

IN THE OHIO SUPREME COURT

KIMBERLY NEAL-PETTTT,
Plaintiff(s)

v.

LINDA LAHMAN, et al.,

Defendant(s)

Supreme Court Case No.

09-0325

On Appeal from 8th Dist. App. Case No.
91551

DEFENDANT-APPELLANT ALLSTATE INSURANCE COMPANY'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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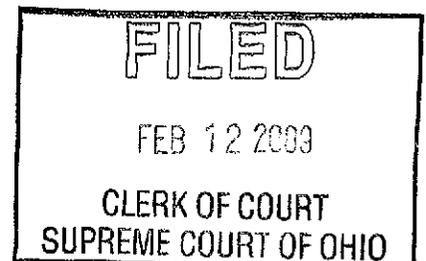


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I. THIS MATTER PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION AND/OR A MATTER OF PUBLIC OR GREAT GENERAL INTEREST.

This Court and the General Assembly have both decreed that Ohio public policy, as reflected in R.C. 3937.182, precludes insurance coverage for punitive damages. The Eighth District Court of Appeal's ("Eighth District") decision in this case threatens to undermine this clear prohibition, inject uncertainty into a once-settled area of law, and stir up wasteful litigation of baseless punitive damages claims. The decision should be reversed in order to bring it in line with other jurisdictions who have addressed this issue.

This case arises out of a car accident, which the jury found was caused by defendant Linda Lahman's negligence. The jury further found that Lahman acted with actual malice because she was intoxicated at the time of the accident, and awarded punitive damages and attorney fees. The attorney fees were awarded as part of - and only because of - the punitive damage award, and are based on the same finding of actual malice that justified punitive damages to begin with. Yet despite the clear prohibition in Ohio on insurance coverage for punitive damages, the Eighth District held that Allstate must pay the portion of the punitive damages award relating to attorney fees.

In reaching this decision, the Eighth District failed to recognize that the attorney fee award in this case was simply an element of the punitive damage award. The prohibition on coverage for punitive damages is based on the idea that the intended deterrent effect of punitive damages will be eliminated if a wrongdoer can obtain insurance for the punitive damages. The rationale in this well reasoned policy is that one should not be able to insure oneself from conduct warranting punitive damages. This is just as true for the attorney fee portion of a punitive damage award as it is for the rest of the award. There is no basis for the Eighth District's holding that attorney fees awarded as part of a punitive damage award are somehow "conceptually distinct" from other punitive damages.

The attorney fee award is certainly both “damages” and intended to be “punitive,” thus making it “punitive damages” under any reasonable construction of the term.

In addition to being wrong, the Eighth District’s decision will promote unnecessary litigation, as plaintiffs try to pressure defendants’ insurers to settle by threatening to seek punitive damages and the now purportedly covered attorney fees that go along with them. Indeed, in the less than two months since the Eighth District’s decision, Allstate has already seen this occurring – with specific reference to the Eighth District’s decision in this case. If this tactic continues, it will encourage the assertion of baseless punitive damage claims, increase tension between insurers and their insureds (since punitive damages claims and allegations of intentional misconduct always present coverage issues), and make ordinary claims harder to settle. None of this will be beneficial to Ohioans.

This is a case of first impression in Ohio, which presents an important issue that this Court should resolve sooner rather than later. This will be an issue in every case in which a defendant has liability insurance and is sued for punitive damages (which is a lot of cases). If this Court does not resolve this issue now, it will continue to be litigated wastefully until there is an inevitable conflict between appellate districts that requires this Court to decide the issue in any event. The Eighth District’s decision marks a dangerous erosion of what was until now a well-settled prohibition on insurance for punitive damages. It sets an unwise precedent, which ought not be allowed to gain any foothold in Ohio. By taking jurisdiction of this case, this Court will have an opportunity to clarify the law in this area, and to reaffirm the principle that tortfeasors who act with actual malice cannot expect their insurers (and the millions of Ohioans who pay insurance premiums) to subsidize their misconduct. This is certainly a matter of public and/or great general interest to Ohioans.

II. STATEMENT OF THE CASE AND FACTS

This matter arises out of a motor vehicle accident between the Plaintiff-Appellee Kimberly Neal-Pettit and Linda Lahman. Linda Lahman was cited for a DUI as a result of this accident.

The underlying matter went to trial and a jury returned a verdict against the insured for compensatory damages totaling \$113,800, punitive damages totaling \$75,000 and attorney fees arising out of the punitive damage award. See Judgment Entry dated July 31, 2006; Supplemental Complaint at ¶8. The trial court further found that Defendant Linda Lahman acted with malice and awarded attorney fees due to the finding of punitive damages in the amount of \$46,825.00 in favor of plaintiff. See Judgment Entry dated March 22, 2007; Supplemental Complaint at ¶8.

Linda Lahman maintained certain motor vehicle insurance through Defendant-Appellee Allstate Insurance Company ("Allstate"). Therefore, Allstate promptly paid the compensatory award, interest and costs from the aforementioned judgment. Supplemental Complaint at 7, 9. Allstate has paid, on behalf of its insured, Ms. Lahman, all amounts due and owing to the plaintiff except for the punitive damage award and the attorney fees arising out of said punitive damages award. Supplemental Complaint at ¶10. However, a dispute arose as to whether or not Allstate was liable for attorney fees that were awarded as part of the punitive damage award.

Appellee filed a complaint against Allstate seeking payment for the attorney fees awarded pursuant to the punitive damages award, directly from Allstate, rather than from the tortfeasor. See, generally, Supplemental Complaint; Allstate's Motion for Summary Judgment and Brief in Opposition to Ms. Neal-Pettit's Motion for Summary Judgment. Liability for said attorney fees has been vehemently denied and/or disputed by Allstate Insurance Company at all times herein. Answer to Supplemental Complaint. Allstate has no duty under the contract, and in fact it would violate public policy, to pay the portion of the punitive damage award for such attorney fees on behalf of its insured. See, generally, Allstate's Motion for Summary Judgment.

Plaintiff filed a supplemental complaint demanding the attorney fee award to be paid by Allstate Insurance Company merely because it had a policy of insurance with defendant Linda Lahman at the time of the accident with plaintiff. See generally, Supplemental Complaint. However, under the clear, unambiguous terms of the policy, and pursuant to clear public policy, Allstate is not responsible for paying the amounts demanded by plaintiff in her Supplemental Complaint, as shown below, as a matter of law.

The Trial Court set a briefing schedule on the issue and on May 6, 2008 entered summary judgment in favor of Appellee and against Allstate on the sole issue of liability for payment of the attorney fee portion of a punitive damage award. Allstate appealed the Trial Court's judgment as it is against public policy for an insurance company to pay any portion of a punitive damages award on behalf of an insured and as it did not contract to pay any such award on behalf of Ms. Lahman.

Allstate timely appealed this matter to the Eighth District, who affirmed the decision of the Trial Court. A copy of said decision by the Eighth District is incorporated herein and attached hereto as **Exhibit A**. The Eighth District found that the Allstate policy did not preclude coverage for the portion of the punitive damage award pertaining to attorney fees even though such an award was only possible where punitive damages were awarded and the policy expressly excluded any "punitive or exemplary damages, fines or penalties." Decision at p. 2. Even though the Eighth District conceded that such fees "are undeniably punitive in nature," the Eighth District inexplicably concluded that attorney fees awarded as part of a punitive damage award are "conceptually distinct from punitive damages." *Id.*¹ As attorney fees were not expressly stated in the policy exclusion - even though they clearly fell within the excluded categories of "punitive or exemplary damages, fines

¹ It is a matter of express public policy that insurance coverage is available to cover the risk of the insured's negligence, but not the risk of his or her willful act, including attorney fees that are awarded as part of the damages for such willful actions. *Baker v. Mid-Century Insurance Company* (1993), 20 Cal.App.4th 921.

or penalties” and did not fall under the expressly defined coverage - the Eighth District found that such fees would be covered under the policy. *Id.* The Court curiously interpreted R.C. 3937.182(B) to allow the paying of the portion of the punitive damages award for attorney fees because the statute prohibited the payment of “punitive damages” and did not specifically list the items which could make up such a punitive damage award, such as attorney fees. *Id.* at 3.

The Eighth District’s decision ignores the purpose of the public policy against insuring punitive damages awards as well as the fact that such attorney fees can only be awarded as part of the punitive damage award. The Eighth District further failed to consider the express language in the insurance contract that only provides coverage for bodily injury or property damages. The policy simply does not provide for the payment of attorney fees awarded as part of a punitive damage claim, as such fees are penalties or fines arising out of a punitive damage award.

Allstate is now appealing to the Ohio Supreme Court as such ruling contradicts clear public policy in Ohio that insurance companies cannot insure payments arising out of punitive damage awards. Such a ruling clearly places the punishment for the tortfeasor’s actions upon their insurer and will burden all Ohioans who purchase the mandatory vehicular liability policies, as the cost of such awards will lead to increased premiums.

III. LAW & ARGUMENT

A. Proposition of law No. I: It is against public policy for an insurance company to pay an award of attorney fees as an element of a punitive damage award against an intoxicated driver.

It is against public policy to assign the responsibility for payment of punitive damages to an insurance company for voluntary payment on behalf of an insured, and any such attempt to make a settlement that includes payment for punitive damages are void.

Punitive damages are given in enhancement of compensatory damages on the account of wanton, malicious or oppressive behavior and are designed to deter others from acting in the same

manner. See *Trainor v. Deters* (1969), 22 Ohio App.2d 135, 139. While an insurance company may be liable for punitive damages based upon its own conduct, an insurance contract cannot insure a person against a punitive damage claim based upon the insured's conduct. *Wedge Products, Inc. v. Hartford Equity Sales Co.* (1987), 31 Ohio St.3d 65, 67; *Lumbermens Mut. Cas. Co. v. S-W Industries, Inc.* (1994), 30 F.3d 1324; R.C. 3937.182(B). In fact, the Revised Code specifically states that:

No policy of automobile or motor vehicle insurance that is covered by sections 3937.01 to 3937.17 of the Revised Code, including, but not limited to, the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in such a policy as authorized by section 3937.18 of the Revised Code, and that is issued by an insurance company licensed to do business in this state, and no other policy of casualty or liability insurance that is covered by sections 3937.91 to 3937.17 of the Revised Code and that is so issued, shall provide coverage for judgments or claims against an insured for punitive or exemplary damages.

R.C. 3937.182(B).

The attorney fees at issue were only available as part of the punitive damages award. There was no statutory or contractual authority to otherwise provide for attorney fees in this matter. If a person is involved in a motor vehicle accident, where no punitive damage award is available, they would not be able to recover their attorney fees, even though they may have been injured in the exact same manner and to the exact same degree as the plaintiff at issue herein. "If compensation was the purpose of an award of attorney fees than such attorney fees would be awarded in all cases and not only those involving willful and reckless misconduct." *Bodner v. United Services Automobile Association* (1994), 222 Conn. 480, 500. See also, *Hood v. Great American Insurance Co.* (2003), 34 Conn. L. Rptr. 449, 2003 WL 1962869;

In her Memorandum in Opposition to Defendant's Motion for Summary Judgment Appellee Neal-Pettit cited to a myriad of cases claiming that attorney fees can be paid as compensatory damages. *Id.* at 3. However in each case so cited, the issue was not who had to pay, but rather how to classify the award to the plaintiff. In the instant matter, the questions is whether or not it is against public policy for an insurance carrier to pay an award of attorney fees that arises

solely out of a punitive damage claim. No cases cited by the Appellee even considered this issue. See: *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St.2d 178 (finding no award of punitive damages or a derivative claim of attorneys fees was warranted in that case); *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 1994-Ohio-461 (Insurer liable for punitive damage due to its own bad faith); *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 2000-Ohio-7 (Seller of real estate liable for punitive damages due to its own fraud); *Zappitelli v. Miller* (2007), 114 Ohio St.3d 102, 2007-Ohio-3251 (holding that attorney fees can only be awarded if punitive damages were awarded against vendors of residence); *Maynard v. Eaton Corp.* (April 23, 2007), Marion County App. No. 9-06-33, 2007-Ohio-1906 (Employer liable for punitive damages due to its own intentional tort against employer); *Wright v. Suzuki Motor Corp.* (June 27, 2005), Meigs County App. Nos. 03CA2, 03CA3, 03CA4, 2005-Ohio-3494 (Motorcycle dealership was required to pay punitive damage award due to its own actions regarding product liability claim); *Waters v. Allied Mach. & Eng. Corp.* (April 30, 2003), Tuscarawas App. Nos. 02AP040032 and 02AP040034, 2003-Ohio-2293 (Employer liable for punitive damages due to its own creation of a hostile work environment); *Brookover v. Flexmag Indust., Inc.* (April 29, 2002), Washington County App. No. 00CA49, 2002-Ohio-2404 (Employer liable for punitive damages due to its own intentional tort against employee). Not one case cited by Appellee required an insurance carrier to pay the attorney fee portion of the punitive damage award which arose out of its insured's willful or intentionally conduct.

The legislature has spoken - insurance against one's own willful or intentional conduct is against public policy as it would encourage wrongful behavior without any meaningful consequence for such wrongful actions. R.C. 3937.182(B). See also, *Wedge Products* at 67; *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 391. Such a prohibition stems from the underlying public policy that a person should not be able to escape liability for their own malicious, willful and/or intentional actions as well as the fact that any deterrent effect would be diminished if the wrongdoer could merely

purchase insurance and have the insurer pay for their wrongful actions without any meaningful consequence to the insured. *Id.*

To the extent any settlement that includes a compromise of both punitive and compensatory damages is made through payment of insurance proceeds, any such settlement is void. *Ruffin v. Sawchyn* (1991), 75 Ohio App.3d 511. In *Ruffin*, the Eighth District specifically examined whether or not a portion of the total liability insurance proceeds provided in a settlement could be considered to compromise both the punitive and compensatory claims in the action. The Eighth District responded in the negative and explained:

The issue which gives rise to appellant's concern is the settlement between the plaintiff and the other codefendants. This settlement of compensatory and punitive damages applied the settlement sum of \$75,000 to the punitive damage portion of the award. The codefendant's insurance carrier funded \$55,582.55 of the settlement amount. Appellant alleges that the use of liability insurance proceeds to satisfy a punitive damage award is against public policy, and that the sum should therefore be applied to the compensatory damages award only. Based on our reasoning in *Casey v. Calhoun* (1987), 40 Ohio App.3d 83, 84-86, 531 N.E.2d 1348, 1349-1350, which determined that punitive damages are not insurable, *we are obliged to hold that the settlement is void to the extent that the settlement purports to satisfy the punitive damage award with payments from the codefendant's insurance carrier.* The settlement amount provided by that carrier must be applied against the compensatory damage award.

Ruffin at 517-518 (emphasis added). In *Casey v. Calhoun* (1987), 40 Ohio App.3d 83, the Eighth District held that Ohio has an unambiguous public policy which does not allow for insurance coverage of punitive damages or any interest charged thereon. *Casey* at 83.

As attorney fees can only be awarded as part of the punitive damages claim in this matter, Allstate is prohibited by law from paying same for precisely the same reason. In fact, any agreement on Allstate's behalf to pay these attorney fees would be void pursuant to public policy as they arise out of a punitive damage claim. *Casey, supra*. See also: *Baker v. Mid-Century Insurance Company* (1993), 20 Cal.App.4th 921.

Baker v. Mid-Century Insurance Company, supra, albeit under California law, has expressly examined an insurer's responsibility for payment of attorney fees which are awarded to an injured

party due to the insured's own willful or malicious conduct, such as driving while intoxicated. The applicable California statute permitted an award of attorney fees in a civil action to any person who was injured in the course of any felony committed by a tortfeasor for which the tortfeasor was convicted. In *Baker*, similar to the instant matter, the plaintiff was injured in a motor vehicle accident in which the tortfeasor was driving while intoxicated. Driving while intoxicated was a felony and the tortfeasor was charged and convicted for same arising out of this accident. The award of attorney fees arose solely out of the statute regarding a felony conviction and not out of any other statutory law. The *Baker* Court noted that the purpose of the statute would be defeated if the felony drunk driver could merely pass his or her attorney fees along to an insurance company. The *Baker* Court concluded that the insurance company could not be held liable for the attorney fees because, as a matter of public policy, an insurer cannot insure a person for that person's own willful or intentional actions, and such uninsurable actions of the insured were necessary to be present before an award could be made for such attorney fees. See also, *Vaillette v. Fireman's Fund Insurance Company* (1993), 18 Cal.App.4th 680 (finding the basis for the requirement of payment of attorney fees arising out of civil action based upon a felony DUI would be defeated if a felony drunk driver could merely pass the attorney fee penalty on to his insurance company); *Combs v. State Farm Fire & Casualty Company* (2006), 143 Cal. App.4th 1338 (holding that an insurance company is not liable for payment of attorney fees arising out of an award based upon a willful act by the insured based upon public policy grounds).

The Connecticut Supreme Court similarly found that insuring against fines or penalties, such as awards of attorney fees, arising out of a punitive damage award violated public policy. *Bodner v. United Services Automobile Association, supra*. The *Bodner* Court explained:

A policy which permitted an insured to recover from the insurer fines imposed for a violation of a criminal law would certainly be against public policy. The same would be true of a policy which expressly covered an obligation of the insured to pay a sum of

money in no way representing injuries or losses suffered by the plaintiff but imposed as a penalty because of a public wrong.

Bodner at 494. Here, the attorney fees awarded pursuant to the punitive damages award does not represent the losses or injuries suffered by the plaintiff as, if such attorney fees were an element of the injury or loss suffered, all persons injured in motor vehicle accidents could seek and be awarded attorney fees. In Ohio, attorney fees can only be awarded pursuant to statute, contract or pursuant to a punitive damage award. Thus, such an award of attorney fees in this matter is not an element of the loss or injury suffered, but rather is an element of the punitive damage award that seeks to punish the tortfeasor for her actions.

In Pennsylvania, it is against public policy for an insurance company to insure a person against punitive damage awards. *Creed v. Allstate Insurance Company* (1987), 365 Pa. Super. 136, 141. Where there is no liability to pay punitive damages there is no obligation to pay attorney fees arising out of such punitive damages claim. *Id.* at 142.

In the instant matter, attorney fees are solely available because the jury found malice and made an award of punitive damages. The purpose of a punitive damage award is to deter others from acting in the same manner. See *Trainor* at 139. The purpose of the punitive damage award would not be met if the insured could merely transfer liability for payment of the punitive damage award or carve out portions of said award, such as an attorney fees, to an insurance company. In fact, this Honorable Court has expressly found that it is against public policy for an insurance company to insure against, or pay, a punitive damage award on behalf of an insured. *Wedge Products, Inc.* at 67. As the attorney fee award is but one element of a punitive damage award, and as it is against public policy for an insurance company to pay such damages, Allstate cannot be held liable for said attorney fees as a matter of law.

Even if Allstate wished to voluntarily make payment, which it does not, it would be prohibited from doing so pursuant to Ohio law and Ohio public policy. The entire purpose of punitive

damages is to punish and deter similar conduct. If such attorney fees could be insured away, the purpose of such an award would be meaningless.

B. PROPOSITION OF LAW NO. II: Punitive damages and any accompanying award of attorney fees are not damages “because of bodily injury” within the meaning of an insurance policy.

Allstate has not contractually agreed to pay these attorney fees arising out of the punitive damage claim pursuant to the clear terms of the policy with its insured, defendant Lahman. In determining whether an insurance company owes a duty to provide coverage to a tortfeasor, a court must first look to the language of the policy itself. See *Timock v. Bolz* (1996), 115 Ohio App.3d 283, 285-286. When reviewing the policy, a court is required to give undefined words their plain and obvious meaning. See *State Auto Mut. Ins. Co. v. Steverding* (June 1, 2000), Cuyahoga App. No. 77196, 2000 WL 709021. “Where provisions of a contract of insurance are reasonably susceptible to more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured.” *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 210 (citation omitted). Where a term of a contract is clear and unambiguous, however, “a court *** cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.” *Santana v. Auto Owners Ins. Co.* (1993), 91 Ohio App.3d 490, 494.

Allstate has agreed to pay for certain bodily harm caused by the tortfeasor to an injured party “because of bodily injury”. Specifically, the policy states:

General Statement of Coverage

If a premium is shown on the Policy Declarations for Bodily Injury Liability Coverage and Property Damage Liability Coverage, **Allstate** will pay damages which an insured person is legally obligated to pay because of

1. **bodily injury** sustained by any person, and
2. damage to, or destruction of property.

Policy at p. 7 (emphasis in original). “Bodily injury” is further defined as “physical harm to the body, sickness, disease or death, but does not include: a. Any venereal disease; b. Herpes; c.

Acquired Immune Deficiency Syndrome (AIDS); AIDS Related Complex (ARC); e. Human Immunodeficiency Virus (HIV).” Policy at 3.

Punitive damages “are not compensation for injury.” *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468 at ¶39, citing *Getz v. Robert Welsh, Inc.* (1974), 418 US 323, 350. “Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.” *Id.* “The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.” *Arbino* at ¶39, citing *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651.

When considering an award of attorney fees, Ohio follows the ‘American Rule,’ under which a prevailing party may not generally recover attorney fees. *Fogel v. Lyonhil Reserve Homeowners’ Association* (Nov. 14, 2008), Butler App. No. CA2007-06-151, 2008-Ohio-6065 at ¶31. Attorney fees may be awarded, however, if (1) a statute creates a duty, (2) an enforceable contract provision provides for an award of attorney fees, or (3) the losing party has acted in bad faith.” *Id.*, citing *Hagans v. Habitat Condominium Owners Assn.* (2006), 166 Ohio App.3d 508, 2006-Ohio-1970.

The award of attorney fees, although seemingly compensatory * * *, does not compensate the victim for damages flowing from the tort. Rather, the requirement that a party pay attorney fees * * * is a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages. * * * Without a finding of malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees, unless there is a basis for sanctions under Civ.R. 11.” *Fogel* at ¶32, citing *Digital and Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, 662, overruled on other grounds.

There is no applicable provision in Ohio law for payment of attorney fees in this case unless punitive damages are awarded to Ms. Neal-Pettit. *Sorin v. Board of Education of Warrensville Heights School District* (1976), 46 Ohio St.2d 177, 179-180. Thus, the attorney fees at issue are not matters

which an insured is legally liable to pay “because of bodily injury” or “property damage” but rather are “private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.” It is well settled in Ohio law that an insurance company has no obligation to its insured, or to others harmed by the actions of an insured, unless the conduct of the insured falls within the coverage stated in the policy. *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 36. As there is no agreement to pay for these attorney fees, Allstate has no obligation to pay same.

C. PROPOSITION OF LAW NO. III: An insurance policy exclusion for “punitive or exemplary damages, fines or penalties” precludes coverage for an award of attorney fees that accompanies a punitive damage award.

The exclusionary language in Allstate’s policy clearly and unambiguously provides that there is no duty to provide coverage for fines or penalties arising out of a punitive or exemplary damage award. An insurer’s commitment to its insured arises only when the policy covers the claim. *White v. Ogle* (1979), 67 Ohio App.2d 35, at paragraph 1 of the syllabus. Therefore, if the claim falls within an exclusion of coverage, the insurer is under no obligation to provide coverage. *Id.* When determining whether a claim falls within an exclusion, a court must enforce the insurance contract as written and give the words their plain and ordinary meaning when the language of the policy is clear and unambiguous. *Hybud Equip. Cor. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 655.

In the instant matter, Defendant Lahman’s policy with Allstate specifically excludes punitive damages and other fees, such as attorney fees, arising out of a punitive damage award:

We will not pay any punitive or exemplary damages, fines or penalties under Bodily Injury Liability or Property damage Liability coverage.

Policy at p. 7 (emphasis in original). In *Creed v. Allstate Insurance Company, supra*, the Pennsylvania Superior Court found that substantially similar language precluded coverage for attorney fees arising out of a punitive damages award. *Creed* at 142. In fact, the *Creed* Court expressly held that:

Under the terms of the policy of insurance issued by Allstate, Allstate did not agree to indemnify its insured for claims for punitive damages...[W]here the insurer has only agreed to indemnify for bodily injury and property damage, it has no obligation to

provide indemnity for punitive damages. Having determined that there is no coverage for punitive damages, there was no duty to defend that portion of the case and, consequently, there is no obligation to pay counsel fees.

Id. Furthermore, the Ohio Supreme Court has held that absent specific contractual language, coverage for damages will not be presumed. *State Farm Mutual Insurance Company v. Blevins* (1990), 49 Ohio St.3d 165 at paragraph 2 of the syllabus.

In *Digital and Analog Design Corp.*, *supra*, the Supreme Court considered the purpose and nature of an attorney fee award made pursuant to an award of punitive damages:

The award of attorney fees, although seemingly compensatory and treated as such in the model jury instruction, does not compensate the victim for damages flowing from the tort. Rather, the requirement that a party pay attorney fees under these circumstances is a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages. There is no separate tort action at law for the recovery of attorney fees under these circumstances. Without a finding of malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees, unless there is a basis for sanctions under Civ.R. 11.

Digital & Analog Design Corp. at 662. The Allstate policy with the defendant in this matter specifically excludes payment of any punitive or exemplary damages, fines or penalties that are due to the insured's own conduct. As the attorney fees at issue fall within an express exclusion in the policy, Allstate has not contractually agreed to pay the amounts at issue and thus, has no liability to make payment for same.

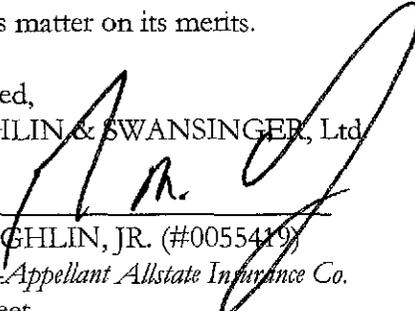
The liberal rule of construction of an insurance policy should not operate to create an ambiguity in a policy when none, in fact, exists. *Hybud Equip. Cor.* at 665. Hence, where an insurance contract is clear and unambiguous, its interpretation as a question of law and its terms must be applied as written. *Gomolka v. State Auto Ins. Co.* (1982), 70 Ohio St.2d 166, 168. More specifically, if an exclusionary clause has only one rational meaning, a court is compelled to enforce the provision appropriately. See *Progressive Specialty Ins. Co. v. Easton* (1990), 66 Ohio App.3d 177, 180.

As the attorney fee award arises out of the punitive or exemplary damages, and as the award of attorney fees are not covered under the policy as it falls under the express exclusion of "punitive or exemplary damages, fines or penalties," Allstate has no duty to provide payment for same to the plaintiff on behalf of defendant Lahman.

IV. CONCLUSION

Allstate did not contractually agree to assume liability for an attorney fees award as part of a punitive damages claim and thus, cannot be held liable for same. Regardless, Ohio law prohibits an insurance company from paying punitive damage claims, including attorney fees awarded as part thereof, as a matter of public policy. As this case concerns matters of public or great general interest, this Honorable Court should accept jurisdiction and hear this matter on its merits.

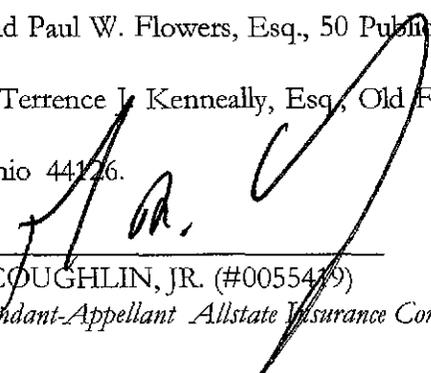
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PROOF OF SERVICE

A copy of the foregoing has been forwarded to the following by regular U. S. mail this 12th day of February 2009 to W. Craig Bashein, Esq. and Paul W. Flowers, Esq., 50 Public Square, 35th Floor, Terminal Tower, Cleveland, Ohio 44113; and Terrence J. Kenneally, Esq., Old Forge Centre, 20595 Lorain Road, Terrace Level 1, Fairview Park, Ohio 44126.

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DEC 29 2008

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
No. 91551

KIMBERLY NEAL-PETTIT

PLAINTIFF-APPELLEE

vs.

LINDA LAHMAN, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-545838

BEFORE: Stewart, J., Cooney, P.J., and Gallagher, J.

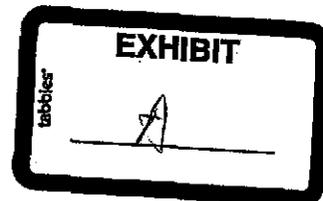
RELEASED: December 18, 2008

JOURNALIZED: DEC 29 2008

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VOL 672 P. 0780



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FILED AND JOURNALIZED
PER APP. R. 22(E)

DEC 29 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(E), 22(D) AND 26(A)
RECEIVED

DEC 18 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the Cuyahoga County Court of Common Pleas, and the briefs of counsel. The sole issue raised in this appeal is whether defendant-appellant Allstate Insurance Company has the legal obligation to pay attorney fees of \$46,825 deriving from a punitive damages award against its insured, defendant-tortfeasor Linda Lahman, in favor of plaintiff-appellee, Kimberly Neal-Pettit. The parties filed cross-motions for summary judgment and agree that there are no issues of material fact and that judgment should issue as a matter of law.¹ See Civ.R. 56.

Insurance policies are contracts which we construe according to their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument.

Olmstead v. Lumbermens Mut. Ins. Co. (1970), 22 Ohio St.2d 212, 216.

¹The parties agree that Allstate has no contractual obligation to pay any amount of punitive damages awarded to Neal-Pettit. The question is whether the attorney fees, stemming as they do from the punitive damages award, are subject to indemnification under the policy.

The Allstate policy states: “We will not pay any punitive or exemplary damages, fines or penalties under Bodily Injury Liability or Property Damage Liability coverage.”² (Emphasis sic.)

Attorney fees awarded with punitive damages are undeniably punitive in nature. See *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, 662. But describing attorney fees as “punitive” in nature is not the same thing as saying that attorney fees are punitive “damages.” Attorney fees are conceptually distinct from punitive damages and “may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted.” *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 558, 1994-Ohio-461. The Allstate policy language saying that it will not pay any “punitive or exemplary damages” is plain – it only excludes punitive “damages” and does not exclude the payment of attorney fees awarded in conjunction with the punitive damage award. Had Allstate intended otherwise, the policy language could easily have been drafted to reflect that intention.

For the same reasons, we reject Allstate’s argument that it would be against public policy to permit indemnification of attorney fees. R.C. 3937.182(B), like the Allstate policy at issue, prohibits insurance coverage for

²Allstate does not argue that attorney fees ordered in this case are a fine or penalty.

“judgments or claims against an insured for punitive or exemplary damages.”

This section only prohibits insurance for punitive damages. It does not prohibit indemnification of attorney fees associated with prosecuting a claim for punitive damages. Even though attorney fees in this case might be considered derivative of the punitive damage award, they remain conceptually distinct.

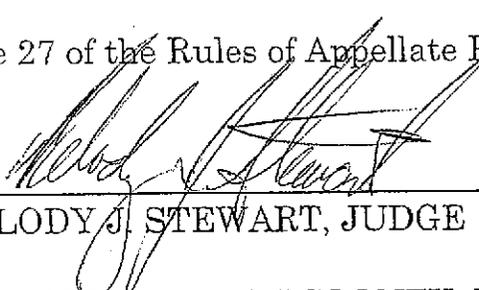
Judgment affirmed.

It is ordered that appellee recover of appellants her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, P.J., and
SEAN C. GALLAGHER, J., CONCUR