IN THE SUPREME COURT OF OHIO

EMOI Services, LLC	:	
Appellee,	:	
v.	:	**On Appeal from the Second Appellate District, Montgomery County Court of Appeals No. 29128**
OWNERS INSURANCE COMPANY,	:	
Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, OWNERS INSURANCE COMPANY

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Compelling and timely issues justify this Court's acceptance of jurisdiction over this appeal.

I. Ransomware is a Major Issue in Today's World

Abundant news reports and industry studies reflect the rising tide of cybercrime wreaked upon businesses in this country and around the world in this digital age.[1] Everything from personal phones and computers to cars, voting machines, and pipeline control systems have been "hacked" or "ransomed". The increased use and reliance on digital information and services developed over the years have opened ripe new target areas to exploit. Computer hacking like ransomware can cause costly fallout and has not been addressed by this Court in the insurance context in Ohio.

A. Coverage for cyber losses under a business property policy is a matter of first impression in Ohio

A specific determination of coverage under a first-party businessowners' property policy for a cyber loss is a matter of first impression for Ohio. No caselaw specific to this topic could be located in the state. Over two hundred and fifty insurance companies call Ohio home and it ranks seventh in the country in insurance industry employment.[2] **An inconsistent or confusing interpretation of a traditional businessowners property policy in the context of cyber coverage would directly affect a significant element of the Ohio economy.** To be able to make sound decisions on both the insurer's and the insured's side of this equation, proper guidance and clarity is needed from this Court and that is of public and great general interest for Ohio's insurance industry and businesses in general.

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[1] *Cyberrisk: Threat and Opportunity*, Robert P. Hartwig, Ph.D., Insurance Information Institute, October, 2016, cyber_risk_wp_102716-92.pdf (iii.org).

[2] Ohio Insurance Institute website, https://insurancecareers.org/ohio-companies. See also, Insurance Information Institute, *A Firm Foundation: How Insurance Supports the Economy View, A 50-State Commitment – Insurance Companies by State*, https://tinyurl.com/p9a79rhs)

B. Traditional property policies are not intended to apply to cyber losses

A specialized type of insurance protection has been developed to provide insurance for digital ransom or other "cyber loss". **The reason that it was developed is because traditional commercial or business property insurance does not contemplate such coverage.** In the 1950s the "all risk" property policy was developed and began incorporating the "physical loss or damage" language. The purpose of incorporating the "physical loss or damage" requirement was to "clarify the underwriters' intent that there was no coverage for intangible losses such as loss of market, loss of value, losses due to delay, loss of use or purely financial losses."[3] It is only where physical damage to tangible property is damaged by some physical force, i.e., wind, water, lightning, fire, etc., that coverage exists. **The concept of direct physical loss of or damage to property does not translate to digital information and software.**

C. Specialty insurance exists for cyber losses such as arising from ransomware

Just as there is specific insurance policies for other specific types of risk – e.g., employment, farming, medical practice – there is specialty insurance available for cyber risks. Each type of coverage is subject to different terms, scopes, and risk analyses. As a consequence of the differences, different premiums result from different underwriting. These various differences permit a business to select and tailor the type of coverage it desires, including consideration of the premium it is willing to pay and the risks it is willing to accept in lieu of coverage. **EMOI in this instance did not purchase a specialty insurance policy to cover its potential cyber losses; rather, it maintained a traditional businessowners all risk property policy.**

II. The Businessowners Property Policy between Owners and EMOI only Covers Physical Damage

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[3] Scott G. Johnson, *What Constitutes Physical Loss or Damage in a Property Insurance Policy?* 54 Tort Trial & Ins. Pract. L.J. 95, 96-97, n.2, pp. 98-99.

A. The language of the policy confirms that physical loss to physical items is required

The businessowners property policy between Owners and EMOI is a traditional "all risk" type of policy. **Its plain and unambiguous terms require "direct physical loss of or damage to" property, throughout the policy, including for business income and extra expense claims.** The "Electronic Equipment" endorsement specifically requires "direct **physical** loss of or damage to" electronic equipment or media by a "covered cause of loss", which, in turn, is defined as "a direct **physical** cause of loss." This court recently reaffirmed the long-established contract interpretation rule that the plain and unambiguous terms used in a policy must be applied as written. *AKC, Inc. v. United Specialty Ins. Co.*, __Ohio St.3d__, __N.E.3d__, 2021-Ohio-3540 (Oct. 6, 2021). When done here, **it is plain that there is no covered cause of loss, and no direct physical loss of or damage to covered media and, thus, no coverage for the claims asserted.**

B. The weight of authority requires a conclusion that no coverage exists

The policy phrase "direct physical loss or damage" was construed by Ohio's Eighth District Court of Appeals in *Mastellone v. Lightning Rod Mut. Ins. Co.,* 175 Ohio App.3d 23, 884 N.E.2d 1130, 2008-Ohio-311 (8th Dist.) This decision has become a lynchpin in a number of recent Covid-19-related cases addressing the phrase "direct physical loss or damage," for example:

- Losses caused by shut down orders did not qualify as "direct physical loss of or damage to property within meaning of policy's risks covered. - *Santo's Italian Café, LLC v. Acuity Ins. Co.* 15 F.4th398, (6th Cir. 2021);

- The plain and ordinary meaning of "direct physical loss of or damage to" property is unambiguous and requires "tangible and structural" damage to property. *Sanzo Ent., LLC v. Erie Ins. Exchange*, Delaware App. No. 21CAE 06-0026, 2021-Ohio-4268 (5th Dist., December 7, 2021);

- There must be physical damage to tangible property to be "direct physical loss or damage", the mere loss of use and purely economic use do not suffice - *System Optics, Inc. v. Twin City Fire Ins. Co.*, No. 5:20-cv-1072, 2021 WL 2075501 (N.D. Ohio, May 24, 2021);

- "Direct physical loss of or damage to" property is not ambiguous, the "phrase intends a tangible loss of or harm to" the insured property - *MIKMAR, Inc. v. Westfield Ins. Co.*, 520 F.Supp.3d 933, 940 (N.D. Ohio 2021).

The reasoning used in these cases is consistent with cases from other jurisdictions addressing cyber losses that find no coverage in situations similar to that presented here. The Court of Appeals decision in this case goes against this mainstream and weight of authority. In order to maintain the stability and predictability of Ohio contract law, the Court must provide guidance on this subject in order to avoid inconsistency with decisions construing the same or similar terms, all of which is of great general interest.

III. The Data Compromise Endorsement Excludes Ransomware Damages

The fact that economic damage or loss resulting from ransomware is not covered by the policy is reinforced by the "Data Compromise" endorsement in EMOI's policy, which expressly excludes ransomware damages. The trial court concluded that the claims asserted by EMOI were not claims governed by the terms of the electronic Equipment Endorsement, but rather fell within the terms of the "Data Compromise" endorsement, which excluded them, stating:

> **In reality, this is a data compromise situation, rather than a situation involving physical damage to electronic equipment.** The hacker gained unauthorized access to EMOI's computer systems as a result of a vulnerability within the system, and EMOI ultimately had to pay a ransom in order to regain control of their software and data. **Unfortunately for EMOI, the Data Compromise endorsement in its insurance policy expressly excludes coverage for costs arising from any threat, extortion or blackmail, including ransom payments. The Data Compromise endorsement also excludes costs arising from correcting any deficiency in its "systems, procedures or physical security that may have contributed to a 'personal data compromise.'"** In other words, the cost endured by EMOI to upgrade its systems to cure the deficiency that left it vulnerable to attack is expressly excluded under the Data Compromise endorsement.
>
> (*EMOI Services, LLC v. Owners Ins. Co.*, Montgomery County Case No. 2019 CV 05979, Decision, Entry and Order Sustaining Defendant's Motion for Summary Judgment, May 4, 2021, p. 6, emphasis added).

The trial court was correct. Both EMOI and the Court of Appeals avoid discussion of this endorsement in an effort to create coverage where none exists. Because the interpretation of businessowners property policies as relates to computer hacking and ransomware situations is a matter of first impression in Ohio, it is critical that this court provide the guidance needed to avoid the confusion now created by the Second District's decision. **Significant portions of the Owners policy become meaningless if not considered in the context of the present ransomware claim and the Second District's decision is not definitively addressed by this Court.**

IV. The Court of Appeals Created a New Bad Faith Standard

The Second District Court of Appeals effectively created an additional element to the Ohio insurance bad faith standard by concluding that a question of fact existed because the insurer had not retained a subject matter expert to review the ransomware claim in this matter before making its coverage decision. This is a new and expanded interpretation of the standards announced in *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 644 N.E.2d 397, 1994-Ohio-461.

A. The Court of Appeals' decision would require insurers to employ or retain experts in every subject matter to make coverage decisions.

The majority in the Court of Appeals spent seven paragraphs discussing the bad faith claims alleged in the case. Three paragraphs discuss case history. The remaining four paragraphs, without elucidation, conclude that there is a genuine issue of material fact existing because the claims handler was not a subject matter expert on cyber matters and did not retain an expert. This conclusion, in effect, requires an insurer to either employ or retain a subject matter expert on every coverage decision, even where the plain an unambiguous language of the policy dictates that no coverage exists. This requirement will significantly increase cost and time for insurers to make even basic coverage determinations based on the plain language of their policies.

B. The Court of Appeals' decision creates a new interpretation of existing law.

The Second District decision also departs from established law in Ohio that:

(1) **it is the insured's burden to establish the existence of the loss and demonstrate it is within the coverage of the policy**; and,

(2) **there is no duty to investigate by the insurer until this is done.**

By functionally reversing this burden and requiring expert opinion by the carrier in making a coverage decision based upon the plain language of the policy, the Court of Appeals has created a new requirement in the bad faith analysis and/or extended the interpretation of "reasonable justification". Without direction from this Court, the result will be confusion, conflict and inconsistency among the courts in Ohio.

V. The Issue of "Direct Physical Loss of or Damage to" Property is Before this Court in *Neuro-Communication Services, Inc., etc. v. The Cincinnati Insurance Company.*

A. Oral Arguments are scheduled in the *Neuro-Communications Services* case

This court has presently pending before it a certified conflict question related to the same operative terms as at issue here, "direct physical loss of or damage to" property, in *Neuro-Communication Services, Inc., etc. v. The Cincinnati Insurance Company*, Ohio Supreme Court Case No. 2021-0130. This case is fully briefed, including by several amici, and is pending oral argument on February 8, 2022. It is of public and great general interest to ensure that the same words and phrases in commercial property insurance be given the same meaning and effect.

B. The "direct physical loss or damage language" should be construed consistently

Avoiding the risk of inconsistent decisions or verdicts is a primary reason that the Ohio Civil Rules permit consolidation (Rule 42), intervention (Rule 24), joinder (Rules 19 and 19.1) and class action proceedings (Rule 23). This is because to be effective, the law must also be predictable and evenly applied. If law is not consistent and predictable, conflict and confusion escalate, if not prevail.

In *Neuro-Communication Services,* the core issue is the same as in this case, whether "direct physical loss of or damage to" property exists that triggers coverage in a business property insurance policy.[4] To permit the present Second District interpretation of "direct physical loss of or damage to" property to stand and risk inconsistent interpretation also risks the result of greatly expanding commercial property coverage beyond what is contemplated by the plain terms of the policy, the underwriters, and the insurance industry.

STATEMENT OF THE CASE AND FACTS

I. Statement of the Case

EMOI filed its complaint alleging breach of contract and bad faith based upon denial of coverage by Owners, for a ransomware attack on its computer system. Owners filed a motion for summary judgment on all claims. The trial court granted Owners' motion on May 4, 2021. EMOI appealed the trial court decision to the Second District. The Second District reversed and remanded the case on November 5, 2021.

II. Pertinent Background Facts

A. Full functionality was restored to EMOI on payment of the ransom

EMOI operates a medical billing and application service for medical providers. In 2019, EMOI maintained a Businessowners Policy of insurance with Owners. On September 12, 2019, EMOI discovered its computer system had been "hacked" and portions encrypted by an outside source. Ransom notes were found in the system folders on several of the company's "virtual" servers demanding three bitcoin in exchange for the decryption key. Ultimately, EMOI paid the ransom.

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[4] There are other differences in facts and policies between the two cases. For example, in *Neuro-Communications*, the parties are not claiming "damage", only loss of use, whereas here EMOI asserts that its system was "damaged" due to its temporary inaccessibility; also, in this case there are additional exclusions for ransomware damages contained in the Data Compromise endorsement in addition to the "direct physical loss or damage" issue.

After the three bitcoin ransom was paid, the hacker promptly provided the decryption key and instructions. The decryption worked and the system was released. The system then again functioned as it was intended. **Importantly, there was no damage to any hardware component of EMOI's computer and/or server system or any physical media as the result of the encryption of its files or the ransomware.**

B. No physical damage occurred to any equipment, component or media

On September 13, 2019, EMOI spoke with Owners regarding EMOI's ransomware claim. **EMOI reported to Owners that its data was not physically damaged, but was inaccessible due to being encrypted and held for ransom.** Owners reviewed EMOI's property insurance policy and concluded the same date that the terms did not apply to this situation. The primary reason was because there was no direct physical loss or damage to the computer system, and specifically to the physical media or hardware (and thus any software on it) as required by the policy. Owners also concluded that the Data Compromise endorsement of the policy was inapplicable and expressly excluded damages from a ransomware attack. EMOI provided no additional or other information to Owners for further consideration.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A businessowners property policy that requires "direct physical loss of or damage to" property does not cover losses from a ransomware attack.

A. The policy requires a physical loss to physical property

The insuring agreement in EMOI's Businessowners Special Property Coverage Form with Owners, states, "**We will pay for direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss.**" The "**Covered Causes of Loss**" are defined as "**risks of direct physical loss**", unless otherwise excluded or limited under the terms of the policy. The policy also contains an Electronic Equipment endorsement, which states:

> (a) * * * [W]e will pay for **direct physical loss of or damage to electronic equipment, component parts of such equipment** * * * which you own, * * * while located at the premises described in the Declarations.
> * * *
> (b) * * * [W]e will pay for **direct physical loss of or damage to "media"** which you own, * * * while located at the premises described in the Declarations. We will pay for your costs to research, replace or restore information **on "media" which has incurred direct physical loss or damage by a Covered Cause of Loss.**
>
> **Direct physical loss of or damage to Covered Property must be caused by a Covered Cause of Loss.** (Emphasis added).

The Electronic Equipment endorsement includes terms for business interruption and extra expenses. Those terms expressly require that the interruption must be "caused by accidental **direct physical loss or damage to the electronic equipment or media** . . . ." "Media" is also specifically defined by the Electronic Equipment endorsement:

> 'Media' means **materials on which information is recorded** such as film, magnetic tape, paper tape, disks, drums and cards. 'Media' includes computer software and reproduction of data **contained on covered media**. (Emphasis added).[5]

By these unambiguous terms, there must be "direct physical loss or damage" to the tangible, structural media on which software is recorded in order for any claimed software loss or damage to be covered, it is not separately or independently covered.

The focus of the business property policy is on the **tangible** nature of the property covered as is readily apparent from the reiteration of the need for **physical** loss or damage to **physical, tangible** property throughout the policy. The policy is plainly directed at **physically existing perceptible items** – the building, contents, machines, and the like - and **physical** things that can happen to them, like storms, fire, water, electrical surges, wind, etc.

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[5] Aside from these definitional and insuring agreement terms, there are also potentially applicable exclusions; however, to reach the exclusions, these terms must be met first and they are not.

B. The weight of legal authority requires a conclusion there was no direct physical loss

A ransomware attack on a business computer system and resultant claim under an all risk commercial property insurance policy has not been addressed in Ohio or by courts applying Ohio law. The seminal case in Ohio to date addressing the phrase "direct physical loss or damage" in a property insurance context is *Mastellone v. Lightning Rod Mut. Ins. Co.*, supra, a mold case. This Eighth District Court of Appeals decision found the phrase, in plain and ordinary language, required a demonstrable, physical change to occur to the structure of tangible property. The court expressly found that this interpretation was consistent with the authorities on insurance law, citing 10A Couch on Insurance (3rd Ed. 1998), Section 148:46:

> **The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.**

Several other cases in Ohio and other jurisdictions followed and reached the same conclusion. Most recently, the same phrase, "direct physical loss or damage" has taken centerstage in the context of business interruption claims arising from loss of business during the Covid-19 pandemic. **The great bulk of caselaw in that and other contexts have also concluded that there must be some perceptible change to a tangible item for "direct physical loss or damage" within the scope of a property policy to exist.** See, e.g., *The Nail Nook, Inc. v. Hiscox Insurance Co., Inc.*, Cuyahoga App. No 110341, 2021-Ohio-4211 (Dec. 2, 2021), (relying on *Santo's Café*).

First-party property cases related to computer losses, in general, are rare, but the weight of authority for similar claims also conclude that intangible property, such as software, cannot sustain physical damage. See, for example:

- No "direct physical loss of or damage to" checks caused by the insured depositing them pursuant to email scheme and later having funds withdrawn from their account when they were determined fraudulent - *Schmidt v. Travelers Indem. Co. of Am.*, 1010 F.Supp. 3d 768 (S.D. Ohio, 2015), (applying Ohio law);

- **Digital information was not tangible and thus could not, itself, sustain physical loss or damage** - *Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.*, 114 Cal.App.4th 548, 7 Cal. Rptr. 3d 844 (4th App. Dist. 2003);

- "Computer data, software and systems are not 'tangible' property in the common sense understanding of the word. . . . **Computer data, software and systems are incapable of perception by any of the senses and are therefore intangible.** Similar to the information written on a notepad, . . . software and systems are intangible items stored on a tangible vessel – the computer or a disk." - *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 207 F.Supp.2d 459, 468 (E.D. Va. 2002);

- **In the absence of physical damage to any components of host drive or computer, there was no "physical damage to the tangible property of others"** - *Seagate Technology, Inc. v. St. Paul Fire and Marine Ins. Co.*, 11 F.Supp.2d 1150, 1155 (N.D. Cal. 1998).[6]

C. The plain terms of the policy must be enforced, consistent with the "hard reality about insurance"

The dissent in the court of appeals properly observed that **the "medium, presumably a server, upon which the software at issue was stored, did not sustain physical loss or damage. Therefore, coverage under the [Electronic Equipment] endorsement was not triggered."** *EMOI Services, Inc. v. Owners Insurance Company*, Montgomery App. No. 29128, 2021-Ohio-3942, ¶71 (Tucker, dissenting, emphasis added). The dissent also recognized the "hard reality about insurance":

> **It is not a general safety net for all dangers.** If risk is not having money when you need it, insurance is one answer to perilous events that could prompt a sudden drop in revenue. Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. Efforts to push coverage beyond its terms creates a mismatch, an insurance product that

[6] The Court of Appeals refers to *Nat. Ink and Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F.Supp.3d 679 (D.Md. 2020), however, in addition to being in the small minority in terms of its interpretation of 'physical loss or damage', the policy terms are different and distinguishable from those used in the Owners policy.

> covers something no one paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for. **That is why courts must honor the coverage the parties did – and did not – provide for in their written contracts of insurance.**

Id. at, ¶74, quoting *Santo's Italian Café,* supra, (Tucker, dissenting). **Giving effect to the plain words and language of the Owners policy results in no coverage being available because there was no physical loss or damage to tangible property.** To permit otherwise results in the "sweeping expansion of insurance coverage without any manageable bounds." *Promotional Headwear International v. The Cincinnati Insurance Company*, D. Kan. No. 20-cv-2211-JAR-GEB, ___F.Supp.3d___, 2020 WL 7078735 (Dec. 3, 2020).

D. *Henderson Road* has been reversed based upon the Sixth Circuit decision in *Santo's Italian Café*

EMOI relied heavily on *Henderson Road Restaurant Systems, Inc. v. Zurich American Ins. Co.*, N.D. Ohio No. 1:20 cv 1239, 2021 WL 168422, which was an outlier in the decisions discussing the "direct physical loss or damage" language. Since that decision, however, the Sixth Circuit decided *Santo's Italian Café,* supra. As a result of the *Santo's Café* decision, the decision in *Henderson Road* relied upon by EMOI was vacated and reversed by the Northern District just three days before the Second District's decision in this case was issued. See, *Henderson Road v. Zurich American Ins. Co.,* N.D. Ohio No. 1:20 cv 1239, 2021 WL 5085283 (N.D. Ohio, Nov. 2, 2021), ("*Henderson* 2"). The court in *Henderson* 2 acknowledged it must follow the Sixth Circuit's interpretation of "direct physical loss" and "property", which requires a "tangible and concrete deprivation of the property itself." It further stated that **"*Santo's* makes clear that coverage for a 'direct physical loss' of 'property' applies only to physical property"** and that "the Sixth Circuit has determined that this language covers only the loss of physical property – not the loss

of use of the property for its original purpose." This conclusion in *Santo's Café* and *Henderson* 2 is consistent with *Mastellone* and the plain terms of the property insurance policy at issue.

Proposition of Law No. II: A court cannot read ransomware coverage into a businessowners all risk property policy by reading key ransomware exclusions out.

The policy between EMOI and Owners contained a Data Compromise endorsement. The trial court expressly found this endorsement determined the claim for coverage and that the claimed loss was expressly excluded. **Thus, this is not a situation where computer hacking or ransomware attack was not contemplated by the policy at all, rather, it is a situation where such attacks and resulting loss are expressly excluded by the terms of the policy.** To divert attention away from this fact, EMOI did not argue for coverage under the Data Compromise endorsement on appeal, instead arguing for coverage only under the Electronic Equipment endorsement.

The Data Compromise endorsement contains the following pertinent exclusions:

> ***
> e. Except as specifically provided above* * *, **costs to review any deficiency in the systems**, procedures or physical security that may have contributed to the personal data compromise;
> f. **Costs to correct any deficiency.** This includes but is not limited to, any deficiency in your systems, procedures or physical security that may have contributed to a "personal data compromise".
> ***
> i. **Any threat, extortion or blackmail. This includes, but is not limited to, ransom payments and private security assistance**;
> j. **Any virus or malicious code** that is or becomes named and recognized by the CERT Coordination Center, McAfee, Seunia, Symantec or other comparable third party monitors of malicious code activity.

There is no available coverage as the result of these express exclusions. **Wish as it might that it had purchased a "cyber" policy that might have provided coverage for this situation, EMOI did not. EMOI maintained a businessowner's property policy providing coverage for physical, tangible damage or loss to physical, perceptible things. There was no such damage**

to any such thing here. Thus, there simply is no coverage. This is consistent with whole of the policy, the history of such policies, the case law in Ohio, and the weight of nationwide authority.

Proposition of Law No. III: Experts are not required for either coverage determinations or to avoid bad faith claims.

A. The Court of Appeals' decision adds the requirement of expert opinion to the longstanding insurance bad faith standards, contrary to precedent

Expanding the reach of bad faith litigation by essentially requiring subject matter experts to investigate and opine on claims grafts a new requirement on to Ohio bad faith law, creates new law and departs from precedent. The bad faith standard in Ohio, as established in *Zoppo v. Homestead Ins. Co.,* supra, is"reasonable justification". This Court has previously made clear that "mere refusal to pay a claim is not bad faith." *Helmick v. Republic-Franklin Ins. Co.,* 39 Ohio St.3d 71, 529 N.E.2d 464 (1988). Nor is a mere "wrongful denial". *Sanzo Ent.*, supra, at ¶72, citing *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315 (1983). Where a claim is "fairly debatable" based upon either facts or applicable law, there also is no bad faith. *Tokles & Son v. Midwestern Indemnity Co.*, 65 Ohio St.3d 621, 630, 605 N.E.2d 936 (1992). No requirement for expert opinion exists in this standard.

B. The Court of Appeals' decision reverses the burden of establishing a loss within coverage, contrary to precedent

The Court of Appeals' decision also departs as well from the recognized burden on the **insured** to both establish the existence of a loss and to demonstrate that it is a loss within the coverage of the policy. *Schwartz v. Stewart Title Guar.,*134 Ohio App.3d 601, 606, 731 N.E.2d 1159 (8th Dist. 1999), citing, *Inland Rivers Service Corp. v. Hartford Fire Ins.*, 66 Ohio St.2d 32, 34, 418 N.E.2d 1381 (1981); *Murray v. Auto-Owners*, Erie App. No. E-18-060, 2019-Ohio-3816, ¶17 (6th Dist.), 144 N.E.3d 1151; *Hickory Grove, LLC, v. Cincinnati Ins. Co.*, Washington App. No. 15CA38, 2016-Ohio-3408, ¶¶18-19 (4th Dist.), citing *Sharonville v. Am. Emp. Ins. Co.*, 109 Ohio St.3d 186,

2006-Ohio-2180. Thus, the Second District decision adds a subject matter expert requirement to essentially any coverage determination and reverses the established burden on the insured to establish a claim under a policy, both contrary to Ohio precedent.

CONCLUSION

This matter presents a number of issues of public and great general interest. The case is one of first impression with regard to the application of a commercial property insurance policy to claims of computer hacking or ransomware attack which will only become more prevalent as technology invades all aspects of daily life. This Court has not spoken on this subject and without its guidance, there is significant risk of inconsistent decision, conflicts among the court and confusion on the part of both insurers and their insureds in Ohio. This is evidenced by the Court of Appeals' decision which expands contract interpretation principles and creates new law as a departure from established precedent. As a result, appellant respectfully requests this court accept jurisdiction of this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served by and through electronic mail upon upon appellee's counsel of record this 13th day of December, 2021 as follows:

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APPENDIX