ORIGINAL

IN THE SUPREME COURT OF OHIO

NATIONWIDE MUTUAL INSURANCE COMPANY	)	Case No. 10-0114
Appellant	)	On Appeal from the Stark County Court of Appeals Fifth Appellate District
vs.	)	
COREY M. BRIGGS	)	Court of Appeals Case No. 2009 CA 00108
Appellee	)	

REPLY BRIEF OF APPELLANT,
NATIONWIDE MUTUAL INSURANCE COMPANY

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RESPONSE TO APPELLEE'S ARGUMENTS

I. APPELLEE MISCHARACTERIZES THE APPELLANT'S POSITION.

The premise of the entire brief of the Appellee is set forth at p. 1 of the Appellee's argument in which the Appellee states: "Nationwide did not, however, deny coverage to Mr. Briggs under this intentional act exclusion."

Consistently, throughout this litigation, Nationwide has premised its denial of coverage under Section II – Liability Exclusion at page H1 of the policy, Coverage E – Personal Liability bodily injury exclusion which includes both intentional acts and criminal acts:

> 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 the 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.

The issue in this matter to be determined by the Court is not whether this falls under section 1 a. or section 1 b. but rather, when the doctrine of inferred intent applies under such sections. If this court determines that coverage is excluded when the act of the insured is criminal in nature and intent exists either because there is evidence of

either actual intent or inferred intent based upon the nature of the criminal act, there is no ambiguity in either the law or the policy.

II. PUBLIC POLICY SUPPORTS INTERPRETATION OF THE PHRASE "CRIMINAL IN NATURE" TO INCLUDE BOTH SITUATIONS IN WHICH THERE IS EITHER A SPECIFIC INTENT TO HARM OR WHERE HARM IS SUBSTANTIALLY CERTAIN TO OCCUR.

As stated by this court in *Saunders v. Mortensen*, 101 Ohio St.3d 86, "We have long held that a contract is to be read as a whole and the intent of each part gathered from a consideration of the whole. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361, 1997 Ohio 202, 678 N.E.2d 519. If it is reasonable to do so, we must give effect to each provision of the contract. *Expanded Metal Fire-Proofing Co. v. Noel Constr. Co.* (1913), 87 Ohio St. 428, 434, 101 N.E. 348."

Applying this principle to the case at bar, it is obvious that the purpose of Section II – Liability Exclusion at page H1 of the policy, Coverage E is to exclude coverage in those instances where the act of the insured was intentional, whether actual or inferred, including those caused by or resulting from a criminal act.

It is important to distinguish that the act of the Plaintiff in this matter started out as a criminal act. Except as set forth by statute, it is a criminal act for individuals in the State of Ohio to possess and/or discharge fireworks. This is not a situation where the original act, such as driving a car, is not criminal in and of itself and only becomes criminal upon some negligent statutory violation. This is a situation where the act from its inception was criminal.

Therefore, Appellee's argument at pp. 2 and 3 of it's brief: "Nationwide wants this Court to interpret 'criminal in nature' to encompass any negligent act which also happens to violate a municipal ordinance. Thus, Nationwide argues for an extremely broad interpretation of 'criminal in nature' requiring neither an intent to harm another before coverage is excluded or that harm is substantially certain to occur before coverage is excluded" is simply not accurate.

III. BECAUSE APPELLEE'S UNDERLYING PREMISE AS TO NATIONWIDE'S POSITION IS INACCURATE, THE SCENARIOS SET FORTH IN SECTION (2) OF THE APPELLEE'S MERIT BRIEF ARE NOT APPLICABLE.

In section (2) of the Appellee's brief, starting at p. 3, Appellee sets forth a nightmare of scenarios in which people would be denied insurance coverage for accidental violations of municipal ordinances which result in injury or damage to another. However, there is no basis for this reading of the exclusion.

Again, reading the policy as a whole, it is the definition of "occurrence" – as "an accident" – that brings negligence actions within the scope of coverage.

Nationwide has consistently argued that there is no coverage in this situation because the result of Appellee's act was not an "occurrence" as that term is defined by the policy. The Nationwide policy at issue provides in pertinent part:

> 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.

Regardless of whether the analysis is based upon whether an insurable "occurrence" is present or whether an intentional act exclusion is applicable, or whether the "criminal acts" exclusion is applied, the conclusion is the same – coverage is not available where inferred intent is present.

IV. THE ARGUMENTS PRESENTED BY NATIONWIDE HAVE BEEN CONSISTENT FROM THE MOTION FOR SUMMARY JUDGMENT FILED IN THE TRIAL COURT THROUGH THE ASSIGNMENTS OF ERROR PRESENTED TO THE COURT OF APPEALS TO THE PRESENT ISSUE BEFORE THIS COURT.

Essentially, the issue presented by Nationwide at each stage of the proceedings is whether there should be insurance coverage when it can be inferred from the nature of the insured's conduct that harm was substantially certain to occur as a result of the insured's conduct. If the doctrine of inferred intent can be used to establish "intentional conduct" in situations beyond instances of sexual molestation or homicide, it does not matter whether the coverage is denied because there was no "occurrence" giving rise to coverage in the first place or because either the "intentional acts" exclusion or the "criminal acts" exclusion is applied, the result is the same.

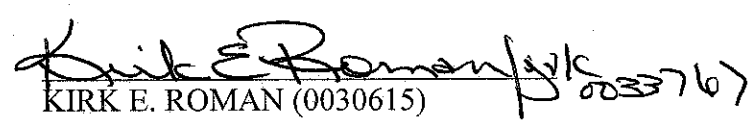
Appellee knew, or ought to have known, given all of the above circumstances that it was substantially certain, property damage and/or bodily injury would result from his intentional act of discharging the fireworks from either a subjective or objective

standpoint. It is for this reason that Nationwide denied coverage under the Nationwide policy to Appellee. All of the various policy provisions, when read as a whole, reinforce the position that when there is intent, whether actual or inferred, there is no liability coverage under the policy of insurance.

CONCLUSION

Appellant respectfully requests that the Court of Appeals' judgment entered in favor of Appellee Briggs be reversed and that judgment be entered in favor of Appellant Nationwide thereby ordering that Appellant Nationwide does not have a duty to defend or indemnify Appellee Briggs for the incident and establishing the Proposition of Law 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.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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