ORIGINAL

IN THE SUPREME COURT OF OHIO

KIMBERLY NEAL-PETTIT	)	
	)	**Supreme Court Case No. 2009-0325**
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	**On Appeal from the Cuyahoga**
LINDA LAHMAN, et al.,	)	**County Court of Appeals,**
	)	**Eighth Appellate District**
Defendant-Appellant.	)	**Case No. 91551**

MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANT ALLSTATE INSURANCE COMPANY

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LAW AND ARGUMENT

PROPOSITION OF LAW NO. I: 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.

A. Ohio Has Long Adhered To The "American Rule" With Respect To Any Recovery Of Attorneys Fees. The Only Exceptions To This Rule Are Where A Statute Specifically Authorizes The Recovery Of Attorneys Fees, Or Where Punitive Damages Are Awarded.

The analysis of this case should start with a consideration of firmly established public policy of the state of Ohio regarding any award of attorney's fees as part of litigation. Ohio follows the "American Rule" with respect to any recovery of attorney's fees as part of a litigated matter. The rule is clear and it is absolute. With respect to any type of civil litigation seeking compensatory damages, the rule is that each party is responsible for paying the party's ***own*** attorneys fees. This Court reaffirmed this rule as recently as this year when it ruled:

> [P7] ***Ohio has long adhered to the "American rule" with respect to recovery of attorney fees: a prevailing party in a civil action may not recover attorney fees as a part of the cost of litigation.*** *Nottingdale Homeowners' Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 33-34,..; *State ex rel. Beebe v. Cowley* (1927), 116 Ohio St. 377, 382,... However, there are exceptions to this rule. Attorney fees may be awarded when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees, *Nottingdale*, 33 Ohio St.3d at 34..., or when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant, *Pegan v. Crawer* (1997), 79 Ohio St.3d 155, 156...

Wilborn v. Bank One Corp., 121 Ohio St. 3d 546, 549 (Ohio 2009). Emphasis added.

There are only two exceptions recognized to the rule prohibiting the award of attorney's fees in civil litigation. As set forth in *Wilborn* above, the exceptions are where: 1. a statute expressly authorizes the award of attorney's fees; and, 2) where the prevailing party demonstrates "bad faith on the part of the unsuccessful litigant." Id. at P. 7.

B. The Award Of Attorneys Fees Is Punitive In Nature. Such Fees May Only Be Awarded As Part Of A Punitive Damage Award.

The threshold case on this issue seems to be *Roberts v. Mason*, 10 Ohio St. 277, 283 (Ohio 1859) which was an intentional tort case for assault and battery. In *Roberts*, the court concluded that attorney's fees could not be awarded in the normal tort or contract case. The award of attorney's fees would only lie where there was conduct sufficient to support an award of punitive damages. The court limited the award of such fees to situations where the jury had the "power to punish." The court included the authority to award attorneys fees within the same sentence as its "power to punish" comment to illustrate that the attorney's fees were a part of the punitive award.

> On this point the authorities are not uniform; but the better opinion now seems to be, that ***in actions ex contractu, and in cases nominally in tort, but where no wrong in the moral sense of the term is complained of, the fees of counsel ought not to be included in the estimate of damages; but in cases where the act complained of is tainted by fraud, or involves an ingredient of malice, or insult, the jury, which has power to punish, has necessarily the right to include the consideration of proper and reasonable counsel fees in their estimate of damages.*** *Sedg. on the Measure of Damages*, 95-6-7. *Linslay v. Bushnell*, 15 Conn. R. 225; *Noyes v. Ward*, 19 Conn. R. 250; *Marshall v. Betner*, 17 Ala. 833. This rule has been recognized by the old supreme court of this state on the circuit. Wright's Rep., *Stephens v. Handly*, above cited, and *Sexton v. Todd*, 316. And the rule seems to us to be in itself reasonable and just.

Roberts v. Mason, 10 Ohio St. 277, 283 (Ohio 1859). Emphasis added

The reference to "bad faith" in the *Wilborn* decision and the myriad cases that precede it is something of a misnomer. The law has developed that, in the absence of a statute expressly providing for the award of attorneys fees, actual "fraud, insult or malice" on the part of the unsuccessful litigant sufficient to support an award of punitive damages is necessary to support an award of attorneys fees.

> ***It is an established principle of law in this state that punitive damages may be awarded in tort cases involving fraud, insult or malice.*** *Roberts v. Mason* (1859),

> 10 Ohio St. 277; *Saberton v. Greenwald* (1946), 146 Ohio St. 414,... ***If punitive damages are proper, the aggrieved party may also recover reasonable attorney fees.*** *Roberts v. Mason*, supra; *Peckham Iron Co. v. Harper* (1884), 41 Ohio St. 100; *Davis v. Tunison* (1959), 168 Ohio St. 471... Appellants premise their claim for punitive damages on the finance company's alleged malice in executing on the automobile.

Columbus Finance, Inc. v. Howard, 42 Ohio St. 2d 178, 183 (Ohio 1975). Emphasis added.

The issue of whether an award of attorney's fees is "compensatory" or "punitive" in nature has already been squarely addressed by this Court. In *Digital & Analog Design Corp. v. N. Supply Co.*, 63 Ohio St. 3d 657 (Ohio 1992), this Court specifically found that an award of attorney's fees was punitive in nature.

> ***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.

Id., at 662. Emphasis added.

In *Digital & Analog Design Corp.*, the court went on to instruct that, because an award of attorneys fees are punitive in nature, it was appropriate to treat them for purposes of trial in the same manner as the issue of punitive damages.

> ***In view of our determination that attorney fees are punitive in nature,*** we find it wholly appropriate to treat attorney fees in the same manner as punitive damages with respect to whether such an issue is to be presented to a jury.

Id. at 663. Emphasis added.

More recently, the court considered whether a finding of fraud, without an award of punitive damages, would allow a jury to award attorneys fees. In *Zappitelli v. Miller*, 114 Ohio St. 3d 102 (Ohio 2007), the jury found the defendant had committed fraud. While deliberating,

the jury asked: ""If we answer, no, to punitive damages, can we add money to compensatory damages to cover the attorney fees?" Id. at 102. The trial court ruled the jury could not consider attorneys fees unless it awarded punitive damages. On appeal, the appellate court reversed. Relying on the landmark *Roberts v. Mason* decision, supra, the appellate court ruled attorneys fees could be awarded even in the absence of an award of punitive damages. The Supreme Court reversed, finding that *Roberts* in no way stood for such a principle. This court ruled that it could not "see how it is possible" to interpret *Roberts* to allow attorneys fees in the absence of punitive damages illustrating that the award of attorneys fees are an element of punitive damages.

> [P6] It is clear to us that paragraph one of the syllabus states that in an action for tort involving fraud, a jury may award punitive damages. ***It is equally clear that paragraph two of the syllabus states that when punitive damages are awarded, the award for compensatory damages may include attorney fees. We do not see how it is possible to reach a different conclusion.***

Zappitelli v. Miller, supra, at P. 6. Emphasis added. *Zappitelli* also cited *Digital & Analog Design Corp.* for the proposition that: "Without a finding of malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees * * *." Id. at P. 6.

In *Santos v. Ohio Bureau of Workers' Comp.*, 101 Ohio St. 3d 74 (Ohio 2004), the issue was raised whether a request for attorneys fees was a request for compensatory damages. The court concluded that attorneys fees did not constitute compensatory damages.

> ***In Santos v. Ohio Bureau of Workers' Comp., 101 Ohio St. 3d 74, 2004 Ohio 28, at P18, 801 N.E.2d 441, however, the Ohio Supreme Court concluded that a request for attorney's fees, litigation expenses, and court costs was not a request for compensatory damages.*** It follows that an award of legal fees and court costs is not an award of compensatory damages. K.R.G., therefore, has not established that it may recover punitive damages. Its second assignment of error is overruled. Because K.R.G. is not entitled to punitive damages, it may not recover attorney's fees. *Zappitelli v. Miller*, 114 Ohio St. 3d 102, 2007 Ohio 3251, at P6, 868 N.E.2d 968 *v. Miller*, 114 Ohio St. 3d 102, 2007 Ohio 3251, at P6, 868 N.E.2d 968.

K.R.G. Inc. v. Patel, 2008 Ohio 5446, Summit App. Nos. 24083, 24190, P13-P12 (Oct. 22, 2008).

The issue of whether are punitive in nature was also addressed in the *Wilborn v. Bank One Corp.*, decision cited above. After reaffirming that Ohio still follows the "American Rule" in regard to an award of attorneys fees, the Court went on to prohibit a contractual provision calling for an award of attorneys fees where a borrower defaulted on a loan. The court found that an award of attorneys fees "operates as a penalty" and "encourages litigation."

> [P14] In other words, a provision in a mortgage or promissory note that awards attorney fees upon the enforcement of the lender's rights when the borrower defaults, such as a foreclosure action that has proceeded to judgment, is unenforceable. ***The rationale for this rule as articulated in Leavans, and reaffirmed in Miller, is that "the stipulation to pay attorney fees operates as a penalty to the defaulting party and encourages litigation to establish either a breach of the agreement or a default on the obligation.***" Worth, 32 Ohio St.3d at 242, 513 N.E.2d 253.

Id. at P. 14. Emphasis added.

The lower appellate courts agree that an award of attorney's fees constitute punitive damages. For instance, in *Capretta v. Goodson*, 8th Dist. No. 76932, 2000 WL 1876404, Ohio's Eighth Appellate District relied upon the foregoing language from Digital & Analog to affirm a trial court order vacating an award of attorney fees where they had not been an award of punitive damages. The court of appeals held noted that "an award of attorney fees is a punitive remedy flowing from a jury finding of malice and the award of punitive damages; attorney fees are not intended to compensate the victim from damages flowing from the tort. (Emphasis added)." Id., at *6. See also, *Ferritto v. Olde & Co., Inc.* (8th Dist. 1989), 62 Ohio App.3d 582, 588, (holding that award of attorney fees in conjunction with award of punitive damages could not be upheld where award of punitive damages was reversed in pre-*Digital & Analog* case).

Likewise, in *Griffin v. Lumberjack* (6th Dist. 1994), 96 Ohio App.3d 257, Ohio's Sixth Appellate District relied upon the foregoing language from *Digital & Analog* to reverse a damages award that wrongly included attorneys fees as part of compensatory damages because

the trial court's instruction to the jury indicated that attorneys fees were to be considered as part of compensatory damages. The court of appeals explained:

> Attorney fees are recoverable as compensatory damages in an action where punitive damages are properly awarded [citations omitted]. Therefore, an award of attorney fees will not be sustained either by the denial or reversal of an award of punitive damages [citations omitted]. ***An award of attorney fees is inextricably intertwined with an award of punitive damages."*** [citations omitted].

Griffin v. Lumberjack, supra, at 266. Emphasis added. The case law cited above simply leaves no question that attorneys fees awarded in a case are punitive, not compensatory in nature.

C. An Award Of Attorneys Fees Where The Tortfeasor Has Been Found To Have Been Intoxicated Necessarily Includes An Element Of Actual Malice Justifying Punitive Damages.

The issue before this court is whether an automobile insurance policy ought to cover attorneys fees awarded in a case where the insured has caused an accident while intoxicated. It bears mention that this court has already instructed that the causing an accident while driving in an intoxicated state constitutes "malice" sufficient to support an award of punitive damages. In fact, this court has ordered that a trial court abuses its discretion if it fails to instruct that the jury should consider awarding punitive damages where the tortfeasor has tested out with a blood alcohol level higher than .10 percent. This court instructed that the blood alcohol test alone would support a finding of malice sufficient to support a punitive damage award.

> The legislature of this state has established that no person may operate a vehicle where his blood-alcohol level is equal to .10 percent by weight. R.C. 4511.19(A). The General Assembly has thus set this level of alcohol consumption as being indicative of a level of intoxication beyond which it is not safe to drive. ***Accordingly, we hold today that where a chemical test administered in accordance with R.C. 4511.19 and 4511.191 reveals that a defendant was driving with an alcohol concentration level in his or her body at or above the applicable statutory limits specified in R.C. 4511.19, a trial court abuses its discretion in failing, upon the plaintiff's motion, to instruct the jury that it may find an award of punitive damages to be appropriate if it finds that the driver acted with actual malice in driving subsequent to having consumed alcohol.***

Cabe v. Lunich, 70 Ohio St. 3d 598, 603 (Ohio 1994)

There is no question then that the issue in this case ought to be more specifically framed to be whether attorneys fees awarded as a result of an insured's "actual malice" ought to be covered by an insurance policy.

D. The Legislature Has Already Ruled That It Is Against The Public Policy Of The State Of Ohio For An Insurance Policy To Cover Punitive Or Exemplary Damages.

Putting aside for a moment the issue of policy language, the law of Ohio is clear that it is against public policy for an insurance policy to in any way indemnify an insured for exemplary or punitive damages. The purpose of punitive damages is two fold. It is to punish the tortfeasor as well as to deter the tortfeasors from engaging in similar conduct in the future.

> [P178] "The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651, 1994 Ohio 324, 635 N.E.2d 331.

Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio St. 3d 77, 103 (Ohio 2002). The Court went on to explain that, with punitive damages, the focus is not on the Plaintiff, or the Plaintiff's loss at all. The focus is solely on the "twin aims of punishment and deterrence."

> We held in *Wightman* that "a punitive damages award is more about defendant's behavior than the plaintiff's loss." 86 Ohio St.3d at 439, 715 N.E.2d 546. The focus of the award should be the defendant, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant.

Id. at 103.

In *Dardinger*, this Court explained that, when dealing with the punitive damages portion of a case, the injured plaintiff is still a named party, but he/she is a nominal one. The focus for the jury is no longer how to in any way "compensate" the plaintiff ("...***punitive damages are assessed for punishment and not compensation"***). *Preston v. Murty*, 32 Ohio St. 3d 334, 336

(Ohio 1987). At this stage of the proceedings, the real, de facto party is society and the jury's job is how to benefit society by punishing the particular defendant.

> At the punitive-damages level, it is the societal element that is most important. The plaintiff remains a party, but the de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant.

Dardinger, supra, at 105.

E. Ohio Law Precludes Insurance Coverage For Punitive Or Exemplary Damages.

Given the purpose to punish and deter the defendant, it is hardly surprising that Ohio law provides it is against the public policy of the state for an insurance policy to indemnify a defendant for any type of punitive damages. The courts have recognized that very little deterrent or punishment effect would result if a defendant simply turned a punitive damages award into his/her insurer for payment.

> The purpose of punitive damages is to punish the offending party and make the offender an example to others so that they might be deterred from similar conduct. *Detling v. Chockley* (1982), 70 Ohio St. 2d 134... ***In accord with this purpose, Ohio law has long disfavored insurance against punitive damages resulting from the insured's own torts.***

State Farm Mut. Ins. Co. v. Blevins, 49 Ohio St. 3d 165, 172 (Ohio 1990) Emphasis added.

There was one instance where this Court ruled that an insurance policy could provide coverage for punitive damages awarded against a tortfeasor. In *Hutchinson v. J.C. Penney Cas. Ins. Co.* 17 Ohio St. 3d 195, (Ohio 1985), the Court ruled that an insured's own uninsured motorist coverage policy could provide coverage not only for the compensatory damages caused by an uninsured motorist, but the policy also would provide coverage for any punitive damages assessed against the uninsured motorist as well. The Legislature amended the Uninsured Motorist Coverage Statute within a year of the *Hutchinson* decision, supra, to preclude any

coverage for punitive damages. See 1986 version of R.C. 3937.18(I). The Legislature also included staff notes to the 1986 statutory amendment contained in H.B. 489, stating somewhat incredulously that it had assumed the law was so clearly against any insurance coverage for punitive or exemplary damages that it did not believe it had to codify that rule of law.

> The Ohio General Assembly in 1986 amended R.C. 3937.18 to expressly prohibit the payment of punitive damages in uninsured and underinsured motorist coverage. R.C. 3937.18(I). This statute in effect nullified the Supreme Court's decision in *Hutchinson v.. J.C. Penney Cas. Ins. Co.* (1985), 17 Ohio St. 3d 195. In *Hutchinson*, the court held that public policy did not preclude the award of punitive damages under an uninsured motorist insurance provision. Id. at paragraph two of the syllabus. The General Assembly, however, very clearly stated its position:
>
> > "The General Assembly hereby declares that in the amendment of Section 3937.18 of the Revised Code in Amended House Bill No. 489 * * *, ***it was assumed that the legal principles opposed to authorization for insurance that would indemnify a person for conduct leading to the award of punitive damages were so well established that it was unnecessary to negate such an intention.***" Section 3, Am. S.B. No. 249 (141 Ohio Laws, Part I, 537).

Casey v. Calhoun, 40 Ohio App. 3d 83, 84-86 (Ohio Ct. App., Cuyahoga County 1987) Emphasis added.

The *Casey* decision nicely summarizes the Legislative activity that was spurred by *Hutchinson.* In addition to modifying the Uninsured Motorist Coverage Statute in 1986, the Legislature addressed insurance coverage for punitive or exemplary damages in 1988 as part of its comprehensive tort reform package, H.B. 1. As part of that tort reform measure, the Legislature enacted R.C. 3937.182 in which it expressly precluded insurance coverage for any "punitive or exemplary damages."

> The legislative intent was again demonstrated recently by the Ohio General Assembly with its passage of Am. Sub. H.B. No. 1, which becomes effective January 5, 1988. Contained within its provisions is R.C. 3937.182(B), which again incorporates the prohibition against punitive damages in uninsured and underinsured motorist coverage as previously expressed in R.C. 3937.18(I) and, in addition, goes on to provide as follows:

> "* * * ***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."***
>
> ***It is clear that with the passage of this bill the General Assembly has assumed its role as policymaker and has firmly expressed its intention that an individual must be prohibited from insuring against his own intentional or malicious acts.***

Casey v. Calhoun, supra, at 86. Emphasis added.

The Ohio Supreme Court also reacted to the *Hutchinson* decision, and the remedial legislation that followed to supersede it. In *State Farm Mut. Ins. Co. v. Blevins*, 49 Ohio St. 3d 165 (Ohio 1990), this Court overruled *Hutchinson* citing the longstanding public policy against insuring against punitive and exemplary damages, as well as the Legislature's most recent pronouncements to that effect.

> The purpose of punitive damages is to punish the offending party and make the offender an example to others so that they might be deterred from similar conduct. *Detling v. Chockley* (1982), 70 Ohio St. 2d 134... In accord with this purpose, Ohio law has long disfavored insurance against punitive damages resulting from the insured's own torts.

Id. at 168.

The law cited above establishes that the "American Rule" is that awards of attorneys fees are not allowed absent an express statutory provision allowing such damages, or absent an award of punitive damages. The attorney's fees are awarded in the stage of the proceedings where there is no interest in compensating the plaintiff, but the sole issue is punishing and deterring the defendant for the malicious conduct. The attorney's fees are not awarded to compensate the plaintiff, but to punish or penalize the defendant. Ohio common law, as well as Ohio statutory law, R.C. 3937.182 preclude any insurance coverage for "punitive or exemplary" damages. As a matter of public policy, there can and should be no insurance coverage for attorneys fees

awarded as part of the punitive damages phase of drunk driving case because such fees are "punitive or exemplary" damages.

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.

PROPOSITION OF LAW NO. III: 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 DAMAGES AWARD.

The Allstate policy contains an "insuring agreement" in which it promises to indemnify an insured for: "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." The policy also contains an exclusion which precludes any coverage under the policy for punitive damages as follows:

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

Significantly, the Allstate language tracks the language of Ohio's Financial Responsibility Act which similarly provides that a liability insurance policy:

> (B) Shall insure the person named therein . . . against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such vehicles . . . subject to limits exclusive of interest and costs, with respect to each motor vehicle as follows:
>
> (1) $12,500 because of bodily injury to or death of one person in any one accident;
>
> (2) $25,000 because of bodily injury to or death of two or more persons in any one accident;

R.C. §4509.51(B). Given the discussion above, that Ohio precludes coverage for "punitive or exemplary" damages, R.C. 3937.182, it cannot be reasonably argued that the Ohio Legislature, which requires an "owners policy" to provide coverage "because of bodily injury" meant, intentionally or otherwise, for an insurance policy containing the same clause to cover attorneys fees

awarded in the punitive damage portion of a lawsuit. Ohio law requires that, when possible, statutes are to be read together harmoniously. "Because these statutes relate to the same subject matter, they must be construed in pari materia and harmonized so as to give full effect to the statutes." *State ex rel. Choices for South-Western City Sch. v. Anthony* (2005), 108 Ohio St. 3d 1, 9. The Financial Responsibility Act, R.C. §4509.51, as well as the statute prohibiting coverage for "punitive or exemplary" damages both concern automobile insurance coverage. The two statutes should be reconciled to provide that a policy providing coverage "because of bodily injury" in no way provides coverage for attorneys fees arising from a punitive damage award.

There is further Ohio law on point that provides that an insurance policy providing coverage for an "accident" or "occurrence" will not be considered to provide coverage for an intentional act. In *Gearing v. Nationwide Ins. Co.*, 76 Ohio St. 3d 34, 39 (Ohio 1996) this court considered the issue of whether a child molestation could ever be considered an "accident" or "occurrence" so as to come within the scope of an insuring agreement. The court first recognized that it has long disfavored insurance coverage for any type of an intentional tort. The court ruled that an insurance policy is meant to cover incidents of only an "accidental" as opposed to "intentional" nature.

> This court has long recognized that Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts. See *State Farm Mut. Ins. Co. v. Blevins* (1990), 49 Ohio St. 3d 165; *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St. 3d 173; *Wedge Products, Inc. v. Hartford Equity Sales Co.* (1987), 31 Ohio St. 3d 65; cf. *Preferred Mut. Ins. Co. v. Thompson* (1986), 23 Ohio St. 3d 78; *Rothman v. Metro. Cas. Ins. Co.* (1938), 134 Ohio St. 241. See, generally, *Prosser & Keeton, Law of Torts* (5 Ed. 1984) 586, Section 82. Thus, inherent in a policy's definition of "occurrence" is the concept of an incident of an accidental, as opposed to an intentional, nature. *Vermont Mut. Ins. Co. v. Malcolm* (1986), 128 N.H. 521, 517 A.2d 800.

Gearing, supra, at 38.

The Court in *Gearing* further instructed that a policy agreeing to indemnify for an "accident" or "occurrence" should not be construed to "relieve wrongdoers of liability for intentional, antisocial, criminal conduct." *Gearing*, supra, at 38. Interestingly, the *Gearing* court further recognized that insurance is a by its very nature a risk sharing arrangement and: "the average

person purchasing homeowner's insurance would cringe at the very suggestion that he was paying for such coverage * * * and certainly * * * would not want to share that type of risk with other homeowner's policyholders." Id. at 39.

The same is true herein. Ohio law provides that words used in an insurance contract ought to be given their "common, ordinary, usual meaning." *Shear v. West American Ins. Co.*, 11 Ohio St. 3d 162 (Ohio 1984) An insurance policy agreeing to pay damages because of bodily injury as required by Ohio's Financial Responsibility Act and which precludes any coverage for "punitive or exemplary damages" cannot be construed to cover attorneys fees "because of" malice. Such a holding would "relieve wrongdoers of liability for intentional, antisocial, criminal conduct." *Gearing*, supra at 38. Also, other persons purchasing automobile insurance coverage would "cringe at the very suggestion" they were helping to pay attorneys fees intended to punish an individual for drunk driving.

CONCLUSION:

Ohio follows the "American Rule" whereby each party is required to pay for his/her own attorneys fees. The only exception to this is where a statute expressly provides for attorneys fees and/or where punitive or exemplary damages have been awarded against the defendant. In such a case, the focus has ceased entirely to concern compensating the plaintiff. Instead, the sole focus is to punish the defendant and to deter the defendant from similar conduct in the future. Attorney's fees may not be awarded absent a finding of punitive damages, even where the jury has already found reprehensible conduct such as fraud. This illustrates that the award of such fees is meant to be a part of punishing or penalizing the defendant.

Because of the laudable goal of punishing and deterring defendants, Ohio common law and statutory law expressly prohibit an insurance contract from indemnifying or protecting a defendant for punitive or exemplary damages. Ohio law also provides that an insurance contract promising to protect an insured from "accidents" or "occurrences" will not be construed to provide coverage where the insured's conduct is "intentional, antisocial or criminal." Other

insureds would "cringe" at the thought they were paying premiums to help drunk drivers pay for the penalties arising from a drunk driving offense.

Well within this legal landscape, Allstate issued an insurance policy that agreed to pay for damages "because of bodily injury" arising from an auto accident. The Allstate language tracked that of the Financial Responsibility Act, R.C. 4509.51(B). Allstate also included an exclusion warning insureds that, frankly, they were on their own when it came to any: "punitive or exemplary damages, fines or penalties." This also was consistent with decades of appellate decisions in Ohio.

An Allstate insured caused an accident while intoxicated. In compliance with this Court's decision in *Cabe v. Lunich*, supra, the jury was asked whether the insured ought to be punished. The jury was also asked whether, as part of the punishment phase, the defendant ought to have to pay the Plaintiff's attorneys fees in derogation of the general "American Rule." The jury ordered both punitive damages and attorneys fees consistent with the "punish and deter" philosophy. Rightly or wrongly, the Allstate insured was ordered to be punished. Allstate, who did not drive drunk, was not ordered to be punished.

From a more global perspective, a ruling that a plaintiff's attorney's fees would be covered by the defendant's automobile liability insurance would encourage litigation as this Court recognized in the *Wilburn v. Bank One Corp.* decision. Any plaintiff (and the plaintiff's attorney) faced with a bodily injury claim having a small or nominal value would be induced to attempt to hit the "bonus round" by pursuing the punitive damage portion of the case. While any punitive damages awarded would not be covered by the liability insurance company, an adverse ruling in this case would mean that the plaintiff and/or plaintiff's lawyer could submit a sizeable fee bill which would be covered. Commonly, the punitive damage portions of cases are not pursued because the drunken drivers are not especially collectible. Covering the plaintiff's attorneys fees would create more litigation, more expense, and more use of scarce judicial resources.

The Ohio Association of Civil Trial Attorneys (OACTA) submits that the propositions of law submitted by Appellant, Allstate Insurance Company, ought to be adopted by this Court. As a matter of public policy and as a matter of contract an insurance policy agreeing only to cover damages "because of bodily injury" arising from an "accident" should not be construed to cover attorneys fees awarded in conjunction with a punitive damage award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Appellant Allstate Insurance Company was served by regular U.S. mail, postage pre-paid, upon Thomas M. Coughlin, Jr., Attorney for Appellant Allstate Insurance Company, at Ritzler, Coughlin & Swansinger, Ltd., 1360 East Ninth Street, 1000 IMG Center, Cleveland, Ohio 44114W. Craig Bashein and Paul W. Flowers, Attorneys for Appellee Kimberly Neal-Pettit, 50 Public Square, 35th Floor, Terminal Tower, Cleveland, Ohio 44113;; and upon Terrence J. Kenneally, Attorney for Defendant Lahman, 20595 Lorain Road, Terrace Level 1, Fairview Park, Ohio 44126 on this 3rd day of August, 2009.

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JAMES R. GALLAGHER (0025658)
Attorney for Amicus Curiae
Ohio Association of Civil Trial Attorneys

jrg\oacta\aneal-pettit brief tb

APPENDIX

LexisNexis

LEXSTAT OHIO REV. CODE ANN. 3937.182

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JULY 6, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 ***

TITLE 39. INSURANCE
CHAPTER 3937. CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE

Go to the Ohio Code Archive Directory

ORC Ann. 3937.182 (2009)

§ 3937.182. Coverage for punitive or exemplary damages prohibited

(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.

HISTORY:

142 v H 1 (Eff 1-5-88); 149 v S 97. Eff 10-31-2001.

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LEXSTAT OHIO REV. CODE ANN. 4509.51

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JULY 6, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
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TITLE 45. MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT
CHAPTER 4509. FINANCIAL RESPONSIBILITY
INSURANCE POLICY REQUIREMENTS

Go to the Ohio Code Archive Directory

ORC Ann. 4509.51 (2009)

§ 4509.51. Requirements for owner's liability insurance

Subject to the terms and conditions of an owner's policy, every owner's policy of liability insurance:

(A) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby granted;

(B) Shall insure the person named therein and any other person, as insured, using any such motor vehicles with the express or implied permission of the insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such vehicles within the United States or Canada, subject to monetary limits exclusive of interest and costs, with respect to each such motor vehicle, as follows:

(1) Twelve thousand five hundred dollars because of bodily injury to or death of one person in any one accident;

(2) Twenty-five thousand dollars because of bodily injury to or death of two or more persons in any one accident;

(3) Seven thousand five hundred dollars because of injury to property of others in any one accident.

HISTORY:

GC § 6298-64; 124 v 563(578); Bureau of Code Revision, 10-1-53; 128 v 1221 (Eff 7-1-60); 133 v H 98. Eff 1-1-70; 150 v H 139, § 1, eff. 2-12-04.