IN THE SUPREME COURT OF OHIO
CASE NO. 2024-1329

ONE CHURCH, Appellee, vs. BROTHERHOOD MUTUAL INSURANCE COMPANY Appellant.	)	CASE NO. 2024-1329 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District, Case No. 23AP-457

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS

Thomas F. Glassman (0061466)
BONEZZI SWITZER POLITO & PERRY, CO. LPA
312 Walnut Street, Suite 2530
Cincinnati, OH 45202
(513) 345-5502 (T) * (513) 345-5510
tglassman@bspplaw.com
Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys

Richard M. Garner (0061734)
Lucas P. Baker (0092187)
COLLINS ROCHE UTLEY & GARNER LLC
655 Metro Place South, Suite 200
Dublin OH 43017
(614) 901-9600 (T) * (614) 901-2723
rgarner@cruglaw.com
lbaker@cruglaw.com
Counsel for Defendant-Appellant, Brotherhood Mutual Insurance Company

Stephen C. Lane (0034607)
7419 Kingsgate Way, Suite A
West Chester OH 45069
steve@stevelanelawoffice.com
(513) 755-6398 (T) * (513) 777-3020
Counsel for Plaintiff-Appellee, One Church

Robert L. Tucker (0023491)
HANNA, CAMPBELL & POWELL, LLP
3737 Embassy Parkway, Suite 100
Akron OH 44333
(330) 670-7300 (T) * (330) 670-7454
ltucker@hcplaw.net
Counsel for Amicus Curiae, Acuity

Timothy J. Fitzgerald (0042734)
KOEHLER FITZGERALD LLC
1111 Superior Ave., East, Suite 2500
Cleveland OH 44114
(216) 539-9370 (T) * (216) 916-4360
tfitzgerald@koehler.law
Counsel for Amicus Curiae, Ohio Insurance Institute

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INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization whose wide array of members consist of attorneys, supervisory or managerial employees of insurance companies, and corporate executives of other corporations who devote a substantial portion of their time to the defense of civil damage lawsuits and the management of insurance claims brought against individuals, corporations, and governmental entities. For over fifty years, OACTA has promoted fairness, excellence, and integrity in the civil justice system, including by seeking predictability, stability, and consistency in Ohio's constitutional safeguards, statutory laws, and legal precedents. As part of this mission, OACTA files amicus curiae briefs in significant cases before federal and state courts in Ohio, advocating for rules of law that promote fairness and improve the administration of justice.

OACTA appears as amicus curiae here in support of Appellant Brotherhood Mutual Insurance Company ("Brotherhood"), and in favor of reversal of the Tenth District's decision, because alternative dispute resolution ("ADR") provisions such as appraisal need to have finality embodied within them in order to serve their stated purpose. If the Tenth District's decision stands, then there can never be finality to an appraisal award, as a dissatisfied party will have the ability to again and again challenge it, in the hope of ultimately achieving the result they desire. It is inevitable that when a decision is put in the hands of a non-party, that at least one party will be dissatisfied with the result. That alone is not a sufficient basis to allow a court to re-write an insurance policy and contravene the clear intent of the insurer and the insured when they entered into the contract.

STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts from the Merit Brief filed by Appellant.

ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

Proposition of Law No. I: Binding appraisal in property insurance cases is intended to: (a) require each party to fully investigate and determine the amount of the loss; and (b) have the practical effect of claim and issue preclusion with respect to the amount of the appraised loss.

We have all heard countless times that there are several things inevitable in life; these include death and taxes. What is also inevitable is that when there is a dispositive ruling on a disputed legal matter, whether it is a jury verdict, judicial decision, arbitration finding, or appraisal award, there will always be at least one party who will walk away unhappy. It is inevitable and it is unavoidable. It is a common, and perhaps normal, reaction for the unhappy party to blame the unfavorable decision on a "mistake" rather than accept that the facts and law simply do not support their position.

ADR continues to be increasingly embraced, as it gives litigants greater control of their cases, and it reduces litigation expenses and the courts' caseloads. Ohio courts have consistently recognized the value of ADR to litigants in all kinds of matters. Appraisal is a form of ADR largely limited to disputes between insurers and policyholders as to the value of a covered loss. It is important and effective for insurers and policyholders alike.

The great judicial deference arbitration awards receive shows the clear preference Ohio courts have for both ADR in general and its finality. In *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, the Ohio Supreme Court highlighted the strong and clear public policy favoring arbitration. The court noted the benefits of ADR included its speed in resolving disputes; cost savings to the parties; and freeing up court dockets. *Hayes*, ¶ 15. "In light of the strong presumption favoring arbitration, all doubts should be resolved in its favor." *Ignazio v. Clear Channel Broadcasting, Inc.*, 2007-Ohio-1947.

Schaefer v. Allstate Ins. Co., 63 Ohio St.3d 708 (1992), held that an insurance policy's arbitration clause must be binding to be enforceable. The court invalidated an arbitration clause that allowed an appeal if the award exceeded a certain amount, emphasizing that for arbitration to be effective, the award must be final and binding.

> [I]t is apparent that the insurance provision in question here represents a clear attempt to bypass R.C. 2711 by setting up an "escape hatch" for any party disappointed with an award exceeding a specified amount. In doing so, the provision completely frustrates the purposes of "arbitration" and every public policy reason favoring the arbitration system of dispute resolution. By permitting a trial *de novo* in some instances, the provision unnecessarily subjects the parties to multiple proceedings in a variety of forums, increases costs, extends the time consumed in ultimately resolving a dispute, and eviscerates any advantage of unburdening crowded court dockets. Accordingly, since the provision is *not* a provision providing for true arbitration, the entire agreement to "arbitrate" clause is unenforceable.

Schaefer went so far as to call "non-binding arbitration" an oxymoron. *Schaefer* at 714.

These principles underscore the Supreme Court's preference for ADR mechanisms, which aim to provide a conclusive resolution to disputes without the prolonged litigation process. The emphasis on finality aligns with the goals of ADR, which include efficiency, cost-effectiveness, and reducing the burden on the judicial system. ADR of course leads to earlier and more economic resolutions of cases, saving parties substantial legal fees and expenses, as well as freeing up the courts.

The legislature has a similar preference for ADR. R.C. 2711.01 shows Ohio public policy favors arbitration. R.C. 2711.01 states that an arbitration agreement "shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." The preference for arbitration is clear from R.C. 2711.02, which permits a party to obtain a stay of litigation in favor of arbitration under R.C. 2711.02. There is no statutory provision

for *de novo* review, or for a dissatisfied party to challenge the result by requesting a second arbitration.

In order for ADR to be an effective tool in resolving cases, the finality of the process must be respected and enforced. Otherwise, any benefits of ADR are effectively erased, as now litigants know that no matter what the result is of arbitration, appraisal, or any other form of binding ADR, they can simply challenge the findings and either relitigate the issues or effectively have a "do over."

The subject insurance policy contains the following appraisal provision which was addressed by both the trial court and appellate court:

> OTHER CONDITIONS
>
> In addition to the policy terms which are contained in the other sections of the Commercial Property Coverage, the following conditions apply.
>
> 1. Appraisal: If you and we do not agree on the amount of the loss or the actual cash value of covered property, either party may demand that these amounts be determined by appraisal.
>
>   If either makes a written demand for appraisal, each selects a competent, independent appraiser and notifies the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the property is located to select an umpire.
>
>   The appraisers will then determine and state separately the amount of each loss.
>
>   The appraisers also determine the actual cash value of covered property items at the time of the loss, if requested.
>
>   A written agreement is binding on all parties . . .

There is no provision in the policy allowing for multiple appraisals or giving the parties opportunities to challenge the amounts of awards. The policy language clearly shows the intent

of the parties to engage in a process with finality, as opposed to being open-ended. The appellate court's decision goes far beyond what the parties contracted with each other to do. It adds layers and provisions to the policy which were neither contemplated nor agreed to.

In construing the terms of a written contract, the primary objective is to give effect to the intent of the parties, which rests in the language utilized. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, citing *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. Appellee is not claiming there is an ambiguity in the policy. Rather, Appellee is asking the courts to re-write the policy to create a remedy that the parties never contracted for, and which is not allowed under Ohio law. When insurance policy provisions are "clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties." *Rhoades v. Equitable Life Assur. Soc. of the U.S.*, 54 Ohio St.2d 45 (1978). "It is not within our province to rewrite contracts to create judicially preferred outcomes." *Acuity, a Mut. Ins. Co. v. Progressive Specialty Ins. Co*., 173 Ohio St.3d 178, 2023-Ohio378.

Appraisal provisions are common in insurance policies, and Ohio courts have long respected and enforced those provisions. *Stuckman v. Westfield Ins. Co.,* 2011-Ohio-2338, 968 N.E.2d 1012. Ohio public policy favors the application of appraisal clauses and their enforcement. *Guider v. LCI Communications Holdings Co.,* 87 Ohio App.3d 412 (10th Dist. 1993). Appraisal resolves claims far more quickly than litigation does, and at a fraction of the cost. Eliminating its finality guts its very purpose, creating the very oxymoron *Schaefer* warned against.

Since appraisal provisions are created by contract, contract law must be applied to their application and interpretation. *Cousino v. Stewart,* 2005-Ohio-6245 (6th Dist.). *Smith v. The Shelby Ins. Group,* 1997 Ohio App. Lexis 5864 (11th Dist. Dec. 26, 1997), recognized that when

properly invoked, the appraisal process should not be disturbed. Judicial review of an appraisal is "extremely limited." *Stuckman*; *see also Smith*, *supra*.

Lakewood Mfg. Co. v. Home Ins. Co. of New York (C.A.6, 1970), 422 F.2d 796, noted that only highly exceptional circumstances warrant disturbing an appraisal award:

> Generally, a court will not interfere with an appraisal award but, to the contrary, will indulge in every reasonable presumption to sustain it in the absence of fraud, mistake, or misfeasance. A court will not substitute its judgment for that of the appraisers or set aside an award for inadequacy or excessiveness unless it is so palpably wrong as to indicate corruption or bias on the part of the appraisers.

See also Csuhran v. Merrimack Mut. Fire Ins. Co., 1994 WL 102248 (11th Dist. Mar. 18, 1994); *Steiner v. Appalachian Exploration, Inc.*, 31 Ohio App.3d 177 (1986); *Royal Ins. Co. v. Ries*, 80 Ohio St. 272 (1909).

Similarly, *Edwards v. Transamerica Ins. Group,* 1986 WL 9619 (10th Dist. Sept. 2, 1986), recognized:

> A valid appraisal provision is binding where invoked by the parties and expressly made the preferred method by the terms of the policy; also public policy favors appraisals which will be enforced in the absence of fraud, mistake, or manifest injustice.

Allowing the appellate court's decision to stand will have profound implications on litigants on many levels. The implications of that decision are not limited to insurance appraisals. It effectively allows anyone who is unhappy with the result of any form of ADR to continuously challenge the result, without restriction or limitation, in the hope they ultimately get the desired result. Many times in insurance litigation an appellate decision will have a negative impact on insurers going forward, but be beneficial to policyholders; other times it is *vice versa*. This scenario is markedly different. Allowing appraisals to continue *ad infinitum* not only renders the

process meaningless, but it also opens it up to misuse and abuse – to the potential detriment of both policyholders and insurers.

Any party who is on the adverse side of a jury verdict, judicial decision, or any other dispositive finding in a legal proceeding will inevitably claim that there was some sort of mistake, leading to the adverse outcome. This is why Ohio has clear rules on what can and cannot be appealed, and when. This is why courts enforce binding arbitration provisions. This is why the exceptions to challenging and appraisal award are very limited.

Proposition of Law No. II: As a matter of law, an insured's unilateral assertion of the finding of additional "hidden damages" after the insured's acceptance of the insurer's payment of a binding appraisal award does not constitute a mistake that permits the appraisal to be set aside.

"If you cannot say what you mean, your majesty, you will never mean what you say and a gentleman should always mean what he says." (Sir Reginald Fleming Johnston to Emperor Pu Yi).

Appellee suggests they are entitled to a second appraisal because a "mistake" was made during the first appraisal. An unsupported and cryptic assertion of "hidden damages," after accepting payment, is not a mistake and is not a basis to challenge the award. In fact, mistake is the only basis Appellee offers to suggest that the appraisal award be set aside. This is striking when juxtaposed with the complaint. The word "mistake" does not appear at all in the underlying complaint. It is not mentioned one single time in the entire pleading. Mistake is not implied in the complaint, nor can it be reasonably be inferred from the allegations pled. Appellee never sought leave from the trial court to amend the complaint to plead mistake the requisite specificity.

Many crucial details are absent from the complaint. Who made the mistake, a party or non-party? Was it a mutual mistake or a unilateral mistake? What was the mistake? When was it made? What was the impact of the claimed mistake? None of this is contained in the complaint, nor can it be reasonably inferred.

This omission is not trivial. Instead, it is fatal to Appellee's claims. Although Ohio is usually a notice pleading state, that is not absolute. Civil Rule 9 requires allegations of fraud and mistake be pled with particularity, a significantly heightened standard of pleading. This heightened standard of pleading is required due to the seriousness of such allegations. *Id.*, Staff Notes to Rule 9. This requirement is not accidental. A party claiming mistake must prove it by clear and

convincing evidence, as opposed to by a mere preponderance of the evidence. *Marchbanks v. Ice House Ventures, LLC*, 2023-Ohio-1866.

The determination of the appropriate level of specificity in the heightened pleading must be made on a case-by-case basis. *Baker v. Conlan*, 66 Ohio App.3d 454 (9th Dist. 1990); *see also F & J Roofing Co. v. McGinley & Sons, Inc.*, 35 Ohio App.3d 16 (9th Dist. 1987). While some cases may meet particularity standards with less specific facts pled, the case-by-case analysis ensures the appropriate level of particularity for defendants to accurately respond, and effectively works to dismiss cases that lack a basis.

The underlying determination of whether a short and plain statement complies with the particularity requirement is "whether the allegation is specific enough to inform the defendant of the act of which the plaintiff complains, and to enable the defendant to prepare an effective response and defense." *Olenchick v. Scramling*, 2020-Ohio-4111 (11th Dist.), citing *Meehan v. Mardis*, 2019-Ohio-4075, (1st Dist.).

This requirement is akin to the rule's federal counterpart, Federal Rule of Civil Procedure 9. The particularity standard is more aligned with the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Those decisions introduced a "plausibility" standard for federal pleadings, requiring that a complaint contains sufficient factual matter to state a claim that is plausible on its face.

Twombly, explained the rationale for heightened standards of pleading. The Supreme Court noted that there need to be mechanisms in place to weed out unsupported claims early in the litigation process, before the parties incur considerable litigation expenses.

> We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals*, *Inc.* v. *Broudo*, 544 U.S. 336 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with " 'a largely groundless claim' " be allowed to " 'take up the time of

> a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.' " *Id.*, at 347 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975)). So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, " 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.' "
>
> ***
>
> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," *post* at 4, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, *e.g.*, Easterbrook, Discovery as Abuse, 69 B. U. L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves"). And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," *post,* at 4; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no " 'reasonably founded hope that the [discovery] process will reveal relevant evidence' " to support a §1 claim. (quoting *Blue Chip Stamps*, *supra*, at 741; alteration in *Dura*).

Reversal does not leave Appellee without recourse. If a mistake was indeed made during the appraisal process, then it has a remedy against its appraiser. Appraisal was initiated at Appellee's request. The parties each engaged appraisers of their own choosing and presumably vetted them. If a mistake was made by Appellee's appraiser, then Appellee must bear the consequences, rather than Appellant.

CONCLUSION

Allowing the appellate court's decision to stand defeats the very purpose of ADR provisions, and the long-established philosophy of the Ohio courts supporting ADR and other forms of resolution not requiring the intervention of the court system. The mere fact a party is displeased or disappointed with a resolution is not a basis to challenge it, particularly when the contract between the parties does not provide any means for appeal. Ohio courts have long recognized there are substantial limitations on a party's ability to challenge an appraisal decision and those limitations should not be disturbed or expanded.

It is not accidental that the drafters of the Civil Rules determined that allegations of mistake must be pled with particularity, and that the traditional notice pleading requirements do not apply. Without that particularity, an adverse party cannot be expected to know or appreciate the basis of the claims against them. Rule 9(B) is intended to weed out unsupported claims such as the one at issue here.

Respectfully submitted,

/s/Thomas F. Glassman
Thomas F. Glassman (0061466)
Bonezzi Switzer Polito & Perry Co., LPA
312 Walnut Street, Suite 2530
Cincinnati, OH 45202
Phone (513) 345-5502
Fax (513) 345-5510
Email tglassman@bspplaw.com
Counsel for Amicus Curiae, OACTA

CERTIFICATE OF SERVICE

A copy of the foregoing has been served via the court's electronic filing system and/or email this 17th day of March, 2025 upon:

Stephen C. Lane (0034607)
7419 Kingsgate Way, Suite A
West Chester OH 45069
steve@stevelanelawoffice.com

Counsel for Plaintiff-Appellee, One Church

Richard M. Garner (0061734)
Lucas P. Baker (0092187)
COLLINS ROCHE UTLEY & GARNER LLC
655 Metro Place South, Suite 200
Dublin OH 43017
rgarner@cruglaw.com
lbaker@cruglaw.com

Counsel for Defendant-Appellant, Brotherhood Mutual Insurance Company

Robert L. Tucker (0023491)
HANNA, CAMPBELL & POWELL, LLP
3737 Embassy Parkway, Suite 100
Akron OH 44333
ltucker@hcplaw.net

Counsel for Amicus Curiae, Acuity

Timothy J. Fitzgerald (0042734)
KOEHLER FITZGERALD LLC
1111 Superior Ave., East, Suite 2500
Cleveland OH 44114
tfitzgerald@koehler.law

Counsel for Amicus Curiae, Ohio Insurance Institute

/s/Thomas F. Glassman
Thomas F. Glassman