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IN THE
INDIANA SUPREME COURT

Case No. _____

BRADLEY BALDWIN, Individually And As Assignee of Tommi C. Hummel and Travor Hummel, Appellant/Defendants and Counter-Claimants, and BRADLEY BALDWIN, Individually and as Assignee of Jess M. Smith, III, of TOM SCOTT & ASSOCIATES, P.C., as Special Personal Representative of the Estate of Jill L. McCarty, Deceased, Appellant/Defendants and Counter- Claimants, v. THE STANDARD FIRE INSURANCE COMPANY, Appellee/Plaintiff and Counter-Defendant, and JOHN M. HOPKINS, STATE FARM MUTUAL INSURANCE COMPANY and DEPARTMENT OF CHILD SERVICES INDIANA CHILD SUPPORT BUREAU Defendants below.	On Petition to Transfer from the Court of Appeals of Indiana Cause No. 23A-CT-02728 Appeal from the Marshall County Circuit Court Cause No. Below: 50C01-1901-CT-000003 The Honorable Curtis Palmer, Judge

BRIEF OF *AMICUS CURIAE* DEFENSE TRIAL COUNSEL OF INDIANA IN SUPPORT OF PETITION TO TRANSFER FILED BY APPELLANT

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I. STATEMENT OF INTEREST

DTCI is an association of Indiana lawyers who represent liability insurers and civil defendants in litigation, including tort and negligence actions, across the State of Indiana. DTCI has an interest in the outcome of this appeal to ensure that the interpleader procedure remains a viable option for insurers to employ to protect their insureds and themselves in situations in which the limits of insurance are not reasonably likely to be sufficient to compensate the expected claimants because of their number, the extent of their injuries, or both.

II. SUMMARY OF ARGUMENT

As is well documented, verdicts and settlements are on a significant rise in the last 10-15 years, yet policy limits have remained constant, either because of minimum limits in the automobile context, or the inability of individuals and companies to purchase higher limits as a result of increased costs of insurance and because of inflation more generally. The combination of these factors, which exacerbate each other, highlight the frequent necessity of the interpleader procedure in allocating increasingly scarce insurance proceeds.

The Court of Appeals decision, if allowed to stand, would incentivize insurers to pay and perhaps exhaust the policy limit to the first claimants who present claims. Such a result would not only disadvantage insureds by eroding or eliminating available insurance proceeds, but also follow-on claimants for whom no, or limited, insurance proceeds might be then available. The lower court's decision would also expose insurers to regular claims for bad faith in situations in which insurers did what they are charged with doing and what the law should encourage: recognize liability and damages and work to attempt to satisfy competing claims. The fairest and most efficient process for discharging that duty is the interpleader procedure because it involves court approval and usually dispenses with protracted discovery. In addition, is the procedure that

provides the greatest due process protections to insureds and claimants alike. If allowed to stand, the Court of Appeals decision will largely eliminate that much-needed process in the increasingly common context involving multi-claimants and insufficient policy limits and, instead, replace it with a free-for-all sprint for proceeds in which claimants race to make demands and insurers – under pressure of those demands – exhaust policies and expose their insureds to liability and themselves to bad faith.

III. ARGUMENT

A. The interpleader process provides fairness and efficiency in the liability insurance context.

Interpleaders are used by insurers to protect themselves and their insureds. In broad strokes the interpleader has been described as follows:

> [A]n interpleader, which is a remedial device that allows parties to be joined in an action where there is uncertainty as to which of multiple claimants a party may be liable. Ind. Trial Rule 22(A); *Indianapolis Newspapers, a Div. of Ind. Newspapers, Inc. v. Ind. State Lottery Comm'n*, 739 N.E.2d 144, 151 (Ind. Ct. App. 2000) (citing 45 Am. Jur. 2d, Interpleader § 1, at 454-55 (1999)), *trans. denied*. One important purpose of interpleader is "to prevent one of multiple creditors from obtaining the advantage of obtaining the first judgment." 22 Ind. Prac., Civil Trial Prac. § 17.17 (Interpleader) (2d ed.). Another is to protect a party from double or multiple exposure to liability. *Id.* Insurance companies frequently execute their duty to protect their insured from additional liability by bringing such interpleader actions.

First Chicago Ins. Co. v. Collins¸141 N.E.3d 54, 64 (Ind. Ct. App. 2020). Often, the filing of an interpleader results in an agreed distribution of the proceeds of the policy among the appearing claimants and the execution of releases in favor of the insured. An insurer can fulfill its duties to defend and indemnify through the interpleader process. See Restatement of the Law of Liability Insurance § 18 PFD No 3 REV (2018).

The facts of *Collins*¸141 N.E.3d at 54 – through the insurer's error in failing to serve one of the many claimants and thus *not* employing the above described procedure as to all claimants – illuminate how the interpleader process should properly work to protect insureds, insurers, and claimants. In *Collins*, an insurer – which issued a minimum limits personal lines automobile policy of insurance to its insured with policy limits of $25,000 per person and $50,000 per accident – was faced with a liability claim by potentially multiple claimants arising out of an automobile accident. *Collins*, 141 N.E.3d at 57-58. The insurer filed an interpleader, served the potential claimants, obtained a default against those claimants that had not appeared, and filed a motion for summary judgment, which was granted and allowed the insurer to deposit the funds and extinguish its duties. *Id*.

However, one of the claimants was not properly served and the default as to that claimant was vacated. *Id*. at 60-61. The trial court ordered – and appellate court affirmed – the vacation of default against that claimant. *Id*. at 65. The court then remanded the matter to the trial court for a determination as to the amount of the damages suffered by that claimant without reference to the limits of the policy. *Id.*

The result in *Collins* demonstrates the utility of the interpleader procedure for all involved in a liability situation in which there are insufficient policy limits to compensate all injured persons. Even though there was an error by counsel for the insurer, that error was not visited on the insured or the claimants. Instead, the insurer had to bear the cost of the error without the protection of the policy limits. Had process been properly effectuated, all of the claimants would have been timely compensated, but in either event, the insured was protected and the policy of insurance exhausted.

B. Increasing verdicts and concomitant settlements with stagnant limits make interpleaders all the more important and common.

The legal press is rife with stories of ever-increasing verdicts. With verdicts that significantly drive-up settlement value, the value of pre-suit resolution is driven up as well. The National Association of Insurance Commissioners briefly described the current situation as follows:

> [T]the risk of large jury verdicts has expanded to other lines of liability insurance, particularly the trucking industry, which has been subject to nuclear verdicts. In 2021, a jury returned a landmark $1 billion judgment ($900 million in punitive damages) against two trucking companies in the death of a teenager. Other lines of insurance impacted by social inflation include commercial auto, pharmaceutical, and medical device manufacturers. Large corporations are seeing the effects of social inflation in directors & officers and errors & omission insurance. Another liability line that is emerging as a social inflation concern is private passenger auto.

Regulator Insight: Social Inflation, Center for Insurance Policy and Research, Library, January 2023.

A May 2024 study by Cary Silverman and Christopher E. Appel of Shook, Hardy & Bacon LLP entitled "Nuclear Verdicts: An Update on Trends, Causes, and Solutions" from the U.S. Chamber of Commerce Institute for Legal Reform emphasized: "while nuclear verdicts dropped significantly during the COVID-19 pandemic, they rebounded to near their prior levels by the third quarter of 2021. When excluding the pandemic years, the data shows an upward trend in the frequency of reported nuclear verdicts at all levels over the 10-year study period." "Since the 1980s, the number and size of nuclear verdicts have continued to rise. Prior to this time, awards in excess of $1 million were rare. Today, multi-million-dollar awards are more common, with some awards reaching the billions. While there can be rational reasons for nuclear verdicts, such as the willful and wanton misconduct of a defendant and/or the severity of the injuries sustained by a plaintiff, some of these verdicts may be due to factors such as the trial venue and the tactics used

by plaintiff attorneys." "Nuclear Verdicts, Tort Liability, and Legislative Responses," Journal of Insurance Regulation, Vol. 42, Marzen, Chad and Cole, Cassandra R. (2023).

In short, irrespective of the cause of rising verdicts, which is not the issue in this case, verdicts are significantly rising and so are settlements as a result. At the same time, premiums are rising. See "25 Straight Quarters of Premium Increases for Commercial Lines: CIAB [Council of Insurance Agents and Brokers] Survey," Insurance Journal, Hemenway, Chad, March 4, 2024 and "Surging auto insurance rates squeeze drivers, fuel inflation," Associated Press, Troise, Damian, April 26, 2024. Policy limits, which for liability policies are almost always occurrence based, remain stagnant and cannot account for the rise in settlements and verdicts. To wit, the minimum limits for personal lines automobile insurance in Indiana under IC 9-25-4-5 have not increased for some time and, given the tradeoff of reduced numbers of insured drivers that would result from increased premium for higher minimum limits, it is unlikely that the General Assembly will increase them again in the near future. Even if the minimum limit were to increase, it would likely only increase by $5,000 (the amount of the last increase), which would not come close to accounting for the increased verdicts and settlements.

The current collision of increased settlements and verdicts on one hand, and stagnant limits on the other, makes it increasingly likely that insurance policy limits, irrespective of the type of insurance, will be insufficient to satisfy multi-claimant situations. Consequently, the interpleader procedure, like bankruptcy can be for many matters, is uniquely and efficiently equipped to achieve an equitable distribution of the limited insurance proceeds available for multi-claimants.

C. Uncertainty and serial litigation will be created by the removal of the interpleader process.

If insurers are not able to use the interpleader procedure to equitably distribute limited policy proceeds in multi-claimant situations, insurers will receive demands ever earlier following a loss and that may lead to the exhaustion of the policy limits before all claims by all claimants are presented. The other alternative an insurer will have is to attempt to estimate, with incomplete information, the value of the claims that have not yet been presented in order to avoid bad faith claims by those who are aggressive enough or who have completed treatment earlier to present their claims sooner following an accident. The inability to effectively use the interpleader procedure may cause claimants to race, scramble, and pressure insurers, leaving insurers unable to determine who to pay and how much to pay as they attempt to protect their insureds from personal liability and themselves from extracontractual liability. The consequence of such a circumstance could be manifold.

First, claimants that are less sophisticated, more seriously injured, minors, or all of the above, may be left with no available recovery or a limited recovery as insurers are forced, in the absence of interpleader, to exhaust or substantially erode the limits of a small policy to satisfy the demands of more sophisticated and perhaps less severely injured claimants. Indeed, the extent of the injury might hamper the ability of a claimant to advance a claim against a policy of insurance. This illustrates yet another advantage of the interpleader process over resolving claims outside of the court supervised process of interpleader: the ability for the court to appoint an administrator to represent the interests of an injured minor or incompetent person under Indiana Rules of Trial Procedure Rule 17(C) or the estate of a deceased person under Indiana Rules of Trial Procedure Rule 25. The interpleader procedure brings due process to bear on the distribution of limited policy

proceeds. These processes can also be used to protect the insured in situations where the insured is severely injured or killed as a result of the accident, but nonetheless a defense needs to be provided.

Second, a distribution process absent the effective tool of interpleader could lead to an insurer exhausting the policy limits without compensating all potential claimants, which renders the insured bare and with additional claimants still needing to be compensated. This exposes the insured to personal liability with the only asset available likely being a bad faith action against the insurer.

Which brings us to the third circumstance that is likely to result absent an appropriate interpleader tool: a radical increase in bad faith litigation, involving claims unlikely to be resolved on summary judgment that will require trial to determine the reasonableness of the insurers' distribution efforts. This will not serve anyone as it will be a substantial burden on the courts and delay resolution of claims. This case is a perfect example of the protracted litigation that will regularly ensue if an insurer's decision to forego an opportunity to settle with one of numerous claimants for policy limits and instead file an interpleader can serve as the basis for a bad faith claim. Insurers should be encouraged to identify situations in which the value of the claims is likely to exceed the available policy limits and tender those limits through the interpleader process so that the insured is protected and the claimants are satisfied.

In an environment where interpleader is not a practical tool for insurers in multi-claimant situations with insufficient policy limits, we can expect ever more aggressive and frequent efforts by claimants to attempt to position insurers to face bad faith claims and force insurers into impossible situations that insurers did not create and cannot solve without the judicial assistance of interpleader.

The case at bar is illustrative: concerned about a claim that McCarty may make, Standard Fire filed the interpleader action, naming its insureds, the Hummels and claimants, Baldwin, McCarty, and Hopkins. At the time of the Baldwin demand in November 2018, there was still at least a year and a half left on the statute of limitations for McCarty to make a claim. Standard Fire could not simply ignore that possibility and fully satisfy Baldwin, especially considering it had already determined that Hopkins' claim would likely be valued in excess of the policy limit. Had it satisfied Baldwin and Hopkins, without filing an interpleader, and then McCarty later advanced a claim, the matter before this court would likely be a different bad faith claim as the Hummels would not have been protected and the policy would have been exhausted. Proceeding as it did in filing the interpleader, Standard Fire protected not just itself, but also the Hummels, and was able to satisfy Hopkins, all while defending the Hummels in the lawsuit filed by Baldwin and seeing if McCarty would advance a claim before the statute of limitations expired. McCarty did not advance a claim, but an insurer is not a clairvoyant, and should not be held to the standard of failing to be so, especially where it showed sufficient foresight and concern for its insureds to file the interpleader.

As noted, the interpleader procedure protects insureds and gives notice and due process to claimants. It should also prevent an insurer from being held to an impossible standard. Increasing the threat of bad faith litigation, as the rule proclaimed by the Court of Appeals will do, will not do justice to insurers, claimants, or insureds, and will only clog the Indiana courts with needless litigation related to situations in which an insurer agreed to pay its limits to satisfy claims, but is unable to do so without court assistance. The Court of Appeals rule rewards the recalcitrant, intransigent, and insatiate claimant, while potentially punishing the other claimants and the insurer

who have appreciated the difficulty of the situation they all find themselves in – one in which no one will be satisfied and potentially leaving the insured with no protection.

No one will be satisfied when there are substantial damages and the policy limits are insufficient. The insurer has to pay its limits, so it is not happy, but that is what it signed up for when it wrote a policy of insurance. The claimants often are forced to resolve their claims for less than what they are worth. The insured is potentially exposed to a multitude of lawsuits and the possibility of personal liability which could make bankruptcy a possibility. The interpleader process can be effectively used to as efficiently and as justly as possible ameliorate those burdens on all involved and bring the entirety of an often-tragic dispute to a conclusion without multiplying litigation that rewards insatiable claimants who refuse to engage in a fair process that resolves all claims of all claimants within the policy limits.

If the decision of the Court of Appeals with respect to use of interpleader by Standard Fire is allowed to stand, not only will insureds be more likely to be exposed to uninsured liability, but the resultant uncertainty with which insurers will have to contend will likely lead to increased premiums and difficulties in procuring insurance. In the automobile context particular to this case, higher liability insurance premiums in turn will likely lead to more uninsured drivers, which then will lead to more uninsured motorist claims and still higher premiums. And the spiral will continue. Consequently, the Court of Appeals' decision should be vacated.

IV. CONCLUSION

For the foregoing reasons, *Amicus Curiae* Defense Trial Counsel of Indiana respectfully requests that the Court grant transfer, vacate the portion of the Court of Appeals of Indiana's decision related to the Breach of Good Faith Settlement Claim and the Bad Faith Claim, and affirm the final judgment of the Trial Court.

Respectfully Submitted,

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WORD COUNT CERTIFICATE

The undersigned hereby certifies that the foregoing Brief of *Amicus Curiae*, Defense Trial Counsel of Indiana, complies with Indiana Appellate Rule 44(E) word limitation in that it contains no more than 4,200 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2024, a copy of the foregoing was filed electronically and served on the following parties electronically through IEFS (Indiana Electronic Filing System).

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