

ORIGINAL

IN THE SUPREME COURT OF OHIO

NATIONWIDE MUTUAL
INSURANCE COMPANY

Appellant

vs.

COREY M. BRIGGS

Appellee

Case No. 10-0114

On Appeal from the Stark
County Court of Appeals
Fifth Appellate District

Court of Appeals
Case No. 2009 CA 00108

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, NATIONWIDE MUTUAL INSURANCE COMPANY**

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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This is a case of public or great interest because there presently exists a conflict between the various courts of appeals concerning the application of the exclusion for criminal acts as found in the homeowner's policy of insurance.

In the Fifth District Court of Appeal's Opinion/Judgment Entry filed December 7, 2009, it was held that Nationwide's "criminal acts" homeowner's policy exclusion was not valid and enforceable as applied to Cory Briggs – an individual who, after a no-contest plea, was found guilty of possession and discharge of fireworks in violation of municipal ordinances.

This is in contrast to four decisions out of three different appellate districts:

1. *Allstate Insurance Company v. Ray*, Seventh District, Case No. 96 CA 20, 1998 Ohio App. LEXIS 6189.
2. *Gunter v. Meacham*, Ninth District, 1995 Ohio App. LEXIS 4151.
3. *American Family Insurance Company v. Annett Scott*, Second District, CA Case No. 07-CA-28, 2008 Ohio 1865, 2008 Ohio App. LEXIS 1589.
4. *Allstate Insurance Company v. David Cartwright*, Second District, Case No. 15472 and Case No. 154783, 1997 Ohio App. LEXIS 2920.

The language contained in the Nationwide policy is not unique to the Nationwide policy. While the Fifth District attempted to distinguish its decision from those of the other appellate districts by stating that the other cases involve situations in which the criminal acts exclusion contains language the wrongdoer knew or ought to

have known damage or injury would result from his or her act, this is inaccurate. None of the cases decided by the other districts involved a criminal acts exclusion which contained language which required that the wrongdoer knew or ought to have known damage or injury would result from his or her act.

Therefore, it is of great public interest for this court to enunciate a standard by which all courts in the state of Ohio will know that a criminal acts exclusion is valid and enforceable.

Both the trial court and the Fifth District Court of Appeals recognized the public policy consideration that the extension of liability insurance coverage for criminal activity would encourage anti-social behavior through shifting monetary responsibility from the perpetrator to the insurance carrier

Other Courts of Appeal have recognized this basic public policy consideration by determining that the "criminal acts" exclusion is enforceable whether or not the insured is actually charged with a crime. In *Allstate Insurance Company v. Ray*, Seventh District, Case No. 96 CA 20, 1998 Ohio App. LEXIS 6189, the Seventh District found the exclusion which stated: "This exclusion applies regardless of whether the insured person is actually charged with, or convicted of, a crime." to be valid and enforceable. None of the exclusionary language contained in the policies interpreted by the other Districts included language which required that the wrongdoer "knew or ought to have known damage or injury would result from his or her act" is simply not true.

Nationwide has filed, in the Fifth District, a Motion to Certify Conflict. Said Motion, as of the drafting of the foregoing Brief, has not been ruled on. The Motion,

however, has not been opposed.

STATEMENT OF THE CASE

Appellant Nationwide sued Appellee Briggs seeking declaratory relief. Appellant filed a Motion for Summary Judgment. The Motion for Summary Judgment of Appellant was denied. No other party filed a Motion for Summary Judgment. Specifically, Appellee did not file a Cross Motion for Summary Judgment. Rather, Appellee only filed an opposition to Appellant's Motion for Summary Judgment. The trial court, however, overruled Appellant's Motion for Summary Judgment, and determined that Appellant owed coverage to Appellee Briggs. Appellant, in a timely manner, initiated an appeal. The Fifth District affirmed the trial court's denial of Nationwide's Summary Judgment Motion. Nationwide has filed a Notice of Appeal to this Court, respectfully requesting that jurisdiction be accepted.

STATEMENT OF FACTS

The incident which underlies this case occurred on or about July 3, 2007 in Massillon, Ohio. Cory Briggs discharged fireworks which resulted in a fire and significant property damage, as well as personal injury ("the incident").

As a result of the incident, Briggs was charged with violation of the following offenses prohibited by City of Massillon ordinances:

- possession of fireworks; and
- discharge of fireworks

Briggs pled no contest to the charges and was found guilty by Judge Keller of the Massillon Municipal Court.

At the time of the incident, there was in effect a Nationwide homeowner's policy of insurance ("the policy"). The named insureds were Kenneth and Peggy Briggs. Kenneth and Peggy Briggs are the parents of Cory Briggs.

Nationwide has accepted that Cory Briggs met the definition of an "insured" under the policy.

The issue in the case is whether Cory Briggs is entitled to homeowner's insurance under the policy for the incident. The pertinent policy language is as follows:

Section II – Liability Coverages
Coverage E – Personal Liability

We will pay damages an insured is legally obligated to pay due to an occurrence resulting from negligent personal acts or negligence arising out of the ownership, maintenance or use of real or personal property.

The term "occurrence" is defined at page G1 of the policy as follows:

Occurrence means **bodily injury or property damage** resulting from an accident, including continuous or repeated exposure to the same general condition. The **occurrence** must be during the policy period.

The term "bodily injury" is defined in the definitions section, at page G1 of the policy as follows:

"Bodily injury" means bodily harm, including resulting care, sickness or disease, loss of services or death. **Bodily injury** does not include emotional distress, mental anguish, humiliation, mental distress or injury, or any similar injury unless the direct result of bodily harm.

The term “property damage” is defined in the definitions section, at page G1 of the policy as follows:

“Property damage” means physical injury to or destruction of tangible property. This includes its resulting loss of use.

The following exclusions, in pertinent part, are included in Section II – Liability

Exclusion at page H1 of the policy:

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 he insured knows or ought to know will follow 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. applied regardless of whether the **insured** is actually charged with, or convicted of a crime.

LAW AND ARGUMENT

Proposition of Law No. I: 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 pertinent policy language in the policy which supports Nationwide’s position is as follows:

1. Coverage E - Personal Liability, and Coverage F -- Medical Payments to others do not apply to **bodily injury** or **property damage**:

* * * * *

- b. caused by or resulting from an act or omission which is criminal in nature and committed by an **insured**.

This exclusion 1.b. applied regardless of whether the **insured** is actually charged with, or convicted of a crime.

As evidenced by his plea and subsequent finding of guilt, Cory Briggs' acts/omissions in possessing and discharging the fireworks were criminal in nature. Consequently, coverage is excluded for the incident based upon the exclusionary language which eliminates coverage for bodily injury or property damage "caused by or resulting from an action or omission which is criminal in nature and committed by an insured . . . regardless of whether the insured is actually charged with or convicted of a crime."

If this case were decided in the other Districts identified supra, it would be determined that Cory Briggs was not entitled to coverage under the Nationwide policy.

The Allstate policy involved in the *Ray*, supra, case contained nearly identical language to the exclusionary language relied on by Nationwide in the instant case. The Allstate exclusionary language in the *Ray* supra, case was as follows:

2. We do not cover bodily injury or property damage resulting from:
 - a) criminal act or omission; * * *

This exclusion applies regardless of whether the insured person is actually charge with, or convicted of, a crime.

In this regard, the *Ray* court stated:

The criminal acts exclusion unequivocally precludes from recovery any injury resulting from a criminal act or omission regardless of whether the insured is convicted or charged of a criminal offense. Such exclusions have long been supported in that providing insurance coverage for criminal acts would encourage anti-social behavior by shifting the financial burden away from the wrongdoer. *Harasyn v. Normandy Metals, Inc.* (1990) 49 Ohio St.3d 173, 176, 551 N.E.2d 962. As a separate exclusion under the policy, the criminal acts exclusion applies regardless of the intentional acts exclusion.

In the Ninth District case of *Gunter v. Meacham*, Ninth District 1995 Ohio App. LEXIS 4151, the Allstate exclusion, is essentially, identical to the Nationwide exclusion at issue in the instant case. The Allstate exclusion in *Gunter*, supra, stated as follows:

* * *

2. We do not cover bodily injury or property damage resulting from:
 - a). A criminal act or omission.

The *Gunter* court refused to invalidate the “criminal acts” exclusion as being against public policy because it was an alleged “blanket” exclusion. Rather, in upholding the application of the “criminal acts” exclusion the appellate court cited the public policy in not allowing “barroom brawlers” to shield themselves from the financial consequences of their actions by being able to rely on insurance coverage to protect them for their criminal actions.

CONCLUSION

WHEREFORE, Appellant, Nationwide Mutual Insurance Company, hereby moves this Court for an order granting it a discretionary appeal in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent postage prepaid via regular U.S. Mail to the following on this 19th day of January, 2010:

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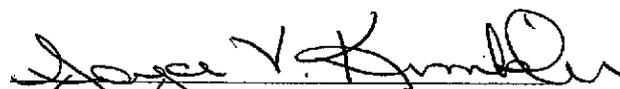
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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY S. REINHOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

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NATIONWIDE MUTUAL INSURANCE
COMPANY

Appellant

-vs-

CORY M. BRIGGS

Appellee

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 2009 CA 00108

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Case No. 2008 CV 01747

JUDGMENT:

Affirmed

Haas

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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For Appellee

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A TRUE COPY TESTE:
NANCY S. REINHOLD, CLERK
By *T.F. [Signature]* Deputy
Date *12/9/09*

6

Hoffman, J.

{¶1} Plaintiff-appellant Nationwide Mutual Insurance Company ("Nationwide") appeals the April 9, 2009 Judgment Entry entered by the Stark County Court of Common Pleas, overruling its motion for summary judgment and finding defendant-appellee Cory M. Briggs entitled to coverage by Nationwide.

STATEMENT OF THE FACTS AND CASE

{¶2} Sometime in mid-June, 2007, Appellee purchased approximately \$170 worth of fireworks, including bottle rockets and smoke grenades. At approximately 9:30 or 10:00pm on July 3, 2007, Appellee and his friend, Quinton Paulik, were watching television and playing video games. Sometime after 10:00pm, Appellee and Paulik went outside and observed some neighborhood children shooting off little firecrackers in a nearby field. A middle school formerly occupied the space.

{¶3} Appellee went inside and retrieved some of the fireworks he had previously purchased. Appellee positioned himself in the middle of the field to shoot off some of the larger sized bottle rockets. The first bottle rocket went up in to the air about twenty yards, made a ninety degree angle, and flew into the garage of a nearby house. In his deposition, Appellee stated his intention was for the bottle rocket to travel straight into the air. Five or six of the children who had been outside shooting off firecrackers ran over to the garage. Appellee grabbed the remainder of his fireworks and returned them to the house. When he came back inside, he observed a small flame at the back of the garage. Appellee started running toward the garage, screaming for someone to dial 911. Appellee also yelled for the occupants of the house to get out. Attempts to squelch the fire with a garden hose were unsuccessful.

{114} Appellee was subsequently charged with possession of fireworks, and discharge of fireworks, in violation of City of Massillon Ordinances 1519.04(a) and (b). Appellee entered pleas of no contest to the charges and was found guilty.

{115} At the time of the incident, Kenneth and Peggy Briggs, Appellee's parents, were the named insureds in a Nationwide homeowner's policy, which was in full force and effect at the time of the incident. Nationwide does not dispute Appellee falls within the definition of "insured" under the policy. Nationwide does, however, dispute whether Appellee is entitled to coverage. Accordingly, on April 8, 2008, Nationwide filed a Complaint for Declaratory Judgment. Appellee filed an Answer and Counterclaim for Declaratory Judgment. On January 26, 2009, Nationwide filed a Motion for Summary Judgment. Appellee filed a motion in opposition thereto. Via Judgment Entry filed April 9, 2009, the trial court overruled Nationwide's motion for summary judgment, finding Appellee was entitled to coverage.

{116} It is from this judgment entry Nationwide appeals, raising the following assignment of error:

{117} "I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT HAS NEITHER A DUTY TO DEFEND NOR A DUTY TO INDEMNIFY APPELLEE, CORY M. BRIGGS, FOR THE INCIDENT WHICH IS THE SUBJECT OF THE INSTANT CASE."

{118} In its sole assignment of error, Nationwide contends the trial court erred in denying its motion for summary judgment as it had neither a duty to defend nor a duty to indemnify Appellee under the provisions of the insurance policy. Specifically,

Nationwide argues, because Appellee's possession and discharge of the fireworks was criminal in nature, coverage under the policy for the incident is excluded. We disagree.

{¶9} Section II – Liability exclusions of the Policy provides, in pertinent part:

{¶10} "1. Coverage E – Personal Liability, and Coverage F – Medical Payments to others do not apply to bodily injury or property damage:

{¶11} "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

{¶12} "b) caused by or resulting from an act or omission which is criminal in nature and committed by an insured.

{¶13} "This exclusion 1.b. applies regardless of whether the insured is actually charged with, or convicted of a crime."

{¶14} Nationwide submits Ohio courts have found "criminal acts exclusions to be valid and enforceable, and not violative of public policy. Nationwide cites *American Family Mut. Ins. Co. v. Annette Scott*, 2nd Dist. App. No. 07CA28, 2008 Ohio 1865; and *Allstate Ins. Co. v. Cartwright*, 2nd Dist. App. No. 15472 and 154783, unreported.

{¶15} As noted by the trial court, criminal acts exclusions have long been accepted based upon the rationale providing insurance coverage for criminal acts would encourage anti-social behavior by shifting the financial burden away from the wrongdoer. However, the trial court found and we agree, 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 or injuries which are accidental or

result from mere negligent conduct. The cases relied upon by Nationwide involve situations in which the criminal acts exclusion contains language the wrongdoer knew or ought to have known damage or injury would result from his or her act.

{¶16} Based upon the foregoing, we find the trial court appropriately denied Nationwide's motion for summary judgment, finding the criminal acts exclusion as applied to Appellee was overly broad as applied to Appellee in this case.

{¶17} Nationwide's sole assignment of error is overruled.

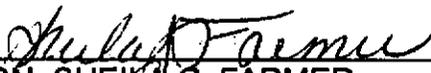
{¶18} The judgment of the Stark County Court of Common Pleas is affirmed.

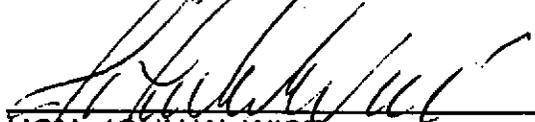
By: Hoffman, J.

Farmer, P.J. and

Wise, J. concur


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER


HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY
FIFTH APPELLATE DISTRICT

NANCY S. REINGOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

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NATIONWIDE MUTUAL INSURANCE
COMPANY

Appellant

-vs-

CORY M. BRIGGS

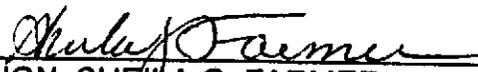
Appellee

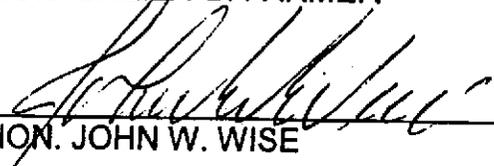
JUDGMENT ENTRY

Case No. 2009 CA 00108

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER


HON. JOHN W. WISE