

STATE OF INDIANA )  
 COUNTY OF DEARBORN )

IN THE DEARBORN SUPERIOR COURT II  
 GENERAL TERM 2019

STATE OF INDIANA ex rel.  
 CURTIS T. HILL, JR.,  
 ATTORNEY GENERAL OF  
 INDIANA

Plaintiff

vs.

CAUSE NO. 15D02-1706-PL-031

OHIO CASUALTY INSURANCE  
 COMPANY and THERESA L.  
 BRUENING

Defendants

ORDER

This matter came for hearing on the 29<sup>th</sup> day of May, 2019. The State of Indiana was present by Shana Tesnar, Deputy Attorney General, and the Defendant, Ohio Casualty Insurance Company ("Ohio Casualty") was present by counsel, Kevin Koons. The judgment defendant, Theresa Bruening, was not present. The Court, having taken this matter under advisement, now finds and orders:

CHRONOLOGICAL SUMMARY

- 1) The Plaintiff filed an action on June 15, 2017 seeking to recover under the insurance policies issued to the City of Lawrenceburg for the alleged acts of malfeasance of the Deputy Clerk-Treasurer for Lawrenceburg, Theresa Bruening.
- 2) On or about July 24, 2017 the Plaintiff filed a Motion for Default Judgment against Theresa Bruening.
- 3) On or about July 31, 2017, Defendant, Ohio Casualty, filed a Motion to Dismiss Complaint Under Trial Rule 12(B)(6) due to alleged failure of Plaintiff to file complaint timely.
- 4) On or about November 13, 2017 after a hearing on the Motion to Dismiss, the Court issued an order finding there were material issues of fact on when notice of loss occurred and denied Ohio Casualty's Motion to Dismiss.

- 5) On or about November 13, 2017, the Court granted a default judgment against Defendant, Theresa Bruening, in the sum of \$356,085.16.
- 6) On or about December 12, 2018, Plaintiff filed a Motion for Partial Summary Judgment as to Defendant, Ohio Casualty, seeking judgment in its favor in the sum of \$252,131.35.
- 7) On or about February 1, 2019, Defendant, Ohio Casualty, filed its response and Cross-Motion for Summary Judgment.

### ISSUES

The issues presented are:

- 1) Whether the Plaintiff is time barred from filing the complaint.
- 2) Whether the acts of the Deputy Clerk-Treasurer, Theresa Bruening, are covered under the policies issued by the Defendant, Ohio Casualty and if so, whether some of the costs are determined to be indirect costs not covered by the policy.

### FACTS

Ohio Casualty issued two crime insurance policies to the City of Lawrenceburg (City). Policy No. 3892111 was effective May 21, 2007 through May 21, 2015. Policy No. 4051950 was effective January 1, 2011 through January 1, 2015. Each policy contained language under "duties in event of loss" that the policy holder was to provide prompt notification to the insurer and may not bring any legal action unless brought within two years of the date of the loss.

Ohio Casualty alleges the State knew of the loss at least by April 30, 2013 when the City Clerk-Treasurer placed Ms. Bruening, the Deputy Clerk-Treasurer, on administrative leave and certainly by June 14, 2013 when the City Clerk-Treasurer converted Ms. Bruening's administrative leave from paid to unpaid citing, "more than enough information" to make that conversion.

On August 14, 2014 Ms. Bruening was charged by an Information filed in federal court and pled guilty pursuant to a plea agreement that same date to wire fraud in relation to her actions as Deputy Clerk-Treasurer.

Ohio Casualty alleges their first notice of claim was when the State Board of Account (SBOA) field examiner, Rich Ahlrich, contacted Ohio Casualty's insurance agent. On August 28, 2015 Ohio Casualty sent the City a proof of loss claim while

reserving in legal rights of Ohio Casualty and when neither the State or the City responded by December 3, 2015, Ohio Casualty closed its file.

Ohio Casualty alleges that the State and City first submitted proof of loss on March 3, 2017. The SBOA filed the special investigative report of the Clerk-Treasurer of the City of Lawrenceburg on December 29, 2016. The Plaintiff filed the complaint June 15, 2017 and alleges this was in the two-year statute of limitation with the period starting on the date the official SBOA report was filed.

Bruening was charged by SBOA with misappropriating public funds in the amount of \$252,131.55, together with additional investigative audit costs incurred by SBOA in the amount of \$22,621.25, for the total amount of \$274,782.60.

On October 31, 2014 Bruening was ordered to pay \$40,551.78 in restitution to the City pursuant to her plea agreement in federal court for unauthorized payroll checks issued to herself in the sum of \$32,745.07, excess payroll contributions totaling \$1,497.27 and duplicate payroll payments issued to herself in the sum of \$6,308.92.

During Bruening's tenure as Deputy Clerk-Treasurer, Ohio Casualty's policies were in place, Bruening's malfeasance occurred between 2009 and 2013.

#### APPLICATION OF LAW TO FACTS

The interpretation of a contract is a matter of law. *Westfield Companies v. Knapp*, 804 N.E.2d 1270 (Ind. Ct. App. 2004). Here, the provisions within the policies requiring the Plaintiff to bring suit within two years of their discovery is satisfied with the holding in *Robertson v. State ex. rel. Hill*, 121 N.E.3d 588 (Ind. Ct. App. 2019).

In *Robertson*, the Court held that where a public official appealed the denial of her Indiana Trial Rule 12 (B)(6) motion to dismiss a complaint to recover public funds filed by the Indiana Attorney General, the statute did not begin to toll until the SBOA official investigation was filed. *Id.*

In *Robertson*, the trial court determined that the plain language of Indiana Code Section 5-11-5-1 provided that "the statute of limitations during which the office of Indiana Attorney General could institute an action, commenced on the date the SBOA published the signed and verified report, even though notice was provided earlier (outside the two-year period) through an unverified report." *Id.* *Robertson* held that, "as a matter of law, the OAG's claims under Indiana Code Section 5-11-5-1 do not

accrue until it receives the SBOA's final report that has been signed and verified." *Id.* at 592.

The next issue to address is what, if any, effect does the policy exclusion for indirect costs have. The Defendant contends that the sum of \$138,737.58 reflecting the contractual liquidated damages and interest paid to IAM National Pension Fund ("Pension Fund") per collective bargaining agreement by the City; late penalties and interest paid to state and federal taxing authorities ("Tax Authorities") in the sum of \$72,742.79 and SBOA audit costs of \$22,651.25 are indirect costs not covered by the policies. The Defendant provides there are no Indiana cases interpreting the 'direct loss' coverage language. In looking to other jurisdictions, the Defendant suggests the phrase "resulting directly from" suggests a stricter standard of causation than mere proximate cause. Citing *Direct Mortgage Corp. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 625 F. Supp. 2d 1177-78 (D. Utah 2008), the Defendant provides if a "loss was contingent on the occurrence of a series of events that were not inevitable...such a contingency takes the loss outside of the scope of the fidelity bond." *Id.*

Ohio Casualty policies in this matter provided that Ohio Casualty will not pay for loss that is an indirect result of any act or occurrence covered by the policy.

Although the Court in *Direct Mortgage* upheld the insurer's denial of the claim, the Court stated *Direct Mortgage's* loss was contingent on the occurrences of a series of events that were not inevitable, and such a contingency takes the loss outside the scope of the fidelity bond. *Id.* @ 1177-78 (citing *Vons Companies, Inc. v. Federal Insurance Co.*, 57 F. Supp. 2d 933, 944 (C. D. Cal) Aff'd, 212 F 3d 489 (9<sup>th</sup> Cir. 2000)).

Here, the costs of the City monies for late payments or non-payments of City obligations for pension and taxing authorities were not contingent on a series of events, but directly related to late payments or non-payments made in malfeasance, misfeasance or omission of the duties of the Deputy Clerk-Treasurer. The resulting penalties and fines were predictable, foreseeable and a direct consequence of the Deputy Clerk's actions.

Ohio Casualty also raises the issue that it is not collaterally estopped by the criminal judgment against Bruening because it was not and is not in privity with Bruening. *Thrasher, Buschmann and Voelkel, P.C. v. Adpoint, Inc.*, 24 N.E. 3d 487, 494 (Ind. Ct. App. 2015). Ohio Casualty further contends that without notice of the

criminal proceeding, Ohio Casualty did not have a full and fair opportunity to litigate the issues. *Nat'l Wine & Spirits, Inc. v. Ernst & Young, LLP*, 976 N.E.2d 699, 704 (Ind. 2012).

Ohio Casualty also asserts that the default judgment, a final judgment on the merits as to that issue, must occur for the principles of res judicata to apply. *Huffman v. State*, 717 N.E. 2d 571, 575 (Ind. 1999).

However, here the SBOA has detailed the costs of Bruening failing to perform her duties resulting in a loss to the City and no evidence of facts have been submitted to provide any conflict with the facts presented in the SBOA audit. Summary Judgment is appropriate where no material issue of facts are present.

#### CONCLUSION

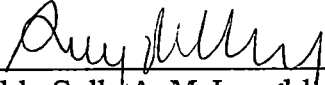
WHEREFORE, the Court now orders and finds:

- 1) The SBOA, pursuant to Ind. Code section 5-11-1-9, performed an examination of the records of the Clerk-Treasurer of the City of Lawrenceburg as outlined in SBOA special investigative report dated December 29, 2016.
- 2) The audit report covered the period of January 1, 2012 to April 12, 2013 and the report disclosed malfeasance, misfeasance or nonfeasance on part of judgment-defendant Bruening and disclosed public money had been unlawfully expanded, obtained by fraud or unlawful manner or wrongfully withheld from the public treasury while Bruening was the Deputy Clerk-Treasurer.
- 3) The statute of limitations began when the SBOA filed its verified report on December 29, 2016 and thus the filing of the case by the Office of the Attorney General on June 15, 2017 was within the two-year statute of limitation.
- 4) The acts of Bruening acting in official duties of the City Clerk-Treasurer as delegated as Deputy were covered by the Ohio Casualty policies for the amount of unauthorized payroll checks to herself, excess payroll contributions to herself and for duplicate payroll payments to herself. Further, City losses directly related by Bruening's failure to pay pension plans and taxing authorities in timely matter are found to be covered by the policy.
- 5) The amount of funds misappropriated, diverted, or misapplied during the terms of Ohio Casualty's bond coverage is \$252,131.35.

- 6) As of July 3, 2017, Bruening has provided documentation to Plaintiff showing she has repaid \$27,441.27 to the City under her criminal restitution order, which will be offset against this total judgment amount.
- 7) The amount misappropriated, diverted, or misapplied does not exceed the amount of bond coverage.
- 8) The remaining amount of public funds misappropriated, diverted, or misapplied during the terms of Ohio Casualty's bond coverage, accounting for Bruening's criminal restitution payments, is \$224,690.08.
- 9) Because the condition precedent to elicit Ohio Casualty's liability was triggered by Bruening's unfaithful performance as Deputy Clerk Treasurer for the City, Ohio Casualty is jointly and severally liable with Bruening to the State in the amount of \$252,131.35, while offsetting Bruening's criminal restitution payments to the City totaling \$27,441.27, for a total amount of \$224,690.08.
- 10) The costs of the SBOA investigation are not found to be covered policy costs.
- 11) The amount of costs for the described acts are established based on Bruening's default judgment, criminal restitution award, and the SBOA audit as there are no issues of material facts as to the loss to the City and Summary Judgment is appropriate.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Summary Judgment is granted to Plaintiff and against Defendant Ohio Casualty Insurance Company, in the amount of \$224,690.08, jointly and severally with Judgment-Defendant Theresa L. Bruening, plus costs and eight percent (8%) post-judgment interest per annum. Defendant's Motion to Dismiss and cross-claim is denied.

SO ORDERED this 8 day of July, 2019.

  
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Honorable Sally A. McLaughlin, Judge  
Dearborn Superior Court II

cc: Counsel for Plaintiff  
Counsel for Defendant