ORIGINAL

IN THE OHIO SUPREME COURT

KIMBERLY NEAL-PETTIT, Plaintiff(s) v. LINDA LAHMAN, et al., Defendant(s)	Supreme Court Case No. 2009-0325 On Appeal from 8th Dist. App. Case No. 91551

DEFENDANT-APPELLANT ALLSTATE INSURANCE COMPANY'S BRIEF ON THE MERITS

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I. STATEMENT OF THE FACTS.

This matter arises out of a motor vehicle accident between Plaintiff-Appellee Kimberly Neal-Pettit and Defendant Linda Lahman. Lahman was cited and convicted of DUI as a result of this accident.

The underlying matter went to trial and a jury returned a verdict against Lahman for compensatory damages totaling $113,800, punitive damages totaling $75,000. (Judgment Entry dated July 31, 2006 (attached as **Appendix A**); Supplemental Complaint at ¶8). In addition, the Jury found that Lahman acted with malice, and awarded attorney fees in the amount of $46,825.00 as part of a punitive damages award. (Judgment Entry dated March 22, 2007 (attached as **Appendix B**); Supplemental Complaint at ¶8).

Lahman maintained motor vehicle insurance through Defendant-Appellant Allstate Insurance Company ("Allstate"). Therefore, Allstate promptly paid the compensatory damage award, interest and costs. (Supplemental Complaint at 7, 9). Allstate has paid, on behalf of Lahman, all amounts due and owing to the plaintiff except for the punitive damage award and the attorney fees arising out of the punitive damage award. (Supplemental Complaint at ¶10). Plaintiff has never claimed that Allstate must pay the $75,000 punitive damage award, but Plaintiff claims that Allstate is liable for attorney fees that were awarded as part of the punitive damage award.

Plaintiff filed a supplemental complaint against Allstate seeking payment for the attorney fee portion of the punitive damages award. (See, generally, Supplemental Complaint; Allstate's Motion for Summary Judgment and Brief in Opposition to Ms. Neal-Pettit's Motion for Summary Judgment). Allstate has steadfastly denied liability for the attorney fees. (Answer to Supplemental Complaint). Allstate has no duty under the contract, and in fact it would violate

public policy, to pay the attorney fee portion of the punitive damage award on behalf of Lahman. (See, generally, Allstate's Motion for Summary Judgment).

The Trial Court set a briefing schedule on the issue and on May 6, 2008 entered summary judgment for Plaintiff and against Allstate on the sole issue of liability for payment of the attorney fee portion of the punitive damage award. (Judgment Entry dated May 6, 2008, attached as **Appendix C**). Allstate timely appealed the Trial Court's judgment as it is against public policy for an insurance company to pay any portion of a punitive damage award, and Allstate did not contract to pay any such award on behalf of Lahman. (Notice of Appeal to the Eighth District; Docketing Statement).

The Eighth District affirmed the decision of the Trial Court. (A copy of said decision by the Eighth District ("Decision"), attached hereto as **Appendix D**). The Eighth District found that the Allstate policy did not preclude coverage for the attorney fees even though such an award was only possible where punitive damages were awarded, and even though the policy expressly excludes any "punitive or exemplary damages, fines or penalties." (Decision at p. 2). The Eighth District conceded that such fees "are undeniably punitive in nature," but inexplicably concluded that attorney fees awarded as part of a punitive damage award are "conceptually distinct from punitive damages." (*Id.*[1]) As attorney fees were not expressly stated in the policy exclusion - even though they clearly fell within the excluded categories of "punitive or exemplary damages, fines or penalties" and did not fall under the expressly defined coverage - the Eighth District found that such fees would be covered under the policy. (*Id.*) The Court

[1] It is a matter of express public policy that insurance coverage is available to cover the risk of the insured's negligence, but not the risk of his or her willful act, including attorney fees that are awarded as part of the damages for such willful actions. *Baker v. Mid-Century Insurance Company* (1993), 20 Cal.App.4th 921.

curiously interpreted R.C. 3937.182(B) to allow the paying of the portion of the punitive damages award for attorney fees because the statute prohibited the payment of "punitive damages" and did not specifically list the items that could comprise a punitive damage award, such as attorney fees. (*Id.* at 3.)

The Eighth District's decision ignores both the purpose of the public policy against insuring punitive damages awards and as the fact that such attorney fees can only be awarded as an aspect of a punitive damage award. The Eighth District further failed to consider the express language in the insurance contract that only provides coverage for bodily injury or property damage. The policy simply does not provide for the payment of attorney fees awarded as part of a punitive damage claim, as such fees are penalties or fines arising out of a punitive damage award.

The Eighth District's ruling contradicts the clear public policy in Ohio that insurance companies cannot pay punitive damage awards. Moreover, the Eighth District's ruling improperly places the punishment for the tortfeasor's actions upon their insurer, and will burden all Ohioans who purchase the mandatory vehicular liability policies, as the cost of such awards will lead to increased premiums. For all of the reasons contained herein, Allstate has timely filed this Appeal. (See Notice of Appeal, attached hereto as **Appendix E**).

II. LAW AND ARGUMENT.

A. <u>Proposition of law No. I:</u> It is against public policy for an insurance company to pay an award of attorney fees as an element of a punitive damage award against an intoxicated driver.

It is against public policy in Ohio for an insurance company to pay any part of a punitive damage award.

Punitive damages, by definition, are given to punish a tortfeasor for wanton, malicious or oppressive behavior, and are designed to deter others from acting in the same manner. See

Trainor v. Deters (1969), 22 Ohio App.2d 135, 139. While an insurance company may be liable for punitive damages based upon its own conduct, an insurance contract cannot insure a person against a punitive damage claim based upon the insured's conduct. *Wedge Products, Inc. v. Hartford Equity Sales Co.* (1987), 31 Ohio St.3d 65, 67; *Lumbermens Mut. Cas. Co. v. S-W Industries, Inc.* (1994), 30 F.3d 1324; R.C. 3937.182(B). In fact, the Revised Code specifically states that:

> No policy of automobile or motor vehicle insurance that is covered by sections 3937.01 to 3937.17 of the Revised Code, including, but not limited to, the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in such a policy as authorized by section 3937.18 of the Revised Code, and that is issued by an insurance company licensed to do business in this state, and no other policy of casualty or liability insurance that is covered by sections 3937.91 to 3937.17 of the Revised Code and that is so issued, shall provide coverage for judgments or claims against an insured for punitive or exemplary damages.

R.C. 3937.182(B), (attached as **Appendix F**).

The attorney fees at issue were only available as part of the punitive damage award. There was no statutory or contractual authority to otherwise provide for attorney fees in this matter. If a person is involved in a motor vehicle accident, where no punitive damage award is available, they would not be able to recover their attorney fees, even though they may have been injured in the exact same manner and to the exact same degree as the plaintiff at issue herein. "If compensation was the purpose of an award of attorney fees then such attorney fees would be awarded in all cases and not only those involving willful and reckless misconduct." *Bodner v. United Services Automobile Association* (1994), 222 Conn. 480, 500. See also, *Hood v. Great American Insurance Co.* (2003), 34 Conn. L. Rptr. 449, 2003 WL 1962869 (attached as **Appendix G**).

In her Memorandum in Opposition to Allstate's Motion for Summary Judgment, Plaintiff cited to a myriad of cases claiming that attorney fees can be paid as compensatory damages. *Id.*

at 3. But in each case so cited, the issue was not who had to pay, but rather how to classify the award to the plaintiff. In the instant matter, the question is whether it is against public policy for an insurance carrier to pay an award of attorney fees that arise solely out of a punitive damage claim. None of Plaintiff's cases even considered this issue. See: *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St.2d 178 (finding no award of punitive damages or a derivative claim of attorneys fees was warranted in that case); *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 1994-Ohio-461 (Insurer liable for punitive damage due to its own bad faith); *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 2000-Ohio-7 (Seller of real estate liable for punitive damages due to its own fraud); *Zappitelli v. Miller* (2007), 114 Ohio St.3d 102, 2007-Ohio-3251 (holding that attorney fees can only be awarded if punitive damages were awarded against vendors of residence); *Maynard v. Eaton Corp.* (April 23, 2007), Marion County App. No. 9-06-33, 2007-Ohio-1906 (Employer liable for punitive damages due to its own intentional tort against employer); *Wright v. Suzuki Motor Corp.* (June 27, 2005), Meigs County App. Nos. 03CA2, 03CA3, 03CA4, 2005-Ohio-3494 (Motorcycle dealership was required to pay punitive damage award due to its own actions regarding product liability claim); *Waters v. Allied Mach. & Eng. Corp.* (April 30, 2003), Tuscarawas App. Nos. 02AP040032 and 02AP040034, 2003-Ohio-2293 (Employer liable for punitive damages due to its own creation of a hostile work environment); *Brookover v. Flexmag Indust., Inc.* (April 29, 2002), Washington County App. No. 00CA49, 2002-Ohio-2404 (Employer liable for punitive damages due to its own intentional tort against employee). Not one case cited by Plaintiff required an insurance carrier to pay the attorney fee portion of the punitive damage award that arose out of its insured's willful or intentional conduct.

The legislature has spoken - insurance against one's own willful or intentional conduct is against public policy as it would encourage wrongful behavior without any meaningful

consequence for such wrongful actions. R.C. 3937.182(B). See also, *Wedge Products* at 67; *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 391. This prohibition stems from the underlying public policy that a person should not be able to escape liability for their own malicious, willful or intentional actions. *Id.* In addition, any deterrent effect would be diminished if the wrongdoer could merely purchase insurance and have the insurer pay for their wrongful actions without any meaningful consequence to the insured. *Id.*

To the extent any settlement that includes a compromise of both punitive and compensatory damages is made through payment of insurance proceeds, any such settlement is void. Thus, in *Ruffin v. Sawchyn* (1991), 75 Ohio App.3d 511, the Eighth District specifically examined whether or not a portion of the total liability insurance proceeds provided in a settlement could be considered to compromise both the punitive and compensatory claims in the action. The Eighth District responded in the negative and explained:

> The issue which gives rise to appellant's concern is the settlement between the plaintiff and the other codefendants. This settlement of compensatory and punitive damages applied the settlement sum of $75,000 to the punitive damage portion of the award. The codefendant's insurance carrier funded $55,582.55 of the settlement amount. Appellant alleges that the use of liability insurance proceeds to satisfy a punitive damage award is against public policy, and that the sum should therefore be applied to the compensatory damages award only. Based on our reasoning in Casey v. Calhoun (1987), 40 Ohio App.3d 83, 84-86, 531 N.E.2d 1348, 1349-1350, which determined that punitive damages are not insurable, ***we are obliged to hold that the settlement is void to the extent that the settlement purports to satisfy the punitive damage award with payments from the codefendant's insurance carrier.*** The settlement amount provided by that carrier must be applied against the compensatory damage award.

Ruffin at 517-518 (emphasis added). In *Casey v. Calhoun* (1987), 40 Ohio App.3d 83, the Eighth District held that Ohio has an unambiguous public policy that does not allow for insurance coverage of punitive damages or any interest charged thereon. *Casey* at 83.

As attorney fees can only be awarded as part of the punitive damage claim in this mater, Allstate is prohibited by law from paying the attorney fees for precisely the same reason. In fact, any agreement on Allstate's behalf to pay these attorney fees would be void as against public policy since they arise out of a punitive damage claim. *Casey, supra.* See also: *Baker v. Mid-Century Insurance Company (*1993), 20 Cal.App.4th 921.

Baker v. Mid-Century Insurance Company, supra, albeit under California law, has expressly examined an insurer's responsibility for payment of attorney fees that are awarded because of an insured's own willful or malicious conduct, such as driving while intoxicated. The applicable California statute permitted an award of attorney fees in a civil action to any person who was injured in the course of any felony committed by a tortfeasor for which the tortfeasor was convicted. In *Baker*, similar to the instant matter, the plaintiff was injured in a motor vehicle accident in which the tortfeasor was driving while intoxicated. Driving while intoxicated was a felony for which the tortfeasor was charged and convicted. The award of attorney fees arose solely out of the statute regarding a felony conviction and not out of any other statutory law. The *Baker* Court noted that the purpose of the statute would be defeated if the felony drunk driver could merely pass his or her attorney fee liability along to an insurance company. The *Baker* Court concluded that the insurance company could not be held liable for the attorney fees because, as a matter of public policy, an insurer cannot insure a person for that person's own willful or intentional actions, and such uninsurable actions of the insured were necessary to be present before an award could be made for such attorney fees. See also, *Vaillette v. Fireman's Fund Insurance Company* (1993), 18 Cal.App.4th 680 (finding the basis for the requirement of payment of attorney fees arising out of civil action based upon a felony DUI would be defeated if a felony drunk driver could merely pass the attorney fee penalty on to his insurance company); *Combs v. State Farm Fire & Casualty Company* (2006), 143 Cal. App.4th 1338 (holding that an

insurance company is not liable for payment of attorney fees arising out of an award based upon a willful act by the insured based upon public policy grounds).

The Connecticut Supreme Court similarly found that insuring against fines or penalties, such as awards of attorney fees, arising out of a punitive damage award violated public policy. *Bodner v. United Services Automobile Association* (1994), 222 Conn. 480. The *Bodner* Court explained:

> A policy which permitted an insured to recover from the insurer fines imposed for a violation of a criminal law would certainly be against public policy. The same would be true of a policy which expressly covered an obligation of the insured to pay a sum of money in no way representing injuries or losses suffered by the plaintiff but imposed as a penalty because of a public wrong.

Bodner at 494. Here, the attorney fees awarded pursuant to the punitive damages award do not compensate Plaintiff for her injuries. If this were so then all persons injured in motor vehicle accidents could recover attorney fees. In Ohio, attorney fees can only be awarded pursuant to statute, contract, or a punitive damage award. Thus, the award of attorney fees in this matter is not an element of the loss or injury suffered, but rather is an element of the punitive damage award that seeks to punish Lahman for driving drunk.

In Pennsylvania, it is likewise against public policy for an insurance company to insure a person against punitive damage awards. *Creed v. Allstate Insurance Company* (1987), 365 Pa. Super. 136, 141. Where there is no liability to pay punitive damages there also is no obligation to pay attorney fees arising out of such punitive damages claim. *Id.* at 142. See also: *Quigley-Dodd v. General Accident Ins. Co.* (2001), 256 Conn. 225, 238.

In the instant matter, attorney fees are available solely because the jury found malice and made an award of punitive damages. The purpose of a punitive damage award is to punish the tortfeasor and deter others from acting in the same manner. See *Trainor v. Deters* (1969), 22 Ohio App.2d 135, 139. The purpose of the punitive damage award would not be met if the

insured could merely transfer liability for payment of the punitive damage award or carve out portions of said award, such as an attorney fees, to an insurance company. In fact, this Court has expressly found that it is against public policy for an insurance company to insure against, or pay, a punitive damage award on behalf of an insured. *Wedge Products, Inc.* at 67. As the attorney fee award is but one element of a punitive damage award, and as it is against public policy for an insurance company to pay such damages, Allstate cannot be held liable for the attorney fees as a matter of law.

Even if Allstate wished to voluntarily make payment, *which it does not*, it would be prohibited from doing so pursuant to Ohio law and Ohio public policy. The entire purpose of punitive damages is to punish and deter similar conduct. If such attorney fees could be insured away, the purpose of such an award would be meaningless.

B. PROPOSITION OF LAW NO. II: Punitive damages and any accompanying award of attorney fees derivative of punitive damages are not damages "because of bodily injury" within the meaning of an insurance policy.

Allstate has not contractually agreed to pay these attorney fees arising out of the punitive damage award. In determining whether an insurance company owes a duty to provide coverage, a court must first look to the language of the policy itself. See *Timock v. Bolz* (1996), 115 Ohio App.3d 283, 285-286. When reviewing the policy, a court is required to give undefined words their plain and ordinary meaning. See *State Auto Mut. Ins. Co. v. Steverding* (June 1, 2000), Cuyahoga App. No. 77196, 2000 WL 709021 (attached as **Appendix H**). "Where a term of a contract is clear and unambiguous "a court *** cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Santana v. Auto Owners Ins. Co.* (1993), 91 Ohio App.3d 490, 494.

As relevant here, Allstate's policy covers only damages "because of bodily injury." Specifically, the policy states:

General Statement of Coverage
If a premium is shown on the Policy Declarations for Bodily Injury Liability Coverage and Property Damage Liability Coverage, **Allstate** will pay damages which an insured person is legally obligated to pay because of

1. **bodily injury** sustained by any person, and
2. damage to, or destruction of property.

Policy at p. 7 (emphasis in original). "Bodily injury" is further defined as "physical harm to the body, sickness, disease or death..." except for certain communicable diseases. Policy at 3.

The attorney fee awarded here was awarded as part of a punitive damage claim. They are not amounts that the insured is legally obligated to pay because of "bodily injury." Rather, they are amounts that the insured has to pay as punishment for her intentional or malicious conduct. Thus, there is no obligation based upon the clear, unambiguous terms of the policy to pay attorney fees arising out of a punitive damage award. See: *Cutler-Orosi Unified School Dist. v. Tulare County School Dist. Liability/Property Self-Insurance – Authority* (1994), 31 Cal.App.4th 617, citing *Hutto v. Funney* (1978), 437 U.S. 678 ("an award of attorney fees, like other costs, 'does not compensate the plaintiff for the injury that first brought him into court; instead, the award reimburses him for a portion of the expenses he has incurred in seeking...relief'"); *First Specialty Insurance Co. v. Caliber One Indemnity Co.* (2008), 988 So.2d 708 (holding that attorney fees are not "damages" but rather are ancillary to damages and not part of a substantive claim and therefore, not covered under the policy).

Punitive damages "are not compensation for injury." *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468 at ¶39, citing *Getz v. Robert Welsh, Inc.* (1974), 418 US 323, 350. "Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.* "The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Arbino* at ¶39, citing *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651.

When considering an award of attorney fees, Ohio follows the 'American Rule,' under which a prevailing party may not generally recover attorney fees. *Fogel v. Lyonhil Reserve Homeowners' Association* (Nov. 14, 2008), Butler App. No. CA2007-06-151, 2008-Ohio-6065 at ¶31. Attorney fees may be awarded, however, if (1) a statute creates a duty, (2) an enforceable contract provision provides for an award of attorney fees, or (3) the losing party has acted in bad faith." *Id.*, citing *Hagans v. Habitat Condominium Owners Assn.* (2006), 166 Ohio App.3d 508, 2006-Ohio-1970.

"The award of attorney fees, although seemingly compensatory * * *, does not compensate the victim for damages flowing from the tort. Rather, the requirement that a party pay attorney fees * * * is a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages. * * * Without a finding of malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees, unless there is a basis for sanctions under Civ.R. 11." *Fogel* at ¶32, citing *Digital and Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, 662, overruled on other grounds.

There is no applicable provision in Ohio law for payment of attorney fees in this case unless punitive damages are awarded to Plaintiff. *Sorin v. Board of Education of Warrensville Heights School District* (1976), 46 Ohio St.2d 177, 179-180. Thus, the attorney fees at issue are not matters that an insured is legally liable to pay "because of bodily injury" or "property damage" but rather are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." See also, *Creed* at 142 (holding that there is no coverage for punitive damages and therefore no duty to defend against same and thus, no obligation to pay any award of attorney fees arising out of said punitive damage award.)

It is well settled in Ohio law that an insurance company has no obligation to its insured, or to others harmed by the actions of an insured, unless the conduct of the insured falls within the

coverage stated in the policy. *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 36. Here, Allstate's policy does not - - and cannot - - cover any portion of the punitive damage award. *Creed, supra; State Farm General Ins. Co. v. Mintarsih* (June 25, 2009), Cal. App. No. B202888, 2009 WL 1801243(attached as **Appendix I**) (holding that a contractual duty to pay costs only arises if there is a contractual duty to defend said claim from which the costs arise); *Toll Brothers, Inc. v. General Accident Ins. Co.* (Dec. 27, 1999), Superior Court of Delaware Case No. 98C-08-203-WTQ, 1999 WL 1442016 (attached as **Appendix J**).

As there is no agreement to pay the attorney fee, the Eighth District's decision is plainly wrong.

C. <u>PROPOSITION OF LAW NO. III:</u> An insurance policy exclusion in accordance with public policy for "punitive or exemplary damages, fines or penalties" precludes coverage for an award of attorney fees that are part of a punitive damage award.

The exclusionary language in Allstate's policy clearly and unambiguously provides that there is no duty to provide coverage for fines or penalties arising out of a punitive or exemplary damage award. An insurer's commitment to its insured arises only when the policy covers the claim. *White v. Ogle* (1979), 67 Ohio App.2d 35, at paragraph 1 of the syllabus. Therefore, if the claim falls within an exclusion of coverage, the insurer is under no obligation to provide coverage. *Id.* When determining whether a claim falls within an exclusion, a court must enforce the insurance contract as written and give the words their plain and ordinary meaning when the language of the policy is clear and unambiguous. *Hybud Equip. Cor. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 655.

In the instant matter, Lahman's policy with Allstate specifically excludes coverage for punitive damages and other amounts, such as attorney fees, arising out of a punitive damage award:

> **We** will not pay any punitive or exemplary damages, fines or penalties under Bodily Injury Liability or Property damage Liability coverage.

Policy at p. 7 (emphasis in original). In *Creed v. Allstate Insurance Company* (1987), 365 Pa. Super. 136, the Pennsylvania Superior Court found that substantially similar language precluded coverage for attorney fees arising out of a punitive damages award. *Creed* at 142. In fact, the *Creed* Court expressly held that:

> Under the terms of the policy of insurance issued by Allstate, Allstate did not agree to indemnify its insured for claims for punitive damages...[W]here the insurer has only agreed to indemnify for bodily injury and property damage, it has no obligation to provide indemnity for punitive damages. Having determined that there is no coverage for punitive damages, there was no duty to defend that portion of the case and, consequently, there is no obligation to pay counsel fees.

Id. Furthermore, the Ohio Supreme Court has held that absent specific contractual language, coverage for punitive damages will not be presumed. *State Farm Mutual Insurance Company v. Blevins* (1990), 49 Ohio St.3d 165 at paragraph 2 of the syllabus.

At least one court has examined whether or not the exclusion of "fines and penalties" operated as an exclusion of attorney fees awarded as part of a punitive damage award. In *First Specialty Insurance Co. v. Caliber One Indemnity Co.* (2008), 988 So.2d 708, the Florida Court of Appeals held that an exclusion for fines and penalties excluded any award of punitive damages or any attorney fees arising out of the punitive damage award as "punitive damages are a type of civil fine or penalty." *Id.* at 712-714.

In *Digital and Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, the Supreme Court considered the purpose and nature of an attorney fee award made pursuant to an award of punitive damages:

> The award of attorney fees, although seemingly compensatory and treated as such in the model jury instruction, does not compensate the victim for damages flowing from the tort. Rather, the requirement that a party pay attorney fees under these circumstances is a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages. There is no separate tort action at law for the recovery of attorney fees under these circumstances. Without a finding of

> malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees, unless there is a basis for sanctions under Civ.R. 11.

Digital & Analog Design Corp. at 662. Allstate's policy specifically excludes coverage for any punitive or exemplary damages, fines or penalties that are due to the insured's own conduct. As the attorney fees at issue fall within an express exclusion in the policy, Allstate has no obligation to pay them.

The liberal rule of construction of an insurance policy should not operate to create an ambiguity in a policy when none, in fact, exists. *Hybud Equip. Cor.* at 665. Hence, where an insurance contract is clear and unambiguous, its interpretation as a question of law and its terms must be applied as written. *Gomolka v. State Auto Ins. Co.* (1982), 70 Ohio St.2d 166, 168. More specifically, if an exclusionary clause has only one rational meaning, a court is compelled to enforce the provision appropriately. See *Progressive Specialty Ins. Co. v. Easton* (1990), 66 Ohio App.3d 177, 180.

The attorney fee award here is part of the punitive damage award. Indeed, but for the punitive damage award, there could not have been any attorney fee award. Since Allstate's policy excludes coverage for "punitive or exemplary damages, fines or penalties," Allstate has no duty to pay the attorney fees.

III. CONCLUSION.

Allstate did not contractually agree to assume liability for an attorney fee award deriving from a punitive damages claim and thus, cannot be held liable for Plaintiff's attorney fees. Regardless, Ohio law prohibits an insurance company from paying any amounts associated with a punitive damage claim as a matter of public policy. If the insurance company becomes liable for the attorney fee portion of a punitive damage award, rather than serving its purpose of punishing the wrongdoer, the punitive damages will punish the law-abiding society at large by

increasing the cost of liability insurance for all Ohioans. Thus, this Court should reverse the Eighth District's decision, and hold that Allstate has no obligation to pay the attorney fee award.

Respectfully submitted,

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By: _____

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PROOF OF SERVICE

A copy of the foregoing has been forwarded to the following by regular United States mail this 31st day of July 2009 to **W. Craig Bashein, Esq.,** 50 Public Square, 35th Floor, Terminal Tower, Cleveland, Ohio 44113; Jack Turoff, Esq., 629 Euclid Avenue, Suite 727, Cleveland, Ohio 44114 and **Terrence J. Kenneally, Esq.,** Old Forge Centre, 20595 Lorain Road, Terrace Level 1, Fairview Park, Ohio 44126.

RITZLER, COUGHLIN & SWANSINGER, Ltd.

By: _____

THOMAS M. COUGHLIN, JR. (#0055419)
Attorney for Defendant Allstate Insurance Co.

APPENDIX

40565822

EDP N.I.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

KIMBERLY NEAL-PETTIT
Plaintiff

LINDA LAHMAN
Defendant

Case No: CV-04-545838

Judge: NANCY MARGARET RUSSO

JOURNAL ENTRY

CASE CALLED FOR VOIR DIRE ON 7-24-06; JURY SWORN AND TRIAL IN PROGRESS ON 7/25/06; TRIAL IN PROGRESS ON 7-26-06; VERDICT RETURNED ON 7-27-06.
JURY RETURNS VERDICT AS FOLLOWS:
COMPENSATORY DAMAGES: $113,800; PUNITIVES IN THE AMOUNT OF $75,000; AND ATTY FEES TO BE DETERMINED BY THE COURT
HEARING ON ATTY FEES SET 9-26-06 AT NOON; PETITION FOR ATTY FEES WITH SUPPORTING DOCUMENTATION DUE TO COURT BY 9-6-06 WITH COPIES TO IS-C AND OPPOSING COUNSEL ON THE DATE OF FILING.

Judge Signature — Date: 7/27/06

RECEIVED FOR FILING
JUL 31 2006
GERALD E. FUERST, CLERK
BY _____ DEP.

THE STATE OF OHIO } SS.
Cuyahoga County }

I, GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL Vol 362 Page 831 Date July 31, 2006
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 27 DAY OF July A.D. 20 06
GERALD E. FUERST, Clerk
By _____ Deputy

EXHIBIT
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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDP

KIMBERLY NEAL-PETTIT
Plaintiff

LINDA LAHMAN
Defendant

Case No: CV-04-545838

Judge: NANCY MARGARET RUSSO

JOURNAL ENTRY

F

89 DIS. W/ PREJ - FINAL

MOTION FOR PREJUDGMENT INTEREST, FEES AND EXPENSES IS GRANTED OSJ.
COURT COST ASSESSED TO THE DEFENDANT(S).

Russo 3/21/07
Judge Signature Date

RECEIVED FOR FILING
MAR 22 2007
GERALD E. FUERST, CLERK
By Deputy

THE STATE OF OHIO
Cuyahoga County } SS.

I, GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY, HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 24 DAY OF July A.D. 20 07
GERALD E. FUERST, Clerk
By Deputy

VOL 3830 PG0265

- 89
03/21/2007

EXHIBIT
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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

KIMBERLY NEAL-PETTIT	)	**CASE NO. 545838**
	)	
Plaintiff,	)	**JUDGE NANCY MARGARET RUSSO**
	)	
v.	)	
	)	
LINDA LAHMAN	)	
	)	**ORDER**
Defendant.	)	

Upon review of Plaintiff's Motion for Prejudgment Interest, Defendant's Brief in Opposition, and the evidence presented at the hearing on March 2, 2007, the Court finds that the insurer for the defendant, Allstate, failed to rationally evaluate the risks associated with this case and failed to make a good faith effort to settle the case. See *Muskovitz v. Mt. Sinai Medical Ctr.*, 69 Ohio 638, 658 (1994). Specifically, the claims adjustor for Allstate failed to evaluate the risks of litigation with counsel. The failure to consult counsel when evaluating the claim exposed the defendant to punitive damages and an excess verdict and constituted bad faith. Further, the adjustor's conduct led to an unnecessary delay in the payment of compensation to the plaintiff for her injuries. Therefore, pursuant to O.R.C. Section 1343.03(C), the Court grants Plaintiff's Motion for Prejudgment Interest in the amount of $37,098.80.

Based on the verdict rendered July 27, 2006, in which the jury awarded plaintiff reasonable attorney fees, and upon review of Plaintiff's Motion for Attorney Fees and Expenses, Defendant's Brief in Opposition, and the evidence presented at the hearing on March 2, 2007, the Court awards attorney fees to plaintiff in the amount of $46,825.00. The award of fees is reasonable in light of the factors outlined in DR 2-106(B). See Code of Prof.Resp., DR2-106(B); *Villella v. Waikem Motors, Inc.*, 45 Ohio St.3d 36, 41 (1989).

Further, the Court finds that the defendant acted with malice at the time of the accident. See *Fouts v. Salay*, 1981 Ohio App. LEXIS 10467 (8th Dist.); See also *Scharf v. Chorney*, 1994 Ohio App. LEXIS 611 (8th Dist), citing *Preston v. Murty*, 32 Ohio St. 3d 334, 335 (1987) in which malice is defined, inter alia, "as a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." Therefore, the Court awards the plaintiff $10,084.96 in expenses.

It is therefore ordered, adjudged and decreed that the defendant shall pay plaintiff prejudgment interest in the amount of $37,098.80, plus attorney fees in the amount of $46,825.00, plus $10,084.96 in expenses for a total of $94,008.76.

Judge Nancy Margaret Russo

IT IS SO ORDERED.

RECEIVED FOR FILING
MAR 22 2007
GERALDE. FUERST, CLERK
By Deputy

CERTIFICATE OF SERVICE

A copy of the foregoing order has been sent on March 2[illegible], 2007 via regular U.S. Mail to:

William Craig Bashein, Esq.
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Cleveland, Ohio 44113

Attorney for Plaintiff

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Rocky River, Ohio 44116

Attorney for Defendant

Nancy Margaret Russo
Judge Nancy Margaret Russo

51372070

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDP F

KIMBERLY NEAL-PETTIT
Plaintiff

LINDA LAHMAN
Defendant

Case No: CV-04-545838

Judge: NANCY MARGARET RUSSO

JOURNAL ENTRY

89 DIS. W/ PREJ - FINAL

UPON REVIEW OF THE CROSS-MOTIONS FOR SUMMARY JUDGMENT, THE BRIEFS IN OPPOSITION, AND THE EVIDENCE PRESENTED, THE COURT FINDS THAT REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION, BEING THAT PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS DENIED. THE COURT HOLDS THAT PLAINTIFF IS ENTITLED TO RECOVER THE ATTORNEY FEE AND LITIGATION EXPENSE AWARD OF $46,825.00 FROM THE DEFENDANT. FINAL.
COURT COST ASSESSED TO THE DEFENDANT(S).

5/5/8

Judge Signature Date

RECEIVED FOR FILING

MAY 06 2008

GERALD E. FUERST, CLERK

By _____ Dep.

THE STATE OF OHIO } SS. I, GERALD E. FUERST, CLERK OF
Cuyahoga County } THE COURT OF COMMON PLEAS
WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRUE AND
TAKEN AND COPIED FROM THE ORIGINAL
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS
DAY OF A.D. 20
GERALD E. FUERST, Clerk
By _____, Deputy

EXHIBIT
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05/05/2008

20864-A

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91551

KIMBERLY NEAL-PETTIT

PLAINTIFF-APPELLEE

vs.

LINDA LAHMAN, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-545838

BEFORE: Stewart, J., Cooney, P.J., and Gallagher, J.

RELEASED: December 18, 2008

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the Cuyahoga County Court of Common Pleas, and the briefs of counsel. The sole issue raised in this appeal is whether defendant-appellant Allstate Insurance Company has the legal obligation to pay attorney fees of $46,825 deriving from a punitive damages award against its insured, defendant-tortfeasor Linda Lahman, in favor of plaintiff-appellee, Kimberly Neal-Pettit. The parties filed cross-motions for summary judgment and agree that there are no issues of material fact and that judgment should issue as a matter of law.[1] See Civ.R. 56.

Insurance policies are contracts which we construe according to their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument. *Olmstead v. Lumbermens Mut. Ins. Co.* (1970), 22 Ohio St.2d 212, 216.

---

[1]The parties agree that Allstate has no contractual obligation to pay any amount of punitive damages awarded to Neal-Pettit. The question is whether the attorney fees, stemming as they do from the punitive damages award, are subject to indemnification under the policy.

The Allstate policy states: "We will not pay any punitive or exemplary damages, fines or penalties under Bodily Injury Liability or Property Damage Liability coverage."[2] (Emphasis sic.)

Attorney fees awarded with punitive damages are undeniably punitive in nature. See *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, 662. But describing attorney fees as "punitive" in nature is not the same thing as saying that attorney fees are punitive "damages." Attorney fees are conceptually distinct from punitive damages and "may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted." *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 558, 1994-Ohio-461. The Allstate policy language saying that it will not pay any "punitive or exemplary damages" is plain – it only excludes punitive "damages" and does not exclude the payment of attorney fees awarded in conjunction with the punitive damage award. Had Allstate intended otherwise, the policy language could easily have been drafted to reflect that intention.

For the same reasons, we reject Allstate's argument that it would be against public policy to permit indemnification of attorney fees. R.C. 3937.182(B), like the Allstate policy at issue, prohibits insurance coverage for

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[2]Allstate does not argue that attorney fees ordered in this case are a fine or penalty.

"judgments or claims against an insured for punitive or exemplary damages." This section only prohibits insurance for punitive damages. It does not prohibit indemnification of attorney fees associated with prosecuting a claim for punitive damages. Even though attorney fees in this case might be considered derivative of the punitive damage award, they remain conceptually distinct.

Judgment affirmed.

It is ordered that appellee recover of appellants her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, P.J., and
SEAN C. GALLAGHER, J., CONCUR

IN THE OHIO SUPREME COURT

KIMBERLY NEAL-PETTIT, Plaintiff(s) v. LINDA LAHMAN, et al., Defendant(s)	Supreme Court Case No. 09-0325 On Appeal from 8th Dist. App. Case No. 91551

DEFENDANT-APPELLANT ALLSTATE INSURANCE COMPANY'S NOTICE OF APPEAL

W. Craig Bashein, Esq. (Counsel of Record)
Paul W. Flowers, Esq.
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Attorney for Plaintiff -- Appellee

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Terrence J. Kenneally, Esq.
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20595 Lorain Road
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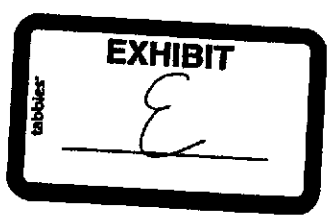
Attorney for Defendant – Appellant Lahman



Now comes Defendant-Appellant Allstate Insurance Company, by and through its undersigned counsel, Ritzler, Coughlin & Swansinger, Ltd., and hereby gives notice of its appeal to the Ohio Supreme Court of the decision by the Eighth District Court of Appeals in the matter of *Kimberly Neal-Pettit v. Linda Lahman, et al*, Cuyahoga App. No. 91551, which was dated December 29, 2008. A copy of said decision is incorporated herein and attached hereto as **Exhibit A**. This case concerns matters of public or great general interest.

Respectfully submitted,

RITZLER, COUGHLIN & SWANSINGER, Ltd.

By: _____

Attorney for Defendant-Appellant Allstate Insurance Co.
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Cleveland, Ohio 44114
216-241-8333 Telephone
216-241-5890 Facsimile
tcoughlin@rcs-law.com

PROOF OF SERVICE

A copy of the foregoing has been forwarded to the following by regular United States mail this 12th day of February, 2009 to W. Craig Bashein, Esq. and Paul W. Flowers, Esq., 50 Public Square, 35th Floor, Terminal Tower, Cleveland, Ohio 44113; and Terrence J. Kenneally, Esq., Old Forge Centre, 20595 Lorain Road, Terrace Level 1, Fairview Park, Ohio 44126.

By: _____

THOMAS M. COUGHLIN, JR. (#0055419)
Attorney for Defendant-Appellant
Allstate Insurance Company

20864-A

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91551

KIMBERLY NEAL-PETTIT

PLAINTIFF-APPELLEE

vs.

LINDA LAHMAN, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-545838

BEFORE: Stewart, J., Cooney, P.J., and Gallagher, J.

RELEASED: December 18, 2008

JOURNALIZED:

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Fairview Park, OH 44126

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Jack N. Turoff
Turoff & Turoff
20320 Farnsleigh Road
Shaker Heights, OH 44122

FILED AND JOURNALIZED
PER APP. R. 22(E)

DEC 29 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(C), 22(D) AND 26(A)
RECEIVED

DEC 18 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

MELODY J. STEWART, J.:

This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the Cuyahoga County Court of Common Pleas, and the briefs of counsel. The sole issue raised in this appeal is whether defendant-appellant Allstate Insurance Company has the legal obligation to pay attorney fees of $46,825 deriving from a punitive damages award against its insured, defendant-tortfeasor Linda Lahman, in favor of plaintiff-appellee, Kimberly Neal-Pettit. The parties filed cross-motions for summary judgment and agree that there are no issues of material fact and that judgment should issue as a matter of law.[1] See Civ.R. 56.

Insurance policies are contracts which we construe according to their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument. *Olmstead v. Lumbermens Mut. Ins. Co.* (1970), 22 Ohio St.2d 212, 216.

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For the same reasons, we reject Allstate's argument that it would be against public policy to permit indemnification of attorney fees. R.C. 3937.182(B), like the Allstate policy at issue, prohibits insurance coverage for

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"judgments or claims against an insured for punitive or exemplary damages." This section only prohibits insurance for punitive damages. It does not prohibit indemnification of attorney fees associated with prosecuting a claim for punitive damages. Even though attorney fees in this case might be considered derivative of the punitive damage award, they remain conceptually distinct.

Judgment affirmed.

It is ordered that appellee recover of appellants her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, P.J., and
SEAN C. GALLAGHER, J., CONCUR

Westlaw

R.C. § 3937.182 Page 1

C

Baldwin's Ohio Revised Code Annotated Currentness

Title XXXIX. Insurance

Chapter 3937. Casualty Insurance; Motor Vehicle Insurance (Refs & Annos)

Motor Vehicle Insurance

➡ 3937.182 Policies not to cover claims or judgments for punitive or exemplary damages

(A) As used in this section, "policy" includes an endorsement.

(B) No policy of automobile or motor vehicle insurance that is covered by sections 3937.01 to 3937.17 of the Revised Code, including, but not limited to, the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in such a policy as authorized by section 3937.18 of the Revised Code, and that is issued by an insurance company licensed to do business in this state, and no other policy of casualty or liability insurance that is covered by sections 3937.01 to 3937.17 of the Revised Code and that is so issued, shall provide coverage for judgments or claims against an insured for punitive or exemplary damages.

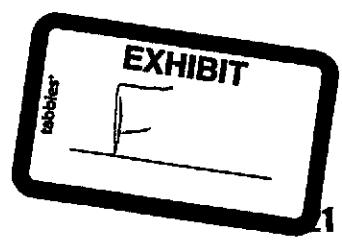
(C) This section applies only to policies of automobile, motor vehicle, or other casualty or liability insurance as described in division (B) of this section that are issued or renewed on or after the effective date of this section.

CREDIT(S)

(2001 S 97, eff. 10-31-01; 1987 H 1, eff. 1-5-88)

Current through 2009 File 8, of the 128th GA (2009-2010), apv. by 7/16/09 and filed with the Secretary of State by 7/16/09.

END OF DOCUMENT



Westlaw

Not Reported in A.2d
Not Reported in A.2d, 2003 WL 1962869 (Conn.Super.), 34 Conn. L. Rptr. 449
(Cite as: 2003 WL 1962869 (Conn.Super.))

C

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford-Norwalk.
Brent HOOD,
v.
GREAT AMERICAN INSURANCE CO.
No. CV020188498S.

April 14, 2003.

Andrew Labella, Stamford, Brent Hood.

Goldstein & Peck PC, Bridgeport, for Great American Insurance Co.

TAGGART D. ADAMS, Judge.

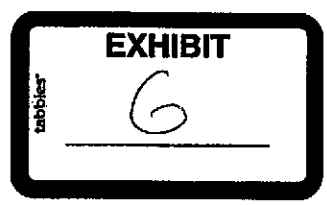
*1 The present action arises out of a motor vehicle collision which allegedly occurred between the plaintiff, Brent Hood, and Kenneth J. Meahan (Meahan), who is not a party to this action. The plaintiff has brought this underinsured motor vehicle coverage action against his insurer, Great American Insurance Co., for injuries and damages he sustained as a result of the collision.

The following facts are alleged in the first count of the complaint. On or about May 10, 2000, the plaintiff and Patricia Messnier entered into a personal automobile insurance contract (the policy) with the defendant, Great American Insurance Co. The policy insured two vehicles owned by the plaintiff, one of which was involved in the motor vehicle collision in question, and was in effect from May 10, 2000, to May 20, 2001. On or about May 31, 2000, the vehicle the plaintiff owned and operated was struck by a vehicle owned and operated by Meahan after Meahan's vehicle went through a red light. The plaintiff contends that the collision was caused by Meahan's negligence, that Meahan violated General Statutes §§ 14-299 and 14-218a, and that the plaintiff suffered and continues to suffer numerous injuries.

According to the allegations in count one, at the time of the collision, Meahan carried automobile liability insurance for his vehicle with Peerless Insurance Company (Peerless). With the defendant's consent, the plaintiff settled his claims with Peerless, thereby exhausting the limits of liability under Meahan's insurance policy. Because he allegedly incurred additional costs related to the collision, the plaintiff sought benefits under the underinsured motorist provisions of his policy with the defendant. The defendant has refused to pay such benefits to the plaintiff.

In count two, the plaintiff alleges that Meahan intentionally or with reckless disregard operated his vehicle at an excessive rate of speed in violation of General Statutes § 14-218a, and/or in a reckless manner in violation of General Statutes § 14-222. In connection with count two, the plaintiff in the third prayer for relief, seeks double or treble damages pursuant to General Statutes § 14-295.[FN1] It is this prayer for relief that is the subject of the pending motion. On November 6, 2002, the defendant moved for partial summary judgment, arguing that because the plaintiff is not entitled to recover statutory multiple damages under General Statutes § 14-295, the defendant is entitled to judgment on the third paragraph of the prayer for relief as a matter of law.

FN1. General Statutes § 14-295 provides: "In any civil action to recover damages resulting from personal injury, wrongful death or damage to property, the trier of fact may award double or treble damages if the injured party has specifically pleaded



> that another party has deliberately or with reckless disregard operated a motor vehicle in violation of section 14-218a, 14-219, 14-222, 14-227a, 14-230, 14-234, 14-237, 14-239 or 14-240a, and that such violation was a substantial factor in causing such injury, death or damage to property."

"Summary judgment procedure is designed to dispose of actions in which there is no genuine issue as to any material fact."(Internal quotation marks omitted.) *Fraser v. United States,* 236 Conn. 625, 639, 674 A.2d 811,cert. denied, 519 U.S. 872, 117 S.Ct. 188, 136 L.Ed.2d 126 (1996). It is a "method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Wilson v. New Haven,* 213 Conn. 277, 279, 567 A.2d 829 (1989). It is well-established that "[t]he party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law ... and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact."(Citation omitted; internal quotation marks omitted.) *Gaynor v. Payne,* 261 Conn. 585, 590-91, 804 A.2d 170 (2002).

***2** Our Supreme Court held in *Bodner v. United Service Automobile Assn.,* 222 Conn. 480, 610 A.2d 1212 (1992), that common law punitive damages are not recoverable in the context of an uninsured motorist claim. In Connecticut, common law punitive damages are "limited to the plaintiff's attorneys fees and nontaxable costs, and thus serve a function that is both compensatory and punitive." *Id.,* at 492."Statutory multiple damages, however, are imposed for the sole purpose of punishment of one who has committed a public wrong ..." *Caulfield v. Amica Mutual Ins. Co.,* 31 Conn.App. 781, 787 n. 4, 627 A.2d 466,cert. denied, 227 Conn. 913, 632 A.2d 688 (1993). Still, "[t]he nature of both the common law punitive damages at issue in *Bodner* and the statutory multiple damages at issue in this case is that they are imposed to punish the wrongdoer."*Id.*

The court in *Bodner v. United Service Automobile Assn., supra,* 222 Conn. at 480, examined the insurance policy in question and concluded, in light of the court's previous decisions in *Tedesco v. Maryland Casualty Co.,* 127 Conn. 533, 18 A.2d 357 (1941) and *Avis Rent A Car System, Inc. v. Liberty Mutual Ins. Co.,* 203 Conn. 667, 526 A.2d 522 (1987), that Bodner's insurance policy did not cover "attorneys fees incurred in the pursuit of his claim against [United Services Automobile Association]."*Bodner v. United Service Automobile Assn., supra,* at 497.Coverage under the insurance policy, nevertheless, was determined to be irrelevant. As the Appellate Court has explained, "[n]otwithstanding policy language that would permit coverage of common law damages, the *Bodner* court concluded that public policy considerations precluded such coverage in the context of uninsured motorist coverage." *Caulfield v. Amica Mutual Ins. Co., supra,* 31 Conn.App. at 786. The Supreme Court held that "[e]ven for common law punitive damages, as they are defined in this state, there is no discernible reason of public policy why uninsured motorist coverage should impliedly encompass a claimant's right to recover attorneys fees for pursuit of a claim against his own insurer that is premised on the egregious misconduct of the third party tortfeasor."*Bodner v. United Service Automobile Assn., supra,* at 499.

The defendant relies heavily on *Caufield v. Amica Mutual Ins. Co., supra,* 31 Conn.App. at 781, where the Appellate Court held that, like common law punitive damages, statutory multiple damages under General Statutes § 14-295 were not recoverable against an insurer in an uninsured motorist context. Upon examination of *Bodner v. United Services Automobile Assn., supra,* 222 Conn. at 480, the Ap-

pellate Court was convinced "that there is no principled way to distinguish *Bodner* from the present case without wholly ignoring the reasoning articulated therein by our Supreme Court."*Caufield v. Amica Mutual Ins. Co., supra,* at 788.

In opposition, the plaintiff argues that *Caulfield v. Amica Mutual, Ins. Co., supra,* 31 Conn.App. at 781, is not binding precedent because the underlying facts involved an *un* insured motorist claim, not an *un* derinsured motorist claim, and therefore, statutory multiple damages are allowed in the latter case. This court is not persuaded that, with regard to statutory multiple damages, there is a distinction between uninsured and underinsured motorist coverage claims.

***3** The purpose of underinsured motorist coverage is to "put the injured party in the same position-no worse and no better-than the party would have been in had the tortfeasor carried liability insurance equal to or more than the amount of underinsured motorist coverage available to the injured party." *Doyle v. Metropolitan Property & Casualty Ins. Co.,* 252 Conn. 79, 88, 743 A.2d 156 (1999). Similarly, "the public policy established by the uninsured motorist statute is that every insured is entitled to recover for the damages he or she would have been able to recover if the uninsured motorist had maintained a policy of liability insurance."(Emphasis omitted; internal quotation marks omitted.) *Bodner v. United Services Automobile Assn., supra,* 222 Conn. at 499. Our Appellate Court has pointed that, "[c]onsistent with the similar purposes of the two types of coverage, our Supreme Court has 'often held that statutes and regulations that apply to uninsured motorist coverage equally apply to underinsured motorist coverage.' *Buell v. American Universal Ins. Co.,* 224 Conn. 766, 769 n. 1, 621 A.2d 262 (1993); *Lumbermens Mutual Casualty Co. v. Huntley,* 223 Conn. 22, 28 n. 9, 610 A.2d 1292 (1992); *General Accident Ins. Co. v. Wheeler,* 221 Conn. 206, 210-11, 603 A.2d 385 (1992); *Nationwide Ins. Co. v. Gode,* 187 Conn. 386, 399-400, 446 A.2d 1059 (1982), overruled on other grounds, *Covenant Ins. Co. v. Coon,* 200 Conn. 30, 36 n. 6, 594 A.2d 977 (1991)." *Gohel v. Allstate Ins. Co.,* 61 Conn.App. 806, 817, 768 A.2d 950 (2001).

This court is not the first trial court to consider this issue. Many decisions issued after *Caulfield v. Amica Mutual Ins. Co., supra,* 31 Conn.App. at 781, have held that statutory multiple damages under General Statutes § 14-295 are not recoverable against an insurer in an underinsured motorist context. See *Tworzydlo v. Safeco Ins. Co.,* Superior Court, judicial district of Windham at Putnam, Docket No. CV 01-0066113 (June 18, 2002, Potter, J.) (32 Conn. L. Rptr. 364);*Kisson v. C.G.U. Southern New England,* Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. CV 00-0069803 (May 8, 2001, Arnold, J.) (29 Conn. L. Rptr. 738);*Laudette v. Peerless Ins. Co.,* Superior Court, judicial district of New London at Norwich, Docket No. 118880 (June 30, 2000, Dyer, J.) (27 Conn. L. Rptr. 456);*Allessa v. Allstate Ins. Co.,* Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. CV 95-0050550 (November 7, 1995, Skolnick, J.) (16 Conn. L. Rptr. 317).

The plaintiff argues that there are issues of material fact, and, therefore, summary judgment must be denied. It is true, as stated above, that genuine issues of material fact render summary judgment inappropriate. Resolution of the issue before this court, however, does not depend on the facts of this case. The Supreme Court in *Bodner v. United Service Automobile Assn., supra,* 222 Conn. at 480, and the Appellate Court in *Caufield v. Amica Mutual Ins. Co., supra,* 31 Conn.App. at 781, did not rely on the underlying facts; in fact, the provisions in the insurance policies in question were deemed irrelevant. Instead, the courts considered the issues before them to be questions of law and public policy. Therefore, while the legal sufficiency of a prayer for relief is normally contested through a motion to strike; Practice Book § 10-39; here, because this issue is best considered solely as a matter

of law and public policy, summary judgment on this issue is available.

*4 For the foregoing reasons, this court holds that the plaintiff may not, as a matter of law, recover from the defendant double or treble damages pursuant to General Statutes § 14-295. The motion for partial summary judgment is, therefore, granted.

So Ordered.

Conn.Super.,2003.
Hood v. Great American Ins. Co.
Not Reported in A.2d, 2003 WL 1962869 (Conn.Super.), 34 Conn. L. Rptr. 449

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Not Reported in N.E.2d
Not Reported in N.E.2d, 2000 WL 709021 (Ohio App. 8 Dist.)
(Cite as: 2000 WL 709021 (Ohio App. 8 Dist.))

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.
STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, Plaintiff-Appellee
v.
Mark J. STEVERDING, et al., Defendants-Appellants
No. 77196.

June 1, 2000.

Character of Proceeding: Civil appeal from Common Pleas Court Case No. 364065.Affirmed.
Brian D. Kerns, Esq., Kerns, Hurt, Proe & Rodman, Middleburg Heights, for plaintiff-appellee.

Henry W. Chamberlain, Esq., Weisman, Goldberg & Weisman Co., L.P.A., Cleveland, for defendants-appellants.

JOURNAL ENTRY AND OPINION

CORRIGAN, J.

***1** This cause came on to be heard upon the accelerated calender pursuant to App.R. 11.1 and Loc.App.R. 25, the record from the Cuyahoga County Court of Common Pleas, oral argument and the briefs of counsel. Mark J. and Terri Steverding, defendants-appellants, appeal from the judgment of the Cuyahoga County Court of Common Pleas, General Division, Case No. CV-364065, in which the trial court entered summary judgment in favor of State Automobile Insurance Company, plaintiff-appellee, on State Auto's complaint for declaratory judgment. The trial court determined that State Auto was not obligated to provide indemnification under insurance policy # PBP 00 761 19-01 purchased under the name of D-Cubed, Inc., the corporate identity of Joseph's Barred and Grill, for injuries sustained by Mark Steverding while he was a patron of the bar. The Steverdings assign a single error for this court's review.

For the following reasons, the Steverdings' appeal is not well taken.

On August 5, 1995, defendants-appellants Mark and Terri Steverding, along with their friend Robert Brown, went to the Old World Festival on East 185th Street in Cleveland, Ohio. The Old World Festival is an annual street fair during which the street is closed to vehicular traffic and many of the merchants located on the street remain open to pedestrian customers for the duration of the event. There are approximately fifteen bars/taverns located on East 185th Street, most of which are yearly participants in the Old World Festival.

During the course of the evening, defendants-appellants' group stopped at an establishment known as Joseph's Barred and Grill, a local tavern and an annual participant in the Old World Festival. On the date in question, Joseph's Barred and Grill provided a full service bar inside the building, as well as a beer tent and a live band in an adjacent parking lot in order to attract and accommodate additional patrons drawn in by the festival. Joseph's Barred and Grill is incorporated under the name D-Cubed, Inc. and is operated by three brothers, Anthony DiSanto, Dennis DiSanto and Robert DiSanto. A fourth brother, Fred DiSanto, is employed at the bar and was working during the 1995 festival.

On the night in question, the bar and adjacent beer tent were extremely crowded due to the high

turnout at the festival. Once inside the bar, Robert Brown allegedly became embroiled in a verbal altercation with another patron. Mark Steverding, who had known Mr. Brown since their service together in the United States Navy, testified that he stepped between Mr. Brown and the other patron in an attempt to play the role of peacemaker. As a result, the verbal dispute did not escalate into a physical altercation. Nevertheless, both Mr. Steverding and Mr. Brown were asked to leave the premises by employees of the bar. Both men allegedly cooperated with the request.

However, as the group reached the parking lot, a physical altercation erupted between Robert Brown and two employees of the bar who had been escorting Mr. Brown to the exit. At the same time, Mark Steverding testified that he was knocked to the ground and kicked and punched repeatedly by an unknown assailant. Mr. Steverding maintained that he was then placed in a choke hold until he passed out. At roughly the same time, Mr. Steverding was allegedly kicked in the face by Joseph's employee Fred DiSanto. As a result of the assault, Mr. Steverding suffered a fracture to the orbital bone in his face requiring the surgical placement of a plate and screws in his cheekbone in order to facilitate healing.

*2 Terri Steverding, who was an eyewitness to the assault, identified Fred DiSanto as her husband's assailant. Mr. DiSanto was subsequently charged with felonious assault. Ultimately, Mr. DiSanto entered a plea of guilty to the amended offense of assault, a misdemeanor of the first degree. During the plea hearing, Mr. DiSanto stated: "I admit my guilt, your Honor, I am sorry this happened."[FN1]

> FN1. During subsequent deposition testimony in the civil suit, Fred DiSanto denied responsibility for the assault of Mark Steverding claiming that the plea of guilty was entered only upon the advice of his attorney and to minimize any possible criminal penalty that could be imposed.

On August 1, 1996, Mark and Terri Steverding filed suit in the Cuyahoga County Court of Common Pleas, General Division, Case No. CV-312784, against the DiSanto Group, Inc., the DiSanto Companies, Joseph's Barred and Grill, Fred DiSanto, Robert DiSanto, and Tony DiSanto. An amended complaint was subsequently filed naming D-Cubed, Inc., the owner of Joseph's Barred and Grill at the time of the underlying assault, as a defendant. The Steverdings alleged that Mark Steverding's injuries were caused by Fred DiSanto, an admitted employee of D-Cubed, Inc., while Mr. DiSanto was acting within the course and scope of his employment as a bouncer and security guard at Joseph's Barred and Grill.

At the time of the incident, D-Cubed, Inc. had contracted with State Automobile Mutual Insurance Company, plaintiff-appellee, for a commercial liability policy of insurance, policy # PBP 00 761 19-01, for Joseph's Barred and Grill. After the initial civil suit had been filed by the Steverdings, State Auto filed the underlying complaint for declaratory judgment in which it maintained that, since Mr. Steverding's injuries were caused by the intentional criminal assault committed by D-Cubed employee Fred DiSanto, coverage was unavailable under the terms of the subject policy of liability insurance. At the time the declaratory judgment action was filed, the parties entered into a partial settlement agreement whereby it was agreed that the injuries to Mark Steverding arising out of the August 5, 1995, assault had a monetary value of $60,000. Therefore, the sole issue presented to the trial court was whether State Auto was required to indemnify and pay for the injuries and damages allegedly sustained by Mark Steverding at the hands of D-Cubed, Inc. employee Fred DiSanto.

State Auto filed a motion for summary judgment on March 25, 1999. The Steverdings filed their brief in opposition to summary judgment on June 30, 1999.

On October 1, 1999, the trial court entered summary judgment in favor of State Auto through the following judgment entry:

Summary judgment is granted in favor of State Auto. State Auto is not required to provide indemnification under policy # PBP 00 761 19-01 to the defendants. Costs to plaintiff. The Court further finds that there is no just cause for delay. This is a final appealable order.

On November 1, 1999, Mark and Terri Steverding, defendants-appellants, filed a timely notice of appeal from the judgment of the trial court.

Defendants-appellants' sole assignment of error states:

I. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT WHEN APPELLANTS MET THEIR BURDEN OF PROOF ON A NEGLIGENT SECURITY CLAIM, PROXIMATELY CAUSING DAMAGES TO APPELLANTS.

*3 Defendants-appellants argue, through their sole assignment of error, that the trial court improperly entered summary judgment in favor of State Auto, plaintiff-appellee. Specifically, defendants-appellants maintain that, under the facts of the present case, the evidence presented demonstrated that the owners of Joseph's Barred and Grill were negligent in failing to provide adequate security during the Old World Festival and their negligence resulted in the injuries to Mark Steverding. Defendants-appellants argue further that State Auto's reliance upon Fred DiSanto's misdemeanor assault conviction is misplaced. It is defendants-appellants' position that, pursuant to R.C. 2903.13, Fred DiSanto could have acted recklessly, rather than knowingly, when committing the assault upon Mark Steverding. Therefore, the misdemeanor assault conviction does not, in and of itself, conclusively establish that the assault was committed intentionally. In addition, defendant-appellants contend that Fred DiSanto's subsequent recantation of responsibility for the assault further weakens State Auto's argument that Mark Steverding's injuries were caused by an intentional act thereby falling outside of the scope of applicable liability insurance coverage.

Initially, this court notes that the standard for granting a motion for summary judgment is set forth in Civ.R. 56(C). In applying this rule, the Ohio Supreme Court has consistently held that, before such a motion can be granted, the moving party must show that: (1) there is no genuine issue of fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383; *Welco Industries, Inc. v.. Applied Cas.* (1993), 67 Ohio St.3d 344; *Osborne v. Lyles* (1992), 63 Ohio St.3d 326.

A party seeking summary judgment bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record which support the underlying claim. Once the movant's initial burden has been discharged, the non-moving party must then produce evidence on issues for which that party bears the burden of production at trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, 1172. The non-movant must also present specific facts and may not merely rely upon the pleadings or upon unsupported allegations. *Shaw v. Pollack & Co.* (1992), 82 Ohio St.3d 656. When a party moves for summary judgment supported by evidentiary material of the type and character set forth in Civ.R. 56(C), the opposing party has a duty to submit affidavits or other material permitted by Civ.R. 56(E) to show that there is a genuine issue for trial. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

***4** In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, the Ohio Supreme Court discussed the standard to be applied when reviewing motions for summary judgment. The court stated:

Again, we note that there is no requirement in Civ.R. 56 that any party submit affidavits to support a motion for summary judgment. See, *e.g.*,Civ.R. 56(A) and (B). There is a requirement, however, that a moving party, in support of a summary judgment motion, specifically point to something in the record that comports with the evidentiary materials set forth in Civ.R. 56(C).

Id. at 298.

The court's analysis of an appeal from a summary judgment is conducted under a *de novo* standard of review. See *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Howard v. Willis* (1991), 77 Ohio App.3d 133. No deference is given to the decision under review and this court applies the same test as the trial court. *Bank One of Portsmouth v. Weber* (Aug. 7, 1991), Scioto App. No.1920, unreported.

In order to establish a claim for negligence, a plaintiff must establish a duty owed by the defendant and a breach of that duty which proximately results in an injury. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614, 616-617. In *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188, 583 N.E.2d 1071, 1073-1074, our court stated:

"Thus, the duty to protect invitees from the criminal acts of third parties does not arise if the business 'does not, and could not in the exercise of ordinary care, know of a danger which causes injury to [its] business invitee. * * * '*Id.* [*Howard v. Rogers* (1969), 19 Ohio St.2d 42, 48 O.O.2d 52, 249 [715 N.E.2d 191] N.E.2d 804] at paragraph three of the syllabus.

"The existence of a duty therefore will depend upon the foreseeability of harm."(Citations omitted.)

The *Reitz* court, in considering what evidence is relevant to establishing foreseeability, stated:

"We believe the 'totality of the circumstances' to be a better indicator to establish knowledge of a defendant than focusing in on any particular criminal occurrences." *Id.*, 66 Ohio App.3d at 193, 583 N.E.2d at 1075.

The court went on to state that "the totality of the circumstances must be somewhat overwhelming before a business will be held to be on notice of and therefore under the duty to protect against the criminal acts of others." *Id.*, 66 Ohio App.3d at 193-194, 583 N.E.2d at 1075.

Because of the special relationship between a business and its customer, a business "may be subject to liability for harm caused to such a business invitee by the conduct of third persons that endangers the safety of such invitee. * * * " *Reitz, supra,* at 191, 583 N.E.2d at 1074, citing *Howard v. Rogers* (1969), 19 Ohio St.2d 42, 48 O.O.2d 52, 249 N.E.2d 804, paragraph one of the syllabus. Thus, a business owner has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know that there is a substantial risk of harm to its invitees on the premises in the possession and control of the business owner. *Howard, supra.*Furthermore, the Ohio Supreme Court has held:

***5** "The proprietor of a business establishment wherein alcoholic beverages are dispensed for consumption upon the premises owes a duty to members of the public while they are in his place of business to exercise reasonable care to protect them from physical injury as a result of violent acts of third persons." *Mason v. Roberts* (1973), 33 Ohio St.2d 29, 62 O.O.2d 346, 294 N.E.2d 884, paragraph two of the syllabus.

In this case, defendants-appellants set forth a claim

for negligent security based upon the alleged failure of Joseph's Barred and Grill to provide adequate security during the Old World Festival. However, a review of the record demonstrates that Mark Steverding's injuries were not the result of a lack of reasonable security measures on the night in question but rather, an intentional assault by an employee of the bar which could not be foreseen given the fact that defendants-appellants were unable to present evidence that any such act had taken place at the bar in the past nor had the employee in question acted in a similar manner beforehand. As such, defendants-appellants' negligent security claim is unsupported by the record.

Turning now to the question of insurance coverage, the commercial liability insurance policy at issue provides that it will pay those sums the insured becomes legally obligated to pay as damages due to "bodily injury." The pertinent policy language states:

b. This insurance applies to "bodily injury" or "property damage" caused by an "occurrence" that takes place in the "coverage territory" * * *.

"Occurrence" is defined as follows:
12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

It is well established that the interpretation of an insurance contract is a question of law that is to be reviewed under a *de novo* standard. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684; *Am. States Ins. Co. v. Guillermin* (1996), 108 Ohio App.3d 547, 671 N.E.2d 317. A court is required to give undefined words used in an insurance contract their plain and obvious meaning. "Where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380. When a term of a contract is clear and unambiguous, a court " * * * cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Santana v. Auto Owners Ins. Co.* (1993), 91 Ohio App.3d 490, 494, 632 N.E.2d 1308.

Generally, acts which are intended to cause harm or inferred to be intended to cause harm, are by definition not accidental. See *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 38, 665 N.E.2d 1115; *Physicians Ins. Co. v. Swanson* (1991), 58 Ohio St.3d 189, 569 N.E.2d 906. In common usage, the word "accident" may mean any of the following:

***6** "1. a: an unforeseen and unplanned event or circumstance b: lack of intention or necessity: CHANCE 2 A: an unfortunate event resulting esp. from carelessness or ignorance b: an unexpected and medically important bodily event esp. when injurious c: an unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured but for which legal relief may be sought" Merriam Webster's Collegiate Dictionary (10 Ed.1996) 7.

Clearly, given the facts of this case, the act of violently kicking a prone individual directly in the face can be construed as intending to cause harm or, more importantly, can be inferred as intending to cause harm to that individual. See *Nationwide Mut. Fire Ins. Co. v. Pendry* (Dec. 11, 1998), Lucas App. No. L-98-1101, unreported; *Gearing, supra.*Where harm appears to be objectively certain, the subjective intent of the actor becomes irrelevant.*Snell v. Katafias* (Mar. 19, 1999), Montgomery App. No. 17440, unreported at 5. Therefore, the assault upon Mark Steverding cannot be considered an accident under the facts of the present case. Given the fact that the subject assault does not qualify as an accident, it cannot then be considered an "occurrence" as specifically defined by the terms of the policy and liability insurance coverage is not available.

In addition, contrary to defendants-appellants' contention, Fred DiSanto's subsequent denial of responsibility for the assault does not somehow lead to the conclusion that the assault was not an intentional act. In fact, defendants-appellants clearly rely upon the intentional nature of the assault in pursuing coverage under the policy of liability insurance issued to D-Cubed, Inc. Even if this court were to assume that Fred DiSanto was not the perpetrator of the assault upon Mark Steverding, it is clear from the trial court record that defendants-appellants still maintain that Mr. Steverding's injuries were caused by an act that was intended to cause harm or inferred to be intended to cause harm; *i.e.*, a kick in the face while Mark Steverding was laying on the ground, thereby removing the assault from coverage under the subject policy of insurance.

Accordingly, the trial court did not err by entering summary judgment in favor of State Auto and determining that insurance coverage was unavailable under the policy of liability insurance issued to D-Cubed, Inc.

Defendants-appellants' sole assignment of error is not well taken.

Judgment of the trial court is affirmed.

It is ordered that appellee recover of appellants its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIMOTHY E. McMONAGLE, P.J., and PATRICIA A. BLACKMON, J., concur.

*7 N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist.,2000.
State Auto. Mut. Ins. Co. v. Steverding
Not Reported in N.E.2d, 2000 WL 709021 (Ohio App. 8 Dist.)

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175 Cal.App.4th 274 Page 1
175 Cal.App.4th 274, 95 Cal.Rptr.3d 845, 09 Cal. Daily Op. Serv. 8195, 2009 Daily Journal D.A.R. 9471
(Cite as: 175 Cal.App.4th 274, 95 Cal.Rptr.3d 845)

C

Court of Appeal, Second District, Division 3, California.
STATE FARM GENERAL INSURANCE COMPANY, Plaintiff and Appellant,
v.
Mimin MINTARSIH, Defendant and Appellant.
No. B202888.

June 25, 2009.

Background: After defending insured in an action for false imprisonment, negligence, and wage and hour violations, liability insurer filed declaratory relief action against insured, seeking determination of the parties' rights and duties under the policies and of its purported right to reimbursement of defense costs. The Superior Court, Los Angeles County, No. BC334728,Mark V. Mooney, J., found that insurer had a duty to indemnify insured for false imprisonment, negligence, and costs awarded in the underlying trial, but not for attorney fees for wage and hour claims. Insurer and insured both appealed.

Holdings: The Court of Appeal, Croskey, J., held that:
(1) insurer had no obligation to pay taxed costs arising solely from claims that were not even potentially covered;
(2) insurer had no obligation to pay attorney fees awarded as costs based on wage and hour claims;
(3) coverage for false imprisonment was barred by statute;
(4) coverage for negligence in failing to obtain medical attention for false imprisonment victim was barred by statute; and
(5) insurer had no obligation to pay postjudgment interest.

Affirmed in part and reversed in part with directions.

West Headnotes

[1] Insurance 217 ⚿1806

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1806 k. Application of Rules of Contract Construction. Most Cited Cases
Courts interpret an insurance policy using the same rules of interpretation applicable to other contracts.

[2] Insurance 217 ⚿1812

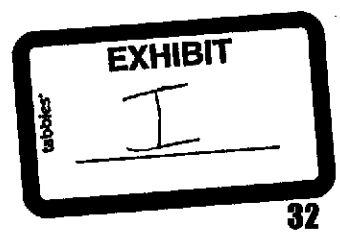
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1811 Intention
217k1812 k. In General. Most Cited Cases
The mutual intention of the contracting parties at the time the contract was formed governs interpretation of an insurance policy.

[3] Insurance 217 ⚿1808

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 k. Ambiguity in General. Most Cited Cases

Insurance 217 ⚿1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a Whole. Most Cited Cases
Insurance policy language is ambiguous if it is susceptible of more than one reasonable interpretation



in the context of the policy as a whole.

[4] Appeal and Error 30 ⚖893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Whether insurance policy language is ambiguous is a question of law reviewed de novo.

[5] Insurance 217 ⚖1808

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 k. Ambiguity in General. Most Cited Cases

Insurance 217 ⚖1817

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1815 Reasonableness
217k1817 k. Reasonable Expectations. Most Cited Cases
Any ambiguity in insurance policy language must be resolved in a manner consistent with the objectively reasonable expectations of the insured in light of the nature and kind of risks covered by the policy.

[6] Contracts 95 ⚖176(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(2) k. Ambiguity in General. Most Cited Cases

Contracts 95 ⚖176(3)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(3) k. Extrinsic Facts. Most Cited Cases
The interpretation of a contract, including the resolution of any ambiguity, is solely a judicial function, unless the interpretation turns on the credibility of extrinsic evidence.

[7] Insurance 217 ⚖2911

217 Insurance
217XXIII Duty to Defend
217k2911 k. In General; Nature and Source of Duty. Most Cited Cases
A liability insurer's duty to defend claims for which there is at least potential coverage under the policy is contractual.

[8] Insurance 217 ⚖2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases

Insurance 217 ⚖2922(1)

217 Insurance
217XXIII Duty to Defend
217k2920 Scope of Duty
217k2922 Several Grounds or Causes of Action
217k2922(1) k. In General. Most Cited Cases
A liability insurer has no contractual duty to defend claims for which there is no potential coverage, but a duty to defend such claims is implied in law if there is at least potential coverage for, and therefore a duty to defend, another claim in the action.

[9] Insurance 217 ⚿2927

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2927 k. Insurer's Options in General. Most Cited Cases
When an insurer defends a claim against the insured for which there is no potential coverage, but a duty to defend is implied in law because there is at least potential coverage for another claim in the action, the insurer may provide the required defense under a reservation of its rights to later assert its objections to coverage as to one or more of the claims alleged against its insured.

[10] Insurance 217 ⚿2927

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2927 k. Insurer's Options in General. Most Cited Cases

Insurance 217 ⚿3506(2)

217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance
217k3506(2) k. Defense Costs. Most Cited Cases
When an insurer defends a claim against the insured for which there is no potential coverage, but a duty to defend is implied in law because there is at least potential coverage for another claim in the action, the insurer may reserve its right to seek reimbursement from the insured of any defense costs that can be attributed solely to claims that were not potentially covered under the policy.

[11] Insurance 217 ⚿3506(2)

217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance
217k3506(2) k. Defense Costs. Most Cited Cases
When an insurer defends a claim against the insured for which there is no potential coverage, but a duty to defend is implied in law because there is at least potential coverage for another claim in the action, the insurer's right to reimbursement of defense costs that can be attributed solely to claims that were not potentially covered under the policy is implied in law to avoid unjust enrichment.

[12] Insurance 217 ⚿2270(1)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2270 Defense Costs, Supplementary Payments and Related Expenses
217k2270(1) k. In General. Most Cited Cases
In defending its insured, liability insurer had no obligation to pay taxed costs arising solely from claims that were not even potentially covered, under umbrella policy supplemental payments provision agreeing to pay "expenses we incur and costs taxed against an Insured in suits we defend" and homeowners policy provision agreeing to pay "the expenses we incur and costs taxed against you in suits we defend," even if insurer had an implied-in-law duty to defend the insured against the claims that were not even potentially covered because they were asserted in the same action as claims that were potentially covered; the language "suits we defend" should be interpreted by reference to the defense duty set forth in the policy. West's Ann.Cal.C.C.P. § 1033.5.
See Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶ 7:160.7

CAINSL Ch. 7A-D); Cal. Jur. 3d, Insurance Contracts, § 546; 2 Witkin, Summary of Cal. Law (10th ed. 2005) Insurance, § 301.

[13] Insurance 217 ⚿2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Insurance 217 ⚿2915

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 k. Matters Beyond Pleadings. Most Cited Cases
A "potential for coverage" under a liability policy, as would give rise to a duty to defend, refers to the possibility that facts alleged in the complaint or otherwise known to the insurer establish a basis for indemnity under the policy.

[14] Insurance 217 ⚿2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Insurance 217 ⚿2915

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 k. Matters Beyond Pleadings. Most Cited Cases

Insurance 217 ⚿2930

217 Insurance
217XXIII Duty to Defend
217k2930 k. Termination of Duty; Withdrawal. Most Cited Cases
If there is a dispute as to the existence of facts alleged in the complaint or otherwise known to the liability insurer establishing a basis for indemnity under the policy, a potential for coverage exists, thus giving rise to a duty to defend, until the factual dispute is resolved so as to establish either actual coverage or the absence of coverage.

[15] Insurance 217 ⚿2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases
Under a liability policy, any factual dispute affecting the existence of coverage creates a potential for coverage and a duty to defend.

[16] Insurance 217 ⚿2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases
There is no "potential for coverage," as would give rise to a duty to defend under a liability policy, if the existence of coverage depends solely on the resolution of a legal question, such as the interpretation or application of policy terms.

[17] Insurance 217 ⚿2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases

Insurance 217 ⚿2917

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty; Conditions Precedent

217k2917 k. In General. Most Cited Cases
If the question of whether coverage exists under a liability policy depends solely on the resolution of a legal question, then a determination of the question in favor of coverage means that a duty to defend existed as of the time that the insurer first became aware of facts alleged in the complaint, or extrinsic facts, establishing a basis for coverage, but resolution of the legal question against coverage, on the other hand, establishes in hindsight that no duty to defend ever existed and that there was never any potential for coverage.

[18] Insurance 217 ⚿2270(1)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2270 Defense Costs, Supplementary Payments and Related Expenses
217k2270(1) k. In General. Most Cited Cases
Attorney fees awarded as costs against the insured under a liability policy can be allocated solely to claims that were not even potentially covered, and thus are not payable under a supplemental payments provision including an obligation for the insurer to pay costs in "suits we defend," if (1) the fees were incurred solely to defend against claims that were not even potentially covered or (2) the right to recover fees arose solely from claims that were not even potentially covered.

[19] Insurance 217 ⚿2270(1)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2270 Defense Costs, Supplementary Payments and Related Expenses
217k2270(1) k. In General. Most Cited Cases
A liability insurer's implied-in-law duty to defend an entire "mixed" action, including claims that are not even potentially covered, does not give rise to an obligation under a supplemental payments provision to pay costs awarded against the insured that can be attributed solely to claims that were not potentially covered.

[20] Insurance 217 ⚿2270(1)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2270 Defense Costs, Supplementary Payments and Related Expenses
217k2270(1) k. In General. Most Cited Cases
In defending its insured, liability insurer had no obligation to pay attorney fees awarded as costs arising solely from wage and hour claims not covered under the policy, under supplemental payments provisions agreeing to pay "expenses we incur and costs taxed against an Insured in suits we defend," absent evidence that there was a potential for coverage for the wage and hour claims.

[21] Insurance 217 ⚿2278(3)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(2) Intentional Acts or Injuries
217k2278(3) k. In General. Most Cited Cases
An act is "willful," within meaning of statute providing that an insurer has no duty to indemnify a loss caused by the insured's willful act, if the in-

sured intended to commit the act and either intended the act to cause harm or the act was inherently harmful. West's Ann.Cal.Ins.Code § 533.

[22] Insurance 217 ⚿2278(3)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(2) Intentional Acts or Injuries
217k2278(3) k. In General. Most Cited Cases

Insurance 217 ⚿2308

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2306 Personal Injury
217k2308 k. False Arrest, Detention or Imprisonment. Most Cited Cases
Statute providing that an insurer has no duty to indemnify a loss caused by the insured's willful act precluded indemnity for damages awarded against insured for false imprisonment, based on insured's acts of intentionally depriving a domestic servant of her freedom of movement, despite the fact that insured's umbrella liability policy expressly promised indemnity for false imprisonment. West's Ann.Cal.Ins.Code § 533.

[23] Insurance 217 ⚿2278(3)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(2) Intentional Acts or Injuries
217k2278(3) k. In General. Most Cited Cases
Statute providing that an insurer has no duty to indemnify a loss caused by the insured's willful act precluded indemnity for damages awarded against insured for negligence, in delaying in sending domestic servant to a doctor and dentist when servant suffered a pain in her toe and a toothache, since this negligence was inseparable from insured's intentional tort of false imprisonment in depriving the servant of her freedom of movement. West's Ann.Cal.Ins.Code § 533.

[24] Insurance 217 ⚿2278(3)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(2) Intentional Acts or Injuries
217k2278(3) k. In General. Most Cited Cases
Statute providing that an insurer has no duty to indemnify a loss caused by the insured's willful act precludes indemnity for a loss caused by conduct that, standing alone, could be characterized as negligent rather than intentional, but that is so closely related to intentional misconduct as to be inseparable from it. West's Ann.Cal.Ins.Code § 533.

[25] Insurance 217 ⚿2270(1)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2270 Defense Costs, Supplementary Payments and Related Expenses
217k2270(1) k. In General. Most Cited Cases
Liability insurer had no obligation to pay postjudgment interest in an action it defended on behalf of

insured, under supplemental payments provisions agreeing to pay "interest on the entire judgment which accrues after entry of the judgment and before we pay or tender, or deposit in court that part of the judgment which does not exceed the limit of liability that applies," where insured's policies provided no coverage for the damages awarded in the underlying action; the policies' limits of liability did not apply to the supplemental payments obligation, and thus the policies tied the obligation to pay postjudgment interest on "the entire judgment" to the failure to pay indemnity for a covered claim rather than the failure to pay other amounts that might be due under the policies.

***848** Horvitz & Levy, Barry R. Levy, Daniel J. Gonzalez, Encino; Grant, Genevose & Baratta, James M. Baratta and Jason S. Roberts, Irvine, for Plaintiff and Appellant.

Garrard & Davis, Donald A. Garrard, Santa Monica; The Ehrlich Law Firm and Jeffrey Isaac Ehrlich, for Defendant and Appellant.

CROSKEY, J.

State Farm General Insurance Company (State Farm) and Mimin Mintarsih both appeal a judgment in a declaratory relief action. Mintarsih sued State Farm's insureds, Dennis Lam and Dina Lam, in the underlying action for false imprisonment and other counts arising from her employment as a domestic servant. She obtained a judgment against the Lams for compensatory and punitive damages, statutory penalties, attorney fees as costs, and other costs. In this action, State Farm sought a declaration of the parties' rights and duties with respect to two insurance policies that were issued to the Lams and later assigned***849** to Mintarsih. The trial court determined that the policies provided coverage for $87,000 in compensatory damages and for the award of $161,591.05 in costs, but that State Farm had no obligation to pay the attorney fee award.

On appeal, Mintarsih contends State Farm is obligated to pay the attorney fee award against the Lams under policy provisions requiring it to pay costs awarded against the insureds, despite the fact that the right to a fee award arose solely from wage and hour claims for which there was no potential coverage under the policies. She also argues that she is entitled to postjudgment interest on the *entire* judgment. In its appeal, State Farm contends that it has no duty to indemnify the Lams for the compensatory damages award, based on Insurance Code section 533 and other grounds.

We conclude that State Farm's obligation under the policies' "supplemental payments" provisions, which promise to pay costs awarded against the insureds, extends *only* to costs arising from claims that were at least potentially covered under one or both of the policies. Mintarsih has not shown that the wage and hour claims that gave rise to the right to recover attorney fees were potentially covered under the policies and therefore has not established that State Farm is obligated to pay the attorney fees awarded as costs. In addition, Insurance Code section 533 precludes indemnity for the compensatory damages awarded against the Lams for false imprisonment and negligence. Because State Farm has no duty to indemnify the Lams under either policy for the damages awarded against them, we conclude that it has no obligation to pay postjudgment interest on the judgment awarded against them (other than interest on the cost award, which State Farm concedes). We therefore affirm the judgment in part and reverse in part with directions.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Insurance Policies*

State Farm issued two insurance policies to the Lams, a homeowners policy and a personal liability umbrella policy. The homeowners policy included

coverage for personal liability for "damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence." (Emphasis omitted.) State Farm also agreed to defend any action seeking such damages. In addition, State Farm agreed to pay certain "claim expenses" over and above the limits of liability, including (1) "expenses we incur and costs taxed against an Insured in suits we defend;" (2) "prejudgment interest awarded against the Insured on that part of the judgment we pay; and [(3)] [¶] ... interest on the entire judgment which accrues after entry of the judgment and before we pay or tender, or deposit in court that part of the judgment which does not exceed the limit of liability that applies." [FN1] (Emphasis omitted.)

> FN1. Such provisions are commonly known as "supplemental payments" provisions.

The personal liability umbrella policy included coverage for the Lams' personal liability for "damages for a loss." (Emphasis omitted.) The term "loss" was defined to include the commission of specified offenses resulting in personal injury, including false imprisonment. State Farm also agreed to defend such an action. The policy also stated: "When the claim or suit is covered by this policy, but not covered by any other policy available to you: [¶] ... [¶] ... we will pay the expenses we incur and costs taxed against you in suits we defend; ... [¶] ... we will pay prejudgment***850** interest awarded against you on that part of the judgment we pay under Coverage L; and [¶] ... we will pay the interest on the entire judgment which accrues after entry of the judgment and before we pay or tender, or deposit in court, that part of the judgment which does not exceed the limit of liability that applies." The policy stated further that the payment of such costs or interest was in addition to the limits of liability.

2. *Underlying Action*

Mintarsih filed a complaint against the Lams in July 2004 (*Mimin Mintarsih v. Dennis Lam et al.* (Super.Ct.L.A.County, No. BC319275)). She alleged that she was falsely imprisoned in the Lams' home in Pasadena and forced to work as a domestic servant from June 1997 until approximately May 2004. She alleged that she previously had worked as a domestic servant for Dina Lam's relatives in Indonesia and Singapore before coming to the United States to work for the Lams. She alleged numerous counts against the Lams.

The Lams tendered their defense to State Farm under the homeowners and umbrella policies. State Farm agreed to defend the Lams, but reserved the right to assert defenses to coverage, to withdraw the defense if it determined that there was no duty to defend or indemnify the Lams, and to seek reimbursement of defense costs.

Mintarsih's complaint against the Lams was submitted to the jury on counts for false imprisonment, negligence, negligence per se, fraud, and wage and hour violations under the Labor Code. The jury found the Lams liable on each of those counts.[FN2] It awarded Mintarsih $75,000 in noneconomic damages and $12,000 in economic damages on the first four counts, and awarded her a total of $745,671 in damages on and a statutory penalty for the wage and hour violations. It also awarded her $2,500 in punitive damages against each defendant. Judgment was entered against the Lams on May 12, 2006.[FN3]

> FN2. On the fraud count, the jury found Dina Lam liable but found that Dennis Lam was not liable.
>
> FN3. An amended judgment was later entered on July 7, 2006.

The court later granted Mintarsih's motion for attorney fees as costs as the prevailing party on the wage and hour claims, pursuant to Labor Code section 218.5. The court awarded her $733,323.60 in

attorney fees and $161,591.05 in other costs.[FN4]

> FN4. State Farm contends the court should have awarded attorney fees under Labor Code section 1194, rather than section 218.5, citing *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 95 Cal.Rptr.2d 57. We need not decide which Labor Code section applies.

3. *Present Action*

State Farm filed a complaint for declaratory relief against the Lams and Mintarsih in June 2005, seeking a determination of the parties' rights and duties under the two policies and of its purported right to reimbursement of defense costs. The court conducted a nonjury trial in August 2006.

State Farm argued that the conduct for which the Lams were found liable was not an "accident" within the meaning of the policies. It also argued that the attorney fee award was based on wage and hour claims for which there was no coverage under the policies and that the policies did not provide for payment of attorney fees awarded as costs in these circumstances. State Farm did not pursue its claim for reimbursement of defense costs at trial.

***851** The Lams and Mintarsih argued that State Farm had a duty to indemnify the Lams for all of the $87,000 in compensatory damages awarded for false imprisonment, negligence, negligence per se, and fraud, although they conceded that State Farm had no duty of indemnity with respect to the fraud count. They also argued that State Farm was obligated to pay the attorney fees awarded as costs regardless of whether the right to recover those fees arose from a claim for which there was no coverage under the policies. They conceded that State Farm had no duty to indemnify the Lams for the amounts awarded for wage and hour violations or for punitive damages.

The trial court issued a statement of decision in January 2007. It concluded that the policies provided coverage for $87,000 in compensatory damages awarded for false imprisonment and negligence, and that the policies also obligated State Farm to pay the $161,591.05 awarded against the Lams as costs. The court concluded, however, that State Farm had no obligation under the policies to pay the attorney fees awarded against the Lams based on wage and hour claims for which the policies provided no coverage, and that Insurance Code section 533 precluded indemnity for those fees. The court entered a judgment on April 3, 2007, stating that (1) State Farm had a duty to indemnify the Lams for damages in the amount of $87,000 and costs awarded against the Lams in the amount of $161,591.05, (2) State Farm otherwise had no duty to indemnify the Lams or pay Mintarsih any additional sum, and (3) State Farm was the prevailing party in this action.

Mintarsih moved to vacate the judgment and enter a different judgment ordering State Farm to pay postjudgment interest on the entire amount of the judgment in the underlying action. She also moved for a new trial. The court denied the new trial motion but granted in part the motion to vacate the judgment, and entered a new judgment. The new judgment, entered on August 15, 2007, stated that (1) State Farm had a duty to indemnify the Lams for damages in the amount of $87,000 and costs awarded against the Lams in the amount of $161,591.05, (2) State Farm was required to pay interest on only those two portions of the judgment in the underlying action, (3) State Farm had no duty to indemnify the Lams for any other amount, and (4) State Farm was the prevailing party in this action.

Mintarsih timely appealed the judgment, and State Farm also appealed.

CONTENTIONS

Mintarsih contends in her appeal that (1) the supplemental payments provisions unambiguously require State Farm to pay costs awarded against the Lams in suits it defends, including attorney fees as costs, regardless of whether the right to recover attorney fees arises from claims that are covered under the policies; (2) Insurance Code section 533 does not preclude payment of the attorney fees awarded against the Lams because their conduct giving rise to the fee award was not willful within the meaning of the statute and because the obligation to pay costs arises from a defense, rather than an indemnity, obligation; and (3) the supplemental payments provisions require State Farm to pay "interest on the entire judgment," including those amounts that are not covered under the policies, until it pays the policy limit.

State Farm contends in its appeal that (1) the false imprisonment was willful within the meaning of Insurance Code section 533, so it has no duty of indemnity as to the damages awarded for false imprisonment; (2) the Lams' negligence was inseparable from the false imprisonment, so it ***852** has no duty of indemnity as to the damages awarded for negligence; (3) the negligence was not an "accident" within the meaning of the policies; (4) workers' compensation exclusions in the policies precluded coverage for the Lams' negligence; and (5) Mintarsih failed to prove what part of the $87,000 in compensatory damages awarded against the Lams was attributable to the counts for which the court concluded there was coverage, as required.[FN5]

> FN5. State Farm does not challenge the finding that it is liable for $161,591.05 in costs awarded against the Lams in the underlying action plus interest on that amount.

DISCUSSION

1. *Rules of Policy Interpretation*

[1][2] "We interpret an insurance policy using the same rules of interpretation applicable to other contracts. (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115 [90 Cal.Rptr.2d 647, 988 P.2d 568].) The mutual intention of the contracting parties at the time the contract was formed governs interpretation. (Civ.Code, § 1636; *Palmer, supra,* at p. 1115 [, 90 Cal.Rptr.2d 647, 988 P.2d 568].) We ascertain that intention solely from the written contract if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. (Civ.Code, §§ 1639, 1647.) We consider the contract as a whole and interpret its language in context, rather than interpret a provision in isolation. (*Id.,* § 1641.) We interpret words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. (*Id.,* § 1644.) If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (*Id.,* § 1638.)" (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506, 86 Cal.Rptr.3d 515.)

[3][4][5][6] Policy language is ambiguous if it is susceptible of more than one reasonable interpretation in the context of the policy as a whole. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648, 3 Cal.Rptr.3d 228, 73 P.3d 1205.) Whether policy language is ambiguous is a question of law that we review de novo. (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 912, 226 Cal.Rptr. 558, 718 P.2d 920; *American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245, 37 Cal.Rptr.3d 918.) Any ambiguity must be resolved in a manner consistent with the objectively reasonable expectations of the insured in light of the nature and kind of risks covered by the policy. (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 869, 77 Cal.Rptr.2d 107, 959 P.2d 265.) The interpretation of a contract, including the resolution

of any ambiguity, is solely a judicial function, unless the interpretation turns on the credibility of extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839.)

2. *Duty to Defend*

[7][8] Liability policies typically promise that the insurer will defend the insured in an action seeking damages for a covered claim. Thus, an insurer's duty to defend claims for which there is at least potential coverage under the policy is contractual. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 47, 65 Cal.Rptr.2d 366, 939 P.2d 766 (*Buss*).) The contractual duty to defend extends to all claims at least potentially covered under the policy, but no further. An insurer has no contractual duty to defend claims for which there is no potential ***853** coverage, but a duty to defend such claims is *implied in law* if there is at least potential coverage for, and therefore a duty to defend, another claim in the action. (*Id.* at pp. 48-49, 65 Cal.Rptr.2d 366, 939 P.2d 766.) In such a "mixed" action, an insurer has a duty to defend the action in its entirety to ensure that the defense of claims that are at least potentially covered will be both meaningful and immediate. (*Id.* at p. 49, 65 Cal.Rptr.2d 366, 939 P.2d 766.)

[9][10][11] In such a circumstance, an insurer may provide the required defense under a reservation of its rights to later assert its objections to coverage as to one or more of the claims alleged against its insured. (*Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489, 497-498, 106 Cal.Rptr.2d 535, 22 P.3d 313.) It may also reserve its right to seek reimbursement from the insured of any defense costs that can be attributed solely to claims that were not potentially covered under the policy. (*Buss, supra,* 16 Cal.4th at pp. 50-53, 65 Cal.Rptr.2d 366, 939 P.2d 766.) An insurer, however, may not seek reimbursement from an insured of defense costs attributable to claims that were at least potentially covered, because the duty to defend such claims was part of the insurance policy bargain. (*Id.* at pp. 49-50, 65 Cal.Rptr.2d 366, 939 P.2d 766.) An insurer has no *contractual* duty to defend claims for which there is no potential for coverage, and defense costs that are solely attributable to such claims are not part of the bargained-for exchange. (*Id.* at p. 51, 65 Cal.Rptr.2d 366, 939 P.2d 766.) An insurer's right to reimbursement of those defense costs is *implied in law* to avoid unjust enrichment. (*Ibid.*) An insured could have no objectively reasonable expectation to retain the windfall of payment for the defense of claims for which there was no potential coverage. (*Id.* at pp. 51, 59, 65 Cal.Rptr.2d 366, 939 P.2d 766.)

3. *State Farm Has No Obligation to Pay Costs Arising Solely from Claims that Were Not Even Potentially Covered*

[12] State Farm agreed to pay "expenses we incur and costs taxed against an Insured in suits we defend," under the terms of the homeowners policy. Under the terms of the umbrella policy, State Farm agreed to pay "the expenses we incur and costs taxed against you in suits we defend," provided that the claim or suit was not covered by any other policy. These provisions make the insurer's obligation to pay an award of costs against the insured dependent on the defense duty. Courts have interpreted the word "costs" as used in such a provision consistent with its use in Code of Civil Procedure section 1033.5, subdivision (a)(10), which provides that attorney fees authorized by contract, statute, or law are allowable as costs to the prevailing party under section 1032. (*Prichard v. Liberty Mutual Ins. Co.* (2000) 84 Cal.App.4th 890, 912, 101 Cal.Rptr.2d 298 (*Prichard*); *Insurance Co. of North America v. National American Ins. Co.* (1995) 37 Cal.App.4th 195, 206-207, 43 Cal.Rptr.2d 518.)

[13][14][15][16][17] We interpreted similar language in *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd.* (2007) 148 Cal.App.4th 976, 56 Cal.Rptr.3d 279 (*Golden Eagle*), in which the insured agreed to pay " 'with respect to ... any "suit" against an insured we defend,' '[a]ll costs taxed against the insured in the "suit." ' " (*Id.* at p. 992, 56 Cal.Rptr.3d 279.) *Golden Eagle* involved an action for declaratory relief regarding duties to indemnify and defend the insured in an underlying action for breach of a commercial lease. (*Id.* at p. 982, 56 Cal.Rptr.3d 279.) The judgment against the ***854** insured lessor included attorney fees awarded as costs based on an attorney fee clause in the lease. (*Id.* at p. 983, 56 Cal.Rptr.3d 279.) The insurer provided a defense, but the trial court later determined that, as a matter of law, no duty to defend had ever arisen. (*Id.* at p. 983, 56 Cal.Rptr.3d 279.) [FN6]

> FN6. A duty to defend arises only if there is at least a potential for coverage, as we have stated. (*Buss, supra,* 16 Cal.4th at pp. 47-48, 65 Cal.Rptr.2d 366, 939 P.2d 766.) A "potential for coverage" refers to the possibility that facts alleged in the complaint or otherwise known to the insurer establish a basis for indemnity under the policy. (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654-655, 31 Cal.Rptr.3d 147, 115 P.3d 460.) If there is a dispute as to the existence of such facts, a potential for coverage exists until the factual dispute is resolved so as to establish either actual coverage or the absence of coverage. (*Id.* at pp. 655, 657, 31 Cal.Rptr.3d 147, 115 P.3d 460; *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1085, 17 Cal.Rptr.2d 210, 846 P.2d 792.) Thus, any factual dispute affecting the existence of coverage creates a potential for coverage and a duty to defend. There is no "potential for coverage" and no duty to defend, however, if the existence of coverage depends solely on the resolution of a legal question (e.g., the interpretation or application of policy terms). (*Waller v. Truck Ins. Exchange* (1995) 11 Cal.4th 1, 25-26, 44 Cal.Rptr.2d 370, 900 P.2d 619; *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1151, 29 Cal.Rptr.2d 559.) In those circumstances, coverage either exists or does not exist. (*Mirpad, LLC v. California Ins. Guarantee Assn.* (2005) 132 Cal.App.4th 1058, 1068, 34 Cal.Rptr.3d 136.) A duty to defend arises if coverage exists under the law, and no duty to defend arises if coverage does not exist. (*Ibid.*) If the legal question is decided in favor of coverage, a duty to defend existed as of the time that the insurer first became aware of facts alleged in the complaint, or extrinsic facts, establishing a basis for coverage. The resolution of a legal question against coverage, on the other hand, establishes in hindsight that no duty to defend ever existed and that there was never any potential for coverage. (*Scottsdale Ins. Co., supra,* 36 Cal.4th at pp. 657-658, 31 Cal.Rptr.3d 147, 115 P.3d 460.)

We rejected a literal interpretation of "any 'suit' against an insured we defend," and concluded that the obligation to pay a costs award could arise only if the insured had a duty to defend the insured. (*Golden Eagle, supra,* 148 Cal.App.4th at p. 996, 56 Cal.Rptr.3d 279.) We stated that just as an insured could not reasonably expect an insurer to pay defense costs for a suit in which there was no potential for coverage, an insured could not reasonably expect an insurer to pay costs awarded against the insured in such a suit. (*Id.* at p. 994, 56 Cal.Rptr.3d 279.) We also stated that requiring an insurer to pay costs awarded against an insured only if the insurer defended the action would discourage insurers from providing a defense in cases

where coverage was in doubt, contrary to the principle that the law should encourage insurers to provide a defense in such cases. (*Id.* at pp. 995-996, 56 Cal.Rptr.3d 279.) Accordingly, we held that because no duty to defend ever arose, the insurer had no obligation to pay costs awarded against the insured, including attorney fees awarded as costs.[FN7] (*Id.* at p. 996, 56 Cal.Rptr.3d 279.)

> FN7. Our statement in *Golden Eagle, supra,* 148 Cal.App.4th at page 996, 56 Cal.Rptr.3d 279, that the supplemental payments obligation "is an integral part of the Golden Eagle defense burden" should be construed to mean only that absent a duty to defend, the insurer had no obligation to pay costs awarded against the insured.

Thus, under a supplemental payments provision similar to those in this case, an insurer is obligated to pay costs awarded against an insured only if the insurer had a duty to defend the insured, regardless of whether the insurer actually provided a defense. (*Golden Eagle, supra,* 148 Cal.App.4th at p. 996, 56 Cal.Rptr.3d 279.) We believe that this is what the parties ***855** intended in referring to "suits we defend" because they anticipated that the insurer would defend a lawsuit if and only if it had a contractual duty to defend. In other words, the language "suits we defend" should be interpreted by reference to the defense duty set forth in the policy.[FN8] Accordingly, we conclude that the *contractual* obligation to pay costs awarded against an insured arises only if there is a contractual duty to defend. The contractual duty to defend extends only to those claims for which there is at least potential coverage under the policy, as we have stated. An insurer has no contractual duty to defend the insured as to claims that are not even potentially covered. (*Buss, supra,* 16 Cal.4th at p. 51, 65 Cal.Rptr.2d 366, 939 P.2d 766.)

> FN8. We interpret policy language in the context of the policy as a whole. (Civ.Code, § 1641.)

[18][19] An insurer's implied-in-law duty to defend an entire "mixed" action, including claims that are not even potentially covered, does not give rise to an obligation under a supplemental payments provision to pay costs awarded against the insured that can be attributed solely to claims that were not potentially covered. This is because the duty to defend claims in a "mixed" action that are not potentially covered is not a contractual duty, and the reference in the supplemental payments provision to "suits we defend" encompasses only those claims that the insurer agreed to defend under the terms of the policy. Just as an insured could not reasonably expect to retain the benefit of an insurer's payment of defense costs that can be allocated solely to claims that were not even potentially covered (*Buss, supra,* 16 Cal.4th at pp. 51, 53, 65 Cal.Rptr.2d 366, 939 P.2d 766), an insured could not reasonably expect an insurer to pay costs that can be allocated solely to claims that were not even potentially covered. Attorney fees awarded as costs against the insured can be allocated solely to claims that were not even potentially covered if (1) the fees were incurred *solely* to defend against claims that were not even potentially covered or (2) the right to recover fees arose *solely* from claims that were not even potentially covered.

Prichard, supra, 84 Cal.App.4th 890, 101 Cal.Rptr.2d 298, involved an action by an insured against an insurer seeking, among other things, payment of attorney fees that were awarded as costs against the insured in the underlying action. (*Id.* at p. 900, 101 Cal.Rptr.2d 298.) The fee award was based on contractual attorney fee clauses. (*Id.* at p. 911, 101 Cal.Rptr.2d 298.) The insurer provided a defense in the underlying action for defamation and other counts, and did not challenge the existence of a duty to defend. (*Id.* at pp. 897, 901, 101 Cal.Rptr.2d 298.) *Prichard* held that a supplemental payments provision obligated the insurer to pay the

fee award, and rejected the insurer's argument that the provision "would not 'apply' to a defended mixed action where there is no actual coverage." (*Id.* at p. 912, 101 Cal.Rptr.2d 298.) *Prichard* stated that the obligation to pay a cost award under the supplemental payments provision was "a function of the insurer's defense obligation, not its indemnity obligation." (*Id.* at p. 911, 101 Cal.Rptr.2d 298.) *Prichard* stated further that because the obligation to pay costs was a function of the defense obligation, the insurer was liable for attorney fees awarded as costs despite "the absence of even the possibility of coverage for the causes of action that generated the large cost award." (*Id.* at p. 912, fn. 22, 101 Cal.Rptr.2d 298.) In so stating, *Prichard* did not distinguish the insurer's *contractual* duty to defend from its duty *implied in law* to defend the entire mixed action. To ***856** the extent that the above-quoted statement may be read to support an insurer's liability for costs arising solely from claims that were not even potentially covered, we decline to follow *Prichard.*

[20] Mintarsih concedes that the policies provided no coverage for her wage and hour claims against the Lams and does not contend there was any potential coverage for those claims. Her statutory right to recover attorney fees was based solely on the Labor Code violations. Absent a showing of a potential for coverage of those claims, we conclude that Mintarsih has established no basis to hold State Farm liable for her attorney fees awarded as costs against the Lams. In light of that conclusion, we need not decide whether Insurance Code section 533 applies to the attorney fee award in these circumstances. (Compare *Combs v. State Farm Fire & Casualty Co.* (2006) 143 Cal.App.4th 1338, 1344-1346, 49 Cal.Rptr.3d 917, with *Golden Eagle, supra,* 148 Cal.App.4th at p. 996 & fn. 17, 56 Cal.Rptr.3d 279; see also fn. 7, *ante.*)

4. *Insurance Code Section 533 Precludes Indemnity for the Damages Awarded to Mintarsih for False Imprisonment and Negligence*

[21] Insurance Code section 533 provides that an insurer has no duty to indemnify a loss caused by the insured's willful act.[FN9] An act is willful within in the meaning of section 533 if the insured intended to commit the act and either intended the act to cause harm or the act was inherently harmful. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 500-501, 78 Cal.Rptr.2d 142.) We held in *Downey Venture* that section 533 precluded indemnification for damages for malicious prosecution despite the fact that the policy expressly provided indemnity coverage for that tort, but section 533 did not relieve the insurer of the contractual duty to defend that claim. (*Downey Venture, supra,* at pp. 506, 509, 78 Cal.Rptr.2d 142.)

> FN9. Insurance Code section 533 states: "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."

[22] The court instructed the jury in the underlying action that the Lams were liable for false imprisonment only if they "intentionally deprived plaintiff of her freedom of movement" without her voluntary consent. The jury found the Lams liable for false imprisonment. It found that Mintarsih worked for the Lams seven days a week for 14 hours per day, and awarded her $286,294 in unpaid wages, $185,744 in liquidated damages, compensation for rest breaks and meal breaks, and other amounts. The jury verdict established that the Lams' misconduct was intentional. The deprivation of Mintarsih's freedom for the purpose of exploiting her as a domestic servant, while depriving her of the wages and breaks to which she was entitled, was inherently harmful. Accordingly, we conclude that the Lams' misconduct was willful within the meaning of Insurance Code section 533. Section 533 precludes indemnity for the damages awarded for false imprisonment, despite the fact that the umbrella

policy expressly promised indemnity for false imprisonment.

[23] The jury also found the Lams liable for negligence. Mintarsih testified in the underlying action that she suffered a pain in her toe and complained to the Lams for several months, but they delayed sending her to a doctor. When she eventually obtained medical care, the doctor had to remove her toenail. She also testified that she complained to the Lams ***857** many times about a toothache, but they delayed sending her to a dentist. When she eventually obtained dental care, the dentist had to remove a tooth. The court instructed the jury that the Lams were liable for negligence if they failed to use reasonable care to prevent harm to another.

[24] Insurance Code section 533 precludes indemnity for a loss caused by conduct that, standing alone, could be characterized as negligent rather than intentional, but that is so closely related to intentional misconduct as to be inseparable from it. (*Horace Mann Ins. Co. v. Barbara B. supra,* 4 Cal.4th at pp. 1084, 1085, 17 Cal.Rptr.2d 210, 846 P.2d 792; *State Farm Fire & Casualty Co. v. Century Indemnity Co.* (1997) 59 Cal.App.4th 648, 662-663, 69 Cal.Rptr.2d 403.) *Horace Mann* involved a junior high school student who sued her teacher for sexual molestation and other harassing conduct. (*Horace Mann, supra,* at p. 1079, 17 Cal.Rptr.2d 210, 846 P.2d 792.) The insurer filed a declaratory relief action, alleging that there was no potential coverage under the teacher's policy because section 533 precluded liability for the insured's intentional misconduct. (*Id.* at p. 1080, 17 Cal.Rptr.2d 210, 846 P.2d 792.) The trial court granted summary judgment in favor of the insurer. (*Ibid.*) The California Supreme Court reversed. (*Id.* at p. 1087, 17 Cal.Rptr.2d 210, 846 P.2d 792.) *Horace Mann* stated that a molester could be liable to his victim for negligence if the negligent conduct was "apart from, and not integral to, the molestation." (*Id.* at p. 1083, 17 Cal.Rptr.2d 210, 846 P.2d 792.) *Horace Mann* stated that the limited evidence in the record failed to show that the alleged negligent acts "occurred in such close temporal and spatial proximity to the molestation as to compel the conclusion that they are inseparable from it." (*Id.* at p. 1084, 17 Cal.Rptr.2d 210, 846 P.2d 792.) While acknowledging that "[i]n many cases the plaintiff's allegations of molestation and other misconduct may be inseparably intertwined," *Horace Mann* concluded that triable issues of fact as to whether the alleged negligent conduct was inseparable from the intentional molestation precluded summary judgment. (*Id.* at p. 1085, 17 Cal.Rptr.2d 210, 846 P.2d 792.)

The evidence presented to the jury in this case shows that the Lams failed to provide timely medical and dental care to their domestic servant during the time that they intentionally deprived her of freedom of movement. Their negligent conduct was intimately connected with their intentional misconduct, both temporally and spatially. Deprived of her freedom of movement, Mintarsih depended on the Lams to satisfy her health care needs. They failed to do so.

In our view, the Lams' negligence was so closely related to their intentional misconduct as to constitute the same course of conduct for purposes of Insurance Code section 533. The evidence compels the conclusion that the Lams' negligence in failing to provide timely health care was inseparable from their false imprisonment of Mintarsih. Section 533 therefore precludes indemnity for the Lams' negligence liability. In light of our conclusion that State Farm has no duty to indemnify the Lams for damages awarded in the underlying action, we need not address its other contentions.

5. *State Farm Has No Obligation to Pay Additional Postjudgment Interest*

[25] In its homeowners policy, State Farm agreed to pay "interest on the entire judgment which accrues

after entry of the judgment and before we pay or tender, or ***858** deposit in court that part of the judgment which does not exceed the limit of liability that applies." Under the terms of its umbrella policy, State Farm promised to pay "the interest on the entire judgment which accrues after entry of the judgment and before we pay or tender, or deposit in court, that part of the judgment which does not exceed the limit of liability that applies."

These provisions contemplate a covered claim and are necessarily tied to and depend upon State Farm's *indemnity* obligation. State Farm agreed to pay postjudgment interest accruing until it pays or tenders in court the amount payable under each policy, not to exceed "the limit of liability that applies." The limits of liability apply to the personal liability coverage under the policies, but do not apply to the supplemental payments obligation. Thus, these provisions tie the obligation to pay postjudgment interest on "the entire judgment" to the failure to pay indemnity for a covered claim rather than the failure to pay other amounts that may be due under the policies. By tying that obligation to the failure to pay indemnity for a covered claim, these provisions indicate that the obligation to pay postjudgment interest on "the entire judgment" does not arise if the policy provides no coverage for the damages awarded against the insured. In light of our conclusion that the policies provide no coverage for the damages awarded in the underlying action, we conclude that no obligation to pay postjudgment interest on "the entire judgment" ever arose. We therefore need not decide the precise meaning of "the entire judgment" in these circumstances.

DISPOSITION

The judgment is reversed to the extent that it holds that State Farm is liable for $87,000 in damages awarded against the Lams plus prejudgment interest on that amount. The trial court is directed to enter a new judgment declaring that State Farm has no duty to indemnify the Lams for the $87,000 in damages nor any obligation to pay prejudgment interest on that amount. The judgment is otherwise affirmed. State Farm is entitled to recover its costs on appeal.

WE CONCUR: KLEIN, P.J., and ALDRICH, J.
Cal.App. 2 Dist.,2009.
State Farm General Ins. Co. v. Mintarsih
175 Cal.App.4th 274, 95 Cal.Rptr.3d 845, 09 Cal. Daily Op. Serv. 8195, 2009 Daily Journal D.A.R. 9471

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.
TOLL BROTHERS, INC. et al.
v.
GENERAL ACCIDENT INS. CO.
No. 98C-08-203-WTQ.

Dec. 27, 1999.

RE: Letter Opinion and Order on Defendant's Motion for Summary Judgment-MOTION GRANTED

QUILLEN, J.

Plaintiffs' Motion-Treated as a Cross Motion for Summary Judgment-MOTION DENIED

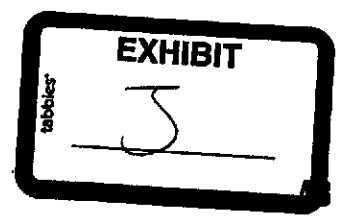
Dear Counsel:

***1** This is the Court's Letter Opinion and Order on issues relating to punitive damages, the Federal Court's awarding of attorneys' fees pursuant to 17 U.S.C. § 505, and the costs incurred by the Toll Corporations in supplementing their own defense. For the reasons stated herein, Defendant General Accident Insurance Company's ("GA") Motion for Summary Judgment on these topics is GRANTED.

FACTS

This case concerns insurance coverage. Toll Brothers Incorporated and its wholly owned subsidiary, TB Proprietary Corporation (collectively "Toll"), purchased an insurance policy from General Accident Insurance Company ("GA") for protection from numerous events. This litigation stems from a suit filed by Toll against smaller competitors in the Federal District Court in the Eastern District of Pennsylvania. Toll alleged violations of the Copyright and Lanham Acts. The competitors filed a Counterclaim against Toll labeled "abuse of process." In Court granted the competitors' Motion for Summary Judgment on the Counterclaim, and the Complaint by Toll against the competitors was dismissed. The Federal Court awarded the competitors $148,003.34 in compensatory damages on the successful abuse of process claim. In a separate jury deliberation on punitive damages only, ajury awarded an additional $675,000 in punitive damages. After the trial, the Federal Court awarded the competitors attorneys' fees pursuant to 17 U.S.C. § 505 in the amount of $204,910.72. At the end of the day, adding prejudgment interest, Toll was on the hook for $1,120,892.46.

Toll submitted its claim to its insurance company to cover the judgment and GA refused to pay the claim. Toll then filed this lawsuit against GA for coverage of the payments it owed stemming from the Counterclaim in the Federal District Court. GA moved for Summary Judgment on claims of compensatory damages and punitive damages. Toll then filed submissions that this Court has treated as Cross Motions for Summary Judgment. This Court issued a Letter Opinion on August 4, 1999. In that Letter Opinion, the Defendant's Motion for Summary Judgment was denied and the Plaintiffs' Motion was granted in part and deferred in part. This Court held that GA was required to indemnify Toll for the compensatory damages sustained in the Federal litigation stemming from the abuse of process claim. The Court asked for additional briefing to determine whether GA must indemnify Toll for the punitive damages, attorneys' fees, and costs for attorneys incurred by Toll in the Federal suit paid out of Toll's own pocket. In so ruling, this Court held



that neither party sufficiently addressed the issues relating to punitive damages, the Federal Court's awarding of attorneys' fees pursuant to 17 U.S.C. § 505, and the costs incurred by the Toll Corporations in supplementing their own defense. The parties entered into a stipulated briefing schedule and submitted additional arguments. Oral argument was held. This is the Court's Letter Opinion and Order on those supplemental issues.

STANDARD OF REVIEW

***2** When considering a Motion for Summary Judgment, the Court's function is to examine the record to determine whether genuine issues of material fact exist. *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, Del.Super., 312 A.2d 322, 325 (1973). If, after viewing the record in a light most favorable to the non-moving party, the Court finds that there are no genuine issues of material fact, Summary Judgment will be appropriate. *Id.* Summary Judgment will not be granted if the record indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances. *Ebersole v. Lowengrub*, Del.Supr., 180 A.2d 467 (1962).

PUNITIVE DAMAGES

The first issue the Court must determine is whether punitive damages are covered by the insurance contract. To do so, the Court will apply Pennsylvania law. *See Toll Brothers, Inc. et al. v. General Accident Ins. Co.*, C.A. No. 98C-08-203, Quillen, J. (Aug. 4, 1999).

The nature of punitive damages in Pennsylvania is designed to punish an individual litigant for misconduct. *Creed v. Allstate Ins. Co.*, Pa.Super., 529 A.2d 10, 12 (1987). Unlike compensatory damages, punitive damages are not intended to "fairly compensate the plaintiff" but rather are intended " 'to deter and punish egregious behavior'.... Punitive damages are not awarded as additional compensation but are purely penal in nature." *Taylor v. Albert Einstein Medical Center*, Pa.Super., 723 A.2d 1027, 1037 (1998) (*appeal granted in part*, 1999 WL 492048); *G.J.D. v. Johnson*, Pa.Supr., 713 A.2d 1127, 1129 (1998). Generally in Pennsylvania, an insurer has no obligation to provide indemnity for punitive damages that are directly or personally caused by the insured. *Creed*, 529 A.2d at 12. The respected Couch treatise agrees with the Pennsylvania rule:

There is a substantial split in authority as to whether punitive damages assessed against an insured are recoverable under the terms of a liability policy. The courts concentrate on the language of the insuring agreement and attempt to make such an interpretation with a view toward the nature of punitive damages which is to deter certain types of conduct. The better position is that, absent specific language in the policy extending coverage for punitive damages, no coverage exists for such damages as it is against public policy to allow the insured wrongdoer to shift the burden of payment of punishment to its insurer.

12 *Couch on Insurance* 3d. § 172:33 (1998).

In Pennsylvania, there is an exception to this general rule. The Pennsylvania Superior Court in *Butterfield v. Giuntoli*, Pa.Super., 670 A.2d 646 (1995) has held that an insurer must indemnify the insured if the insured is vicariously liable for the actions that caused the punitive damage sanctions. Both parties to this case have argued at length as to the proper application of the *Butterfield* vicarious liability standard.

***3** In *Butterfield*, suit was brought suit against the University of Pennsylvania hospital and four of its doctors for damages arising from a drug induced leukemia. The jury awarded 3.5 million in punitive damages apportioned between the hospital trustees,

and the four doctors involved.[FN1] The insurance carrier of the Medical Professional Liability Catastrophe Loss Fund, the Lexington Insurance Company, did not want to pay the claims on behalf of the hospital because it claimed that it was against public policy in Pennsylvania to insure for punitive damages.

> FN1. Eventually, fifty percent of the punitive damages were apportioned to the hospital in the amount of $1,750,000.

On appeal, the *Butterfield* Court held that "that Pennsylvania public policy does not preclude recovery of punitive damages where the insured is *only* vicariously liable for the damages." *Butterfield,* 670 A.2d at 655 (emphasis supplied). But, later in the Opinion, the Court also held that Lexington, the insurance carrier, had the burden to show that the jury "assessed the punitive damages *solely* on the basis of direct liability." *Id.* at 657 (emphasis supplied). In the end, the hospital trustees were granted insurance coverage.

The *Butterfield* Court certainly was not clear in its holding. There are two earlier cases that have discussed the issue of punitive damage insurance coverage for vicarious liability under Pennsylvania law. They are *Pennbank v. St. Paul Fire and Marine Insurance Co.,* D. Pa., 669 F.Supp. 122 (1987) (cited by *Butterfield*) and *Esmond v. Lisco,* Pa.Super., 224 A.2d 793 (1966). The Federal Court in *Pennbank* stated: "Pennsylvania does not preclude recovery of punitive damages from an insurer where the insured is *only* vicariously liable for such damages." *Pennbank,* 669 F.Supp. at 125-26. Additionally, the *Esmond* Court in dicta stated: "In general, allowing one who is *only* vicariously liable for punitive damages to shift the burden of satisfying the judgment to his insurer does not conflict with the ... [Pennsylvania no indemnification of punitive damages] policy[.]" *Esmond,* 224 A.2d at 800 (emphasis supplied). Thus, based on the Pennsylvania precedent, and despite the seemingly inconsistent statements in the *Butterfield* opinion, this Court is confident that, absent specific language in the contract, Pennsylvania law allows insurance coverage for punitive damages when the insured is *only* vicariously liable.

The facts here quite clearly show that Toll was not *only* vicariously liable for the punitive damage sanction. Toll was directly as well as vicariously liable for filing suit against the smaller competitors. Toll companies had a direct involvement in the "abuse of process" claim because Toll was the driving force behind the litigation. Toll hired outside counsel to file suit and directed counsel to begin litigation. It is a bit disingenuous of Toll to now say that the punitive penalty should be covered under the vicarious liability exception when it was so involved in the litigation. The express findings of the District Court stated that "[w]ithout repudiation, TB and Toll ratified the actions of the Panitch lawyers.... TB and Toll can hardly characterize themselves as unsophisticated clients blindly following counsel's advice."*T.B. Proprietary Corp. v. Sposato Builders Inc.,* D.Pa., C.A. No. 94-6745, Shapiro, J. (Nov. 20, 1996). Toll was, at least in part, directly liable for the suit being filed.

***4** Additionally, when speaking of vicarious liability, in the eyes of this Court, the attorney-client relationship is a different kind of relationship than say the hospital/trustee relationship that was presented in *Butterfield.*"An attorney at law ... is one who is put in the place ... or turn of another, to manage his matters of law." 3 BLACKSTONE, COMMENTARIES*25. In modern practice, an attorney normally must represent litigants. For instance, a corporation, as an artificial entity, cannot itself practice law, and therefore, a corporation must normally be represented by an attorney when appearing before most Courts in this State. *Gibson v. North Delaware Realty Co., Stoneybrook Townhomes,* Del.Super., Civ. A. No. 95A-08-011, Herlihy, J. (Aug. 20, 1996).[FN2] Additionally, under the rules of professional conduct, attorneys are required

to communicate with their clients. In doing so, attorneys should give their clients sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued. Prof. Cond. R. 1.4 cmmt. Thus, clients are ultimately in charge of the litigation and not the lawyers. There is no suggestion in the record that Toll's attorneys did not communicate with it about this suit.

> FN2.Supreme Court Rule 57 has allowed corporations to be represented by pro se litigants in the Justice of the Peace Courts for small claims matters.

To adopt Toll's rationale in this case, by creating vicarious liability when an abuse of process or a malicious prosecution claim was filed, would create a blanket coverage for punitive damages (unless expressly excluded in the coverage contract) for any action filed by an attorney. The nature of the attorney-client relationship is simply too intimate, absent special circumstances, to create vicarious liability in any routine sense for the actions of an attorney in an abuse of process case. It appears that the Pennsylvania Superior Court intended a more attenuated, less alter ego relationship when it carved out its exception forcing insurers to indemnify parties for punitive damages from a vicariously liable defendant. GA is entitled to judgment as a matter of law on the punitive damages issue.

ATTORNEYS' FEES

The next questions is whether the attorneys' fees, awarded in the amount of $204,910.72 by the District Court pursuant to 17 U.S.C. § 505, should be indemnified under the insurance contract. Toll claims that the policy expressly provides coverage for the award of attorneys' fees on page 5 of 12 where the policy gives coverage for "All costs taxed against the insured in the suit."[FN3]GA argues that there is no coverage for a losing copyright litigant under the GA policy.

> FN3. The Plaintiff's cite the case of *Shelton v. Evans,* for the proposition that "[d]amages in malicious prosecution cases 'include all of the Plaintiffs' actual expenses in defending themselves,'*e .g.* counsel fees."(Plaintiff's Corrected Br. at 4). The full quote from *Shelton* states: "[i]n an action for malicious prosecution, *compensatory damages* may include all of the plaintiff's actual expenses in defending himself, compensation for loss of liberty or time, harm to reputation, physical discomfort, interruption of business, mental anguish, humiliation, and injury to feelings." *Shelton v. Evans,* Pa.Super., 437 A.2d 18, 21 (1981) (emphasis supplied).

"A [Pennsylvania] court 'may not rewrite an insurance contract or construe clear and unambiguous language to mean other than what it says." ' *Patterson v. Reliance Ins. Co.,* 481 A.2d 947, 949 (1984) (quoting *Blocker v. Aetna Casualty and Surety Co.,* Pa.Super., 332 A.2d 476, 478 (1975)); *see also Phillips Home Builders v. Travelers Ins. Co.,* Del.Supr., 700 A.2d 127, 129 (1997) ("[I]f the relevant contract language is clear and unambiguous, courts must give the language its plain meaning."). If there is ambiguity in the contract, the contract language is construed most strongly against the insurance company who drafted it. *Phillips Home Builders,* 700 A.2d at 129 (citing *Rhone-Poulenc Basic Chems. Co. v. American Motorist Ins. Co.,* Del.Supr., 616 A.2d 1192, 1196 (1992)). "[[A]] provision of a policy is ambiguous [only] if reasonably intelligent men on considering it in the context of the policy would honestly differ as to its meaning." *Patterson,* 481 A.2d at 949 (brackets in original).

*5 Whether or not the plain language of the contract creates insurance coverage turns on the definition of the word tax. "Tax," in a general sense

means "any contribution imposed by government by government upon individuals, for the use and service of the state, whether under the name of toll, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply or other name. And, its essential characteristic is not a debt."*Blacks L. Dictionary,* 1457 (6th ed.1990) (citing *City of Newark v. Jos. Hollander Inc.,* N.J. Ch., 42 A.2d 872, 875 (1945)). The essential characteristics of a tax is that it is not a voluntary payment or donation, but an enforced contribution enacted pursuant to legislative authority. *Id.* (citing *Michigan Employment Sec. Commission v. Patt,* Mich.App., 144 N.W.2d 663, 665 (1966)). A tax has also been defined as "[a] forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction to provide public revenue for the support of the government, the administration of the law or the payment of public expenses."*Balentine's L. Dictionary,* 1257 (3d ed.1969). Thus the phase "[a]ll costs taxed against the insured in the suit" does not create coverage for all attorneys' fees awarded.

GA argues that the amount awarded for attorneys' fees were completely separate from the damages, including attorneys' fees and costs, relating to the separately tried abuse of process claim. Thus, GA contends that the damage awards should be parceled apart. GA is correct. Judge Shapiro's order clearly states that the abuse of process claims were subtracted from the attorneys' fees and costs. (Order Dated August 23, 1996, Dkt. No. 72). $148,003.34 was subtracted from the attorneys' fees and costs relating to the abuse of process award because this portion of the amount was already awarded as compensatory damages on the verdict for the abuse of process counterclaim. *T.B. Proprietary Corp. v. Sposato Builders et. al,* C.A. No. 94-6745, Shapiro, J. (Aug. 24, 1996) at *9. While this Court has previously held that coverage exists for the abuse of process claim, there is no similar provision in the policy that provides coverage for a losing copyright litigant. GA cannot be required to indemnify Toll for the $204,910.72 awarded by the District Court pursuant to 17 U.S.C. § 505 because that amount is solely attributable to the defense of the copyright claims. GA is entitled to a ruling as a matter of law on the attorneys' fee issue.

SUPPLEMENTAL COSTS

Toll has paid $36,000 in attorneys' fees that were paid in excess of the rate paid by GA. GA claims that nothing in the policy entitles Toll for reimbursement for the extra expenditures made because Toll agreed to pay the expenses outside the policy limits so that Toll could use its own attorneys. A letter from The Simkiss Agency, Inc., dated November 2, 1995 (GA's Exhibit V) states "[w]e had earlier reached an understanding that Toll Brothers, Inc. can continue to use the law offices of Fox, Rothchild as their defense counsel. The reimbursement of legal fees will be set at the present rate established by General Accident."GA claims that it owes nothing more to Toll simply because its selected defense attorneys that charged more than GA's rate.

*6 Toll claims that GA became obligated to pay Toll's independent attorneys' fees when GA reserved its rights instead of acknowledging coverage. In support of this contention, Toll cites *San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc.,* Cal.App., 208 Cal Rptr, 494, 496 (1984). In that case, the California Court held:

[W]here there are divergent interests of the insured and the insurer brought about by the insurer's reservation of rights based upon possible noncoverage under the insurance policy, the insurer must pay the *reasonable* cost for hiring independent counsel by the insured. The insurer may not compel the insured to surrender control of the litigation[.]

Id. at 506 (emphasis supplied).[FN4]

> FN4. The holding of this case has been partially superseded by statute as described in *Dynamic Concepts, Inc. v. Truck Ins. Exchange,* Cal.App., 71 Cal Rptr.2d 882 (1998).

In the present action, GA did not refuse to pay the attorneys' fees. GA did in fact pay the attorneys' fees up to the amount specified as per the agreement of the parties. In the California case, the insurer refused to pay at all for the independent attorney when it became clear that a conflict existed between it and the insured. *Id.* at 497.Without commentary on the applicability of the California rule to Pennsylvania, it is sufficient to say that it does not apply in this case because the insurer did in fact pay the costs. The agreement between Toll and GA, to allow Toll to continue to use the services of its selected attorney if Toll paid the excess expenses, is valid. GA has fulfilled its obligation to pay up to its rates and the extra expenses incurred by Toll cannot be recovered in this case just because GA has reserved its rights to some portions of the coverage alleged. GA is entitled to a ruling as a matter of law on this remaining issue.

CONCLUSION

For the foregoing reasons, GA will not be required to indemnify Toll for punitive damages assessed in the Federal action. GA also will not be required to indemnify Toll for the attorneys' fees assessed by the Federal Court under 17 U.S.C. § 505. Furthermore, GA will not have to indemnify Toll for the $36,000 in supplemental counsel fees paid that were incurred as a result of Toll retaining its own attorneys to defend itself, based on the agreement between GA and Toll. Thus, Summary Judgment is GRANTED to GA on all of the remaining claims. IT IS SO ORDERED.

Del.Super.,1999.

Toll Brothers, Inc. v. General Acc. Ins. Co.
Not Reported in A.2d, 1999 WL 1442016 (Del.Super.)

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