

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

HARTFORD LIFE AND ACCIDENT
INSURANCE COMPANY,

Plaintiff,

: Case No. 3:09-cv-293

- VS -

Magistrate Judge Michael R. Merz

ALICE JANE DILLABAUGH, et al.,

Defendants.

:

DECISION AND ORDER ON ADMISSION OF ROY G. DILLABAUGH'S LETTERS

Defendant Alice Jane Dillabaugh ("Mrs. Dillabaugh"¹) moves, pursuant to Fed. R. Evid. 802, to "exclude from evidence any testimony on, or reference to, the letters Roy Dillabaugh wrote to Alice Jane Dillabaugh, Lorne Dillabaugh, and Johanna Long ..." (Motion in Limine, Doc. No. 53, PageID 2339).

The specific documents referenced in the Motion are identified there as Plaintiff's trial Exhibits 1, 3, 11, 12, and 19 ("PX ____"). *Id.* PageID 2341-2342. The reference is confusing to the Court since PX 1, 2, 3, and 4 purport to be Roy G. Dillabaugh letters; PX 11 appears to be a Contract of Deposit Note from The Dillabaugh Group to Lorne and Lisa Dillabaugh; PX 12 purports to be a Roy G. Dillabaugh letter; PX 19 purports to be a group of promissory notes from The Dillabaugh Group to Randall Manns and Debra Devres; and PX 21 purports to be a letter from Roy G.

¹Counsel for Alice Jane Dillabaugh will please advise the Court prior to commencement of trial whether she prefers to be referred to as "Ms. Dillabaugh" or "Mrs. Dillabaugh." The Court has no personal preference in the matter whatsoever but realizes that the Defendant may have a preference.

Dillabaugh to Johanna Long. The Court understands from the Joint Proposed Final Pretrial Order that Plaintiff intends to offer all of these documents and that Mrs. Dillabaugh's Motion is directed to as many of these as constitute letters of Roy G. Dillabaugh.

Mrs. Dillabaugh contends these letters are hearsay and they do not come within the exceptions for dying declarations (Fed. R. Evid. 804(B)(2)), statements against interest (Fed. R. Evid. 804(b)(3)), or expressions of then-existing states of mind (Fed. R. Evid. 803(3)). Hartford opposes the Motion, contending that the letters are not hearsay because they (1) are not offered to prove the truth of their contents and (2) are admissions of a party opponent. Alternatively Hartford argues they come within the exceptions in Fed. R. Evid. 803(3) and 804(b)(3). The Court agrees that these are not dying declarations and Hartford does not claim that exception.

Hartford persuades the Court that these letters are not hearsay because they are not offered to prove the truth of their contents, but rather to prove that the decedent made these statements. Offering them to show that they were made is a valid purpose for offering them in this case because they will present the jury with evidence of what the decedent was thinking about shortly before his death.² Obviously the decedent's state of mind at the time of his death is the key question in the case and proof of what he was thinking in the time shortly before his death is probative of what he was thinking at the time of his death.

Secondly, Hartford is correct that those portions of the letters which constitute instructions are not hearsay because they are not assertive speech. *United States v. Rodriguez-Lopez*, 565 F.3d 312 (6th Cir. 2009).

²There is competing evidence about when the undated letters were written, but there is also evidence to be presented about instructions from Roy Dillabaugh to Johanna Long about what to do with the letters which were given to her just before the fatal collision. There is also evidence from which the jury could conclude that the letter to Long was in fact written the day before or the day of the death.

Because the letters are admissible as non-hearsay, the Court need not reach the question whether they come within any exception to the hearsay rule. Mrs. Dillabaugh's Motion to Exclude the letter is denied.

November 30, 2010.

s/ **Michael R. Merz**
United States Magistrate Judge