

**IN THE SUPREME COURT OF OHIO**

AARON FINGER,

Plaintiff,

vs.

LIBERTY MUTUAL PERSONAL  
INSURANCE CO., et al.,

Defendants.

APPEAL FROM THE CUYAHOGA  
COUNTY COURT OF APPEALS  
CASE: CA-23-112349

SUPREME COURT OF OHIO  
CASE: \_\_\_\_\_

---

**APPELLANT'S MEMORANDUM IN FAVOR  
OF JURISDICTION**

---

James E. Boulas (0070007)  
**JAMES E. BOULAS CO., L.P.A.**  
Raintree Plaza  
7912 Broadview Road  
Broadview Heights, OH 44147-1205  
(440)526-8822 / Fax (440)828-8822  
jim@sue2win.com

Attorney for Appellant,  
Aaron Finger

Frank S. Carson (0089575)  
William M. Harter (0072874)  
**FROST BROWN TODD LLC**  
10 West Broad Street, Suite 2300  
Columbus, Ohio 43215  
(614)464-1211 / Fax (614)464-1737  
wharter@fbtlaw.com  
fcarson@fbtlaw.com

Attorneys for the Appellee,  
Liberty Mutual Personal  
Insurance Company

## TABLE OF CONTENTS

<b>I.</b>	<b>Explanation of Why this Case Involves A Question of Public or Great Importance....</b>	<b>3</b>
<b>II.</b>	<b>Statements of the Facts and the Case.....</b>	<b>5</b>
	1. Mr. Finger’s Purchase of the Insurance Policy.....	5
	2. The Loss. ....	6
	3. The “Rewrite Unit.” ....	7
	4. Liberty Mutuals’ Rescission of the Policy.....	7
	5. Liberty Mutuals’ Denial of the Claim. ....	8
	6. The Case.....	8
<b>III.</b>	<b>Arguments in Favor of Propositions of Law .....</b>	<b>9</b>
	1. A Court must look to the plain and ordinary meaning of the words in the context of the whole document when determining whether there is ambiguity in an insurance agreement.....	9
	2. An Insurance Company can become bound by promissory estoppel if the documents that it prepared would cause a reasonable person to believe they have coverage. ....	10
	3. An Insurance Company acts in bad faith when it denies a claim based on an ambiguous policy.....	11
	4. Racial stereotyping is extreme and outrageous conduct giving rise to an intentional infliction of emotional distress claim.....	12
	5. Sworn testimony of changes in appetite and sleep patterns due to stress can create a dispute of material fact as to whether the Plaintiff suffered serious emotional distress for an intentional infliction of emotional distress claim.....	12
<b>IV.</b>	<b>Conclusion.....</b>	<b>14</b>

## **I. EXPLANATION OF WHY THIS CASE INVOLVES A QUESTION OF PUBLIC OR GREAT IMPORTANCE**

In 2022 66% percent of Ohioans were homeowners. Federal Reserve Bank of St. Louis, *Homeownership Rate for Ohio*, <https://fred.stlouisfed.org/series/OHHOWN>, (accessed August 16, 2023). 93% of homeowners hold an insurance policy. Nathan Paulus, *Homeowner Insurance Statistics*, <https://www.moneygeek.com/insurance/homeowners/homeowners-insurance-statistics/#:~:text=By%20the%20end%20of%202021,some%20form%20of%20home%20insura>nce (accessed August 16, 2023). Homeowner insurance policies are a matter of great importance to Ohioans. It is vital that Courts interpret these policies consistently to protect homeowner's reasonable expectations when they purchase homeowner insurance.

This case presents significant issues as to how Ohio Courts should interpret homeowner insurance policies. The issues brought forth in this case are as follows: (1) When a court determines whether there is ambiguity in an insurance agreement, must it consider the context of the words in the document? (2) Can an Insurance Company become bound by promissory estoppel when it makes statements that would cause a reasonable person to believe coverage was guaranteed? (3) Does an Insurance Company Act in bad faith when it denies a claim based on an ambiguous policy? (4) Can racial stereotyping rise to the level of extreme and outrageous conduct necessitated for an intentional infliction of emotional distress claim? (5) Is the sworn testimony of the claimant as to the negative consequences they suffered sufficient create a dispute of material fact as to whether the claimant suffered serious emotional distress for an intentional infliction of emotional distress claim?

Here, the Court of Appeals and the Trial Court used the dictionary definitions of the words “primary”, “principal” and “resident” in an insurance application to find that the application

unambiguously referred to the place where the applicant lived. However, in its opinion the Court of Appeals did not reference the context of the terms in the application. Confusingly, the application identifies the insured location as a principal residence and in the same section asks, “is your primary residence insured (or concurrently being written) with Liberty Mutual”. This acknowledges that the applicant’s primary residence is different from the insured location. Additionally, here Mr. Finger disclosed at the time of the Application that there were two tenants living on the premises and on the application disclosed that those were the only two occupants of the premises. In context this created sufficient evidence of ambiguity to constitute a dispute of material fact.

Additionally, The Court of Appeals and Trial Court found that there was no promissory estoppel because Mr. Finger’s reliance on Liberty Mutual’s promise of coverage was not reasonable because the application and policy language was unambiguous. Liberty Mutual rescinded the policy which means there was no contract. Liberty Mutual assured Mr. Finger that he would have proper coverage if he truthfully responded to the questions in the application. Mr. Finger truthfully answered all the questions Liberty Mutual required in the Application and thus reasonably believed he had proper coverage on the Insured Location. Due to this belief, he did not pursue other coverage options.

The Court of Appeals and Trial Court also opined that there was no bad faith because Liberty Mutual has a reasonable justification for denying Mr. Finger’s claim, which was that he did not reside at the insured location. While this is true, Mr. Finger was transparent about not residing at the insured location from the time he filled out his application. Therefore, it was bad faith for Liberty Mutual to deny the claim.

As to the Intentional Infliction of Emotional Distress claim, the Trial Court found that racist remarks do not constitute outrageous conduct under Ohio law. However, the Court of Appeals notably decided the issue differently. Judgement Affirmed 7-6-23 at 23-24. The Court of Appeals resolved the claim based on a lack of evidence of serious mental anguish. The Court's decision to resolve the claim on a different element raises the question of whether it considered racist remarks to rise to the level of outrageousness required for such a claim under Ohio Law.

Additionally, the Court found that Mr. Finger did not offer any evidence that he suffered a severe and debilitating emotional injury. However, the Court did acknowledge Mr. Finger's sworn testimony that his anguish affected his ability to sleep, his appetite, and his health. This testimony should be sufficient to create a question of material fact as to whether Mr. Finger suffered severe and debilitating emotional distress.

## **II. STATEMENT OF THE FACTS AND THE CASE**

This case involves Mr. Finger's purchase and Liberty Mutual's issuance of a policy of insurance for a residential property and Liberty Mutual's subsequent refusal to pay Mr. Finger's claim when the property was damaged by fire.

### **1. Mr. Finger's Purchase of the Insurance Policy.**

On October 28, 2019, Mr. Finger visited Liberty Mutual's website to purchase a policy of insurance on a residential property located at 3279 E. 130<sup>th</sup> Street in the City of Cleveland ("the Insured Location"). Liberty Mutual's Online Application consisted of approximately ten pages and was so complex that Mr. Finger was unable to fully complete it. On October 29, 2019, Mr. Finger received a call from Liberty Mutual's commissioned vender to complete the application process. Intemann Depo. p. 93, 12-17. During the call, Mr. Finger advised Liberty Mutual that

he wanted to purchase insurance for the Insured Location that was being used as a rental property. This call was recorded by Liberty Mutual but subsequently deleted.

Following the call Mr. Finger received from Liberty Mutual, via email, a form titled “Your Home Insurance Application”. The Application instructed Mr. Finger to verify his answers to specific questions in order “to ensure proper coverage.” Mr. Finger verified the answers to those questions, signed the Application and returned it to Liberty Mutual. This is the only application signed by Mr. Finger. Following its receipt of the signed Application, Liberty Mutual issued the Policy insuring the Insured Location for, among other things, damage or loss by fire with an effective date of October 30, 2019.

## **2. The Loss.**

On May 9, 2020, the Insured Location was substantially damaged by fire (“the Loss”). Mr. Finger timely notified Liberty Mutual of the Loss, which was a covered loss under the Policy, and made a claim for payment under the Policy (“the Claim”). Following the Loss, Liberty Mutual assigned Karl Intemann (“Intemann”), its “Senior Special Investigator” to interview Mr. Finger. On May 18, 2020, Intemann conducted a recorded interview with Mr. Finger. During the interview, Intemann inquired whether Mr. Finger owned any other real estate to which Mr. Finger responded that he owned three properties. Thereafter, the interview continued as follows:

**Intemann:** Yeah. And, um, do you have any mortgages on any of these properties?

**Mr. Finger:** No.

**Intemann:** No mortgages at all?

**Mr. Finger:** None at all.

**Intemann:** How was it you were able to afford buyin’ [sic] these things?

Mr. Intemann asked the last question in a manner that implied disbelief that Mr. Finger was able to afford to own three relatively inexpensive properties. This is especially obvious when

one listens to the audio and hears the tone Mr. Intemann used to ask the question. Mr. Intemann seems to suggest that individuals like Mr. Finger are not capable of purchasing real estate without borrowing money or obtaining the funds illegally. Mr. Finger is black, and Mr. Intemann is white. The question was racially charged and offensive. Further, Liberty Mutual has no written policy on racial profiling and stereotyping. Intemann Depo. p. 104 -105.

### **3. The “Rewrite Unit.”**

Following his interrogation of Mr. Finger, Intemann contacted a department of Liberty Mutual referred to as the “Rewrite Unit.” The Rewrite Unit functions as hind-sight underwriter in that it reviews policies that have already been issued and on which claims have been submitted. Unlike Liberty Mutual’s commissioned vendors who are financially incentivized to sell policies, the Rewrite Unit’s purpose is to find reasons to avoid paying a claim. Intemann Depo. p. 66-67. Intemann asked the Rewrite Unit whether the Insured Location’s use as a rental would have caused Liberty Mutual to deny issuing the Policy three times. On the first two inquiries the Rewrite Unit responded that it would not. However, on Mr. Intemann’s third inquiry, the Rewrite Unit relented and gave Intemann the answer he wanted, that Liberty Mutual would not have issued the Policy if it knew that Mr. Finger did not have prior insurance on the Insured Location. Intemann Depo. p. 73. Liberty Mutual took three actions in regard to the Claim and Policy, those being rescission of the Policy, denial of the Claim, and cancellation of the Policy.

### **4. Liberty Mutuals’ Rescission of the Policy.**

On July 20, 2020, Liberty Mutual sent Mr. Finger a letter rescinding the Policy and claiming that Mr. Finger failed to disclose, concealed, or otherwise misrepresented that he “had prior insurance, expiring on November 29, 2019” when he did not have insurance on the Insured Location at the time he applied for the Policy. This Rescission identifies Mr. Finger’s alleged misrepresentation that he had prior insurance on the Insured Location as the only reason for

rescinding the Policy. Liberty Mutual was not justified in rescinding the Policy since Mr. Finger made no representation that he had prior insurance on the Insured Location in the Application. Mr. Finger could not anticipate that the Policy would be rescinded because he verified the answers given in his signed Application as being accurate.

Moreover, Robert Fix, Liberty Mutual's Special Investigations Unit Property Examiner at the time of the Loss, testified in a December 17, 2021 deposition that Liberty Mutual does not rescind every policy in which there was no prior insurance and that there is no steadfast rule in determining whether to rescind a Policy. Fix further testified that the level of scrutiny in making the decision to rescind a policy, which he acknowledged to be "the harshest remedy," depends on the dollar value of the claim. Fix Depo p. 37, 2-3.

#### **5. Liberty Mutuals' Denial of the Claim.**

On July 20, 2020, in addition to its rescission of the Policy, Liberty Mutual sent Mr. Finger a letter denying the Claim. Liberty Mutual based its denial of the Claim on the ambiguous Policy definition of "Residential Premises" and on the fact that Mr. Finger did not reside at the Insured Location. Mr. Finger never indicated to Liberty Mutual that he resided at the Insured Location. Liberty Mutual never asked Mr. Finger to verify that he resided at the Insured Location. In fact, Mr. Finger's home address, which differs from that of the insured location, appears on the Application and is the address to which Liberty Mutual mailed all Policy Documents and correspondence. Mr. Finger's home address was known to Liberty Mutual at the time he applied for and purchased the Policy.

#### **6. The Case**

On February 25, 2021, Appellant Aaron Finger filed a lawsuit against Appellee Liberty Mutual Personal Insurance Company (hereinafter "Liberty Mutual") alleging bad faith breach of contract, promissory estoppel, and spoliation of evidence. On March 2, 2022, Mr. Finger



amended his Complaint and asserted additional claims for fraud, intentional infliction of emotional distress and declaratory judgment.

On August 15, 2022, Liberty Mutual filed its motion for summary judgment (hereinafter “MSJ”). On September 23, 2022, Mr. Finger filed his Brief in Opposition to the MSJ (hereinafter “BIO MSJ”). On January 9, 2023, the Trial Court erroneously granted Liberty Mutual’s motion for summary judgment and dismissed all of Mr. Finger’s claims against Liberty Mutual.

On January 23, 2023, Mr. Finger filed his Notice of Appeal as there are genuine issues of material fact that preclude the granting of summary judgment in favor of Liberty Mutual. On July 6, 2023, the Eighth District Court of Appeals entered judgment affirming the Trial Court.

### **III. ARGUMENTS IN FAVOR OF PROPOSITIONS OF LAW**

#### **1. A Court must look to the plain and ordinary meaning of the words in the context of the whole document when determining whether there is ambiguity in an insurance agreement.**

The Court of Appeals looked to the meaning of the terms “primary”, “principal” and “resident” in determining whether the policy was ambiguous. However, the Court did not consider the context of these terms. The Online Application contemplates the possibility of insuring Mr. Finger’s primary residence in addition to the Insured Location. The only time “your” primary residence is used is in reference to a residence other than the insured location. It also acknowledges that the Insured Location will be occupied by two people, both renters. This is contrary to the Policy language requiring Mr. Finger to reside at the Insured Location. The resulting dichotomy should have been resolved by the trier of fact and in the context of summary judgment, it should have been resolved in Mr. Finger’s favor.

This Court has held that a contract should be read as a whole. *Foster Wheeler Enviresponse v. Franklin County Convention Facilities Auth.*, 78 Ohio St. 3d 353, 361 (citing). A court must consider the context of the words they are giving meaning to in order to follow this rule of contract construction.

**2. An Insurance Company can become bound by promissory estoppel if the documents that it prepared would cause a reasonable person to believe they have coverage.**

Promissory estoppel has been defined as a promise which a promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *Hortman v. City of Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, ¶ 1. Here, Liberty Mutual expressly promised Mr. Finger that he would have “proper coverage” on the Insured Location if he verified his answers to certain specific questions. Mr. Finger verified his answers by signing and returning the Application to Liberty Mutual. He paid the required premium and the Application stated that the Policy was effective from October 30, 2019 through October 30, 2020.

Based on Liberty Mutual’s promise of “proper coverage” for the Insured Location, Mr. Finger reasonably believed the Insured Location was properly covered and insured. He did not seek to purchase insurance elsewhere, a forbearance that Liberty Mutual should have reasonably expected. The Insured Location was damaged by fire, which would have been covered under the Policy. As it has been rescinded by Liberty Mutual, the Policy never existed. All that is left is a promise of proper coverage. An injustice can only be avoided by enforcing that promise.

Certainly, not every rescission of an insurance policy will lead to a promissory estoppel claim. However, Mr. Finger never misrepresented in the Application that he had prior insurance

on the Insured Location and Liberty Mutual was not justified in rescinding the Policy. If the rescission was justified, then Mr. Finger would not have a claim for promissory estoppel because, knowing of his misrepresentation, he could not reasonably believe he had proper coverage. Under those circumstances, refusing to enforce Liberty Mutual's promise would not result in an injustice. Here, Mr. Finger truthfully answered all the questions Liberty Mutual required in the Application and he reasonably believed he had proper coverage on the Insured Location. The Trial Court erred in granting summary judgment in favor of Liberty Mutual on Mr. Finger's promissory estoppel claim.

**3. An Insurance Company acts in bad faith when it denies a claim based on an ambiguous policy.**

An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefore. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 552, 1994-Ohio-461, 644 N.E.2d 397. According to the "reasonable justification" standard, an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor. Intent is not and has never been an element of the reasonable justification standard. *Id.*

"In Ohio, an insurance company has a **fiduciary responsibility toward its insured to act in good faith toward its insured in carrying out its duties under the contract**" and a breach of that duty "arises when the insurer fails to perform under the contract or unreasonably refuses to act in a prompt manner." *Johnson v. Am. General Life Ins. Co.*, 2006-Ohio-5771. [Emphasis added]. Liberty Mutual owes Mr. Finger a fiduciary duty to act in good faith in the handling of the Claim.

**4. Racial stereotyping is extreme and outrageous conduct giving rise to an intentional infliction of emotional distress claim.**

Racial Trauma or Race-Based Traumatic Stress (BRTS) is recognized as a mental and emotional injury caused by encounters with racial bias. Racial Trauma, Mental Health America, <https://www.mhanational.org/racial-trauma> (last accessed March 13, 2023). RBTS is a mental injury that can occur as the result of living within a racist system or experiencing events of racism. Mr. Finger's symptoms are consistent with RBTS. To rule that racial remarks do not constitute outrageous conduct under Ohio law is not consistent with reality.

On May 4, 2022, Corey Pujols, a 27 year-year-old black man, fatally punched a white man for using a racial slur. Pujols, who was initially charged with manslaughter, plead guilty to felony battery, and received a sentence of two years house arrest. The racist comments made by the victim were considered in mitigating Mr. Pujols' punishment. In other words, our society acknowledges that racial discrimination, profiling, and stereotyping are more than upsetting inconveniences as argued by Liberty Mutual. Mr. Finger does not ask this Court to establish a new tort but rather simply to acknowledge that this type of conduct can be so extreme and outrageous that it goes beyond the bounds of decency and is intolerable in a civilized society.

**5. Sworn testimony of changes in appetite and sleep patterns due to stress can create a dispute of material fact as to whether the Plaintiff suffered serious emotional distress for an intentional infliction of emotional distress claim.**

Loss of appetite and loss of sleep are evidence of emotional distress and create an issue of fact that a finder of fact should determine. Elevated stress levels are shown to affect sleep patterns. Eric Suni, Alex Dimitriu, Sleep Foundation, *Stress and Insomnia* Aug. 8, 2023. Additional acute stress – stress which is caused by a traumatic event is shown to cause a decrease in appetite. Armghan H. Ans et al., Cureus, *Neurohormonal Regulation of Appetite and its Relationship with Stress: A Mini Literature Review*, July 23, 2018.

When it comes to emotional distress requiring expert testimony or medical diagnosis to survive summary judgment will leave behind many Plaintiffs who are suffering from an emotional injury. Studies have shown that most adults in the United States with a mental health disorder do not receive any treatment. Ronald C. Kessler PhD, et al., PubMed Central, *US Prevalence and Treatment of Mental Disorders: 1990–2003*, March 30, 2010; Ramin Mojtabai MD, PhD, MPH et al., PubMed Central, *Barriers to Mental Health Treatment: Results from the National Comorbidity Survey Replication (NCS-R)*, Dec. 10, 2010. This is often due to structural barriers to treatment such as stigma and a lack of availability of treatment or personnel. *Id.* Therefore requiring treatment in order to survive summary judgment on an emotional distress claim will preclude the majority of injured plaintiffs from ever coming before a finder of fact. To prevent injustice, this Court should find that a plaintiff's sworn testimony of loss of sleep and appetite creates a dispute of material fact as to whether the Plaintiff suffered serious emotional distress.

#### IV. CONCLUSION

For the reasons set fourth above, this case involves a matter of public and great general interest. Therefore, the Appellant respectfully requests that this Court accept jurisdiction in this case so that the important issues presented may be reviewed on the merits.

Respectfully Submitted,

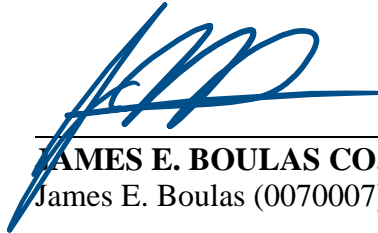


---

James E. Boulas (0070007)  
**JAMES E. BOULAS CO., L.P.A.**  
Raintree Plaza  
7912 Broadview Road  
Broadview Heights, Ohio 44147-1202  
(440) 526-8822/Fax (440) 838-8822  
Email: jim@sue2win.com  
Attorney for Plaintiff-Appellant,  
Aaron Finger

**CERTIFICATE OF SERVICE**

The foregoing was electronically filed on August 21, 2023 and will be served on counsel for Defendant-Appellee Liberty Mutual Personal Insurance Company via electronic mail at wharter@fbtlaw.com and fcarson@fbtlaw.com. Additionally, a copy of this Motion has been served via regular U.S. Mail upon Defendant Milton Loftus at 3618 E. 149<sup>th</sup> St., Cleveland, Ohio 44120.



---

**JAMES E. BOULAS CO., L.P.A.**

James E. Boulas (0070007)