

IN THE SUPREME COURT OF OHIO

ORIGINAL

CASE NO. 2009-0325

KIMBERLY NEAL-PETTIT
Plaintiff-Appellee

-vs-

LINDA LAHMAN; ALLSTATE INSURANCE COMPANY
Defendant - Appellants

ON APPEAL FROM THE CUYAHOGA COUNTY
COURT OF APPEALS CASE NO. 91551

MERIT BRIEF OF
PLAINTIFF-APPELLEE, KIMBERLY NEAL-PETTIT

W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
(216) 771-3239
FAX: (216) 771-5876

Paul W. Flowers, Esq. (#0046625)
[Counsel of Record]
PAUL W. FLOWERS CO. L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
FAX: (216) 344-9395

Attorneys for Plaintiff-Appellee

Thomas M. Coughlin, Jr. Esq.
(#005419)
**RITZLER, COUGHLIN & SWANSINGER,
LTD**
1360 East Ninth Street
1000 IMG Center
Cleveland, Ohio 44114
(216) 241-8333
FAX: (216) 241-5890

*Attorney for Defendant-Appellant
Allstate Insurance Company*

Terrance J. Kenneally, Esq.
**TERRENCE J. KENNEALLY &
ASSOCIATES**
20595 Lorain Road
Terrace Level 1
Cleveland, Ohio 44126

*Attorney for Defendant,
Linda Lahman*

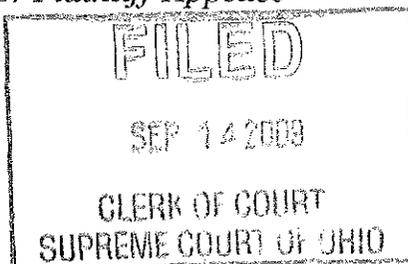


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STATEMENT OF CASE AND FACTS

As confirmed in the police report that was submitted in the proceedings below, the accident at issue in this litigation occurred on March 27, 2003 while Defendant, Linda Lahman ("Lahman"), was fleeing from a prior collision. While changing lanes at a high speed on I-77, she collided into the vehicle being operated by Plaintiff-Appellee, Kimberly Neal-Pettit, causing both to spin and lose control. Plaintiff's vehicle skidded approximately 80 feet and struck the guardrail. The investigating officer observed that the 1995 Chevrolet Camaro had sustained "disabling damage." Lahman's speed was estimated at 90 mph in a 60 mph zone. She was charged with numerous offenses, including driving while intoxicated in violation of R.C. §4511.19(A)(1).

Notwithstanding the trauma of the high speed collision and her significant injuries, Plaintiff had to continue with her wedding the next day. Her new husband was leaving immediately thereafter to start a tour of duty in Iraq with his unit in the United States Army.

At the time of the collision, Defendant Lahman was covered under a motor vehicle insurance policy which had been issued by Defendant-Appellant, Allstate Insurance Company ("Allstate"). While Plaintiff had been willing to accept \$38,000.00 to resolve the case, Allstate only offered \$16,500.00 in settlement. The jury thereafter returned a verdict in favor of Plaintiff for compensatory damages of \$113,800.00 and punitive damages of \$75,000.00. *See Judgment Entry of July 31, 2006.* They further indicated that Plaintiff should recover her attorney fees and litigation expenses. *Id.* Following an evidentiary hearing, Judge Nancy Margaret Russo set this award at \$46,825.00 in fees and \$10,084.96 in expenses.

While Plaintiff did not expect Defendant Lahman's insurer (*i.e.*, Allstate) to satisfy the punitive damages award, a prompt demand was made for payment of the compensatory award, including the attorney fees and litigation expenses. Allstate refused to cover the latter component of the recovery, which forced Plaintiff to file her Supplemental Complaint pursuant to R.C. §3929.06 on July 27, 2007. The insurer submitted an Answer, denying that anything further was owed under the policy on August 6, 2007.

During the ensuing summary judgment proceedings, the Allstate Auto Insurance Policy that was in effect at the time of the accident was produced. *Allstate Insurance Company's Brief in Opposition to Plaintiff's Motion for Summary Judgment, Exhibit B*. In Part 1 (Automobile Liability Insurance/Bodily Injury Liability), the insurer broadly promised that:

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.

Under these coverages, **your** policy protects an **insured person** from liability for damages arising out of the ownership, maintenance or operation, loading or unloading of an **insured auto**. *** [bold original, underlining added].

Id., p. 7. Following thereafter was exclusion for "any punitive or exemplary damages, fines or penalties." None of the numerous policy exclusions pertained to "attorney fees" or "litigation expenses." *Id.* Notably, the term "damages" used in the Allstate policy was undefined.

In a final Judgment Entry dated May 6, 2008, Judge Nancy Margaret Russo concluded that Plaintiff was entitled to recover her attorney fees and litigation expenses in the amount of \$46,825.00 under Allstate's policy. Allstate responded with an appeal on June 2, 2008. The Cuyahoga County Court of Appeals issued its opinion, affirming the trial judge on December 29, 2008. *Neal-Pettit v. Lahman*, 8th Dist. No. 91551, 2008-Ohio-6653, 2008 W.L. 5259726. The unanimous panel concluded that (1) no attorney-fee exclusion had been included in the policy and (2) public policy did not preclude such coverage. Allstate is now seeking further review in this Court.

ARGUMENT

Oddly, Allstate's analysis begins with – and focuses primarily upon – the demand for an expansion of Ohio “public policy.” *Defendant's Merit Brief*, pp. 3-9. The seemingly more significant question of whether the insuring agreement actually covers attorney fee awards has been relegated to the final few pages of the Merit Brief. *Id.*, pp. 12-14. In an effort to return to an analytically proper approach, Plaintiff will address the contractual arguments first.

**PROPOSITION OF LAW NO. III: AN INSURANCE
POLICY EXCLUSION IN ACCORDANCE WITH PUBLIC
POLICY FOR “PUNITIVE OR EXEMPLARY DAMAGES,
FINES OR PENALTIES” PRECLUDES COVERAGE FOR
AN AWARD OF ATTORNEY FEES THAT ARE PART OF
A PUNITIVE DAMAGE AWARD.**

The final Proposition of Law addresses whether the motorist insurance policy, which Allstate has prepared, provides coverage for legal fees and litigation expenses under its plain and ordinary terms. As noted earlier in this Brief, the “General Statement of Coverage” promised indemnity against all forms of “damages” arising from motor vehicle accidents. *Allstate Insurance Company's Brief in Opposition to Plaintiff's Motion for Summary Judgment, Exhibit B*, p. 7. Ohio law has long recognized that awards of attorney fees and litigation expenses are a component of the “compensatory damages” even when they are only available because punitive damages have been imposed. *Roberts v. Mason* (1859), 10 Ohio St. 277, 1859 W.L. 78, paragraph two of the syllabus; *Zappitelli v. Miller*, 114 Ohio St. 3d 102, 103, 2007-Ohio-3251, 868 N.E. 2d 968, 969 ¶ 6. There thus can be no serious disagreement that the “damage” award fell within the “General Statement of Coverage” set forth in Part 1 of the insuring agreement. *Allstate Insurance Company's Brief in Opposition to Plaintiff's Motion, Exhibit B*, p. 7.

It is a familiar maxim that once an initial right to coverage has been established, the insurer bears the burden of demonstrating that a policy exception or exclusion is applicable. *Continental Ins. Co. v. Louis Marx & Co., Inc.* (Ohio 1980), 64 Ohio St. 2d 399, 401-402, 415 N.E.2d 315, 317. Exclusions of coverage must be clear and unambiguous to be enforceable. *Moorman v. Prudential Ins. Co. of Am.* (Ohio 1983), 4 Ohio St.3d 20, 445 N.E.2d 1122, 1124; *Nationwide Ins. Co. v. Johnson* (12th Dist. 1992), 84 Ohio App.3d 106, 109, 616 N.E.2d 525, 527.

Theoretically, Allstate could have avoided the instant dispute by including language in the motor vehicle insurance policy addressing the commonplace awards. Despite the popularity of attorney fee exclusions within the insurance industry, the insurer did not do so. After promising the insureds that all forms of “damages” attributable to bodily injuries and property losses would be covered as long as the premiums were paid, the insuring agreement provided only that:

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

Allstate's Brief in Opposition to Summary Judgment, Exhibit B, Auto Insurance Policy, p. 7. Noticeably absent from this exclusion is any reference to “attorney fees” and “litigation expenses.” Consequently, any reasonable person reviewing the policy would have been led to believe that such additional damages were covered.

The shortcoming of the policy language has not been lost upon Allstate. In an effort to create the illusion that attorney fees and litigation expenses have been specifically excluded from coverage, the insurer's Merit Brief is rife with remarks such as:

In the instant matter, Defendant Lahman's policy with Allstate specifically excludes punitive damages and other amounts, such as attorney fees, arising out of a punitive damage award ***. [emphasis added].

Defendant's Merit Brief, p. 12. This is untrue. As can be readily observed, the exclusion which Allstate fashioned is scrupulously limited to "punitive or exemplary damages, fines or penalties" and mentions nothing about any "fees." *Allstate's Brief in Opposition to Summary Judgment, Exhibit B, Auto Insurance Policy* p. 7. It should not be forgotten that "**** insurance policies are to be given their ordinary meaning and are not to be expanded by judicial fiat ***." *Atwood v. State Farm Mut. Ins. Co.* (4th Dist. 1990), 68 Ohio App.3d 179, 182, 587 N.E.2d 936, 937. The clear and unmistakable import of the provision that Allstate drafted is that the exclusion is confined to "punitive or exemplary damages, fines or penalties." *Allstate's Brief in Opposition to Plaintiff's Motion for Summary Judgment, Exhibit B*, p. 7. Plaintiff is not seeking insurance coverage for any such awards here.

Largely at the urging of the insurance industry, the courts of this State have steadfastly refused to glean new terms and provisions from unambiguous insurance contracts. *Atwood*, 68 Ohio App.3d at 182. Regardless of the practical implications for the parties, the courts of Ohio have never been in the business of judicially re-writing insurance policies that appear to have been drafted improvidently. *McNally v. American States Ins. Co.* (6th Cir. 1962), 308 F.2d 438, 445; *Schwartz v. Stewart Title Guar. Co.* (8th Dist. 1999), 134 Ohio App.3d 601, 607, 731 N.E.2d 1159, 1163. Instead, any uncertainty must be resolved in favor of the insured. *Buckeye Union Ins. Co. v. Price* (Ohio 1974), 39 Ohio St.2d 95, 313 N.E.2d 844, syllabus; *Csulik v. Nationwide Mut. Ins. Co.*, 88 Ohio St.3d 17, 20, 2000-Ohio-262, 723 N.E.2d 90, 92.

Examples of Ohio courts refusing to "imply" new terms in insurance contracts at

the request of policyholders are legion. In *Travelers Indem. Co. v. Reddick* (Ohio 1974), 37 Ohio St.2d 119, 308 N.E.2d 454, the insureds urged the court to construe a purportedly ambiguous “physical contact” requirement in a hit-and-run motor vehicle clause to permit uninsured motorist coverage even though the tortfeasor’s vehicle had never struck their automobile. The unanimous opinion concluded that there was “nothing uncertain” about the terms appearing in the policy and refused to stray beyond the actual language employed. *Id.*, 37 Ohio St.2d at 122. Likewise, the insureds argued in *Cincinnati Indem. Co. v. Martin*, 85 Ohio St.3d 604, 1999-Ohio-322, 710 N.E.2d 677, that a “bodily injury to an insured” clause should be read to permit coverage even for non-insureds. In affirming the entry of summary judgment in favor of the insurer, the majority specifically observed that:

It is well established that when the language in an insurance policy is clear and unambiguous, we must enforce the contract as written and give the words their plain and ordinary meaning. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096, 1102.

Id., 85 Ohio St.3d at 607. This principle has been upheld again and again during the course of Ohio jurisprudence. *Rhoades v. Equitable Life Assur. Soc. of the U.S.* (Ohio 1978), 54 Ohio St.2d 45, 47, 374 N.E.2d 643, 644 (“Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties.”); *Cincinnati Ins. Co. v. Kramer* (1st Dist. 1993), 91 Ohio App.3d 528, 531, 632 N.E.2d 1333, 1334 (“When the provisions of an insurance contract are clear and unambiguous, courts cannot enlarge the coverage by implying terms that are not in the agreement.”); *Progressive Ins. Co. v. Tarpeh* (8th Dist. 1996), 116 Ohio App.3d 634, 637, 688 N.E.2d 1102, 1104 (refusing to “liberally” construe policy in favor of insured since language

was “clear and unambiguous”); *Mueller v. Taylor Rental Cntr.* (8th Dist. 1995), 106 Ohio App.3d 806, 809, 667 N.E.2d 427, 429 (affirming grant of summary judgment in favor of insurer because unambiguous policy language “must be applied as written, without judicial interpretation”); *White v. Ogle* (8th Dist. 1979), 67 Ohio App.2d 35, 39, 425 N.E.2d 926, 929 (“An insurance company is only liable according to the terms and provisions of its contract, and not otherwise.”)

The irony is, of course, that Allstate is now essentially imploring this Court to artificially broaden the exclusion for “punitive or exemplary damages, fines or penalties” to also include “attorney fees” and “litigation expenses.” *Defendant’s Merit Brief*, pp. 12-14 The insurer plainly is in no position to suggest that some sort of “ambiguity” exists, given that a small army of attorneys and insurance experts undoubtedly had been retained for the overriding purpose of ensuring that the policy was as favorable to the carrier’s interests as the law would tolerate. There is simply no dancing around the fact that the plain and ordinary terms of the insuring agreement do not preclude coverage for attorney fees and litigation expenses, even when imposed upon a jury’s finding of bad faith or malice.

Indeed, there are numerous decisions involving virtually the same policy language in which attorney fees have been held to constitute covered damage. In *Fair Housing Advocates Assoc., Inc. v. Terrace Plaza Apartments* (Aug. 10, 2006), U.S. Dist. Ct., S.D. Ohio Case No. 2:03-CV-0563, 2006 W.L. 2334851, the court considered whether an insured could recover under her insurance policy the attorney fees assessed against her. The policy at issue provided that the insurer “will pay those sums that the insured becomes legally obligated to pay as damages because of ‘personal injury’” *Id.* at p. *4. The insured argued that the fees assessed against her constituted

“damages” covered by the coverage grant. The *Fair Housing* court concluded that the undefined term “damages” was ambiguous. Moreover, the policy as a whole was silent as to attorney fees. *Id.* at pp. *4-5. Since the insurer was in the best position to draft its policy to clarify whether it meant “damages” to include or exclude attorney fees, the court construed it against the insurer and required the insurer to afford coverage for the fees award against the insured. *Id.* at p. *5.

Similarly, in *The Sylvania Twnshp. Bd. of Trustees v. Twin City Fire Ins. Co.* (Feb. 6, 2004), 6th Dist. No. L-03-1075, 2004-Ohio-483, 2004 W.L. 226115, the court reversed the decision of the trial court and held that attorney fees awarded against an insured constituted “damages” under the insured’s errors and omissions policy. The relevant policy language provided that the insurer “will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of errors or omissions. . . .” *Id.* at p. *2. “Damages” was defined in the subject policy as “monetary judgment, award or settlement but does not include fines or penalties or damages for which insurance is prohibited by law” *Id.* The court concluded that the attorney fee award was a “monetary judgment” and held that the policy covered such amounts. *See also City of Kirtland v. Western World Ins. Co.* (11th Dist. 1988), 43 Ohio App.3d 167, 540 N.E.2d 282 (holding that insurer was contractually obligated to provide coverage to insured for attorney fees award).

Allstate has assured this Court that: “At least one court has examined whether or not the exclusion of ‘fines and penalties’ operated as an exclusion of attorney fees awarded as part of a punitive damage award.” *Defendant’s Merit Brief*, p. 13. The insurer has plainly misconstrued *First Specialty Ins. Co. v. Caliber One Indem. Co.* (Fla. App. 2008), 988 So. 2d 708. The Florida court held merely that the exclusion for

“civil penalties or fines” prohibited coverage for punitive damages. *Id.*, at 713-174. Not once did the panel suggest that this policy language could be applied to the attorney fees which had been imposed in the underlying wrongful death action. *Id.* Coverage for that aspect of the award was denied solely because Florida courts do not consider attorney fees to be “damages.” *Id.*, at 714. Ohio’s judiciary view such awards differently. *Langhort v. Riethmiller* (1st Dist. 1977), 52 Ohio App. 2d 137, 142, 368 N.E. 2d 328, 331-332 (“***[A]ttorney’s fees are recoverable as compensatory damages by a plaintiff in an action in which an award of punitive damage is proper.”); *Danial v. Lancaster*, 8th Dist. No. 92462, 2009-Ohio-3599, 2009 W.L. 2186762 ¶ 18 (“The Supreme Court of Ohio, as well as this court, has held that attorney fees are recoverable as part as compensatory damages only when punitive damages have been awarded.”) Once *First Specialty Insurance* is properly understood, it becomes apparent that Allstate has been unable to locate a decision which has been issued by any court from anywhere in the United States suggesting that “fines and penalties” are synonymous with attorney fees and litigation expenses.

Given that Allstate’s exclusion mentions neither “attorney fees” nor “litigation expenses,” it will be impossible as a matter of law for the carrier to establish that such coverage has been precluded in the instant case. Accordingly, this Court should reject the Third Proposition of Law.

PROPOSITION OF LAW NO. II: PUNITIVE DAMAGES AND ANY ACCOMPANYING AWARD OF ATTORNEY FEES DERIVATIVE OF PUNITIVE DAMAGES, ARE NOT DAMAGES “BECAUSE OF BODILY INJURY” WITHIN THE MEANING OF AN INSURANCE POLICY.

Allstate seems to be arguing under the Second Assignment of Error that coverage for attorney fees and litigation expenses is precluded because the policy

requires that the “damages” must be “because of *** **bodily injury** sustained by any person ***.” *Defendant’s Merit Brief*, pp. 9-12 (emphasis original). There was never any dispute during the post-trial hearing which Judge Russo conducted that the fees and expenses had been necessary because, and only because, of the serious and disabling “bodily injuries” that the intoxicated insured had caused during her flight from the authorities. No lawyers would have been required if Plaintiff had emerged unharmed and without any damage to her car. The requirement of a “**bodily injury**” has plainly been satisfied, and all “damages” arising there from are covered save for those which are specifically excluded. *See generally Jones v. Progressive Prof. Ins. Co.* (9th Dist. 2006) 169 Ohio App.3d 291, 2006-Ohio-5420, 862 N.E.2d 850; *American Modern Home Ins. Co. v. Safeco Ins. Co. of Illinois* (Nov. 21, 2007), 11th Dist. No. 2007-L-044, 2007-Ohio-6247, 2007 W.L. 4147932, p. *4; *Hall v. Nationwide Mut. Fire Ins. Co.* (Sept. 1, 2005), 10th Dist. No. 05AP-305, 2005-Ohio-4572, 2005 W.L. 2100627, pp. *2-4; *Brunn v. Motorists Mut. Ins. Co.* (Jan. 5, 2006), 5th Dist. No. 2005CA0022, 2006-Ohio-33, 2006 W.L. 29116, p. *3; *Lager v. Gonzalez* (Aug. 10, 2007), 6th Dist. No. L-07-1022, 2007-Ohio-4094, 2007 W.L. 2285319, p. *3.

The award of attorney fees and litigation expenses at issue is indistinguishable from the medical bills and lost wages that were attributable to the accident. No one disputes that these recoveries fell within the terms of coverage since they were sustained “because of *** **bodily injury**[.]” Because Defendant and her insurer were unwilling to pay the amounts due to Plaintiff voluntarily, the efforts of lawyers were needed before she would be fully compensated for her bodily injuries. As a matter of simple logic and common sense, the fees and expenses were thus necessary “because of *** **bodily injury**” and are thus recoverable as “damages” under Allstate’s policy.

If Allstate believed that some (or all) of the lawyers' time and effort was unrelated to the objective of recovering full compensation for the bodily injuries that had been suffered in the accident, then an attempt should have been made during the hearing that Judge Russo conducted to establish the point. But none was. The notion that all of the attorney fees and litigation expenses were, as a matter of law, entirely unconnected to the "bodily injury" Plaintiff sustained defies reason. The Second Proposition of Law thus lacks merit.

PROPOSITION OF LAW NO. 1: IT IS AGAINST PUBLIC POLICY FOR AN INSURANCE COMPANY TO PAY AN AWARD OF FEES AS AN ELEMENT OF A PUNITIVE DAMAGE AWARD AGAINST AN INTOXICATED DRIVER.

In the first Proposition of Law, Allstate is proposing an expansion of "public policy" well beyond that which the legislature has determined to be appropriate. If the insurer has its way in this Court, no carrier doing business in Ohio will ever have to cover an award of attorney fees and litigation expenses which has been issued in connection with punitive damages. Those insurers which desire to create a more attractive policy by specifically including such coverage will be effectively prohibited from doing so. And if an insured is able to secure such additional protection, presumably in exchange for a higher premium payment, the carrier will never actually have to honor the claims once they arise.

Allstate initially relies upon R.C. §3937.182(B), which directs simply that no motor vehicle insurance policy "shall provide coverage for judgments or claims against an insured for punitive or exemplary damages." *Defendant's Merit Brief*, pp. 4-6. The terms "punitive" and "exemplary" are interchangeable. *Trainor v. Deters* (1st Dist. 1969), 22 Ohio App.2d 135, 259 N.E.2d 131, 134. It was undoubtedly no accident that the General Assembly did not include a reference to attorney fees and litigation

expenses in this enactment. In essence, Allstate is requesting that this Court judicially engraft these terms into the unambiguous statutory prohibition. "In matters of construction, it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Cleveland Elec. Illum. Co. v. City of Cleveland* (Ohio 1988), 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus (citation omitted).

With respect to the common law public policy standards which have been developed by the courts, the most glaring flaw in Allstate's analysis is the assumption that attorney fees/litigation expenses are merely "derivative" from or an "element" of punitive damages. *Defendant's Merit Brief*, p. 9. Repeatedly asserting that this is the case cannot change the undeniable verity that Ohio courts have long viewed awards of attorney fees and litigation expenses as a separate form of "compensation." One hundred and fifty years ago, this Court squarely held in *Roberts*, 10 Ohio St. 277, paragraph two of the syllabus, that when punitive damages are recoverable "the jury may, in their estimate of *compensatory* damages, take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action." (emphasis original); see also *United Power Co. v. Matheny* (Ohio 1909), 81 Ohio St. 204, 211, 90 N.E. 154, 156. The high court reaffirmed this ruling a few decades later:

In *Roberts v. Mason*, 10 Ohio St. 277, it was held that in an action to recover damages for a tort, which involved the ingredients of fraud, malice, or insult, a jury may go beyond the rule of *mere* compensation, and award exemplary or punitive damages, and that in such a case, they may, in their estimate of *compensatory* damages, take into consideration and include reasonable fees of counsel employed to prosecute the action. [italics original, underlining added].

Stevenson v. Morris (Ohio 1881), 37 Ohio St. 10, 19-20, 1881 W.L. 53. In removing any

doubt that may have remained as to the compensatory nature of the recovery of fees and expenses, the court declared in *Finney v. Smith* (Ohio 1877), 31 Ohio St. 529, 534-535, 1877 W.L. 67:

In this state, it must, therefore, be regarded as settled, that in actions of tort, involving malice, fraud, insult, or oppression, the jury may, in estimating compensatory damages, take into consideration the reasonable counsel fees of the plaintiff in prosecuting his action for the redress of his injuries, against the wrong-doer, even where there are mitigating circumstances not amounting to a justification. [italics original, underlining added].

No confusion should have remained after *Smith v. Pittsburgh, Ft. W. & C. Ry. Co.* (Ohio 1872), 23 Ohio St. 10, 18, 1872 W. L. 50, in which this Court reexamined *Roberts*, 10 Ohio St. 277, and reasoned that:

The doctrine there announced is, that in a case where punitive as well as compensatory damages may be awarded, the jury, in discriminating, should regard counsel fees as compensation and not as punishment. [emphasis added].

In accordance with these precedents, modern courts have repeatedly recognized, without wavering, that in punitive damage cases an award of attorney fees and litigation expenses is compensatory in nature.

Attorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted. *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St.2d 178, 183, 71 O.O.2d 174, 177, 327 N.E.2d 654, 658. [emphasis added].

Zoppo v. Homestead Ins. Co., 71 Ohio St.3d 552, 558, 1994-Ohio-461, 644 N.E.2d 397, 402; see also *Galmish v. Cicchini*, 90 Ohio St.3d 22, 35, 2000-Ohio-7, 734 N.E.2d 782, 795; *Zappitelli*, 114 Ohio St.3d at 103; *Maynard v. Eaton Corp.* (Apr. 23, 2007), 3rd Dist. No. 9-06-33, 2007-Ohio-1906, 2007 W.L. 1176488, p. *2; *Wright v. Suzuki Motor Corp.* (June 27, 2005), 4th Dist. No. 03CA2, 2005-Ohio-3494, 2005 W.L.

1594850, p. *31; *Waters v. Allied Mach. & Eng. Corp.* (Apr. 30, 2003), 5th Dist. No. 02AP040032, 2003-Ohio-2293, 2003 W.L. 21027180, p. *18; *Brookover v. Flexmag Indust., Inc.* (Apr. 29, 2002), 4th Dist. No. 00CA49, 2002-Ohio-2404, 2002 W.L. 1189156, p. *32. Not long ago, the Eighth District confirmed that:

When there is bad faith or malicious misconduct, “*** the jury may, in their estimate of *compensatory* damages, take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action.” *Roberts v. Mason* (1895), 10 Ohio St. 277. Attorney fees are recoverable as *compensatory* damages by a plaintiff in an action in which punitive damages are proper. *Kapcsos v. Hammond* (1983), 13 Ohio App.3d 140, 13 OBR 173, 468 N.E. 2d 325; *Langhorst v. Riethmiller* (1977), 52 Ohio App.2d 137, 6 O.O.3d 101, 368 N.E.3d 101, 368 N. E. 2d 328. [italics originals].

Vinci v. Ceraolo (8th Dist. 1992), 79 Ohio App. 3d 640, 649, 607 N.E. 2d 1079, 1085. This sound holding comports with the general understanding that attorney fee awards are intended to make the prevailing party whole. *Taylor v. Luper, Sheriff & Niedenthal Co., L.P.A.* (S.D. Ohio 1999), 74 F.Supp.2d 761, 767. See also *McClure v. Fischer Attached Homes* (Ct. Com. Pl., Clermont Cty. 2008), 146 Ohio Misc.2d 57, 2008-Ohio-2676, 889 N.E.2d 602.

The only response which Allstate has been able to muster to this long line of precedent is to assert that: “But in each case so cited, the issue was not who had to pay, but rather how to classify the award to the plaintiff.” *Defendant’s Merit Brief*, p. 5. It is evident, however, that the question of “how to classify the award to the plaintiff” lies at the heart of the instant dispute. Allstate’s own Brief devotes pages of analysis to attempting to explain how awards of attorney fees/litigation expenses are really just “derivative” from or an “element” of punitive damages. The insurer’s analysis is riddled with proclamations, which are unaccompanied by case citations, such as: “The

attorney fees at issue were only available as part of the punitive damage award.” *Defendant’s Merit Brief*, p. 4. Allstate’s challenges to the Eighth District’s ruling hinge upon the argument that awards of attorney fees/litigation expenses must be classified as punitive in nature.

But the controlling case law is decidedly to the contrary. The critical difference between the two types of awards, which Allstate’s analysis cannot overcome, is that attorney fees/and litigation expenses are properly deemed to be compensatory while punitive damages are punishment. *Smith*, 23 Ohio St. at 18. The fees and expenses that were imposed against Defendant Lahman thus properly fall within rubric of “damages” arising from a bodily injury which Allstate had agreed to cover in the Automobile Liability Insurance/Bodily Injury Liability section of the Auto Insurance Policy. *Allstate Insurance Company’s Brief in Opposition to Plaintiff’s Motion for Summary Judgment, Exhibit B*, p. 7. In elucidating upon how “to classify the award to the plaintiff,” the courts in *Roberts*, *Matheny*, *Finney*, and their progeny confirmed beyond all legitimate debate that attorney fees are compensatory in their own right and not some subservient “part of the punitive damages award.” *Id.*, p. 6. There is no escaping that the very premise of Allstate’s ill-conceived public policy argument cannot be reconciled with established precedents.

Plaintiff must respectfully disagree with the Eighth District’s comment in the proceedings below that: “Attorney fees awarded with punitive damages are undeniably punitive in nature.” *Neal-Pettit*, 2008-Ohio-6653 ¶ 4. The only authority which has been cited in support of this statement is *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St. 3d 657, 662, 590 N.E. 2d 737, which Allstate has been touting throughout these proceedings. *Defendant’s Merit Brief*, pp. 11-14. In *dicta*, the

Digital opinion contradicted prior precedent by remarking, without any citation to authority, that attorney fee awards do “not compensate the victim for damages flowing from the tort.” *Id.*, 63 Ohio St. 3d at 662. The decision was overturned in large part by *Zoppo*, 71 Ohio St. 3d at 557. This Court specifically recognized in *Zoppo* that attorney fee awards are compensatory. *Id.*, at 558. The principle was reaffirmed by a unanimous court just two years ago in *Zappitelli*, 114 Ohio St. 3d at 103 ¶ 6 (“It is equally clear that paragraph two of the syllabus [of *Roberts*, 10 Ohio St. 277] states that when punitive damages are awarded, the award for compensatory damages may include attorney fees.”) While the Eight District thus appears to have mistakenly relied upon a single untenable sentence from *Digital*, the unanimous panel reached the correct conclusion by affirming the trial judge. *Neal-Pettit*, 2008-Ohio-6653 ¶ 4-5.

Allstate has yet to cite any authorities holding that Ohio law precludes a liability carrier from covering the attorney fees and litigation expenses awarded in connection with punitive damages. Every authority that the insurer identified emanating from this State recognizes only that the punitive component is uninsurable for public policy reasons. *Defendant’s Merit Brief*, pp. 4-9. For example, the insurer has furnished a lengthy discussion of *Ruffin v. Sawchyn* (8th Dist. 1991), 75 Ohio App. 3d 511, 599 N.E. 2d 852, but in that instance this court was careful to invalidate a questionable settlement only “to the extent that the settlement purports to satisfy the punitive damage award with payments from the codefendant’s insurance carrier.” *Id.*, 75 Ohio App. 3d at 518. Allstate has cited *Casey v. Calhoun* (8th Dist. 1987), 40 Ohio App.3d 83, 531 N.E.2d 1348, in support of the proposition that “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.” *Defendant’s Merit Brief*, p. 7. (emphasis added) That

decision actually makes no mention of attorney fees at all. Just like all of the insurer's other inapposite authorities, the *Casey* court held only that "punitive damages" could not be covered.

One of the *amici* has argued that *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St. 3d 74, 2004-Ohio-28, 801 N.E. 2d 441, stands for the proposition that attorney fees are not compensatory in Ohio. Left unsaid is that *Santos* was a class action proceeding where the fees were required to be paid – not by the defendant – but as a percentage of the class recovery. Such payments are born by the class, as is the case with any contingency fee agreement. *State ex rel. Montrie Nursing Home v. Creasy* (1983), 5 Ohio St. 3d 124, 127, 449 N.E. 2d 763, 766. *Santos* had nothing to do with the attorney fees which are awarded to make the plaintiff whole when bad faith or malice is shown.

Turning toward other states, Allstate has represented that *Creed v. Allstate Ins. Co.* (1987), 365 Pa. Super 136, 529 A. 2d 10, holds that: "Where there is no liability to pay punitive damages there also is no obligation to pay attorney fees arising out of such punitive damages claims." *Defendant's Merit Brief*, p. 8. This is basically a true statement in Ohio as well, but *Creed* does not hold that attorney fee awards are uninsurable. No monetary judgment had actually been imposed at all in that dog bite case. The lawsuit had been settled by Allstate, with the defendant-insured paying a small portion to cover a claim for punitive damages. *Id.*, 365 Pa. Super at 138-139. The defendant-insured then attempted to force the insurer to reimburse her not only for her settlement contribution but also for the personal counsel she had retained to defend the punitive damage claim. Not surprisingly, the Pennsylvania trial judge was unpersuaded. His holding with regard to the attorney fees was merely that:

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., at 142. The *Creed* court was thus addressing the fees incurred by the defendant-insured and not the plaintiff's counsel. *Defendant's Merit Brief*, p. 8. Nor were any "damages" imposed at all in *Creed* which could conceivably be covered under a motor vehicle insurance policy. Allstate's reliance upon this decision is thus mystifying.

Allstate has also dredged up a California appellate court decision that was focused upon a statute specific to that state. *Defendant's Merit Brief*, p. 7. Even there, *Baker v. Mid-Century Ins. Co.* (4th Dist. 1993), 20 Cal. App. 4th 921, 25 Cal. Rptr.2d 34, had little to do with punitive damages. As even a cursory review of the decision reveals, the question presented was whether fees were insurable which had been recovered under the particular terms of a statute that imposed liability for the commission of a felony offense. *California Code of Civil Procedure §1021.4*. The court remarked that "punitive damages" are not insurable just once in passing. *Baker*, 20 Cal. App. 4th at 925.

Equally misplaced is Allstate's reliance upon *Bodner v. United Servs. Auto. Ass'n* (Conn. 1992), 222 Conn. 480, 610 A. 2d 1212. *Defendant's Merit Brief*, pp. 4 & 8. That opinion involved an arbitration award arising from a claim for uninsured motorist coverage. *Id.* A peculiar feature of the applicable law was that "the punitive damage that [the plaintiff] seeks are common law punitive damages, which in Connecticut are limited to the plaintiff's attorney's fees and nontaxable costs, and thus serve a function that is both compensatory and punitive." *Id.*, 222 Conn. at 492. As previously established, this Court has always treated punitive damages and awards of attorney fees/litigation expenses as separate and distinct, with the only provision that

the additional compensation is available only when the exemplary award has been assessed. *Roberts*, 10 Ohio St. at 282; *Stevenson*, 37 Ohio St. at 19-20; *Smith*, 23 Ohio St. at 18; *Zappitelli*, 114 Ohio St. 3d at 103. Perhaps more significantly, the Connecticut Supreme Court later recognized that the *Bodner* decision had been based upon the state's "uninsured motorist policies" instead of, as Allstate is insinuating, the public policy prohibition against insuring punitive damages. *Quigley-Dodd v. General Acc. Ins. Co.* (2001), 256 Conn. 225, 237-238, 772 A. 2d 577, 585-586. For these same reasons, *Hood v. Great Am. Ins. Co.* (Conn. Super. 2003), 34 Conn. L. Rptr. 449, 2003 W.L. 1962869, is also readily distinguishable.

The glaring absence of any authorities nationwide supporting Allstate's position that legal fees/litigation expenses are uninsurable is likely attributable to the reality that unduly broad public policy prohibitions interfere with the fundamental freedom of contract. Those carriers which identify an advantage to furnishing the broadest protections possible should be permitted (if not encouraged) to do so. Adopting Allstate's result-oriented position would forever preclude any insurer from offering, and any insured from purchasing, coverage in Ohio against awards of attorney fees and litigation expenses. Unscrupulous carriers could even take unfair advantage of their insureds by including promises of such coverage within their policies even though "public policy" will never allow such claims to be paid.

In the end, no sound justification exists for this Court to expand the concept of public policy in the manner that Allstate proposes. The specter of punitive damages will always serve as a deterrent to malicious misconduct, and that is not about to change. When insureds are led to believe, however, that all other forms of "damages" associated with bodily injuries and property losses are going to be covered under the

policies they have purchased, carriers must be held to those promises. Even when awarded upon a demonstration of bad faith or actual malice, attorney fees are still compensatory and potentially insurable. If Allstate believes that it should not have to cover such awards, the carrier only needs to draft the policies accordingly. There thus is no merit to the first Proposition of Law.

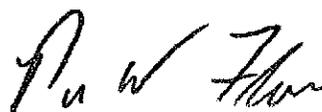
CONCLUSION

The inescapable truth is that the actual terms of Allstate's motor vehicle insurance policy should dictate whether awards of attorney fees and litigation expenses are to be covered. For whatever reasons, no exclusion was included therein which would have warned the policyholders that they were on their own with regard to such routine recoveries. Both R.C. §3937.182(B) and Ohio public policy are limited to punitive damages, which are wholly distinct from the compensatory awards at issue here. This Court should decline the invitation to imply a new exclusion into Allstate's insuring agreement and affirm the Eighth Judicial District in all respects.

Respectfully Submitted,



W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO., L.P.A.



Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.

Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that the forgoing **Brief** was served via regular U.S. Mail on this 10th day of September, 2009 upon:

Thomas M. Coughlin, Jr. Esq.
**RITZLER, COUGHLIN & SWANSINGER,
LTD**
1360 East Ninth Street
1000 IMG Center
Cleveland, Ohio 44114

*Attorney for Defendant-Appellant
Allstate Insurance Company*

Terrance J. Kenneally, Esq.
**TERRENCE J. KENNEALLY &
ASSOCIATES**
20595 Lorain Road
Terrace Level 1
Cleveland, Ohio 44126

*Attorney for Defendant,
Linda Lahman*



W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO., L.P.A.
Attorney for Plaintiff-Appellee