

ORIGINAL

IN THE SUPREME COURT OF OHIO

NATIONWIDE MUTUAL)	CASE NO. 10-0114
INSURANCE COMPANY)	On Appeal from the Stark
Appellant)	County Court of Appeals
)	Fifth Appellate District
vs.)	
)	
COREY M. BRIGGS)	Court of Appeals
Appellee)	Case No. 2009CA00108

MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE, COREY M BRIGGS

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EXPLANATION OF WHY THIS CASE IS NOT
A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This is not a case of public or great general interest because there does not exist 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 Appeals' Judgment Entry filed on January 21, 2010, it was determined that Appellant Nationwide Mutual Insurance Company's Motion to Certify a Conflict between their opinion and opinions issued by other courts of appeals was overruled. They held that upon their review of the cases cited by Appellant, that those cases were factually distinguishable from the instant action.

Furthermore, the Fifth District Court of Appeals' Opinion/Judgment Entry filed December 7, 2009, held that 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 Fifth District Court of Appeals found that the policy language issue herein to be overly broad as it applies 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 Fifth District Court of Appeals goes on to say that the cases relied upon by Appellant involve situations 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.

Appellant's reason for denying its insured a defense and excluding coverage is

based solely upon Appellee's conduct being criminal in nature. Therefore, as to Appellee's response to Appellant's Memorandum we will respond only to this issue which Appellee disputes that his conduct was criminal in nature.

The cases cited by Appellant, in support of its position regarding exclusion of coverage for this incident, clearly reflect an intentional act on the part of the insured. The cases referred to in Appellant's Memorandum display an act committed by the insured in which the act itself is criminal in nature due to the fact that the insured's acts would directly cause the specific result.

The cases that Appellant mentions are clearly distinguishable from the facts in this case. The conduct of Appellee was not intentional but negligent. Appellee's negligence was the proximate cause of the damage that occurred.

For instance, in *Allstate Insurance Company v. Wolff* (June 27, 1997), 2nd Dist. No. 15472, the Court held that the criminal act exclusion was enforceable when the insured committed a crime and that harm was reasonably expected to result from the crime. However, in *Wolff*, the exclusion contained the language that Allstate does not cover bodily injury "which may be reasonably expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person." *Id.* The court cautioned that while it is true that public policy disfavors insuring for certain injuries stemming from certain criminal acts, it surely does not prohibit coverage for all injuries resulting from any criminal act. Of course, public policy does not, for example, prohibit insurance coverage for unexpected injuries stemming from minor traffic offenses or crimes based upon only negligent acts.

There is no strong public policy justification for applying the criminal acts exclusion in the Nationwide policy to the acts giving rise to the instant action. The exclusion is not restricted to injuries or damage that are reasonably expected but encompass accidents resulting from negligent conduct. "If the maxim, that no man shall profit from his own wrong [or criminal act], be applied liberally, then the slightest negligence [or most minor offence] *** would bar recovery. Such a result would be recognized generally as impractical and unjust." *Id.* citing *Three Sons, Inc. v. Phoenix Ins. Co.* (1970), 257 N.E. 2d 774, quoting *Minasian v. Aetna Life Ins. Co.* (1936), 3N.E. 2d 17.

Appellee's conduct was not criminal in nature. The act took place during the Independence Day celebration when it is socially accepted behavior that fireworks are to be discharged. Appellee took the necessary precautions when discharging the fireworks by going to an open field, where a school once sat, and a parking lot was located adjacent to the field. He stuck the bottle rocket into the ground, he lit it, and it went up in the air about 15-20 yards and took a 90 degree angle. Appellee immediately stopped discharging the fireworks, and put the remainder of the fireworks inside the premises. When Appellee came back out of the premises, he saw a flame in the back of a garage of an adjacent house. He put his own life in peril by using a hose to try and put out the flame. Based upon Appellee's actions and reactions it is obvious his conduct was prohibited and negligent, but not criminal in nature, and for these reasons he was not charged with criminal damage or arson which are clearly offenses that could be considered criminal in nature.

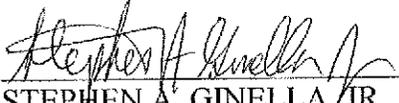
Furthermore, the Complaint filed against Appellee dealt with one criminal offense that being a violation of Massillon City Ordinance Section 1519.04 - Possession Sale or

Discharge Prohibited, Exception. Appellee pled no contest to a violation of Massillon City Ordinance Section 1519.04 and was found guilty by Judge Mack. Appellee could only be sentenced under one subsection of the Massillon City Ordinance in which it is not clear from court entries journalizing plea and conviction/disposition which subsection of the ordinance he was found guilty of.

Therefore, the criminal in nature exclusion should not be considered in this incident since there is a clear absence of criminal intent which would make the exclusion language too broad and against public policy. The acts of Appellee may be wrongful but not culpable. The policy never defines what is criminal in nature making the exclusion vague and ambiguous in an attempt by Appellant to rely on this language to avoid their contractual obligation to their insured to provide coverage for the type of conduct present in this case and similar situations.

CONCLUSION

WHEREFORE, Appellee, Corey M. Briggs, hereby request this Court to deny Appellant Nationwide Mutual Insurance Company, an order granting it a discretionary Appeal in this case.


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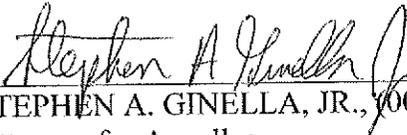
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