United States Court of Appeals for the Sixth Circuit

CASE NO. 25-3439

3371 READING, LLC

Plaintiff/Appellant

v.

LIBERTY MUTUAL GROUP, INC.,
OHIO CASUALTY INSURANCE COMPANY, and
JONATHAN JONES

Defendants/Appellees

Appeal from the U.S. District Court, Southern District of Ohio, 1:22-cv-00062

PLAINTIFF'S/APPELLANT'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Plaintiff/Appellant (“Plaintiff”) is not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome.

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STATEMENT CONCERNING ORAL ARGUMENT

This case raises important issues regarding insurance coverage, and it contains a significant factual record that the district court either ignored or misrepresented. As such, this case presents important issues for this Court and oral argument is warranted.

JURISDICTIONAL STATEMENT

The district court had diversity jurisdiction after Defendants/Appellees Liberty Mutual Group, Inc. ("Liberty") and Ohio Casualty Company ("Ohio Casualty") removed the case from state court under 28 U.S.C. §1332, where complete diversity existed and the amount in controversy exceeded $75,000. [Notice of Removal, Doc. 1, PageID#1-70]. Mr. Jonathan Jones ("Jones") was then added to the case as a defendant, but he also was diverse to Plaintiff. [Amended Complaint, Doc. 76, PageID#3731-3835]. On May 16, 2025, the district court entered summary judgment in favor of Defendants after full briefing on cross-motions for summary judgment. [Order, Doc. 119, PageID#6336-6355]. Final judgment was then entered in accordance with that decision. [Judgment, Doc. 120, PageID#6356]. Plaintiff filed a timely notice of appeal on June 9, 2025. [Notice of Appeal, Doc. 121, PageID#6357-58]. Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

This appeal presents the following questions:

(1) Did the district court err as a matter of law in granting summary judgment to Liberty and Ohio Casualty on the breach of contract claim, and did it further err as a matter of law in denying Plaintiff summary judgment on that same claim?

(2) Did the district court err as a matter of law in granting summary judgment to Liberty and Ohio Casualty on the bad faith claim, and did it further err as a matter of law in denying Plaintiff partial summary judgment as to liability on that same claim?

(3) Did the district court err as a matter of law in granting summary judgment to Defendants on the fraud claim, and did it further err as a matter of law in denying Plaintiff partial summary judgment as to liability on that same claim?

(4) Did the district court err as a matter of law in granting summary judgment to Liberty and Ohio Casualty on the Ohio Deceptive Trade Practices claim, and did it further err as a matter of law in denying Plaintiff partial summary judgment as to liability on that same claim?

INTRODUCTION

The material facts are not in dispute. Those facts demonstrate that Liberty and Ohio Casualty, through their agent Jones ("Defendants"), underwrote and issued a policy of builders' risk insurance ("the Policy"), purportedly covering the renovation of a building located at 3371 Reading Road, Cincinnati, Ohio ("the Premises") against fire loss. However, Jones, the Rule 30(B)(6) underwriter witness for Liberty and Ohio Casualty, shockingly admitted that the Policy would never cover any fire loss at the Premises because he knew it was impossible to comply

with the "Protective Devices Endorsement" ("PDE") he added to the Policy, at least based on the plain language of the PDE and how Defendants planned, from the start, to interpret the PDE.

Specifically, Jones added a conditional "exclusion" to the Policy (i.e. the PDE) requiring the insured to "maintain" a "fence" at least six-foot-high, controlled by Plaintiff, and "completely surrounding the jobsite," which Jones defined as the entire address of the Premises. Jones did this knowing the building at the Premises shared a common wall with another building, that it bordered the property line of the Premises on three sides, and that any fence would have to be entirely on the property of a third party. Thus, Jones knew Plaintiff could never "place" a separate fence, that Plaintiff controlled, "completely surrounding the jobsite," much less "maintain" such a fence, as the plain language of the Policy required. Of course, once a covered fire loss occurred, Defendants, just as they planned from the start, interpreted (rewrote actually) the PDE as requiring Plaintiff to have "placed" a six-foot-high fence "completely surrounding the jobsite" and, in bad faith, denied Plaintiff's claim solely on that basis.

As a result, Plaintiff initially sued Liberty and Ohio Casualty for breach of contract and bad faith, but then were allowed to amend (Doc. 75) and add claims for fraud (including a claim against Jones in his personal capacity) and violations of the Ohio Deceptive Trade Practices Act after Jones shockingly admitted to the material

facts of those claims in his Rule 30(B)(6) deposition. Both Plaintiff and Defendants filed cross-motions for summary judgment. After briefing and oral argument, the district court, perhaps even more shockingly, upheld Defendants' bad faith denial of coverage by determining, as a matter of law, that the PDE was not an exclusion, despite its plain language saying it was an "Exclusion" and that it modified the "Perils Excluded" on the Policy, and despite Defendants' undisputed Rule 30(B)(6) testimony admitting the PDE was an exclusion from coverage that had to be interpreted in favor of the insured if it reasonably could be.

The district court also determined, as a matter of law, that the language of the PDE was unambiguous (despite Defendants' admissions about reasonable definitions of the disputed terms that would result in coverage), but then interpreted the PDE in a way that further redrafted the actual language chosen by Defendants. Specifically, the district court held, as a matter of law, that Plaintiff "***could have put up a fence around the three sides of the building***…" (even though the undisputed record refutes this completely unsupported factual conclusion), and that such a three-sided fence would have satisfied the "***plain language***" of the PDE that required the insured to "***maintain***" at all times during the policy period "***a fence…that completely surrounds the jobsite***…"

Continuing in this "words mean exactly what I want them to mean" vein,[1] the district court then held that it wasn't determining the common wall was part of any required fence because, according to the district court: "***No fence was necessary on the side of the building where it abutted its neighbor***…" Consequently, the district court falsely concluded it was only interpreting the "***completely surrounds***" language in the manner it was "***obviously meant to be read***." Of course, this false conclusion ignored Jones' admission that, from the beginning, the PDE was meant to be read as requiring the placement of a separate, six-foot-high fence, controlled by Plaintiff, completely surrounding the jobsite, and it ignored Defendants' other Rule 30(B)(6) witness' admission that this same interpretation was the sole basis of Defendants' bad faith denial of coverage. In other words, the district court entirely ignored Defendants' binding testimony about how the PDE was meant to be read, in favor of the district court's own interpretation of how the PDE was meant to be read, which violated binding Ohio coverage law on how the PDE was required to be read.

In reaching its false conclusion, the district court also ignored Defendants' Rule 30(B)(6) witness' testimony that there was a reasonable construction of the relevant language of the PDE that favored coverage. Consequently, the district court failed to adopt a reasonable construction of the undefined terms of the PDE in favor

[1] Perhaps Lewis Carroll never guessed how useful this Humpty Dumpty quote would be to future generations, but unfortunately its utility continues.

of the insured and in favor of coverage, as Defendants' Rule 30(B)(6) witnesses conceded was required and binding Ohio caselaw confirms, and instead construed the allegedly unambiguous language in favor of Defendants. In other words, the district court ignored Defendants' admitted fraud in the inducement, rewrote the Policy in a legally spurious effort to give it "vitality" so as to avoid the conclusion the coverage was illusory, thus resulting in yet another denial of coverage to Plaintiff. The district court then carried over its erroneous and legally flawed conclusions to the other claims asserted by Plaintiff, despite the stunning admissions from Defendants' corporate witnesses who substantiated the factual bases of those other claims.

Simply put, Plaintiff was entitled to summary judgment. At a minimum, genuine issues of material fact precluded entry of summary judgment in favor of Defendants. The district court erred on all fronts, and its judgment should be reversed.

STATEMENT OF THE CASE AND FACTS

I. Background on 3371 Reading, LLC and its principals and the acquisition of the property located at 3371 Reading Road

On or about May 1, 2020, 4588, LLC, a real estate development company, paid $425,000 to acquire the Premises, as part of a larger acquisition of three other parcels held in receivership in a Hamilton County Common Pleas court case.

(Depo. Stanislav Grinberg, Doc. 94-1, at 38-40, PageID#4448-4450). 4588, LLC then became Vision & Beyond Group, LLC. ("Vision & Beyond"). *Id.* at 18-19, PageID#4428-4429.

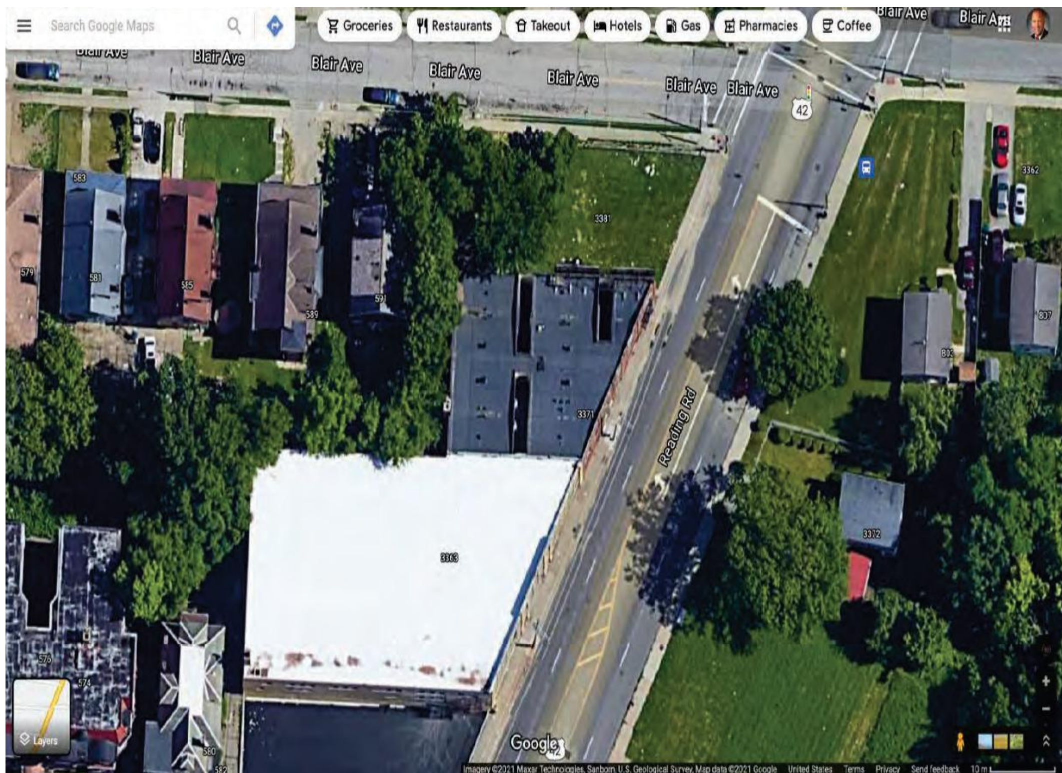
The sole members of both 4588, LLC and Vision & Beyond are Stanislav Grinberg and his partner, Peter Gizunterman. *Id.* Vision & Beyond, and prior to that 4588, LLC, set up limited liability companies for each property they acquired. *Id.* at 22-23, PageID#4432-4433. One such entity was 3371 Reading, LLC ("3371 Reading" and/or "Plaintiff"), which also is solely owned by Mr. Grinberg and Mr. Gizunterman. *Id.* at 23, 41, PageID#4433, 4451. Three days after acquiring the Premises, 4588, LLC transferred title to Plaintiff. (*Id.* at 40-41, PageID#4450-4451, Exhibit 6, Doc. 94-2, PageID#4581).

Mr. Grinberg and Mr. Gizunterman planned to rehab the building on the Premises into 18 apartment units and two storefronts. (*Id.* at 53, PageID#4463). As demonstrated in the photographs below, the Premises contained a building that shared a common wall with a building located on the adjoining property to the South (the building on the Premises is depicted in the immediately below photograph as the darker brick building, and the building to the South is the lighter brick building). (Depo. Wormington, Doc. 53, at 127, 186-187, PageID#2919, 2978-2979; Decl. Fatal, Doc. 102-1 at ¶2, PageID#5876-5877). The building also abutted the property line on the North, and that adjoining property is and was

owned by the Urban League. *Id.* In addition, the building abutted a city sidewalk on the East side of the property. *Id.* A photograph contained in Liberty's claim file, that accurately depicts the building when purchased, from the point of view on Reading Road, is below:

(Doc. 49-3, PageID#909).

An accurate aerial photograph from Google maps, which also was contained in Liberty's claim file, and shows the building on the Premises when purchased, is below:



(Doc. 49-4, PageID#1008).

J. 3371 Reading, LLC obtains insurance on the Premises from Defendants, the terms of the Policy, and testimony regarding same

As part of its underwriting process, Liberty asked about "security measures" at the jobsite, and Camargo, Plaintiff's insurance agent, truthfully reported that the building was secured. (Depo. Jay Mueller, Doc. 74. at 59-60, PageID#3450-3451). Liberty agreed to bind coverage on December 11, 2020, and issued policy number BMO (21) 62 48 02 92, effective from December 11, 2020, to December 11, 2021, with the address of 3371 Reading Rd., Cincinnati, OH 45229 contained on the declarations under locations ("Policy"). (Depo. Jones, Doc. 49, at 58-60,

PageID#484-486, Exhibit A, PageID#540-600). The named insured on the Policy was 3371 Reading, LLC. (Exhibit A at PageID#541). Coverage limits were $450,000 for building materials, and $700,000 for the existing building. (*Id.* at PageID#544).

The Policy indicated that "Coverage is Provided In: The Ohio Casualty Company," (*Id.* at PageID#541-546), yet numerous pages indicated "Liberty Mutual Insurance" and its logo. (*Id.* at PageID#541-546, 553, 567-572). The Policy also provided that claims are to be made to "Liberty Mutual Insurance claims professionals," (*Id.* at PageID#555), it contained a "Liberty Mutual Group" privacy notice, and it defined the terms "we," "us," and "our" to include "Liberty Mutual Group" and its subsidiaries. (*Id.* at PageID#560).

The Policy covered direct physical loss from a covered peril to both an existing building and building materials. (*Id.* at PageID#585). Covered perils included all "risks of direct physical loss ***unless the loss is limited or caused by a peril that is excluded***." (*Id.* at PageID#589). (emphasis added). Fire and theft losses were not listed under any of the "Perils Excluded." (*Id.* at PageID#589; Depo. Jones, Doc. 49, at 75, PageID#501). However, Jones added a Schedule to the Policy and a PDE that, by its terms, modified the "Perils Excluded." (*Id.* at PageID#547-548). Specifically, the Schedule provided as follows:

IM 7904 04 04 Protective Devices Schedule

AAIS
IM 7904 04 04
Page 1 0f 1

This endorsement changes
the Inland Marine Coverage
-- PLEASE READ THIS CAREFULLY --

PROTECTIVE DEVICES SCHEDULE

(The entries required to complete this schedule will be shown below or on the "schedule of coverages".)

Protective Device or Service

Fenced Jobsite. Fenced jobsite means a fence, not less than six (6) feet in height, that completely surrounds the jobsite, with no openings unless gated. All gates to such fence shall be closed and locked, to secure against entry to the jobsite, during all non-working hours

IM 7904 04 04 Copyright, American Association of Insurance Services, Inc. 2004

(*Id.* at PageID#547). And the PDE plainly and unambiguously stated that **"As respects the locations specified in the Protective Devices Schedule the following exclusion is added to Perils Excluded"** as follows:

IM 7853 04 04 Protective Devices Endorsement

AAIS
IM 7853 04 04

This endorsement changes
the Inland Marine Coverage
- PLEASE READ IT CAREFULLY -

PROTECTIVE DEVICES ENDORSEMENT

If indicated on the Protective Devices Schedule, the following conditions apply to the locations described on the schedule.

OTHER CONDITIONS

Protective Devices - "You" are required to maintain, at all times during the policy period, the protective devices and services described on the Protective Devices Schedule.

PERILS EXCLUDED

As respects the locations specified in the Protective Devices Schedule, the following exclusion is added to Perils Excluded:

"We" do not pay for loss caused by fire or theft if, prior to the fire or theft, "you":

1. had knowledge of any suspension or impairment in any protective device or service described on the Protective Devices Schedule and did not notify "us"; or

2. failed to maintain in complete working order, any protective device or service described on the Protective Devices Schedule which "you" control.

(*Id.* at PageID#548). Defendants admit no locations were specified or listed on the PDE. (*Id.* at PageID#547; Depo. Jones, Doc. 49, at 73-74, PageID#499-500). Likewise, Defendants admit the "failure to maintain' language of the exclusion was conditional, as it only applied where the insured "**failed to maintain**" the described protective device that the insured actually "control[led]". (*Id.* at PageID#548; Depo. Jones, Doc. 49, at 81-82, PageID#507-508).

1. Jones' testimony, both as Defendants' FRCP 30(b)(6) designee for underwriting and on behalf of himself, concerning underwriting, and his underwriting and approval of the Policy

Jones was Defendants' designated representative for underwriting topics. (Depo. Jones, Doc. 49-13, at Exhibit H, PageID#2139-2141). Jones made numerous critical admissions on behalf of Defendants. Jones admitted that the insurance carrier selects the terms and conditions of the insurance policy, and that it is up to the carrier to accurately assess any risks it accepts. (*Id.* at 27, PageID#453). To help the insurance carrier assess risk with builders risk policies, the underwriter asks relevant questions and nothing limits what questions can be asked. (*Id.* at 30-31, PageID#456-457).

As part of its underwriting, Liberty does not perform site inspections of potential insureds if the amount of the policy is less than $5,000,000. (*Id.* at 35-36, PageID#461-462). But underwriting will use online tools, such as Google Maps, to get a sense of the site and its layout. (*Id.* at 36-37, PageID#462-463).

Jones selected policy form BMO 62480292, which is a renovation policy. (*Id.* at 40-41, PageID#466-467). He also reviewed the on-line application submitted by Camargo on behalf of Plaintiff. (*Id.* at 41, PageID#467). As part of that application, Liberty asked about security at the property, and the response was "building secured," which Jones does not dispute as being a truthful response. (*Id.* at 46-47, PageID#472-473). It is undisputed that all of the information submitted by Camargo in the on-line questionnaire was true. (*Id.* at 42, PageID#468).

On December 11, 2020, Jones communicated with Camargo and asked additional underwriting questions where he found out that Plaintiff was a subsidiary of a larger (parent) company, and that both companies had a common interest in insuring the Premises. (*Id.* at 49-54, 61-63, PageID#475-480, 487-489). Consequently, and knowing that the parent and subsidiary both had an interest in getting coverage, Jones decided that coverage was bindable and communicated this fact to Camargo on December 14. (*Id.* at 63, PageID#489).

Finally, and as part of his underwriting efforts, Jones ran a "Risk Meter" report on the Premises. (*Id.* at 64-65, PageID#490-491). As part of that effort, he looked at pictures showing that the building on the Premises shared a common wall with a neighboring building. (*Id.* at 65-67, PageID#491-493). Knowing this layout, Jones then defined the "jobsite" as the entirety of 3371

Reading Road, Cincinnati Ohio. (*Id.* at 67-68, PageID#493-494).

On behalf of Defendants, Jones unilaterally selected the coverage forms that he determined should form the terms and conditions of the Policy. (*Id.* at 68-69, PageID#494-495). Plaintiff had no input into those decisions. (*Id.* at 69, PageID#495). As part of selecting the coverage terms and conditions, Jones added a PDE and Schedule to the Policy, and ***he admitted the PDE was an exclusion***. (*Id.* at 69, 72-74, 81, PageID#495, 498-500, 507). Jones also admitted that Defendants decided which terms were defined in the Policy and which terms were not defined. (*Id.* at 70-71, PageID#496-497). Among terms that Defendants chose not to define were "fence," "gate," "gated," and "maintain." (*Id.).* But Defendants did define "fenced jobsite," as "a fence not less than 6 feet in height that completely surrounds the jobsite." (*Id.* at 71, PageID#497).

Significantly, Jones admitted that under Defendants' interpretation of the Policy forms, including the definitions they supplied, any fence "completely surrounding the jobsite" would be entirely on neighboring property (i.e.: not property Plaintiff controlled). (*Id.* at 72, PageID#498). He also admitted that the PDE was conditional, in that it only applied to locations specified or listed on the Schedule, and he admitted there were no locations specified or listed on the Schedule. (*Id.* at 73-74, PageID#499-500). Jones also admitted that Defendants

chose other conditional language for these forms in that coverage ***was excluded*** where the insured "failed to maintain" a fence, ***but only if*** the fence the insured failed to maintain was a fence the insured "controlled". (*Id.* at 77-78, 81-83, PageID#503-504, 507-509). Jones also admitted that unless an exclusion clearly and unambiguously applied to the facts of a loss, coverage was owed. (*Id.* at 79-80, PageID#505-506).

Stunningly, Jones admitted that when he assembled the Policy with these forms, he knew ***it was impossible*** to have a fence completely surrounding the jobsite, because he knew that the building on the Premises shared a common wall with a building on the adjacent property to the South, and it bordered the public sidewalk to the East of the Premises. (*Id.* at 65-66, 71-72, PageID#491-492, 497-498). Jones also admitted that if there was no fence, that the insured controlled, completely surrounding the Premises (i.e.: an impossibility), then ***no fire or theft coverage would ever apply for any loss at the Premises***. (*Id.* at 72-78, PageID#498-504).

These stunning admissions were as follows:

> **Q. … And so this exclusion, assuming this exclusion is on the policy, it is Liberty Mutual -- or it's Ohio Casualty's position that Ohio Casualty will never pay for a fire loss if the insured fails to maintain in complete working order a 6 foot high fence completely surrounding the job site which the named -- a fence which the named insured controls –**

A. Yes.

Q. -- right? That's Liberty -- that's Ohio Casualty's coverage and Liberty Mutual's coverage position, right?

A. Yes.

Q. So if there is no 6 foot high fence completely surrounding the job site, then it is Ohio Casualty's position there is never any fire coverage or theft coverage on this policy?

A. Yes. (*Id.* at 78, PageID#504).

2. Mr. Fatal's declaration concerning reliance and statements regarding the Policy

Shlomi Fatal, the current COO of Vision & Beyond, was an officer of Plaintiff and acted with authority on behalf of Plaintiff to include procuring insurance on the Premises for the benefit of Plaintiff. (Decl. Fatal, Doc. 102-1 at ¶1, PageID#5876). In December 2020, Plaintiff received confirmation from Jones, acting on behalf of Defendants, that Plaintiff had insurance coverage from Defendants for fire and theft losses occurring to the building. (*Id.* at ¶4, PageID#5878-5879). Fire and theft are the primary concerns when conducting building renovation and rehabilitation, which is what Plaintiff was engaged in at the Premises. (*Id.*). This confirmation was material to Plaintiff because coverage was a necessary condition for the investors and for any potential lenders. (*Id.*). Consequently, Mr. Fatal and the other officers and principals of Plaintiff justifiably

relied on Defendants' representations confirming coverage in order to undertake the entire renovation and rehabilitation project on the Premises. (*Id.*at ¶5, PageID#5879).

K. Renovation and rehabilitation activities begin

As noted, Mr. Fatal served as the construction manager for Plaintiff. (*Id.* at ¶1, PageID#5876; Depo. Fatal, Doc. 97 at 13-14, PageID#5076-5077). City permit records confirm that Plaintiff had a building permit entered in its name on February 11, 2021, with a final building permit issued to Plaintiff on May 24, 2021. (Decl. Fatal, Doc. 102-1 at ¶9, Exhibit 2, PageID#5880, 5886-5887). In the meantime, on March 25, 2021, one of the partners of Defendants' defense counsel, on behalf of the Urban League, the owner of the property abutting the North property line of the Premises, wrote Plaintiff and told it to "keep off" of the Urban League's property. (Decl. Fatal, Doc. 102-1 at ¶10, Exhibit 3, PageID#5880-5881, 5888-5890).

L. 3371 Reading, LLC partners with Yuval Mayost and creates a new entity comprised of 3371 Reading, LLC and an entity owned by Mr. Mayost

Mr. Grinberg and Mr. Gizunterman solicited Israeli investors, namely Yuval Mayost and his brother Oshri Mayost, who together formed Mayost Partners, LLC, for the purpose of investing in the Premises. (Depo. Grinberg, Doc. 94-1 at 26, 43-44, PageID#4436, 4453-4454). On January 6, 2021, Mayost Vision I, LLC ("Mayost Vision I"), was formed by a filing with the Ohio Secretary of State.

(Decl. Fatal, Doc. 102-1 at ¶8, Exhibit 1, PageID#5880, 5882-5885). On February 10, 2021, an operating agreement was created listing Mayost Partners, LLC and Vision & Beyond as the members of this entity. (Depo. Grinberg, Doc. 94-1 at 60, PageID#4470; Exhibit 9, Doc. 94-2, PageID#4609-4624). Then on February 20, 2021, an Amended and Restated Operating Agreement was executed correctly noting that that the members of Mayost Vision I actually were Plaintiff and Mayost Partners, LLC. (*Id.* at 62-63, PageID#447204473; Exhibit 10, Doc. 94-2, PageID#4625-4638). The relative ownership of Mayost Vision I, which continues to this day, is a 25% membership interest for Plaintiff, and a 75% for Mayost Partners, LLC. (*Id.* at pp. 43, 59, 61-64, PageID#4453, 4469, 4471-4474; see, also Declaration of Grinberg, Doc. 102-2, PageID#5898-5901).

On April 21, 2021, and in consideration for the 25% interest that it was granted in Mayost Vision I, Plaintiff conveyed the Premises to Mayost Vision I. (Depo. Grinberg, Doc. 94-1 at 42, PageID#4452). In other words, Plaintiff was a 25% owner of the entity that owned the Premises on the date of loss.

M. The August 6, 2021, fire

Prior to August 6, 2021, and as confirmed by Defendants' investigator, by August 3, 2021, the City had documented that the Premises was "secure." (Depo. Wormington, Doc. 53 at 99 PageID#2981). And as Mr. Fatal confirms, from December 5, 2020, until the evening of August 6, 2021, continuously and without

interruption, the solid brick walls for the building on the Premises exceeded six feet in height, completely surrounded the building, and had no openings other than doors and windows (with bars on them), all of which were secured at all times during non-working hours. (Decl. Fatal, Doc. 102-1, at ¶3, PageID#5878).

A fire of undetermined origin occurred at the Premises on the evening of August 6, 2021, after work had ended for the day. (Depo. Wormington, Doc. 53 at 37, 78 PageID#2829, 2870; Decl. Fatal, Doc. 102-1 at ¶11, PageID#5881). Mr. Fatal received notice from the Cincinnati Fire Department about the fire. (Decl. Fatal, Doc. 102-1 at ¶11, PageID#5881). The fire was so severe that the roof collapsed from the fire, the walls were made unstable, and that is why the City directed Plaintiff to raze the building as soon as possible. (Depo. Wormington, Doc. 53 at 96, 153, PageID#2888, 2945; Decl. Fatal, Doc.102-1 ¶12, PageID#5881). A photograph, taken thereafter, shows the demolition:

(Doc. 49-3, PageID#919).

N. Liberty's claim handling resulting in the bad faith denial of coverage (and the adjuster's testimony regarding same)

James Wormington ("Wormington") served as the adjuster on this loss from August 16, 2021, onward, and he testified as Defendants' Rule 30(b)(6) witness on claims handling matters. (Depo. Wormington, Doc. 53 at 145, PageID#2937; Exhibit C, Doc. 53-4, PageID#3000-3002).

1. <u>General insurer duties</u>

Wormington testified there is no negotiation of terms and conditions for insurance policies, which are adhesion contracts – because the insurer chooses the language. (*Id.* at 53-54, PageID#2845-2846). Thus, any ambiguities are construed against the drafter (the insurance company) and in favor of the insured. (*Id.* at 54, PageID#2846). Insurance companies (and insureds) resort to dictionary definitions

for terms the insurance company chooses not to define. (*Id.* at 51-52, PageID#2843-2844). Further, ***any reasonable understanding of language in the insurance contract that favors coverage will be adopted, and insurers have the duty to find coverage if it is possible to do so***. (*Id.* at 54, 56, PageID#2846, 2848).

Wormington admitted that an insurer has the duty to prove that a particular exclusion applies. (*Id.* at 53, PageID#2845). In other words, ***an insurer can only apply an exclusion if it clearly and unambiguously applies to the facts of the* loss, *and it is the burden of the insurer to prove the exclusion applies***. (*Id.* at 76-77, PageID#2868-2869). And Wormington admitted that he knew exclusions are strictly construed against insurers under Ohio law, and that ***if more than one reasonable definition applies to an undefined term in an insurance contract,* he *needed to apply the definition that affords coverage***. (*Id.* at 57-60, PageID#2849-2852).

Wormington admitted that where a peril is covered in an insurance contract, ***the insurer has to provide coverage for it, at least in some circumstances, or the insurance becomes illusory***, which is not permitted under the law. (*Id.* at 61-64, PageID#2853-2856). Wormington admitted ***it is not reasonable to interpret a policy in a way that it never covers a covered peril, at least in some circumstances***. (*Id.* at 63-66, PageID#2855-2858). And Wormington admitted that an insurer owes its insured a duty of good faith and fair dealing, which means

that there must be a reasonable justification for everything the insurer does or does not do in claim handling. (*Id.* at 66, PageID#2858).

In carrying out these duties of good faith and fair dealing, the adjuster has the duty at all times to truthfully communicate with the insured and to truthfully document the claim file with any information that may be relevant to the coverage determination. (*Id.* at 67-68, PageID#2859-2860). Further, ***in making a coverage determination, the insurer has the duty to apply the policy language as written. Consequently, the insurer cannot avoid coverage after a loss by rewriting, or purporting to rewrite, in any way, the policy language, particularly if it would render the coverage illusory***. (*Id.* at 69-70, PageID#2861-2862). And, in any denial of coverage letter, the insurer must accurately quote policy language, and must accurately communicate each and every reason for a denial. (*Id.* at 70-71, PageID#2862-2863).

2. The claim handling and bad faith denial in this case

The Policy explicitly provides that fire loss is a covered peril (*Id.* at 73, PageID#2865), and the Policy covered the Premises. (*Id.).* Thus, the Policy covered a fire loss occurring at 3371 Reading Road, unless otherwise excluded. (*Id.* at 75, PageID#2867). Wormington admitted that Defendants "pretty quickly" knew that the cause of the fire loss was undetermined. (*Id.* at 78, PageID#2870). Thus, the only possible exclusion that could apply to this total loss was the PDE,

but that only applied if it "clearly and unambiguously" applied to the facts of the loss. (*Id.* at 78-79, PageID#2870-2871). In other words, if that conditional exclusion did not clearly and unambiguously apply, then the Policy provided coverage for this total loss. (*Id.*).

Significantly, and with regard to the PDE, Wormington, like Jones from underwriting, admitted ***that it was impossible*** to place a separate fence (separate from the building walls) completely surrounding the Premises (i.e.: jobsite), because the building on the Premises shared a common wall with a building on the neighboring property to the South. (*Id.* at 91-92, 126-127, PageID#2883-2884, 2918-2919). And Wormington admitted the building on the Premises abutted a City sidewalk on the East side of the Premises. (*Id.)*. He also testified that he couldn't speculate ***whether it even was possible to place a fence on any other sides of the building on the Premises***. (*Id.* at 91-92, PageID#2883-2884). Wormington also admitted he never bothered to inquire whether it was possible to place a separate fence on the City sidewalk. (*Id.* at 127, PageID#2919). And, as previously noted, the North side of the Property was bordered by an empty lot owned by the Urban League, and Plaintiff received a letter in March of 2021, from a partner of Defendants' counsel in this matter, demanding that Plaintiff "keep off" the Urban League's property. (Decl. Fatal, Doc. 102-1 at ¶10, Exhibit 3, PageID# 5880-5881, 5888-5890). Consequently, the undisputed facts demonstrate it was

impossible to "maintain" a fence, one that Plaintiff controlled, on even three sides of the Premises, much less all four sides.

Even though Wormington knew in early August, 2021, about the PDE and Schedule, the lack of separate fencing completely surrounding the building, and the fact it was impossible to have placed a separate fence completely surrounding the building, Wormington testified he issued a 21-day delay letter to Plaintiff on August 21 where he asked for information regarding Plaintiff's damages. (Depo. Wormington, Doc. 53 at 122-123, PageID#2914-2915; Exhibit A, Doc. 49-2, PageID#633). However, Wormington admitted that "Ohio is a valued policy state, and if coverage is confirmed, we will issue payment based on the policy," meaning that "**if it's a total loss, then I'm going to pay the policy amount, assuming the loss is not excluded**." (*Id.* at 131, PageID#2923). (emphasis added). Here, Wormington admitted that the Policy amount for building materials was $450,000, and the Policy amount for the existing building was $700,000, for a total of $1,150,000 of coverage for this total loss. (*Id.* at 132, PageID#2924). And Wormington admitted that Plaintiff paid all premiums when and as due under the Policy. (*Id.* at 172-173, PageID#2964-2965).

Finally, on September 30, 2021, Wormington issued a denial of coverage letter ("denial letter"). (*Id.* at 129-130, PageID#2921-2922; Exhibit A, Doc. 49-4, PageID#1062-1065). The denial letter was written on Liberty letterhead with the

underwriting company listed as Ohio Casualty. (Exhibit A, Doc. 49-4, PageID#1062-1065). Wormington admitted he had the authority to bind Liberty. (*Id.* at 160, PageID#2952). He also admitted that, based on the content of the denial letter, ***it was reasonable to believe he was speaking on behalf of both Liberty and Ohio Casualty***. (*Id.)*. In fact, the denial letter repeatedly used the term "we". (Exhibit A, Doc. 49-4, PageID#1062-1065). And the intention of the denial letter was to document every reason Defendants had to deny the claim. (Depo. Wormington, Doc. 53, at 161-162, PageID#2953-2954).

In invoking portions of the PDE and Schedule as the sole basis to deny coverage, the denial letter contained the following: "***The placement of a fence*** around the jobsite is a policy requirement," and ***"No fencing was placed*** around the jobsite ***as required by the Protective Devices Endorsement*** on the policy." (Exhibit A, Doc. 49-4 at PageID#1062, 1064) (emphasis added). Wormington admitted he used the words ***"placement"*** and ***"placed,"*** even though those words ***are not used anywhere in*** the PDE or the Schedule. (Depo. Wormington, Doc. 53, at 183-184, PageID#2975-2976). And Wormington used these words even though he previously admitted that insurers have a duty to accurately quote policy language and cannot rewrite that language after a loss to deny coverage for a loss. (*Id.* at 70-71, PageID#2862-2863).

Likewise, Wormington admitted that the terms "fence" and "fenced" were not defined terms in the Policy. (*Id.* at 148-149, PageID#2940-2941). Consequently, ***he admitted that a reasonable definition for "fence"*** obtained from a dictionary, is ***"a barrier to control access."*** (*Id.* at 150, PageID#2942). And he admitted that brick walls, and locked doors and windows are barriers. (*Id.).* However, he claimed brick walls with locked doors and windows are not a "fence" because that's not ***how he interpreted the term "fence" in order to deny coverage*** (thus admitting to bad faith)*,* even though he also admitted that other than being six feet in height and completely surrounding the jobsite, Defendants leave it up the insured to determine what materials to use for any fence. *(Id*. at 150-152, PageID#2942-2944).

Likewise, ***Wormington admitted that a reasonable definition for the word "gate"*** is "***a hinged barrier to close an opening in a wall".*** (*Id.* at 150, PageID#2942). ***And he admitted that he possessed no evidence that the jobsite, ever, was not secure against entry during non-working hours***. (*Id.* at 153, PageID#2945). Wormington also admitted he had no evidence that the presence of a separate fence (versus the secured, brick building with locked doors and windows) would have prevented the fire loss. (*Id.* at 154, PageID#2946).

With respect to the use of the word "maintain" in connection with a fence, ***Wormington admitted that a reasonable definition of "maintain"*** was ***"to cause***

or enable a condition to continue." (*Id.* at 157-158, PageID#2949-2950). Despite these admissions, it was Defendants' coverage position that the Policy not only required the "placement" of a fence separate and apart from the building itself, ***the fence had to completely surround the jobsite, or there would be no fire or theft coverage under the Policy***. (*Id.* at 159, PageID#2951).

As noted, Wormington agreed that the only reason coverage was denied, ***and the only ground he had to deny the claim***, was the cited to portion of the PDE and Plaintiff's failure to "place" another barrier/fence ***that completely surrounded the jobsite***. (*Id.* at 169-170, 172, PageID#2961-2962, 2964). Of course, Wormington admitted that it ***was impossible*** to put a separate fence (separate from the building walls) ***completely surrounding the jobsite***, because the building on the Premises shared a common wall with the neighbor on the South side of the building. (*Id.* at 91-92, 126-127, 173-174, PageID#2883-2884, 2918-2919, 2965-2966). And in terms of the City sidewalk that abutted the East side of the building, that also may have made it impossible to place a fence, but Wormington never checked with the City to see if it would have allowed one. (*Id.* at 126-127, 174-175, PageID#2918-2919, 2966-2967). And he was not sure, and never asked, whether the Urban League, who owns the property to the North, would have permitted Plaintiff to install a separate fence on that property. (*Id.* at 187-188, PageID#2979-2980).

And even though Wormington admitted that he could not rewrite the terms of the Policy after a loss (*id.* at 69, PageID#2861), that he had no authority to waive coverage terms, that he didn't even know who within Defendants could waive coverage terms (*id.* at 165, PageID#2957), that he didn't consider the common wall to be a "fence" as required by the PDE (*id.* at 178, PageID#2970), and that he denied the claim solely because Plaintiff failed to "place" a separate fence completely surrounding the jobsite (*id.* at 169-170, 172, PageID#2961-2962, 2964), he then self-servingly testified he would have paid this loss if only Plaintiff had attempted to place a fence around three sides of the Premises. (*Id.* at 177-182, PageID#2969-2974). Of course, that post-hoc coverage position is not to be found anywhere in Defendants' coverage denial letter. (Exhibit A, Doc. 49-4 at PageID#1062, 1064)

3. <u>Mr. Grinberg's testimony</u>

Mr. Grinberg's testimony about Plaintiff's purported ability to place and maintain a fence completely surrounding the jobsite (a fence that Plaintiff "controlled" as required by the PDE) was that it was impossible because of the common wall the building on the Premises shared with a building located on a neighboring property to the South, and because all three other sides of the Premises were owned by others, including the City, and he wouldn't control any such fence even if it is was possible to place or install such a fence. (Depo. Grinberg, Doc.

94-1, at 113-114, PageID#4523-4524). Consequently, and in light of the fact he paid 100% of the premiums on this Policy, but never got any fire or theft coverage whatsoever, he considers it fraud. (*Id*.).

O. Additional evidence demonstrating Liberty and Ohio Casualty's bad faith

As documented and testified to at length by Plaintiff's bad faith expert, Louis Fey, Defendants committed bad faith in a variety of ways. (Depo. Fey, Doc. 98, at pp.10, 110, PageID#5189, 5289; Exhibit 43 thereto, Doc. 92-2, at pp. 1-31, PageID#5339-5369). Ultimately, the gist of those opinions is that Defendants had no reasonable basis to deny Plaintiff's claim, Defendants misrepresented pertinent facts and coverage terms, and Defendants forced Plaintiff to file suit to collect sums owed under the Policy, all in deviation from insurance industry standards. (*Id.).*

P. The district court's opinion

Despite the undisputed material facts and binding Ohio coverage law compelling judgment for Plaintiff, the district court both ignored Defendants' material factual admissions while also creating its own facts out of whole cloth, ignored binding Ohio coverage law, and then granted summary judgment to Defendants as to all claims and entered final judgment. (Doc. 119, 120). This timely appeal followed.

SUMMARY OF THE ARGUMENT

As the introduction indicates, the district court erred in granting summary judgment to Defendants and further erred in denying summary judgment to Plaintiff. It rewrote the policy and failed to provide a reasonable construction in favor of the insured, in violation of Ohio law. It likewise erred in its determination on the bad faith, fraud, and deceptive trade practices claim.

ARGUMENT

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

In considering a motion for summary judgment, the court must view the factual evidence in favor of the non-moving party and draw all reasonable inferences in the non-moving party's favor. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (*en banc*). In reviewing a district court's decision to grant or deny a summary judgment motion, this court reviews the district court's legal conclusions *de novo*. *Johnson v. City of Memphis*, 617 F.3d 864, 867 (6th Cir. 2010) (*citing Shelby Cnty. Health Care Corp. v. Majestic Star Casino, LLC*, 581 F.3d 355, 375 (6th Cir. 2009)).

I. The district court erred as a matter of law in granting summary judgment to Liberty and Ohio Casualty on the breach of contract claim, and also in not granting summary judgment to Plaintiff on that claim.

Under Ohio law, the elements of a breach of contract claim are: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damage or loss to the plaintiff as a result of the breach. *Savedoff v. Access Grp., Inc.*, 524 F.3d 754, 762 (6th Cir. 2008).

<u>A. Ohio law concerning insurance contract interpretation</u>

It is "well-settled" in Ohio law that, "where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, 519 N.E.2d 1380, 1383 (Ohio 1988); *see also Home Indem. Co. of N.Y. v. Village of Plymouth,* 146 Ohio St. 96, 64 N.E.2d 248, 250 (Ohio 1945) ("Courts universally hold that policies of insurance, which are in language selected by the insurer, and which are reasonably open to different interpretation, will be construed most favorably to the insured."). In other words, when the parties have offered their own separate interpretations of the policy language, both of them plausible, **the court must** "resolve any uncertainty in favor of the insured." *Neal-Pettit v. Lahman*, 125 Ohio St. 3d 327, 2010-Ohio-1829, 928 N.E.2d 421, 424 (Ohio 2010).

Because "insurance policies are interpreted strictly against the insurer, 'it will not suffice for [an insurer] to demonstrate that its interpretation is more reasonable than the policyholder's.'" *Andersen v. Highland House Co.*, 93 Ohio St. 3d 547, 2001-Ohio-1607, 757 N.E.2d 329, 333 (Ohio 2001). Rather, "[t]o defeat coverage, 'the insurer must establish not merely that the policy is capable of the construction it favors, but rather ***that such an interpretation is the only one that can fairly be placed on the language in question***.'" *Andersen*, 757 N.E.2d at 332

(*quoting* Reiter, Strasser & Pohlman, The Pollution Exclusion Under Ohio Law: Staying the Course, 59 U. CIN. L. REV. 1165, 1179 (1991)). (emphasis added).

This rule of construction is particularly true with respect to interpreting exclusions. There is a general presumption that anything not clearly excluded is included in the insured's coverage. *Id.* "If a policy does not plainly exclude a claim from coverage, then an insured may infer that the claim will be covered." *Id.* That is because, "when an insurer denies liability coverage based upon a policy exclusion, the insurer bears the burden of demonstrating the applicability of the exclusion." *Continental Ins. Co. v. Louis Marx & Co., Inc.*, 64 Ohio St.2d 399, 415 N.E.2d 315, syllabus (1980); *Neal-Pettit*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, ¶ 19. And any ambiguity in an exclusion is strictly construed against the insurer and in favor of both the insured and coverage. *Lane v. Grange Mut. Cos.*, 45 Ohio St. 3d 63, 65, 543 N.E.2d 488, 490 (1989).

1. Based on the undisputed facts of this case, the Schedule and PDE provide no legal basis to deny coverage

First, the PDE only applied to locations specified in the Schedule itself, but there were no locations specified or listed in the Schedule, and Defendants admit this. Thus, the PDE does not apply to this location.

Second, and even if applicable to this location, the PDE, which Defendants admit is an exclusion from coverage and which is in language drafted by Defendants, merely requires maintenance, not installation/placement, of the

protective device described in the Schedule. Specifically, Defendants admit that a reasonable definition of "maintain," is "to cause or enable a condition to continue." Construing this language against Defendants and in favor of coverage, as Defendants admit they are required to do, means it is undisputed Plaintiff did not fail to "maintain" a fence.

Third, it is undisputed that the six-foot-high brick walls of the building (with locked doors and windows) are "a barrier to control access," and that Defendants agree this was a reasonable definition of "fence," which also was a dictionary definition. Thus, the brick walls with locked doors and windows satisfy the undefined term selected by Defendants for use in the PDE and Schedule.

Fourth, Defendants' own interpretation of the PDE from the moment they assembled the Policy to the moment they denied Plaintiff's claim on that same basis is undisputed. As noted, Defendants admit there never was fire or theft coverage under the Policy ***unless*** Plaintiff placed ***and*** maintained a six-foot-high fence, that Plaintiff controlled, ***completely surrounding the jobsite***, even though Defendants also admit this was an impossibility they were aware of from the inception of the Policy. Likewise, Plaintiff argued this was Defendants' acknowledged intent regarding the language Defendants selected when drafting their PDE, and that these reasons were why the impossible-to-comply-with exclusion was not a legal basis upon which to deny coverage. Consequently, the

district court was not free to disregard the undisputed record when it wrongly determined, as a matter of law, how the PDE, "was obviously meant to be read."[2]

a. The PDE by its terms only applied to locations specified in the Schedule, there were no locations specified or listed in the Schedule, Defendants admitted this, and thus the PDE does not apply to this location

As noted, the Schedule provides as follows:

IM 7904 04 04 Protective Devices Schedule

AAIS
IM 7904 04 04
Page 1 0f 1

This endorsement changes
the Inland Marine Coverage
-- PLEASE READ THIS CAREFULLY --

PROTECTIVEDEVICESSCHEDULE

(The entries required to complete this schedule will be shown below or on the "schedule of coverages".)

Protective Device or Service

Fenced Jobsite. Fenced jobsite means a fence, not less than six (6) feet in height, that completely surrounds the jobsite, with no openings unless gated. All gates to such fence shall be closed and locked, to secure against entry to the jobsite, during all non-working hours

IM 7904 04 04 Copyright, American Association of Insurance Services, Inc. 2004

[2] Quite obviously, the PDE was not "meant to be read" as the district court reinterpreted the PDE, because the drafter of the PDE testified, on behalf of Defendants, that the PDE was "meant to be read" as requiring the placement and maintenance of a separate fence, at least six-foot in height, controlled by Plaintiff, and "completely surrounding the jobsite." (Depo. Jones, Doc. 49 at 78, PageID#504). Likewise, the claim handler who denied the claim testified, on behalf of Defendants, that he denied the claim solely on that same basis with the same understanding as to the meaning of the relevant language (i.e.: the PDE required the placement of a separate fence, controlled by Plaintiff, completely surrounding the jobsite). (Depo. Wormington, Doc. 53 at 169-170, 172, PageID#2961-2962, 2964).

(Depo. Jones, Doc. 49, at 58-60, PageID#484-486; Exhibit A, PageID#547-548). And the PDE provides with respect to the "***locations specified in the Protective Devices Schedule***" as follows:

IM 7853 04 04 Protective Devices Endorsement

AAIS
IM 7853 04 04

This endorsement changes
the Inland Marine Coverage
- PLEASE READ IT CAREFULLY -

PROTECTIVE DEVICES ENDORSEMENT

If indicated on the Protective Devices Schedule, the following conditions apply to the locations described on the schedule.

OTHER CONDITIONS

Protective Devices - "You" are required to maintain, at all times during the policy period, the protective devices and services described on the Protective Devices Schedule.

PERILS EXCLUDED

As respects the locations specified in the Protective Devices Schedule, the following exclusion is added to Perils Excluded.

"We" do not pay for loss caused by fire or theft if, prior to the fire or theft, "you":

1. had knowledge of any suspension or impairment in any protective device or service described on the Protective Devices Schedule and did not notify "us"; or

2. failed to maintain in complete working order, any protective device or service described on the Protective Devices Schedule which "you" control.

(*Id.*).

Here, Defendants admit no location was specified or listed in the Schedule. (Depo. Jones, Doc. 49, at 73-74, PageID#499-500). Consequently, and quite obviously, where no locations are "specified" in the Schedule, then the 'Perils Excluded' portion of the Policy is not modified to add this new exclusion concerning protective devices. This is particularly true where the PDE, in language chosen by Defendants, must be strictly construed against Defendants. *Lane*, 45 Ohio St. 3d 63, 65, 543 N.E.2d 488, 490.

b. By its plain and unambiguous terms, the PDE does not require installation, but rather maintenance, of the listed protected device, and thus Defendants failed to meet their burden of proof demonstrating the PDE is applicable to this loss

Even if the PDE applied to the location of the Premises here, it unambiguously provides: "Protective Devices – 'You' are required to maintain, at all times during the policy period, the protective devices and services described on the Protective Devices Schedule." As noted, Defendants chose not to define the word "maintain." (Depo. Jones, Doc. 49, at 80, PageID#506). However, Defendants' Rule 30(B)(6) witness admitted a reasonable definition of "maintain" was "to cause or enable a condition to continue." (Depo. Wormington, Doc. 53 at 157-158, PageID#2949-2950).

Rejecting this admittedly (by all parties to the contract) reasonable definition of the word maintain, the district court substituted its own definition and held, as a matter of law, that "maintain" actually means "to put in place a Fenced Jobsite as that term was defined in the Protective Devices Schedule." (Doc. 119, PageID#6347). In a footnote, the district court nonsensically reasoned that "the verb maintain applies to the jobsite with the required protective device, not to the fence itself." (*Id.* at fn. 9). However, it is undisputed that Defendants defined "Fenced Jobsite" to mean "a fence…." (Depo. Jones, Doc. 49, Exhibit A, PageID#547).

Not surprisingly, the district court cited no authority for its conclusion and, instead, merely stated that "Ohio Casualty has the better of this linguistic argument." (*Id.*). Of course, the district court's conclusion violates binding Ohio coverage law that where the language of an exclusion is chosen by an insurer, it must be strictly construed against the insurer and in favor of coverage. *Lane*, 45 Ohio St. 3d 63, 65, 543 N.E.2d 488, 490. And that in order, "[t]o defeat coverage, 'the insurer must establish not merely that the policy is capable of the construction it favors, but rather ***that such an interpretation is the only one that can fairly be placed on the language in question***.'" *Andersen*, 757 N.E.2d at 332 (citation omitted).

Here, the undisputed facts conclusively demonstrate there is a reasonable interpretation of the word "maintain" that favors coverage. The district court erred as a matter of law in rejecting that undisputedly reasonable interpretation.

c. Applying a dictionary definition of the term "fence," meaning 'a barrier to control access,' which Defendants admit is a reasonable meaning of the term that Defendants failed to define in the Policy, results in coverage where the 6-foot-high solid brick walls (with their locked windows and doors) are a barrier to control access

Undisputedly, Defendants' bad faith denial of coverage was predicated on Defendants' interpretation of the term "fence" to mean a barrier to control access separate and apart from the building walls themselves. But the "Fenced Jobsite'

language of the Policy, as Defendants defined it, "means a fence, not less than six (6) in feet height, that completely surrounds the jobsite, with no openings unless gated. All gates to such fence shall be closed and locked, to secure against entry to the jobsite, during all non-working hours." However, Defendants chose not to define their use of the terms "fence" or "gate" or "gated" in the Policy.

Yet the record here is undisputed that Defendants admit a reasonable definition of the term "fence" is "a barrier to control access." (Depo Wormington, Doc. 53 at 150, PageID#2942). Defendants also admit that a reasonable definition for the word "gate" is "a hinged barrier used to close an opening in a wall". (*Id.*). Moreover, the use of dictionary definitions to define policy terms the insurer chooses not to define is typical in insurance coverage disputes, *Fed. Ins. Co.*, 128 Ohio St. 3d 331, 2010-Ohio-6300, 944 N.E.2d 215, 218-19., and in any event is admitted to being an obligation of Defendants here. (Depo. Wormington, Doc. 53, at 51-52, PageID#2843-2844).

Here, it is undisputed that the building itself was enclosed by four brick walls, all more than six feet in height, with barred windows and doors, all unquestionably secured and locked, thus reasonably fulfilling the meaning of the terms Defendants chose to employ but failed to define. Once again, Defendants' witnesses agree this understanding of these undefined terms is a reasonable understanding of these terms. (Depo. Wormington, Doc. 53, at 150-151,

PageID#2942-2943). And, to the extent that the district court held that Defendants intended any other meaning, the law is clear that these admitted ambiguities are construed against the insurer and strictly in favor of the insured. *Lane*, 45 Ohio St. 3d 63, 65, 543 N.E.2d 488, 490.

Inexplicably, the district court completely ignored Defendants' admissions when granting summary judgment in favor of Defendants, and instead misleadingly stated that "3371 Reading's proposed interpretation of this policy provision−whatever its consistency with one dictionary definition of 'fence'−is unreasonable." (Doc. 119 at 11-12, PageID#6345-6346). Once again, Defendants admit 3371 Reading's proffered definition of "fence" and "gate" are reasonable definitions. (Depo Wormington, Doc. 53 at 150, PageID#2942).[3] *See, also, Cruciano v. Ceccarone*, 36 Del. Ch. 485, 133 A.2d 911 (Del. 1957) (a wall is included in the definition of "fence"); *Ebert v. Millers Mut. Fire Ins. Co.*, 220 Md. 602 (Md. 1959) (a wall was a "fence" within the meaning of an insurance policy); *Bubis v. Kassin*, 184 N.J. 612, 620-621, 184 N.J. 612 (NJ 2005) (fence is a barrier).

And Defendants admit they are required to employ those reasonable definitions to find coverage. (*Id.* at 54, 56, PageID#2846, 2848). Consequently,

[3] The definition of a "fence" from Merriam-Webster is "a barrier intended to prevent escape or intrusion or to mark a boundary. . . …" Fence, Merriam-Webster.com Dictionary, available at: https://www.merriam-webster.com/dictionary/fence (last visited 9/22/2025). The walls here meet that definition as well.

and as a matter of law, the district court erred in holding otherwise. *Lane, supra; Anderson, supra.*

In addition, and despite admitting the building was secure on the date of loss, Defendants made no effort to prove how the presence of a separate fence would have prevented the loss at issue, nor can they. In fact, Defendants admit they have no proof the presence of a separate, at least 6 foot high, fence would have avoided the loss. (Depo. Wormington, Doc. 53, at 154, PageID#2946). Here, the cause of the fire is undetermined. (*Id.* at 78, PageID#2870). As the party who claims an exclusion applies, Defendants must have some basis for claiming the presence of a separate fence surrounding the jobsite would have prevented the loss, or that the lack of a fence played some role in causing the loss. *See Praetorian Ins. Co. v. Axia Contr., LLC*, 794 Fed. Appx. 791 (10th Cir. 2019). (Court held the carrier could not rely on the "Protective Devices Schedule" and the "Protective Devices Endorsement" to avoid coverage after a fire where there was no evidence the insured's failure to maintain fencing caused or contributed to the loss.); *Praetorian Ins. Co. v. Axia Contr., LLC*, 488 F. Supp. 3d 1042 (D. Col. 2020) (determining after remand that a fence is not considered a protective device for a fire). In fact, the district court never addressed this undisputed proof and legal argument raised below, and that is a further reason the district court erred as a matter of law in granting summary judgment to Defendants. (Doc. 119).

d. Applying the PDE as written, and intended to be interpreted, by Defendants results in illusory coverage

The impossibility of placing or installing a separate fence (as opposed to the walls, doors and windows of the building itself) controlled by Plaintiff, that completely surrounds the building and/or jobsite (where it would have to be located entirely on property owned by third parties), as Defendants undisputedly required by their interpretation of the PDE, renders illusory the fire coverage contained in the Policy. Once again, Defendants shockingly admit that no fire loss ***ever would be covered by the Policy as issued (or as rewritten by Defendants in their coverage denial letter)*** because Plaintiff never could comply with Defendants' interpretation of the PDE. (Depo. Jones, Doc. 49 at 65-66, 71-72, 78, PageID#491-492, 497-498, 504). In fact, Defendants admit their exclusion (i.e.: the PDE) only applies if Plaintiff actually "controls" the described protective device, and here they admit that any fence "completely surrounding" the jobsite would have to be located entirely on property controlled by third parties (including through the common wall of an abutting building), not by Plaintiff. (*Id.* 71-72, 79, PageID#497-498, 505). Simply put, Defendants enforced their impossible-to-comply-with exclusion to deny coverage even though this interpretation rendered illusory all fire coverage under the Policy.

Ohio law is clear, an insurance provision is illusory when it appears to grant a benefit to the insured, although it does not. *Coleman v. Progressive Preferred*

Ins. Co., 1st Dist. No. C-070779, 2008 Ohio 3568, P13 (Ohio App. 1st Dist. 2008); *GenCorp., Inc. v. AIU Ins. Co.*, 104 F.Supp.2d 740, 745 (N.D. Ohio 2000). Courts (unlike Defendants and the district court here) do not give insurance provisions a meaning that would render them illusory. *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 2007 Ohio 2722, P133, 873 N.E.2d 345 (Ohio App. 2d Dist. 2007); *Talbert v. Continental Cas. Co.*, 157 Ohio App. 3d 469, 2004 Ohio 2608, 811 N.E.2d 1169 (Ohio App. 2d Dist. 2004); *Rogers v. Sure Conveyors, Inc.*, 510 F. Supp. 3d 515, 521 (N.D. Ohio 2021); *see, als*o, Doctrine of Illusory Coverage, Black's Law Dictionary (11th ed. 2019) ("Courts avoid interpreting insurance policies in such a way that an insured's coverage is never triggered and the insurer bears no risk."); *CapWealth Advisors, LLC v. Twin City Fire Ins. Co.*, 2024 U.S. App. LEXIS 6313 (6th Cir. 2024).

Disregarding this well-settled coverage law, and the undisputed factual record, the district court instead engaged in a game of heads Defendants win, tails Plaintiff loses. Specifically, the district court rejected the well-founded, based on Defendants' admitted interpretation of the PDE, conclusion that the fire coverage on the Policy is illusory. Under Ohio law, accepting Defendants' intended interpretation actually would have meant Defendants owed coverage for this fire

loss. *Coleman, supra.*[4] The district court did so by rejecting the "literal reading" of the "unambiguous as a matter of law" PDE and, instead, rewriting it to only require "a fence around the three sides of the building," and then holding, as a matter of law, that Plaintiff could have erected a fence "around the three sides of the building that did not abut an adjacent building. See Doc. 108, PageID 6052 (depicting where fence could have been constructed)." (Doc. 119 at 13-14, PageID#6348-6349). The district court erred on all counts.

First, under Ohio coverage law, the district court was not free to impose what it decided was "the better interpretation of the plain language of the policy," where the district court contradictorily found the language was "unambiguous" as a matter of law. (*Id.* at 10, 14, PageID#6345, 6349). Rather, the district court was required to give the language of the PDE an interpretation that favored finding coverage if a "literal reading" of the "plain" language, language that Defendants chose, had to be rejected. *Anderson,* 757 N.E.2d at 332. (The insurer must establish not merely that the policy is capable of the construction it favors, but rather that

[4] Likewise, the only proper and well-supported reason to hold that the fire coverage on the Policy is not illusory, would be by not enforcing the inapplicable, not-possible-to-fulfill exclusion (i.e.: PDE). Holding that the PDE does not apply to Plaintiff's loss also would mean Defendants do owe fire coverage for this loss, thus rendering such coverage not illusory. *See GNFH, Inc, supra; Talbert, supra.* In contrast, the district court did the exact opposite and violated Ohio coverage law by rewriting the PDE and then falsely (on this record) concluding Plaintiff could have complied with the rewritten PDE, all in an effort to give the exclusion "vitality." Of course, the district court did so by ignoring Defendants' admitted interpretation of the PDE that, from Defendants' point of view, never provided fire coverage to the Premises. This is the heads Defendants win, tails Plaintiff loses outcome of the district court's opinion.

such an interpretation is the only one that can fairly be placed on the language in question.); *Lane,* 45 Ohio St.3d 63, 65, 543 N.E.2d 488, 490 (Any ambiguity in an exclusion is strictly construed against the insurer and in favor of the insured, and coverage.). Likewise, here, there was no evidentiary basis for the district court to reject the "literal" reading of the PDE because, as noted, Defendants admitted that was their intended interpretation of the language of the PDE when they drafted it and when they denied coverage solely based on the "literal" understanding of that language. (Depo. Jones, Doc. 49 at 72-78, PageID#498-504; Depo. Wormington, Doc. 53 at 91-92, 126-127, 159, PageID#2883-2884, 2918-2919, 2951).

Moreover, even if the rewrite of the PDE by the district court was factually and legally supported, the district court completely ignored the fact that the Policy still required any such fence to be one that Plaintiff controlled. Obviously, as any such fence would be entirely on property owned by third parties, Plaintiff would never "control" such a fence, thus making it impossible for Plaintiff to comply with even the district court's rewritten PDE. (Depo. Grinberg, Doc. 94-1 at 113-114, PageID#4523-4524). Consequently, the district court invented out of whole cloth its contradicted-by-the-record determination that Plaintiff "could have put up a fence around three sides of the building that did not abut an adjacent building." (Doc. 119 at 14, PageID#6349).

In fact, the district court's lone factual citation to support its false conclusion is to mere argument in Defendants' Response to Plaintiff's Motion for Partial Summary Judgment. (Doc. 108, PageID#6052). Stunningly, the district court completely ignored the undisputed factual record that Defendants cannot say whether it was "possible" to install a fence on the City sidewalk or on the Urban League's property (Depo. Jones, Doc. 49 at 91-92, 126-127, PageID#2883-2884, 2918-2919), and it ignored Plaintiff's evidence that it received a cease-and-desist letter from the Urban League to "stay off" its property. (Decl. Fatal, Doc. 102-1 at ¶10, Exhibit 3, PageID#5880-5881, 5888-5890). However, it is undisputed Defendants had the burden to demonstrate, clearly and unambiguously, that Plaintiff could have complied with the exclusion, even as improperly rewritten by the district court (i.e.: install a fence entirely on property owned by third parties so that it goes around three sides of the building). *Continental Ins. Co. v. Louis Marx & Co., Inc.,* 64 Ohio St.2d 399, 415 N.E.2d 315, syllabus (1980). (When an insurer denies liability coverage based upon a policy exclusion, the insurer bears the burden of demonstrating the applicability of the exclusion.)

Continuing its descent into baseless factual and legal reasoning as to why the PDE did not render illusory the fire coverage on the Policy, the district court also held that no "fence was necessary on the side of the building where it abutted its neighbor, because the building was fully protected on that side by the neighbor."

(Doc. 119 at 14, PageID#6349). Likewise, it held that were "a three-sided fence to have been erected, the exterior of the jobsite would have been fully protected as required by the Protective Devices Endorsement." (*Id.* at 14-15, PageID#6349-6350). Putting aside for the moment that it appears the district court is holding, as a matter of law, that all the PDE required was for the building on the Premises to be protected (i.e.: secure), the factual record is unrebutted that the building was secure throughout the entire Policy term and Defendants have no evidence to the contrary. (Decl. Fatal, Doc. 102-1 at ¶3, PageID#5878; Depo. Wormington, Doc. 53 at 1215-126, PageID#2917-2918). Therefore, coverage should have been owed.[5]

[5] Although not addressed by the district court, it is anticipated Defendants will cite to the statement of Lynn Plona, an employee at Camargo, that, had she known in advance of the "protective safeguard," she would have told the insured to "put up a fence or you won't get insurance". Defendants' reliance on Ms. Plona's taken-out-of-context, wholly irrelevant statement is nothing more than a red herring.

First and foremost, careful attention to what Ms. Plona said, and the question to which she responded, makes clear she referred to a generic underwriting scenario, not the post-loss situation involving the actual language of the PDE at issue.

> Q: In layman's terms, we're trying to understand if you would you have written the Policy had you known about the protective safeguard, if the fencing was not completed?
>
> A: We would've said, "Put up a fence or you won't get insurance." We do that all the time. If an underwriter says. "This is what you need to do," then we tell this client, "This is what you need to do," and they do it.

(Plona Rec. Stmt., 40:16-40:43, filed conventionally on 12/9/24). This understanding is confirmed by the fact that at the time the Policy actually was issued, neither the agent nor the insured had even seen the PDE or Schedule to even know what its language legally required.

Regardless, the district court failed to follow the law when it ignored Defendants' admissions regarding the illusory nature of the fire coverage, and then did exactly what Defendants did by improperly denying coverage to Plaintiff. The district court should be reversed, and judgment should be entered in favor of Plaintiff that coverage is owed.

2. <u>Because there was a total loss, Ohio Rev. Code 3929.25 applies, requiring payment of the policy limit of $1,150,000</u>

Ohio Rev. Code 3929.25 is the total loss statute. As this Court explained in *Carpenter v. Liberty Ins. Corp.*, 2023 U.S. App. LEXIS 26339, 2023 WL 6389041, at *4 (6th Cir. Oct. 2, 2023) (case quotations and citations omitted):

> "Ohio law requires insurers to pay out the 'whole amount' of certain policies if there's a 'total loss' to an insured building. Ohio Rev. Code § 3929.25. To be a total loss, the building must have lost its identity and specific character as a building. It must be of no value in repairing or rebuilding."

see, also, Paterson-Leitch Co. v. Ins. Co. of N. Am., 366 F. Supp. 749, 757 (N.D. Ohio 1973). The only exception to the operation of Ohio Rev. Code § 3929.25 is where a policy "requires actual completion of repair or replacement to be

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(Depo. Mueller, Doc. 74-9, PageID#3659-3668). Although referenced in the proposal for insurance, the actual Policy language of the PDE and Schedule was not included in the proposal, and thus could not have been known by the agent or the insured until after the Policy was issued. *Id.* Regardless, the language of the actual PDE is strictly construed against Defendants as a matter of law. *King, supra*; *United States ex rel. Compton v. Midwest Specialties*, 142 F.3d 296, 301-302 (6th Cir. 1998) (contract interpretation is for the court, not for witness testimony).

completed," at which point the policy can require such repairs or replacement before paying full value. Ohio Rev. Code 3929.25.

In terms of total loss, "[a] building loses its identity and specific character when it has been so far destroyed by fire that it can no longer be called a building, and the portions that remain cannot be utilized to advantage in rebuilding it." *Pennsylvania Fire Ins. Co. v. Drackett*, 63 Ohio St. 41, 57 N.E. 962, 964 (Ohio 1900).

Here, of course, Wormington testified that if coverage existed, the claim would be paid out as a total loss for the face value of the policy. (Depo. Wormington, Doc. 53, at p. 131, PageID#2923). Wormington also admitted that, following the fire, the Property was so destroyed that the City condemned the building due to safety issues, ordered it to be demolished and it was. (*Id.* at 96, 195, PageID#2888, 2987; Decl. Fatal, Doc. 102-1, at ¶12, Exhibit 4, PageID#5881, 5894-5897). Wormington also admitted that the face value of the Policy was $1,150,000, comprising $450,000 in building materials and $700,000 for the existing building. (*Id.* at 132, PageID#2924; Doc. 49-1, PageID#544).

Thus, the district court erred in not entering judgment in favor of Plaintiff and against Liberty and Ohio Casualty, in the amount of $1,150,000, on Plaintiff's breach of contract claim.

II. The district court erred in granting summary judgment to Liberty and Ohio Casualty on the bad faith claim, and also erred in denying Plaintiff partial summary judgment as to liability on that claim

In Ohio, an insurer has a duty to act in good faith in handling claims. *Hoskins v. Aetna Life Ins.*, 6 Ohio St.3d 272, 6 Ohio B. 337, 452 N.E.2d 1315 (1983). An insurer "fails to exercise good faith in processing a claim of its insured where its refusal to pay is not predicated upon circumstances that furnish reasonable justification therefor." *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994 Ohio 461, 644 N.E.2d 397, paragraph one of the syllabi (1994). Moreover, "a cause of action for the tort of bad faith may exist irrespective of any liability arising from a breach of contract." *Bullet Trucking, Inc. v. Glen Falls Ins. Co.*, 84 Ohio App. 3d 327, 616 N.E.2d 1123, 1126 (Ohio Ct. App. 1992); *See also Gerken v. State Auto Ins. Co. of Ohio*, 2014- Ohio 4428, 20 N.E.3d 1031, 1044 (Ohio Ct. App. 2014) (citing cases); *Broad v. North Pointe Ins. Co.*, No. 5:11CV2422, 2014 U.S. Dist. LEXIS 37205, 2014 WL 1097925, at *19 (N.D. Ohio Mar. 19, 2014).

Plaintiff's bad faith expert, Louis Fey, unquestionably testified that Liberty and Ohio Casualty committed bad faith and he explained how and why that was so, applying his decades of insurance experience to demonstrate that there was no reasonable justification for the delays in a claims decision, for other claims handling practices, and for the wrongful denials here that were not supported by the plain language of the policy, and the ongoing refusal to pay what was owed through

attempts to rewrite the insurance policy. (Depo. Fey, Doc. 98, at pp. 10, 110, PageID# 5189, 5289; Exhibit 43 Doc. 98-2, PageID#5339-5369). More significantly, and as demonstrated throughout Plaintiff's pleadings below, Liberty and Ohio Casualty's bad faith stands unrebutted based upon Defendants' Rule 30(b)(6) testimonial admissions, where Defendants admitted to the proper standard for handling Plaintiff's claim, but then also admitted they did the opposite in denying Plaintiff's claim.

In particular, whether it was Defendants' admitted failure to apply an admittedly reasonable definition to undefined Policy terms that would have afforded coverage, or Defendants' admitted application of a conditional exclusion as the sole basis to wrongfully deny coverage where the condition, admittedly, never applied, or Defendants' admitted rewriting of that exclusion after the loss in an effort to wrongfully deny an otherwise covered fire loss claim, or Defendants' admission that compliance with that exclusion was impossible, which is something they knew from the start, and thus admitting their intention that no coverage ever would be provided for a fire loss to the Property, but then denying Plaintiff's fire loss claim on the basis Plaintiff allegedly failed to comply with the exclusion, Liberty and Ohio Casualty's bad faith is established as a matter of undisputed fact and law. Plaintiff is thus entitled to judgment as a matter of law on liability for bad faith, or at least reversal of summary judgment in favor of Defendants on this claim.

III. The district court erred in granting summary judgment to Defendants on the fraud claim, and also erred in denying Plaintiff partial summary judgment as to liability on that claim

To prove fraud under Ohio law, Plaintiff must establish: "(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Groob v. KeyBank*, 108 Ohio St.3d 348 at ¶ 47, 2006-Ohio-1189, 843 N.E.2d 1170 (2006), *quoting Gaines v. Preterm-Cleveland, Inc.,* 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987).

And while the "general rule is that fraud cannot be predicated upon a representation concerning a future event," *Nilavar v. Osborn*, 127 Ohio App.3d 1, 21, 711 N.E.2d 726 (2d Dist.1998), a "'promise of future action, occurrence, or conduct'" can qualify as an actionable misrepresentation if the person who makes the promise "'has no [concurrent] intention of keeping [it].'" *See Martin v. Ohio State Univ. Found.*, 139 Ohio App.3d 89, 98, 742 N.E.2d 1198 (10th Dist.2000), quoting *Tibbs v. Natl. Homes Constr. Corp.*, 52 Ohio App.2d 281, 287, 369 N.E. 1218 (1st Dist.1977); *see also Nilavar*, 127 Ohio App.3d at 22.

Along those lines, this Court has held that "a promise made with a present intention not to perform constitutes a misrepresentation of existing fact even if the promised performance is to occur in the future." *Micrel, Inc. v. TRW, Inc.*, 486 F.3d 866, 874 (6th Cir. 2007); *Whisman v. Ford Motor Co.*, 157 Fed. Appx. 792 at *799 (6th Cir. 2005). That is the case here.

Here, it is unrebutted that Plaintiff purchased the Policy under the belief, based upon Defendants' representations, that the Policy would, in some instances, cover a fire at the Premises. (Depo. Grinberg, Doc. 94-1, at 94, 116, pageID#4504, 4526; Decl. Fatal, Doc. 102-1, at ¶¶4-5, PageID#5879). It equally is unrebutted that Defendants, when they underwrote, drafted, assembled and authorized the Policy to be bound, did so with the knowledge that (as far as they were concerned) the Policy would never provide any fire coverage for any loss at the insured location (ever) because Defendants knew it was impossible to install a 6 foot high, separate fence, controlled by Plaintiff, completely surrounding the jobsite, and because of that they knew their position was, and would be, "there is never any fire coverage or theft coverage on this policy." (Depo. Jones, Doc. 49 at 65-66, 71-72, 78, PageID#491-492, 497-498, 504). Moreover, and without limitation, Defendants also communicated other knowingly false, material representations made by Defendants to Plaintiff including the following:

(i) That the Policy was going to provide fire and theft coverage to 3371 Reading, LLC, for 3371 Reading Rd, Cincinnati, OH 45229-3171, for fire and theft losses during the policy period. (Policy, at Exhibit A, Doc. 49-1 and 49-2, PageID#544-545, 567-568, 585, 589, 597, 599, authenticated in Depo. Jones, Doc. 49 at p. 42, PageID#469).

(ii) That the Policy was going to provide fire and theft coverage in exchange for the paid premium, as reflected on pages 4 and 30 of the Policy. (*Id.* at PageID#543, 569).

(iii) That fire and theft coverage was provided for the scheduled jobsite with a building materials limit of $450,000 and a building limit of $700,000. (*Id.* at PageID#544, 570).

(iv) That fire and theft coverage was provided for the existing building, as it then-existed. (*Id.* at PageID#545, 571).

(v) That "Liberty Mutual Insurance claims professionals across the United States are ready to resolve your claim quickly and fairly, so you and your team can focus on your business. Our claims teams are specialized, experienced and dedicated to a high standard of service." (*Id.* at PageID#555).

(vi) That fire and theft coverage was provided during renovation and rehabilitation of the Premises. (*Id.* at PageID#585).

(vii) That direct physical loss from fire was a covered peril for this Premises and would be paid. (*Id.* at PageID#589).

Defendants, by and through the actions of Jones, who was acting on their behalf and with their authority, and Jones personally, communicated the foregoing knowingly false, material statements to Camargo, as agent for Plaintiff, via email at approximately 2:37 p.m. on December 14, 2020, and then communicated the foregoing Policy terms through Liberty's online system immediately thereafter. (Doc. 49-4, PageID#981). Camargo then communicated the Policy and the foregoing materially false statements made by Defendants to Plaintiff via email on December 16, 2020, at 8:59 a.m. (Doc. 74-11, PageID#3698-3702). And it is undisputed these statements were material to Plaintiff, and that Plaintiff justifiably relied on these statements. (Depo. Grinberg, Doc. 94-1, at pp. 94, 116, PageID#4504, 4526; Decl. Fatal, Doc. 102-1 at ¶¶ 4-5, PageID#5878-5879).

Moreover, Defendants intended that the foregoing knowingly false, material statements be relied upon by Plaintiff, so that they could collect a premium and enrich themselves at the expense of Plaintiff, which they did. (*Id.* at 64, PageID#490). This fact is further supported by Jones' testimony that even though the Policy did not provide fire coverage and indeed never could provide any fire or theft coverage to the Premises under Liberty's interpretation (*id.* at 65-66, 72-78, PageID#491-492, 498-504), yet Jones testified that even the portion of the premium

Plaintiff paid for fire and theft coverage was earned premium and would not be refunded by Defendants. (*Id.* at 105-108, PageID#531-534). In fact, Defendants collected that premium and retained that premium to date, all without disclosing that Defendants had issued a Policy containing sham fire and theft coverage provisions, and pursuant to which they never intended to pay any fire or theft loss to the Premises. (*Id.* at 65-66, 72-78, 105-107, PageID#491-492, 498-499, 531-533; Depo. Wormington, Doc. 53 at 173-174, PageID#2965-2966).

Plaintiff is entitled to partial summary judgment as to liability against all named Defendants (to include Jones) on its claim for fraud, or at least reversal of summary judgment in favor of Defendants on this claim.

IV. The district court erred in granting summary judgment to Liberty and Ohio Casualty on the Deceptive Practices claim, and also erred in denying Plaintiff partial summary judgment as to liability on that claim

On or about December 14, 2020, and in the course of their respective businesses, Defendants Liberty and Ohio Casualty knowingly represented that goods or services, namely the Policy, had uses or benefits it did not have, including:

(i) That the Policy was going to provide fire and theft coverage to 3371 Reading, LLC, for 3371 Reading Rd, Cincinnati, OH 45229-3171, for fire and theft losses during the policy period. (Policy, at Exhibit A, Doc. 49-1 and 49-2, PageID#544-545, 567-568, 585, 589, 597, 599, authenticated in Depo. Jones, Doc. 49 at p. 42, PageID#468).

(ii) That the Policy was going to provide fire and theft coverage in exchange for the paid premium, as reflected on pages 4 and 30 of the Policy. (*Id.* at PageID#543, 569).

(iii) That fire and theft coverage was provided for the scheduled jobsite with a building materials limit of $450,000 and a building limit of $700,000. (*Id.* at PageID#544, 570).

(iv) That fire and theft coverage was provided for the existing building, as it then-existed. (*Id.* at PageID#545, 571).

(v) That "Liberty Mutual Insurance claims professionals across the United States are ready to resolve your claim quickly and fairly, so you and your team can focus on your business. Our claims teams are specialized, experienced and dedicated to a high standard of service." (*Id.* at PageID#555).

(vi) That fire and theft coverage was provided during renovation and rehabilitation of the Premises. (*Id.* at PageID#585).

(vii) That direct physical loss from fire was a covered peril for this Premises and would be paid. (*Id.* at PageID#589).

Defendants, by and through the authorized actions of Jones on their behalf, and Jones personally, communicated the foregoing statements to Camargo, as agent for Plaintiff, via email at approximately 2:37 p.m. on December 14, 2020, and then communicated the foregoing Policy terms through Liberty's online system immediately thereafter. (Doc. 49-4, PageID#981). Camargo then communicated the Policy and the foregoing statements to Plaintiff via email on December 16, 2020, at 8:59 a.m. (Doc. 74-11, PageID#3698-3702). Thus, Defendants, admittedly, misrepresented that the Policy provided coverage and had

"characteristics, … uses, [or] benefits … that [it does] not have," in contravention of Ohio Rev. Code § 4165.02(7).

Plaintiff justifiably relied upon the statements and representations set forth above, paid the premium when and as due, and further relied upon the foregoing statements and representations in commencing construction and work on the Property. (Depo. Wormington, Doc. 53 at 173-174, PageID#2965-2966; Depo. Mueller, Doc. 74 at 53-54, PageID#3444-3445; Depo. Grinberg, Doc. 94-1, at 94, 116, PageID#4504, 4526; Decl. Fatal, Doc. 102-1, at ¶¶ 4-5, PageID#5878-5879). And this caused damages. (Decl. Fatal, Doc. 102-1, at ¶ 6, PageID#5879). This was sufficient to establish the claim. *Rui He v. Rom*, 751 Fed. Appx. 664 (6th Cir. 2018) (reliance on seller's false representations established the claim); *Schumacher v. State Auto. Mut. Ins. Co.*, 47 F. Supp. 3d 618 (SDOH 2014) (same in context of insurance).

Pursuant to Ohio Rev. Code § 4165.03(A)(2), Plaintiff is entitled to actual damages for these violations, because it relied upon these false statements to its detriment. And pursuant to R.C. 4165.03(A), and in light of the policies and practices of Defendants to deceptively sell insurance policies that provide no fire or theft coverage under any circumstances, and then deny claims on that basis, and in light of the practice of Plaintiff and related entities of obtaining insurance in the Ohio insurance market, (Decl. Fatal, Doc. 102-1, at ¶7, PageID#5879-5880),

Plaintiff and others are likely to be damaged by the deceptive trade practices of Defendants, and Plaintiff seeks injunctive relief as permitted in that section.

Plaintiff specifically requested below injunctive relief and damages on this claim. Plaintiff is entitled to partial summary judgment as to liability against Liberty and Ohio Casualty on this claim, or at least reversal of summary judgment in favor of Defendants on this claim.

CONCLUSION

The district court erred in granting Defendants summary judgment and in denying Plaintiff summary judgment on all four claims. At a minimum, genuine issues of material fact precluded entry of summary judgment in favor of Defendants. The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon Counsel for the Defendants/Appellees, this 29th day of September, 2025, by filing same with the Court via its CM/ECF system, and by electronic mail upon Counsel for the Defendants/Appellees, which will provide notice to all parties Counsel.

/s/ Christopher Wiest___________

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32(a), I certify that this Appellant's Brief contains 12,927 words. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman font using Microsoft Word.

/s/ Christopher Wiest___________

APPENDIX -- DESIGNATION OF THE DISTRICT COURT RECORD

Plaintiff/Appellant, pursuant to Sixth Circuit Rule 30(g), designates the following filings from the district court's electronic record:

Doc. ID	Date	Description	Page ID
1	02/02/2022	Notice of Removal	1-70
4	02/02/2022	Complaint	73-129
7	02/09/2022	Answer	134-202
49	05/26/2023	Deposition of Jonathan Jones	427-2142
50	05/26/2023	Motion to Amend	2143-2259
51	05/30/2023	Corrected Exhibits to doc. 49	2260-2761
53	06/16/2023	Deposition of James Wormington	2793-3005
61	10/27/2023	Plaintiff's Expert Disclosures	3065-3208
63	12/01/2023	Witness List by Defendants	3392-3715
74	05/16/2024	Deposition of Jay Mueller	3392-3715
75	05/30/2024	Order granting Motion to Amend	3716-30
76	06/11/2024	Amended Complaint	3731-3835
81	06/25/2024	Answer by Corporate Defendants	3842-3855
82	08/09/2024	Answer by Jonathan Jones	3856-3867
91	12/06/2024	Notice of Filing Deposition of James Wormington	3868-4114
92	12/06/2024	Notice of Filing Deposition of Jonathan Jones	4115-4229
93	12/06/2024	Notice of Filing Deposition of Shawn Asselin	4230-4377
94	12/06/2024	Notice of Filing Deposition of Stanislav Grinberg	4378-4701
95	12/06/2024	Notice of Filing Deposition of Jacob P. Mueller	4702-5027
96	12/06/2024	Affidavit of Lynn Plona	5028-5031
97	12/09/2024	Deposition of Shlomi Fatal	5032-5148
98	12/09/2024	Deposition of Louis G. Fey	5149-5380

99	12/09/2024	Motion for Summary Judgment by Defendants	5381-5411
100	12/09/2024	Deposition of J. Rudy Martin	5412-5618
101	12/09/2024	Deposition of Raymond Jackson	5619-5842
102	12/09/2024	Declaration of S. Fatal and S. Grinberg	5843-5870
103	12/09/2024	Motion to Exclude the Testimony of Raymond Jackson	5871-5888
104	12/09/2024	Motion to Exclude the Testimony of J. Rudy Martin	5889-5900
105	12/09/2024	Motion for Partial Summary Judgment by Plaintiff	5901-5991
108	01/06/2025	Motion for Partial Summary Judgment by Plaintiff	6027-6121
109	01/21/2025	Response in Opposition to Motion for Partial Summary Judgment	6122-6155
110	01/21/2025	Response in Opposition to Motion to Exclude the testimony of J. Rudy Martin	6156-6167
111	1/21/2025	Response in Opposition to Motion to Exclude the testimony of Raymond Jackson	6168-6177
112	1/23/2025	Motion for Leave to file supplemental response to Plaintiff's Motion for Partial Summary Judgment	6178-6257
113	01/25/2025	Reply in Support of Motion for Partial Summary Judgment	6258-6277
114	02/03/2025	Reply in Support of Motion for Summary Judgment	6278-6299
115	02/07/2025	Unopposed Motion for Extension of time to file response/reply	6300-6302
116	02/19/2025	Reply in support of motion to exclude the testimony of Raymond Jackson	6313-6315
117	02/19/2025	Reply in support of motion to exclude the testimony of J. Rudy Martin	6316-6325
118	02/19/2025	Response in Opposition to Motion for Leave to file Supplemental Response	6326-6335
119	05/16/2025	Opinion and Order	6336-6355

120	05/16/2025	Judgment	6356
121	06/09/2025	Notice of Appeal	6357-6358

/s/ Christopher Wiest____________