No. 2022-0322

IN THE
SUPREME COURT OF OHIO

AUSTIN KREWINA,
Appellee,

v.

UNITED SPECIALTY INSURANCE COMPANY,
Appellant.

JURISDICTIONAL APPEAL FROM THE
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO
CASE NO. C-210163

BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANT UNITED SPECIALTY INSURANCE COMPANY

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EXPLANATION OF WHY THE FIRST APPELLATE DISTRICT'S OPINION IS FLAWED, UNWORKABLE AND MUST BE REVERSED

I.

In urging the Ohio Supreme Court to review this case, Judge Beth Myers wrote a concurring opinion expressing the view that "[i]t **does not make sense** to me to have the [Assault and Battery] exclusion dependent upon the mental state of the perpetrator as opposed to the conduct trying to be excluded under the policy." (Emphasis added). *Krewina v. United Specialty Ins. Co.*, 1st Dist. Hamilton No. C-210163, 2021-Ohio-4425, ¶50 (Myers, J., concurring) ("App. Op."). While concurring with the majority opinion in this case, Judge Myers noted that reversal and remand of this case to the trial court was called for based on "the reasoning" of *Nationwide Ins. Co. v. Estate of Kollstedt*, 71 Ohio St.3d 624, 646 N.E.2d 816 (1995). But, for good reason, Judge Myers was skeptical and not convinced that *Kollstedt* should be expanded to apply here because the result "seems to be in contrast to the common understanding of an assault and the plain meaning of the terms." (App. Op., ¶49). Judge Myers is correct. *Kollstedt* has no application in the context of this case.

II.

Having accepted jurisdiction over this case, this Court will be resolving a question of first impression, and one where there is conflicting authority in the appellate courts of Ohio: whether an assault and battery exclusion or an abuse endorsement with a sub-limit, which are common subject-matter provisions used in commercial general liability ("CGL") policies for businesses – like mental health facilities, bars and liquor establishments, schools and churches – apply where a non-insured third-party commits a violent act or abuse that is allegedly caused by the negligence of the insured under the policy. In a substantial percentage of such cases, the non-insured third-

party will claim some kind of justification or avoidance, such as self-defense or mental incompetence/incapacity to avoid liability for his or her otherwise tortious and criminal conduct. The insurance provisions in this case are designed to apply no matter what the subjective intent or justification of the attacker/abuser is. This includes when the non-insured assailant or abuser is suffering from a mental condition or impairment resulting in a finding of no criminal culpability based upon a not guilty by reason of insanity defense, meaning that the assailant was mentally ill and unable to act with intent to commit an assault or battery or abuse the victim.

Moreover, as Judge Myers' concurring opinion makes clear, there is uncertainty and confusion in Ohio courts as to whether this Court's opinion in *Kollstedt* extends to third persons who are not insured under the insurance policy to avoid the type of assault and battery exclusion and abuse endorsements commonly found in the CGL policy at issue here.

This case involves an altercation at a mental health facility where a razor knife was used to violently inflict serious injuries to the victim, but the First Appellate District's opinion applies equally to bars, taverns, restaurants, and churches which oftentimes are the venues where emotions and tempers flare, sometimes leading to physical altercations between residents, employees/bouncers, patrons and other frequenters on the premises. In the altercation that led to this litigation, there is no dispute that both an assault and battery occurred. One resident of the group care facility attacked another resident with a razor knife resulting in multiple lacerations to the other resident's face, back, and neck.

Whether a plea of self-defense or not guilty by reason of insanity might allow the assailant to avoid criminal liability and punishment for the bodily injuries, neither extinguishes the undisputed fact that the assault and battery happened. One combatant's assertion of impaired mental capacity – or any other affirmative defense such as self-defense, for that matter – does not

play into the equation of whether an insurer has a duty to indemnify for the injuries caused by the assault and battery where, as here, no coverage was intended or expected for any "bodily injury" arising out of an "actual, alleged or threatened assault or battery."

III.

By misconstruing the assault and battery exclusion and abuse endorsement in the CGL policy, the First Appellate District has announced an unexpected shift in the scope of insurance coverage provided to mental health facilities – as well as bars, taverns, restaurants and churches - all across the State of Ohio for injuries resulting from physical altercations and abuse which sometimes take place between residents, employees, patrons, or anyone else on the premises. The appellate opinion in this case not only signals an unprecedented change in the law of assault and battery by declaring that – for insurance coverage purposes – a finding of not guilty by reason of insanity can mean that an assault or battery, as those terms are commonly understood – did not occur, but it rewrites the clearly expressed intent in a widely-used exclusion and endorsement to a CGL insurance policy in finding liability insurance coverage for a violent confrontation that culminated in an assault and then a battery where such coverage was expressly excluded and never intended.

IV.

Ohio law has always recognized that the touchstone for defining an insurer's obligations to its insured is the intent of the parties at the time they entered into the insurance policy. The scope of the coverage that the insured intends to obtain and the insurer intends to provide determines the amount of premiums the insured must pay to spread the risk. The parties' intentions are expressed in the language used in the insurance policy, and words and phrases are to be interpreted consistent with those intentions. However, the ruling by the First Appellate District in

this case completely ignores the intentions of the parties to the insurance policy. Instead, it noted that a non-insured's mental state which negated criminal culpability for an assault and battery based upon a finding of not guilty by reason of insanity resulted in a finding against the insurer and in favor of coverage under the CGL policy, without regard to the insured and insurer's actual intentions as expressed in an assault and battery exclusion and abuse endorsement. The First Appellate District thereby expanded coverage under the insurance policy in ways that the parties had never intended, increasing the risk on which the policy premium had been calculated.

The opinion of the First Appellate District adopts an aberrant and illogical interpretation of a CGL insurance policy endorsement excluding coverage for "actual, threatened or alleged" assault or battery which flouts the intent of the parties, interferes with the right to freely enter a contract to carry out those intentions, and creates a conflict among other appellate courts. The opinion re-defines the scope of coverage available under the CGL policies and serves as a seriously flawed authority that may be relied upon by Ohio's trial and appellate courts to give credence to meritless claims for defense and indemnity coverage despite an endorsement which was intended to preclude insurance coverage for bodily injuries arising from assault and battery claims against mental health facilities, bars, taverns, and restaurant establishments.

Consistent application of assault and battery exclusions and abuse endorsements provide certainty and predictability in that both the insured and insurer will then have mutually clear expectations that no claims arising out of an assault or battery. Here, the First Appellate District engaged in a redrafting of the CGL policy to circumvent the assault and battery exclusion and abuse endorsement in order to afford coverage for a claim amounting to an assault or battery where such coverage was never intended. That holding illustrates the need for this Court to provide guidance on this issue of first impression.

V.

Confusion and uncertainty abound when Ohio's courts interpret the language commonly found in insurance policies differently depending on the appellate district in which a case is pending. *See, e.g.*, *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, 951 N.E.2d 770, ¶ 13 and 21. Insurance contracts construed by the First Appellate District should be subject to the same rule of law applied in the other appellate districts in Ohio. But that is not what has happened.

As explained herein, the First Appellate District's opinion conflicts with the Second Appellate District's opinion in *Badders v. Century Ins. Co.*, 2d Dist. Montgomery No. 28170, 2019-Ohio-1900 and the Tenth Appellate District case of *World Harvest Church v. Grange Mut. Cas. Co.*, 10th Dist. Franklin No. 13AP-290, 2013-Ohio-5707. This Court should establish a uniform rule for application of assault or battery exclusions and abuse endorsements, like the one in United Specialty Insurance Company's CGL policy, when there is a claim for coverage based upon an assault or battery where the non-insured assailant has avoided criminal culpability for the same conduct due to a finding of not guilty by reason of insanity.

VI.

A rule of law that circumvents the assault and battery exclusion and abuse endorsement, as the First Appellate District opinion does here, will sweep within the scope of coverage assault and battery claims upon the mere assertion by one of the combatants of an avoidance or justification defense, such as an insanity defense in a criminal prosecution. Such a rule results in an insurer, like United Specialty Insurance Company, having coverage under a CGL policy which, based upon exclusions for assault and battery or abuse, never intended to cover claims for assault and battery and abuse occurring on the premises of a mental health facility, bars, taverns, and restaurants across

the State of Ohio. Going forward, according to the First Appellate District, anytime an assault or battery occurs, as long as one of the parties raises a claim of avoidance or justification – such as mental impairment or insanity – the insurer's duty to defend the lawsuit and possibly indemnify will now be triggered despite the presence of the assault and battery exclusion under the CGL policy.

The reasoning of the First Appellate District here would, no doubt, surprise most policyholders and insurers. As aptly observed by Judge Myers, "from a policy holder's perspective, surely they would believe that an attack upon a person with a knife would constitute an assault under the policy, causing it to come under the exclusion." (App. Op., ¶50). It is the kind of absurd result which this Court cautioned against in the past when an insurance policy is construed without regard to the parties' intent. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶35.

Such an unprecedented expansion would also threaten to completely upset the Ohio insurance market by suddenly forcing CGL insurers to absorb huge exposures for assault and battery lawsuits even though no commensurate premium was collected or ever contemplated. Or insurers will be unwilling or unable to offer CGL coverage to certain businesses where assault, battery and abuse often occur – such as bars, adult care facilities, nursing homes, churches, etc. Assault and battery exclusions and abuse endorsements are included in CGL policies to control the risks and costs in cases where assault, battery and abuse occur. Removing those exclusions – or making them illusory as has happened here – will make it difficult for such entities to obtain affordable general liability coverage. Ironically, both insurance provisions in the United Specialty Insurance Company CGL policy were designed to make liability insurance more affordable by reducing the amount of risk being transferred to a liability insurer. The First Appellate District's

opinion frustrates that intent and purpose.

INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization whose wide array of members consist of attorneys, supervisory or managerial employees of insurance companies, and corporate executives of other corporations who devote a substantial portion of their time to the defense of civil damage lawsuits and the management of insurance claims brought against individuals, corporations and governmental entities. For over fifty years, OACTA has long been a voice in the ongoing effort to ensure that the civil justice system is fair and efficient by promoting predictability, stability, and consistency in Ohio's constitutional safeguards, statutory laws, and legal precedents.

OACTA's mission is to provide a forum where its members can work together and with others on common problems to propose and develop solutions that will promote and improve the fair and equal administration of justice in Ohio. OACTA strives for stability, predictability and consistency in Ohio's case law and jurisprudence. On issues of importance to its members, OACTA has filed amicus curiae briefs in significant cases before federal and state courts in Ohio advocating and promoting public policy and sharing its perspective with the judiciary on matters that will shape and develop Ohio law.

OACTA's appearance as *amicus* in this case and its submission of this *amicus* brief pursuant to S.Ct.Prac.R. 16.06 in support of Appellant United Specialty Insurance Company is premised upon the recognition that there is a glaring need for the Court to provide clear, consistent and reasoned guidance to Ohio courts regarding the scope of common assault and battery exclusions or abuse endorsements in CGL insurance policies. Guidance and clarification is needed as to how such provisions apply when a non-insured assailant has a mental condition or impairment

that may overcome criminal culpability and punishment for his or her actions and whether a business has coverage for negligently failing to protect one of its customers, clients or patients from being attacked by a third person who is not insured under the insurance policy. In providing this guidance and clarification, OACTA urges this Court to readdress the holding in *Kollstedt*.

STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts set forth expansively in the Merit Brief of Appellant, United Specialty Insurance Company. Very clearly and unequivocally, those facts show and establish that the physical altercation—a razor knife fight—that took place on September 27, 2014 between non-party Colin Doherty ("Doherty") and Appellee Austin Krewina ("Krewina"), while both were residents of Brown County Care Center ("BCCC"), was without a doubt an assault, as that concept is commonly, plainly and ordinarily understood, which resulted in serious personal bodily injuries to Krewina—serious lacerations to his face, neck, and back that allegedly resulted in significant permanent scarring, nerve damage and loss of function to the muscles of his face and neck.

The plain language of the Assault and Battery Exclusion in the CGL policy issued to BCCC by Appellant United Specialty Insurance Company ("USIC") is unambiguously very broad and precludes coverage for any potentially covered damages arising out of "any" actual, threatened or alleged assault, or by the alleged failure to prevent an assault, or attributed to BCCC's negligent employment, training, and/or supervision of an employee. It precludes coverage where "any actual, threatened or alleged assault or battery" results in damage or injury, whether "bodily injury,"

"property damage" or "personal and advertising injury."[1] The unambiguous policy language is, without doubt, applicable to the facts and circumstances of this case.

The trial court was correct in entering judgment in favor of USIC finding that the Assault and Battery Exclusion barred coverage for Krewina's claims. By in essence re-writing the USIC policy and the Assault and Battery Exclusion, the judgment and opinion of the First Appellate District is legally flawed and should be reversed.

[1] USIC in its Merit Brief does an excellent job articulating and laying out how and why the policy language of the Assault and Battery Exclusion should be interpreted to include the conduct of Doherty, regardless of his mental state or condition. (USIC Merit Br. at 6-18).

ARGUMENT IN SUPPORT OF THE PROPOSITION OF LAW

Proposition of Law: Liability insurance exclusions and limitations for harm arising from assault and battery or abuse are subject-matter provisions that are triggered when an ordinary person would believe that assault and battery or abuse had taken place rather than by the subjective intent of the assailant.

This Court addressed the proper manner in which to interpret an insurance contract in *Galatis*:

> When confronted with. an issue of contractual interpretation, ***the role of a court is to give effect to the intent of the parties to the agreement***. We examine the insurance contract as a whole and presume that the intent of the parties is re-reflected in the language used in the policy. ***We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy***. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. ***As a matter of law, a contract is unambiguous if it can be given a definite legal meaning***.

Id., ¶11-12 (Emphasis added; citations omitted.)

I. The First Appellate District's Opinion Does Not Give Effect to the Intent of the Policy.

With respect to the Proposition of Law urged by USIC, the Court is being asked to address and clarify that a mental impairment due to a not guilty by reason of insanity defense to a criminal charge for assault or battery does not trigger the defense and indemnity coverage provided in a CGL policy which contains an endorsement excluding coverage for "bodily injury" arising out of an "actual, threatened or alleged assault and battery." This is a matter of first impression since the Court has not decided a case addressing the issue of whether an insanity plea in defense to a criminal charge will overcome and trump the express exclusionary language similar to that found in the assault and battery endorsement in the CGL policy.

The First District notes that the CGL policy and its assault and battery exclusionary

endorsement does not provide a definition of the terms "assault" and "battery." (App. Op., ¶4, 22. While those terms are not defined, the "mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous." *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995). A civil assault occurs when there is a willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such harmful or offensive contact. *Stafford v. Columbus Bonding Center*, 177 Ohio App.3d 799, 2008-Ohio-3948, 896 N.E.2d 191, ¶15 (10th Dist.) While this is the legal definition, the commonly understood meaning of an "assault" is no different based upon the dictionary definition of the term.[2] This Court has on occasion referred to a dictionary definition when construing words or phrases in insurance policies. *See*, *e.g.*, *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, 128 Ohio St.3d 331, 2010-Ohio-6300, 944 N.E.2d 215, ¶ 12; *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 549, 757 N.E.2d 329 (2001).

A civil battery occurs when there is an intentional contact with another that is harmful or offensive. *Love v. Port Clinton*, 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988). This legal definition is similar also to the dictionary definition and commonly understood meaning of a battery.[3] Yet, in holding that coverage existed under the CGL policy, the First District opinion mistakenly intimates that the commonly understood meaning of the terms "assault" and "battery" somehow differs from their legal definitions. (App. Op., ¶22).

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[2] The plain and ordinary meaning is "an attack or violent onset" regardless of the actual intent of the tortfeasor allegedly committing the assault and battery. *Badders*, *supra*, ¶14. *See also*, Merriam-Webster.com., http://www.merriam-webster.com/dictionary/assault, (last visited on 3/22/22) defining "assault" as "a threat or attempt to inflict offensive physical contact or bodily harm on a person (as by lifting a fist in a threatening manner) that puts the person in immediate danger of or in apprehension of such harm or contact."

[3] *See*, Merriam-Webster.com., http://www.merriam-webster.com/dictionary/battery, (last accessed on 8/10/22) defining a "battery" as "an offensive touching or use of force on a person without the person's consent."

Compounding this error was the mistaken treatment of the import of a mental impairment or insanity defense to the question of insurance coverage. "An affirmative defense is a new matter which, assuming the complaint to be true, constitutes a defense to it. * * * 'An affirmative defense is any defensive matter in the nature of a confession and avoidance. It admits that the plaintiff has a claim (the "confession") but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the "avoidance").'" (Citations omitted) *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 75 Ohio St.3d 31, 33, 661 N.E.2d 187 (1996).

Mental impairment or insanity is an affirmative defense in that it represents more than a denial or contradiction of the evidence establishing that an assault or battery in fact took place; rather, a mental impairment or insanity defense admits the facts claimed by a plaintiff and then relies on independent facts or circumstances which a defendant claims exempt him or her from liability for the resulting harm or injury. Specifically, operation of the affirmative defense of not guilty by reason of insanity only relieves a defendant from culpability rather than negating an element of the assault or battery offense. A person claiming mental impairment or insanity concedes that the person committed the assault or battery but asserts he or she is not liable or culpable in doing so. *Estill v. Waltz*, 10th Dist. Franklin No. 02AP-83, 2002-Ohio-5004, ¶24.

Whether the attacker here acted without the mental capacity to be criminally culpable or not, he still is alleged to have committed the battery which the assault and battery endorsement expressly intended to exclude from coverage and precludes USIC's duty to defend and indemnify in this case. A defense like mental impairment or insanity cannot trump the express language of an insurance policy exclusion and create coverage by transforming an assault or battery into something other than the commonly understood meaning of an assault and battery.

A. To Paraphrase William Shakespeare's *Romeo and Juliet*, An Assault By Any Other Name Is Still An Assault.

This court has long recognized and been steadfast that the substance of the subject matter of a case is determinative, not the form under which a party characterizes or chooses to bring it. *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.*, 73 Ohio St.3d 391, 394, 653 N.E.2d 235 (1995), citing *Love*, *supra*. In *Love*, the court recognized that nearly any assault and battery can be creatively recharacterized or recast as something other than a claim for assault and battery, but doing so does not change or alter the essential character of the underlying conduct—i.e., acts of offensive touching or contact without the other's consent. *Id.* at 99, 524 N.E.2d at 168. As reaffirmed in *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 537, 629 N.E.2d 402 (1994), superseded on other grounds by enactment of R.C. 2305.111(C) in 2006,[4] a party, like Krewina or BCCC, "cannot be allowed to mask or change the fundamental nature of appellant's causes of action" to avoid undesirable legal ramifications, here that ramification being no insurance coverage for Doherty's attack on Krewina with a razor knife.

Ohio's appellate courts have consistently upheld the strong precedent that when an assault occurs, efforts to recharacterize the nature of the conduct is not permissible. *See*, *Jordan v. Howard*, 2d District Montgomery No. 29190, 2021-Ohio-4025, ¶¶29-30; *Stone v. Cellura*, 11th Dist. Portage No. 2014-P-0043, 2015-Ohio-2453, ¶29; *Wright v. Larschied*, 3d Dist. Allen No. 1-14-02, 2014-Ohio-3772, ¶¶26-28; *Saleh v. Marc Glassman, Inc.*, 8th Dist. Cuyahoga No. 86010, 2005-Ohio-6127, ¶36. A mental impairment does not avoid the fact that an assailant can be held civilly liable for assault and battery where the true nature of the subject matter of the claims is an intentional, offensive touching. *Frederic v. Willoughby*, 11th Dist. Portage No. 2007-P-0084, 2008-Ohio-3259, ¶¶81-86, relying upon and citing *Clark v. Estate of Halloran* (Jan. 13, 1994), 8th

[4] *See*, *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, ¶ 15–25.

Dist. No. 64576, 1994 Ohio App. LEXIS 74, at *6, and citing cases from other jurisdictions.

B. The Unworkable Standard of the First Appellate District.

One all too common scenario demonstrates how and why the First Appellate District opinion is seriously flawed and will be so unworkable. The example: mass shootings. Sadly, all are far too familiar with these recurring tragedies. Recall school shootings at now infamous places in communities that are now synonymous with tragedy like Columbine, Sandy Hook, Parkland, Virginia Tech, and, just this year, Uvalde, Texas to name just a few.[5] Ohio is not immune. In February 2012, six students were shot at Chardon High School in Chardon, Ohio, resulting in the deaths of three of them. In February 2016, four students at the Madison Junior-Senior High School in Middletown, Ohio. were injured during a shooting in the school's cafeteria.

Then there are mass shootings at churches and places of worship.[6] And bars and nightclubs are frequent scenes such as the Pulse nightclub in Orlando, Florida and the Dayton, Ohio shooting at the Ned Peppers Bar in August 2019.

As Ohio and the nation reckon with these increasingly common public massacres, many blame mental illness as the fundamental cause. The public tends to link serious mental illnesses, like schizophrenia or psychotic disorders, with violence and mass shootings. The state of a perpetrator's mental health is often the focus of news reports in the aftermath of mass shootings and other acts of violence. But a recent study finds that "[e]vidence suggesting a link between mass shootings and severe mental illness (i.e. involving psychosis) is often misrepresented, generating stigma." Brucato, et al (2021). *Psychotic symptoms in mass shootings v. mass murders*

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[5] For a listing of the most deadly mass school shootings in the United States, see, Fox7 Austin, *List: The most deadly US mass school shootings*, published 5/24/22, accessed at https://tinyurl.com/57uftxvx (last accessed on 8/10/22).

[6] For a listing of mass church shootings since Columbine, see, Lifeway Research, *How Frequently Do Church Shootings Occur?*, published on 2/12/20, accessed at https://tinyurl.com/munfmnmr (last accessed on 8/10/22).

not involving firearms: findings from the Columbia mass murder database. Psychological Medicine, accessed at https://tinyurl.com/2p8e5t25 (last accessed on 8/10/22).

If the First Appellate District's opinion is allowed to stand, the focus of whether CGL policies like the one issues by USIC that have exclusions for acts of violence, whether for simple assaults at group homes—as occurred between Doherty and Krewina here—or mass shootings at establishments like schools, churches and places of worship, and bars or nightclubs, will not be based upon the unambiguous policy language and its exclusions from coverage for assault and battery but will focus instead upon the mental state of the perpetrator or assailant (who are oftentimes killed during the altercation). Those injured or killed, who will seek insurance coverage for such mass acts of violence or shootings, will undoubtedly argue about the mental state of the assailant to avoid exclusions in CGL policies, like the Assault and Battery exclusion here, by asserting that the perpetrator was mentally incapable of forming the intent necessary to be convicted for assault or battery and be criminally punished. The First Appellate District's opinion opens the door to these efforts going forward.

If, as often happens, the assailant is no longer alive having been killed by law enforcement, it will be impossible, or nearly so, to determine his or her mental state at the time of the shooting. And the public stigma that those who commit mass shootings are mentally unstable—whether ultimately they are found not guilty by reason of insanity or simply incapable of having the intent to be criminally convicted for assault or battery—will allow coverage where no such coverage was ever contemplated or intended.

If left undisturbed, the rule of law adopted below allowing a not guilty by reason of insanity plea to negate intent for assault and battery and abuse risks opening a "Pandora's box." *Selander v. Erie Ins. Group*, 85 Ohio St.3d 541, 548, 709 N.E.2d 1161 (1999) (Lundberg Stratton, J.,

dissenting).[7]

Coverage determinations should not be subject to the vagaries and prolonged delays precipitated by proceedings that take place in the criminal courts. Issues of a criminal defendant's mental capacity oftentimes triggers questions of competency to stand trial which can delay the ultimate resolution of the criminal proceedings. It is not uncommon for criminal defendants to enter pleas and then seek to withdraw those pleas as not having been freely and knowingly agreed to. Appeals will follow. Findings and verdicts of guilt lead to post-trial motions and appeals on the merits which can take years to conclude. What happens when post-conviction claims of ineffective assistance of counsel for not adequately raising or developing the criminal defendant's mental impairment or incapacity are raised? How long must the coverage determination await the final

[7] While this case does not involve interpretation of an intentional acts exclusion in an insurance policy, the ruling below by the First Appellate District will create uncertainty, confusion, and issues, perhaps unintended, that implicate this Court's line-of-cases adopting the inferred-intent doctrine when determining insurance coverage. Under the inferred-intent doctrine, "when there is no evidence of direct intent to cause harm and the insured denies the intent to cause any harm, the insured's intent to cause harm will be inferred as a matter of law in certain instances." *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, 942 N.E.2d 1090, ¶ 9, citing *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 36, 665 N.E.2d 1115 (1996). This Court has inferred intent only in cases in which would-be insureds committed particularly heinous acts—the murder of a child in *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108, 114–115, 507 N.E.2d 1118 (1987), and the molestation of children in *Gearing*—as applied to an insurance policy's intentional-act exclusion, the doctrine of inferred intent is not limited to cases of sexual molestation or homicide. *Campbell* at paragraph one of the syllabus. This Court in *Campbell* noted, "intent could hypothetically be inferred in certain felonious-assault or rape cases, where the intentional acts necessarily cause harm;***." *Id.*, ¶48. What happens to the inferred-intent doctrine when there is a not guilty by reason of insanity plea in a case of murder or sexual molestation of a child? Won't the murderer or sexual molester be able to avoid an intentional acts exclusion and the inferred-intent doctrine with a not guilty by reason of insanity plea, thus creating insurance coverage. Based upon the First Appellate District's opinion, as a matter of law Doherty was not legally capable of forming any intent--direct or inferred—in connection with the assault on Krewina because of his mental illness, thus allowing BCCC to avoid the Assault and Battery Exclusion and Abuse Endorsement in the USIC policy. Will this ruling not open the door for those seeking insurance coverage to assert that, when murderers and sexual molesters plead not guilty by reason of insanity, an Assault and Battery Exclusion or Abuse Endorsement do not apply because the perpetrator was legally incapable of forming any intent? The First Appellate District's opinion has opened a veritable Pandora's box.

disposition of all post-trial motion practice, appeals, and post-conviction relief efforts?

There are also due process concerns as well. The parties seeking a coverage determination, i.e., the insurer like USIC and claimants like Krewina, will have no ability to challenge or even be heard in the proceedings determining whether the criminal defendant is not guilty by reason of insanity.

II. Clarification is Needed Regarding the Scope of *Kollstedt*.

The First Appellate District contended that its holding was mandated by *Kollstedt*. (App. Op., ¶26-46). Not so.

In *Kollstedt*, the Court was asked to determine whether an expected or intended injury exclusion in a liability policy was applicable to bar coverage for injuries caused where the alleged insured tortfeasor lacked the mental capacity to have committed an intentional tort. *Id*., at paragraph one of the syllabus. This Court found that such an exclusion would not apply to bar coverage for the acts of an insured tortfeasor. *Id*. However, the Court did so on the basis of the express policy language at issue—that is, liability coverage does "not apply to bodily injury . . . which is expected or intended by the insured." 71 Ohio St.3d at 625, fn. 1.

While she concurred in the judgment, Judge Myers was troubled by application of *Kollstedt* under the facts of this case, and wrote a concurring opinion in this case:

> . . . From the victim Krewina's standpoint, surely he would believe he was the victim of an assault, even if Doherty was found not guilty by reason of insanity. And from a policy holder's perspective, surely they would believe that an attack upon a person with a knife would constitute an assault under the policy, causing it to come under the exclusion. It does not make sense to me to have the exclusion dependent upon the mental state of the perpetrator as opposed to the conduct trying to be excluded under the policy. In other words, the very same attack would be excluded if the perpetrator was someone other than Doherty who had the mental capacity to commit the crime/tort of assault.

(App. Op., ¶¶50-51).

OACTA does not believe that *Kollstedt* is or should be controlling and, to the extent that there is confusion as noted by Judge Myers, OACTA agrees that this Court should clarify that the assault and battery exclusion is a broad categorical damages exclusion that is designed to completely remove from coverage damages in any way related to an "actual, threatened or alleged" assault and battery. Whether the non-insured assailant had the mental capacity to form the actual intent is and should have been irrelevant under the circumstances. Moreover, the abuse endorsement should have been applicable since the victim expressly argued that he was abused as a result of acts or omissions by the insured mental health facility.

III. The Inter-District Conflict Needs to Be Resolved.

The First Appellate District's holding that the assault and battery exclusion in the USIC Policy does not bar coverage to BCCC because Doherty could not form the requisite intent to commit assault and battery against Krewina due to mental illness creates an inter-district conflict because it is at odds with *Badders*. In *Badders*, the Second Appellate District held that technical definitions of "assault and battery" are "not necessarily representative" of the "plain and ordinary meaning" of the words. Rather, the plain and ordinary meaning of the words is, in pertinent part, "an attack or violent onset" regardless of the actual intent of the tortfeasor allegedly committing the assault and battery. *Id.*, at ¶14. This was true even though the Second Appellate District, in a companion case, had already determined there were questions of fact about whether the tortfeasor in *Badders* had acted with actual intent to harm the victims in that case. *Id.* at ¶¶2, 13, 18, 31.

Despite the established question of fact on the underlying tortfeasor's actual intent, the majority concluded that the exclusion "applies to exclude coverage for personal injuries and property damage that result from any legally cognizable form of assault, without respect to whether the assault is criminal or tortious." *Id.*, ¶18. Based upon *Badders*, whether Doherty "technically"

committed "an actual, threatened or alleged assault and battery" should not have been outcome determinative of this appeal.

The First Appellate District, at ¶¶42-43 of its opinion, looked to R.C. 2903.34(A)(1) and R.C. 2903.33(B) for the definition of "abuse" as "knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact." Then, the First Appellate District applied this definition to Doherty and found that abuse could not have been committed because Doherty could not form the intent to act either knowingly or recklessly".

However, under similar circumstances, in *World Harvest Church*, the Tenth Appellate District held that "abuse" should not be defined by reference to a statute, but instead should be defined by the plain and ordinary meaning of the term. *World Harvest* explained:

> The plain and ordinary meaning of the word "abuse," which is not defined in the CGL and CU policies, is, as pertinent here, physical maltreatment.[2]
>
> [2.] Although both parties cite the R.C. 2151.031 definition of "abused child," this statutory definition is inapplicable because that definition is limited, by its own terms, to application of the phrase in R.C. Chapter 2151, i.e., "[a]s used in this chapter."
>
> *See Black's Law Dictionary* 10 (9th Ed.2009), defining "abuse" as "[p]hysical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury"; *Webster's Encyclopedic Unabridged Dictionary* 7 (1996), defining "abuse" as "bad or improper treatment; maltreatment"; *see also Discover Property & Cas. Ins. Co. v. Scudier*, D.Nevada No. 2:12–CV–836 JCM (CWH), 2013 WL 2153079 (May 16, 2013) (stating that "abuse," which was undefined in the insurance policies, meant according to the definition in the Oxford Dictionaries to " 'use or treat in such a way as to cause damage or harm' " or to " 'treat with cruelty or violence, especially regularly or repeatedly' "); *State v. Eagle Hawk*, 411 N.W.2d 120, 123 (S.D.1987), fn. 5 (noting that "abuse" is defined in *Webster's New Collegiate Dictionary* 5 (1980) as "improper use or treatment" and "physical maltreatment").

World Harvest Church, 2013-Ohio-5707, ¶ 45.

There is no difference between the use of the term "abuse" in the abuse endorsement in this case treatment of the term "abuse" in *World Harvest*. There is no mental element in the plain

and ordinary meaning of the word "abuse". Consequently, the assailant's mental capacity should have been irrelevant to the issue of the abuse endorsement.

CONCLUSION

Amicus curiae The Ohio Association of Civil Trial Attorneys respectfully urges this Court, as the final arbiter of Ohio law, to adopt the Proposition of Law advanced by Appellant United Specialty Insurance Company and, in so doing, clarify the law in these critically important and wide-ranging, yet still unsettled, areas of Ohio insurance coverage law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing ***Merit Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Appellant United Specialty Insurance Company*** was sent via e-mail pursuant to S.Ct.Prac.R. 3.11(C) on this 15th day of August, 2022 to:

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