

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.)	
)	Court of Appeals
COREY M. BRIGGS)	Case No. 2009 CA 00108
)	
Appellee)	

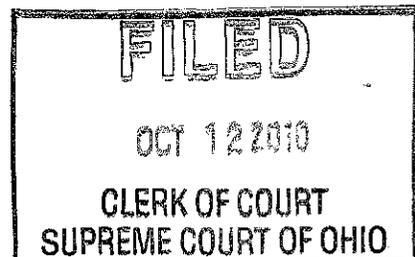
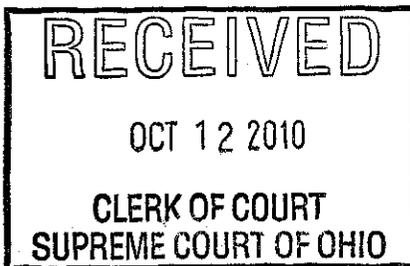
**APPELLANT, NATIONWIDE MUTUAL INSURANCE
COMPANY'S RESPONSE TO MOTION TO DISMISS**

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This matter is before the Court upon the motion of Appellee, Cory M. Briggs, to dismiss the appeal of Appellant, Nationwide Mutual Insurance Company. The motion is premised upon the misconception that the issue accepted by this court for review:

Proposition of Law No. 1:

The doctrine of inferred intent applies to an intentional act exclusion in a liability insurance policy and extends to cases beyond sexual molestation and homicide where undisputed facts establish harm was substantially certain to occur as a result of the insured's conduct.

was never raised in the lower court and that the Appellant's only argument in the lower court 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.

Appellant's motion is incorrect both factually and legally.

Factually, a review of the briefs filed in the courts below reveals that from the very beginning Appellant argued that 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.

This is the exact same exclusion argued by Appellant in Appellant's merit brief in this matter filed on September 6, 2010.

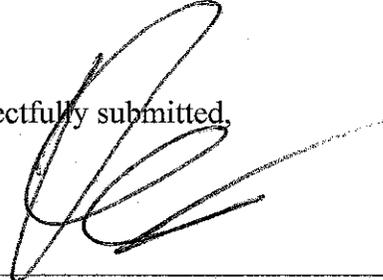
Legally, a discretionary review in the Supreme Court is not concerned with mere appellate error. On the contrary, the decision to accept discretionary review is guided by issues that affect public and great general interest. The application of the doctrine of inferred intent is one such issue.

The doctrine of inferred intent was implicitly raised in the application of the policy exclusions to the facts in this matter. This is not a situation in which insurance coverage is eliminated where an insured violates a minor traffic regulation. This is not a situation where the criminal charge arises out of action that was originally legal, such as the operation of a motor vehicle, and through some act of negligence became illegal; to wit: the minor traffic violation. This is a situation where the original action, the purchase of fireworks in violation of state and local laws, was illegal. This is clearly the situation in which the act of the insured was criminal in nature from the very beginning. In such a situation, the doctrine of inferred intent should be applied because the initial act of the insured was a criminal act. Because the doctrine of inferred intent is implicit in the analysis of these exclusions, it was part and parcel of the underlying analysis by both the trial court and the court of appeals even if the precise terminology, "inferred intent," was not used. Appellate counsel is not responsible for predicting the exact development of the law in an area marked by conflicting holdings.

It is interesting to note that Appellee did not raise this issue in response to

Appellant's Motion for Reconsideration. It can only be deduced that the reason this issue was not raised earlier is that the implicit nature of this issue was apparent to counsel for Appellee. The appropriate time to raise this issue has passed. This Court should now DENY the Appellee's Motion to Dismiss and allow this matter to proceed on the merits.

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 11th day of October, 2010:

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