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IN THE SUPREME COURT OF OHIO

NATIONWIDE MUTUAL INSURANCE COMPANY, Appellant, v. CORY M. BRIGGS, Appellee.	CASE NO.: 2010-0114 On appeal from the Stark County Court of Appeals, Fifth District Court of Appeals Case No. 2009 CA 00108

BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEE CORY M. BRIGGS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Association for Justice ("OAJ") is comprised of approximately fifteen hundred attorneys practicing personal injury and consumer law within the State of Ohio. The members of OAJ are dedicated to protecting the rights of individuals in litigation and to the improvement and promotion of public confidence in the legal system. The main purpose of this brief is to express OAJ's concerns regarding the ambiguity and overly broad nature of Nationwide's criminal acts exclusion which would deprive Ohio citizens of liability insurance coverage for their negligent acts. OAJ also wants to underscore how Nationwide's inferred intent argument was never made in the lower courts and thus should not be considered by this Court. Finally, even if this Court applies the inferred intent doctrine, Mr. Briggs is still entitled to liability coverage for the property damage caused by his negligence.

ARGUMENT

The main purpose of this *Amicus Brief* is to illustrate the significant liability exposure for Ohio citizens created by Nationwide's overly broad criminal acts exclusion which does not require an intent to cause harm in order to preclude coverage. Section II of Nationwide's policy contains the following liability coverage exclusion:

> 1. Coverage E – Personal Liability, and Coverage F – Medical Payments to others do not apply to bodily injury or property damage:
>
> a) caused intentionally, by or at direction of an insured, including willful acts, the result of which the insured knows or ought to know will flow from the insured's conduct.
>
> b) **caused by or resulting from an act or omission which is criminal in nature and committed by an insured.**
>
> This exclusion 1.b. applies regardless of whether the insured is actually charged with, or convicted of a crime.

One thing that everyone agrees on is that "Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts." *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 48; 665 N.E.2d 1115. The Exclusion found in Section II, Subsection 1(a) is a typical intentional act exclusion that eliminates insurance coverage for "bodily injury or property damage * * * caused **intentionally** * * * **including willful acts**, the result of **which the insured knows or ought to know** will flow from the insured's conduct." This type of exclusion is found in every liability policy due to the sound public policy of not indemnifying acts intended to cause harm to another. Id. Nationwide did not, however, deny coverage to Mr. Briggs under this intentional act exclusion.

(1) Nationwide's failure to define "criminal in nature" renders the criminal acts exclusion ambiguous.

Rather, Nationwide denied coverage in this case pursuant to Section II, Subsection 1(b) which eliminates liability coverage for damage "**caused by or resulting from an act or omission which is *criminal in nature* and committed by an insured.**" (Emphasis added). When one thinks of criminal acts not being insurable, acts like rape, murder, arson, etc. come to mind. Not insuring crimes that necessarily include the intent to harm another person as an element of the offense furthers sound public policy. *Gearing* 76 Ohio St.3d at 48; 665 N.E.2d 1115. Coverage for these types of criminal acts is precluded by both exclusions 1(a) and 1(b) in Nationwide's policy.

Ambiguity lies in Nationwide's failure to define the phrase "criminal in nature." A plain reading of "criminal in nature" means an act in violation of a criminal law where the insured has either the specific intent to cause harm or when harm is substantially certain to occur. The public policy behind not insuring intentional acts is satisfied if this Court interprets "criminal in nature" to include only cases where there is either a specific intent to harm or where harm is substantially certain to occur. Interpreting "criminal in nature" in this fashion is logical, consistent with public policy, and protects Ohio citizens who purchase liability insurance from the significant risk of personal liability for merely negligent acts. There already exists a body of law to assist courts in determining if an insured either intended to harm another or that harm was substantially certain to occur. *Allstate Ins. Co. v. Campbell*, 10th Dist. App. N. 09AP-306; 2009-Ohio-6055.[1]

[1] This Court accepted jurisdiction to hear an appeal regarding the doctrine of inferred intent. Sup. Ct. No. 2009-2358.

Nationwide wants this Court to interpret "criminal in nature" to encompass any negligent act which also happens to violate a municipal ordinance. Nationwide argues for an extremely broad interpretation of "criminal in nature" requiring neither an intent to harm another or that harm is substantially certain to occur before coverage is excluded. Public policy does not support allowing an insurance company to exclude coverage for negligent acts and omissions which happen to violate a municipal ordinance when harm to another was neither intended nor substantially likely to occur. How this Court resolves the ambiguity regarding the phrase "criminal in nature" will determine if policyholders across Ohio are saddled with significant personal liability for negligent acts which everyone rightly assumes would be covered under a liability policy of insurance.

It is well settled under Ohio law that any ambiguity in a policy must be construed against the insurance company and liberally in favor of the policyholder. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 211; 519 N.E.2d 1380. Thus, the phrase "criminal in nature" must be construed against Nationwide and liberally in favor of coverage on behalf of Mr. Briggs. This Court should affirm the lower court's decision to reject Nationwide's overly broad interpretation of its ambiguous criminal acts exclusion.

(2) Nationwide's interpretation of its criminal acts exclusion is overly broad eliminating liability coverage for negligent acts which violate a municipal ordinance.

Ohio Courts have recognized the risk to Ohio policyholders caused by an overly broad interpretation of "criminal in nature." In *Allstate Ins. Co. v. Cartwright*, 1st Dist. App. Nos. 15472, 15473, 1997 Ohio App. LEXIS 2920, the court held "we question the reach of some criminal acts exclusions. We are aware that the unfettered application of

criminal acts exclusions may mean that insurance companies can avoid their obligations under their policies whenever an insured also violates a criminal statute. Insurance companies are now writing their criminal acts exclusions very broadly to exclude any injury resulting from a criminal act, regardless of the type of criminal act and whether the injury was reasonably expected to occur. While it is true that public policy disfavors insuring for certain injuries stemming from certain criminal acts, it surely does not prohibit coverage for all injuries resulting from any criminal act. Of course, public policy does not, for example, prohibit insurance coverage for unexpected injuries stemming from minor traffic offenses or crimes based only on negligent acts. We find that the following quote best illustrates this problem: 'if the maxim, that no man shall profit from his own wrong [or criminal act], be applied liberally, then the slightest negligence [or most minor offenses] *** would bar recovery. Such a result would be recognized generally as impractical and unjust.'" *Cartwright,* 1st Dist. Montgomery County App. Nos. 15472, 15473, 1997 Ohio App. LEXIS 2920; citing *Three Sons, Inc. v. Phoenix Inc. Co* (1970), 257 N.E.2d 774, 357 Mass. 271 quoting *Minasian v. Aetna Life Ins. Co.* (1936), 3 N.E.2d 17, 18-19, 295 Mass. 1, 5.

The court in *Cartwright* went on to state "these broadly written criminal acts exclusions could, without a strong public policy justification, reach many injuries that are normally considered to be covered by insurance. It is possible that these broadly written criminal acts exclusions will be used to gut normal insurance coverage and extend what may be excluded under insurance policies to include accidents. Either the type of criminal acts that come within the purview of these exclusions need to be restricted or the injuries stemming from criminal acts need to be limited to those which

are expected to avoid this problem." *Cartwright,* 1997 Ohio App. LEXIS 2920.

The facts in our case illustrate how a criminal acts exclusion without the requirement of either an intent to harm another, or that harm is substantially certain to occur, leads to situations where Ohio policyholders are not insured for negligent acts. Mr. Briggs set off some fireworks on the Fourth of July weekend. He was in the middle of a field. He aimed a bottle rocket straight up into the air. After ignition, the bottle rocket unexpectedly turned on a 90 degree angle, landed in a person's garage and started a fire resulting in property damage. Mr. Briggs had absolutely no intent to cause injury or property damage in this case. There is no evidence that Mr. Briggs' act of firing the bottle rocket straight up into the air was substantially certain to cause property damage to another.

After analyzing the facts surrounding the incident as well as the terms of Nationwide's policy, the lower court found that "the policy language at issue herein is overly broad as applied to Appellee. The language of the exclusion found in Section II, Subsection 1(b) does not differentiate between damages or injuries intended or reasonably expected to result and those damages which are accidental or result from mere negligent conduct." *Nationwide Mut. Ins. Co. v. Briggs,* Franklin County App. No. 2009 CA 00108; 2009-Ohio-6453, ¶ 15. The holding of the lower court protects all Ohio citizens who are prudent enough to purchase liability insurance to indemnify them for their negligent acts which also happen to violate a municipal ordinance.

Below are just a few scenarios where Nationwide's overly broad interpretation of the term "criminal in nature" would lead to Ohio citizens facing personal exposure for their negligent acts despite the fact they purchased liability insurance coverage. The

most obvious situation is in the context of a motor vehicle collision. Running a stop sign, red light, failure to control one's vehicle, failure to maintain an assured clear distance, traveling above the speed limit, etc. are all examples of negligent conduct that also involve violation of a criminal statute.[2]

Responsible Ohio citizens purchase auto and umbrella insurance policies to indemnify them if they negligently harm another doing any of the above. Nationwide's interpretation of "criminal in nature" would preclude liability coverage for all of these negligent acts solely because each also involves a violation of Ohio law. Public policy does not support allowing insurance companies to exclude coverage for motor vehicle accidents absent an intent to harm another or where harm is substantially certain to occur.

Another overly broad application could occur with respect to municipal ordinances prohibiting "animals running at large" requiring dog owners to keep their animals on their property or on a leash. An example is Harrison Ohio Municipal Code (OH) § 505.01 which makes it a minor misdemeanor for a dog to leave its owner's property without a leash.[3] Under Nationwide's overly broad interpretation of "criminal in nature," homeowners would have no liability insurance coverage if their dog leaves their property and injures another. For example, if a dog breaks its chain, digs under a fence or sneaks out of the house and injures another person off the dog owner's property, then Nationwide would deny coverage based on its overly broad interpretation

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[2] RC §§ 4511.12, 4511.202, 4511.34 and 4511.21.

[3] Harrison Ohio Municipal Code (OH) § 505.01(f) makes is a fourth degree misdemeanor for repeat offenders.

of "criminal in nature." There is clearly no public policy supporting Nationwide's exclusion of coverage in just such a case. Dog owning Ohio citizens would be left with significant personal liability exposure if this Court reverses the lower courts and allows Nationwide to exclude coverage for acts where there is neither an intent to harm or harm is not substantially certain to occur.

The City of Akron has made it a third degree misdemeanor to "use, operate or ride a skateboard within the city limits after daylight hours." Akron Municipal Code (OH) § 139.14. It is hard to believe many Akronites even know that it is illegal to ride a skateboard after the sun sets. Under Nationwide's interpretation of "criminal in nature," the exact time the sun sinks below the horizon is determinative of whether or not injuries to another caused by riding a skateboard are covered. Assume that the official time of sunset on a given day is 6:30 pm. If an insured negligently injures someone while skateboarding at 6:29 pm they are covered. If, however, the accident happens at 6:31 pm, there is no coverage. Subjecting Ohio citizens to personal liability for injuries to another caused by the act of skateboarding based on the time the sun sets is absurd. But under Nationwide's overly broad interpretation of the term "criminal in nature" that is exactly what would happen.

Many cities also enact curfews requiring minor children to either be home or accompanied by a responsible adult between certain hours. An example of such a curfew would be Harrison Municipal Code (OH) § 509.08(c) which makes it "unlawful for any minor 16 years of age and under the age of 18 years to be, or remain in, about or upon any place in the City away from his/her dwelling house or usual place of abode of said minor between 12:00 midnight and 6:00 am."

Let's look at the example of a person playing catch with a baseball who negligently throws the ball through a friends's window. There would be coverage under Nationwide's policy if the person who threw the ball was 17 years old and the ball broke the window at 11:59 pm or 6:01 am. However, there would be no coverage if the ball broke the window at midnight or 5:59 am. Further, if the person who threw the ball was 18 years old he would be covered at all times and at any place. But if the ball thrower is 17 years and 360 days old, he faces significant personal liability for his negligent act if it occurs at the wrong time and place.

Nationwide's interpretation of "criminal in nature" leads to these absurd coverage outcomes and is why the lower courts found the exclusion overly broad and unenforceable. This Court should affirm the lower court's decision which protects Ohio policyholders from significant personal liability for negligent acts or omissions which also happen to violate a municipal ordinance or similar statute.

(3) This Court should reject Nationwide's arguments regarding the inferred intent doctrine because they were never raised in the lower courts.

"Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *Quarto Mining Company v. Foreman* (1997), 79 Ohio St.3d 78, 81; 679 N.E.2d 706, 709. This Court has held that the above rule is "deeply embedded in a just regard for the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings

before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error." Id.

Nationwide failed to argue in the lower courts that the doctrine of inferred intent applied and was the basis of the coverage denial. Neither the previously filed briefs nor the lower court opinions address the doctrine of inferred intent. Nationwide's sole proposition of law set forth in its memorandum in support of jurisdiction was "a criminal acts exclusion which purports to exclude coverage for bodily injury and/or property damage which is caused by or results from an act or omission which is criminal in nature is enforceable to eliminate coverage regardless of whether the insured is actually charged with a crime."

The very first time Nationwide even cited the inferred intent doctrine was when it filed a motion to reconsider this Court's initial decision to deny jurisdiction. In Nationwide's merit brief, it completely abandoned all of the coverage arguments advanced in the lower courts. Now Nationwide's sole reason for denying coverage is their newly raised inferred intent argument. Nationwide's abandonment of its previous coverage arguments is a tacit acknowledgment of the correctness of the lower courts' rulings that the criminal acts exclusion was overly broad.

Because Nationwide never argued that Mr. Briggs either intended to cause damage or that damage was substantially certain to occur, no record was made on this issue at the trial court. This is exactly why "reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *Quarto Mining Company v. Foreman* (1997), 79 Ohio St.3d 78, 81; 679 N.E.2d 706, 709. It leads to

situations like that which exist in this case — an insurance company denies coverage for one reason until both the trial and appellate courts disagree, only to argue another new, completely different basis to deny coverage in front of the Supreme Court. Id. As such, Nationwide's arguments regarding the inferred intent doctrine must be disregarded and the rulings of the lower court affirmed.

(4) Mr. Briggs is entitled to coverage even if the inferred intent doctrine is applied because he never intended to cause harm, nor was harm substantially certain to occur, as a result of firing a bottle rocket up into the sky.

This Court is currently reviewing the inferred intent doctrine in *Allstate Ins. Co. v. Campbell*, Sup. Ct. No. 2009-2358. The appellate court in *Campbell* detailed the development of the inferred intent doctrine in Ohio over the years. *Allstate Ins. Co. v. Campbell*, Franklin County App. N. 09AP-306; 2009-Ohio-6055. The inferred intent doctrine applies when harm to another is an inevitable and direct consequence of an act or omission. *Gearing* (1996), 76 Ohio St.3d 34, 1996-Ohio-113.

There is simply no evidence that Mr. Briggs intended to cause damage by going to an open field and launching a bottle rocket straight up into the sky. Nationwide is not claiming that Mr. Briggs intentionally aimed and shot the bottle rocket into the garage which was damaged. Further, the act of launching a bottle rocket up into the air is not substantially certain to cause harm as evidenced by the fact many people launch bottle rockets each year without causing harm.

A court is required to construe all of the evidence in a light most favorable to Mr. Briggs when deciding Nationwide's motion for summary judgment. Civ.R. 56(C); *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292; 662 N.E.2d 264. After viewing all of the

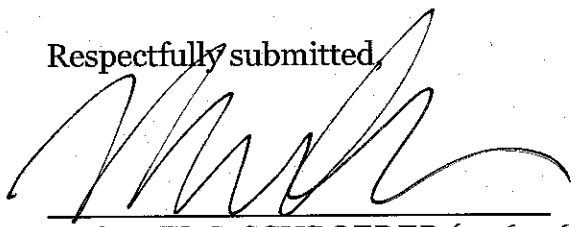
evidence, a court cannot conclude as a matter of law that injury was either intended or substantially certain to occur in this case. Therefore, the lower courts correctly denied Nationwide's motion for summary judgment and held that Mr. Briggs was entitled to liability coverage from Nationwide.

CONCLUSION

OAJ supports an insurance company's right to exclude coverage for criminal acts which are done with either the intent to harm another or where harm is substantially certain to flow from an act or omission. This type of coverage exclusion is clearly supported by Ohio's public policy of not providing coverage to people who intentionally cause harm to another. However, as illustrated in this case and by the above examples, a criminal acts exclusion without the requirement of an intent to harm (or that harm be substantially certain to occur) is overly broad and eliminates liability coverage in many situations where Ohio policyholders would reasonably expect there to be coverage. Reversing the lower courts in this case will leave Ohio policyholders facing significant personal liability exposure for risks that should be covered. Further, Nationwide's arguments regarding the inferred intent doctrine should be disregarded because they

were not made in the lower courts. Thus, the decision of the court of appeals should be affirmed.

Respectfully submitted,



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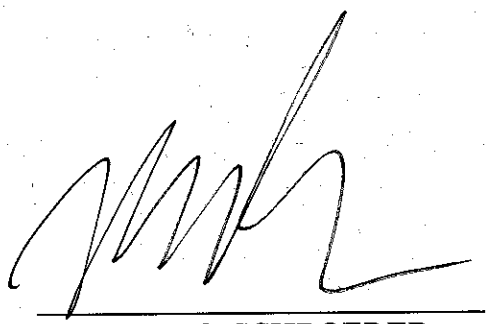

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