

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| 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 |

APPELLEE'S MOTION TO DISMISS
 APPELLANT, NATIONWIDE INSURANCE COMPANY'S APPEAL

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Now comes the Appellee, Corey M. Briggs, by and through counsel and moves this Court to dismiss the Appeal of Appellant, Nationwide Mutual Insurance Company.

Appellant in their Merit Brief filed with this Court is now asserting that the doctrine of inferred intent applies to an intentional act exclusion in a liability insurance policy beyond instances of sexual molestation or homicide where undisputed facts objectively establish harm was substantially certain to occur as a result of the insured's conduct.

Appellant's argument was never raised in the lower courts, even though such an argument was available to them.

Appellant's only argument in the lower courts was that Appellee's possession and discharge of the fireworks was criminal in nature, and therefore coverage under the policy for the incident is excluded. The Fifth District Court of Appeals disagreed, by holding that 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 Appellant 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/her act.

Another argument for why this case should be dismissed is for the reason that on April 14, 2010 this Court declined jurisdiction to hear the case. The Appellant, Nationwide Mutual Insurance Company on or about April 23, 2010 filed a Motion for Reconsideration of Appellant, Nationwide Mutual Insurance Company. In their motion they rely upon the doctrine of inferred intent, again an issue that was never raised by

Appellant in the lower courts. Based solely upon the Appellant's argument of the doctrine of inferred intent this Court granted the motion for reconsideration and accepted the appeal.

WHEREFORE, Appellee requests this Court to dismiss Appellant's appeal for the reason that the Proposition of Law raised in Appellant's Merit Brief was never raised in the lower courts.

Respectfully Submitted,



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