourth Proposition of Law was always, and remains, a non-issue. Plaintiffs had openly acknowledged during the appeal that they bore the burden under *Ferrando* to rebut the presumption of prejudice. *Court of Appeals Brief of Plaintiff-Appellants, p. 30*. The Eighth District likewise recognized that " 'the insured bears the burden of presenting evidence to rebut.' " *LTF 55 Properties,* 2020-Ohio-4294, at ¶ 53, quoting *Ferrando*, 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, at ¶ 90. As the panel further determined, Plaintiffs did so through proof that independent investigatory reports had been available to Adjuster Rembiesa detailing both the nature and extent of the fire loss, as well as numerous post-fire scene photographs, which he chose to ignore before denying coverage to Plaintiffs. *Id.* at ¶ 93. Accepting and upholding this Proposition of Law would thus still require an affirmance of the appellate court's sound decision.

**PROPOSITION OF LAW NO. 5: IN ORDER TO AVOID LIABILITY FOR BAD FAITH CLAIMS DECISIONS, INSURERS NEED NOT PROVE THEIR INVESTIGATION**

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**FOLLOWING LATE NOTICE DID NOT SUCCEED IN COMPLETELY MITIGATING THE PREJUDICE THEIR INSUREDS CAUSED, WAS BEYOND REPROACH OR THAT THEIR CLAIM DECISION WAS PERFECTLY CORRECT IN EVERY RESPECT**

The final Proposition of Law is nothing more than an odd commentary on the insurer's contrived interpretation of the incomplete record evidence, which could not possibly possess any legitimate precedential value for Ohio jurisprudence. The only proof that is required to establish a claim for bad-faith in this state is that there was no "reasonable justification" for the insurer's decision. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 554-555, 644 N.E.2d 397 (1994); *Wagner v. Midwestern Indemn. Co.*, 83 Ohio St.3d 287, 289-290, 699 N.E.2d 507 (1998). While discovery is not yet concluded in this particular action, it is already evident that Adjuster Rembiesa denied Plaintiffs' fire loss claim without bothering to fully review and appropriately consider the investigatory reports, numerous photographs, and other supporting evidence that had been gathered in the wake of the blaze by the Cleveland Fire Department and EFI Global. *LTF 55 Properties,* 2020-Ohio-4294, at ¶ 93. Once Defendant has finally produced the witnesses who still need to be deposed as well as the internal records that have not yet been divulged, Plaintiffs anticipate that there will be no doubt over the insured's bad-faith handling of the claim.

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## CONCLUSION

For the foregoing reasons, this Court should decline jurisdiction over this appeal.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum** has been served by e-mail on this 16th day of November, 2020 upon:

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