Supreme Court of Ohio Clerk of Court - Filed August 15, 2022 - Case No. 2022-0322

IN THE SUPREME COURT OF OHIO

AUSTIN KREWINA,	)	CASE NO. 2022-0322
	)	
Appellee,	)	On Appeal from the Hamilton County Court
	)	of Appeals, First Appellate District,
vs.	)	Case No. C-210163
	)	
UNITED SPECIALTY INS. CO.,	)	
	)	
Appellant.	)	

BRIEF OF *AMICUS CURIAE* THE OHIO INSURANCE INSTITUTE IN SUPPORT OF APPELLANT UNITED SPECIALTY INSURANCE COMPANY

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<u>THIS CASE RAISES ISSUES OF GREAT PUBLIC AND SPECIFIC INTEREST FOR THE *AMICUS CURIAE*</u>

The **Court of Appeals** below **created new law that will generate significant confusion in Ohio courts and result in unnecessary costly disputes regarding coverage for damage and injuries caused by everyday altercations** in bars, restaurants, churches, grocery stores, gyms, nursing homes, hospitals, group homes, universities and any other place that carries standard liability insurance which excludes coverage for assaults and batteries occurring on their premises **by**:

- **inexplicably grafting a criminal punishment standard onto civil insurance contracts; and**
- **ignoring well-established Ohio law that persons with mental illness can commit intentional torts that are excluded from coverage by contractual provisions at issue here**.

The Court of Appeals reached these troubling conclusions by bypassing the main thrust of the Trial Court's findings and misreading the key language of the relevant policy.

The decision below upends well-established law to award un-bargained-for insurance benefits and unjustifiably relieves insured parties of their obligation to supervise and manage predictable risks

The Court of Appeals' decision **creates untenable and incongruous new law**. The **types of risks covered and excluded by standard liability policies,** such as the policy at issue here, are **injuries and damage that occur when the act is completed, regardless of the mental capacity of the actor**; **capacity matters only for determining the ultimate punishment** – incarceration, in-patient treatment, or another type of restriction on the person who committed the act, to achieve the societal goal of crime punishment and prevention**.** This Court should **reverse to prevent unnecessary future disputes between insurers and their insureds about the nuances of criminal legal definitions and delays in coverage that will result from**

waiting for criminal prosecutions to run their course. And in cases where a defendant is found "incompetent to stand trial" and sent to a hospital for restoration, the issues of intent and criminal liability can be extended for years awaiting a decision of whether a defendant can first even be restored to competency. If ever actually restored, only then will the criminal trial be held. Meanwhile, under the Court of Appeals' decision, the determination of insurance coverage will also be delayed for years if criminal liability must first be determined.

This issue is of great public interest and of particular interest to *amicus curiae* The Ohio Insurance Institute ("OII"). Common law currently allows someone who is found not guilty by reason of insanity to still be found civilly liable in tort for their actions. Similarly, this is a commercial contract. It is inconsistent to negate a civil contract term because of language in the criminal code that applies to finding someone not guilty by reason of insanity when they could still be found civilly liable.

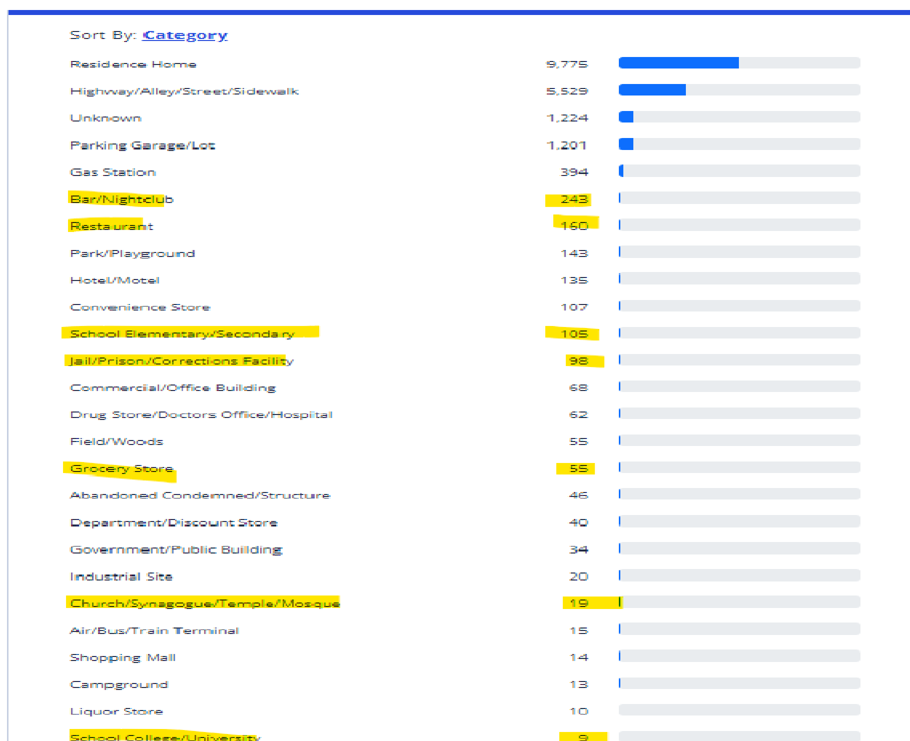
The bargain between every insurer and insured with respect to the standard assault and battery exclusions in standard liability policies is that both **coverage and exclusions are triggered by the injury**. Moving the plain policy language beyond the common and ordinary meaning of assault and battery as a completed act of violence—**the *actus reus***—into the **amorphous** realm of an assailant's precise mental state at moment of the commission of the act—the ***mens rea***—**will introduce into civil law confusion, expense, and delay surrounding proof of insanity that already exists in criminal law**.

Moreover, allowing the decision below to stand **will unjustifiably relieve the obligation that insured facilities**—like the group home at issue here—**have to supervise the potentially high-risk individuals they serve**.

Parties contracting for ordinary liability coverage do not bargain for or anticipate potentially having to wait months for a legal determination in the ensuing criminal matter before knowing whether coverage is due. Nor do they anticipate that coverage will exist if the insured entity fails to exercise any standard of care or provide any supervision in serving their customers, students, employees, residents, or patients.

Special liability policies cover these risk

In any given year in Ohio, there are nearly 20,000 aggravated assaults (attacks where **an offender uses or displays a weapon in a threatening manner, or causes severe bodily injury**).[1] In 2020, bars and restaurants, schools, grocery stores, colleges, houses of worship, shopping malls, parks and playgrounds all reported such attacks on their premises.[2]



[1] *Ohio Incident-Based Reporting System* (OIBRS), years 2020-2021, available at https://dpsoibrspext.azurewebsites.net/ (accessed August 15, 2022); in 2020, 20,213 aggravated assaults were reported, in 2021, that number was 19,470.

Because nearly every type of entity is vulnerable to its employees, patients, residents, students, tenants, or customers becoming victims or perpetrators of such attacks, separate coverages are available, especially to businesses that deal with particularly vulnerable or volatile populations, and employ security staff that may engage in an altercation with a patron.[3]

This Court should clarify the law for Ohio courts and hold that **policies written to exclude liability for injuries or damage sustained as a result of assault or battery do not require analysis under the irrelevant criminal *mens rea* standard designed for determining criminal culpability and appropriate punishment** and affirm the Trial Court's findings below. Parties concerned with having coverage for the risk of an attack on their premises are free to bargain for additional coverage or can purchase separate policies covering such injuries or damage. Precisely because the standard liability policies expressly exclude coverage for assault and battery-related injuries and damages, **separate policies are available to businesses to cover risks of the types of injuries at issue in the underlying case**.[4]

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[2] *Federal Bureau of Investigation Crime Data Explorer*, *available at* https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/crime-trend (accessed August 15, 2022).
[3] MFE Insurance, *Why Your Bar Needs Assault & Battery Insurance, available at* https://www.mfeinsurance.com/assault-and-battery-insurance-for-your-bar/#:~:text=Assault%20%26%20Battery%20Insurance%20is%20a,injury%20while%20on%20bar%20premises (accessed August 15, 2022).
[4] *See e.g.* https://prince-insurance.com/assault-and-battery/ (accessed August 15, 2022); https://www.rmsinsurance.com/coverages/assault-battery (accessed August 15, 2022); https://www.thebankofsainsurance.com/business/assault-battery (accessed August 15, 2022); https://commercialinsurance.net/assault-and-battery-insurance (accessed August 15, 2022);

STATEMENT OF INTEREST OF *AMICUS CURIAE*

OII is uniquely qualified to provide this Court with a broad perspective on the principles of insurance law relevant to this appeal, as well as practical insight into the negative consequences for insurers and insureds alike if the ruling below is upheld.

OII is the professional trade association for property and casualty insurance companies in the State of Ohio. Its members include twenty-seven domestic property and casualty insurers, twelve foreign property and casualty insurers and reinsurers, seven insurance trade associations, and four insurance-related organizations. OII's member companies represent 87% of Ohio's private passenger auto insurance market, 81% of the homeowners' market and 50% of the commercial market. OII strives for stability, predictability and consistency in Ohio's case law and jurisprudence governing insurance coverage and policy interpretation. On issues of importance to its members, OII has filed amici briefs in significant cases before federal and state courts in Ohio to promote sound public policy and to share its perspective with the judiciary on matters that will shape Ohio insurance law.

OII appears as *amicus* in this case and submits this brief because insurers and their Ohio clients **need a clear, consistent and reasoned opinion explaining that the standard general liability policy exclusion for assault and battery does not require an application of the irrelevant criminal liability standard**. The legal questions presented in this case directly concern OII and its members because the outcome can: **(1) significantly reduce availability and affordability of standard liability policies, especially for entities that serve high-risk clients and (2) cause delays and uncertainly in coverage that will now depend on the outcomes of separate criminal prosecutions.** Inability to secure or afford insurance coverage

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providing additional coverage to businesses whose general liability policy excludes assault and

can cause bankruptcies in productive enterprises, causing the **disappearance of jobs**, and **leaving certain segments of society unprotected, or insufficiently protected, against truly significant liabilities**.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

I. PROPOSITION OF LAW NO. I: 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.

The plain and ordinary meaning of
the relevant policy language
leaves no room for
grafting a criminal mens rea /
subjective third-party state of mind standard
onto ordinary civil insurance contracts

The clear and **unambiguous policy language** in this case **precludes coverage for "bodily injury,"** "property damage," or "personal . . . injury" **resulting from** (a) "**any actual, threatened or alleged assault or battery**" or (b) "the **failure of any insured . . . to prevent or suppress any assault or battery**." Nothing in this language refers to the mental state of a person committing the act. The key to finding that this exclusion applies is simply "the injury." ***If it causes an actual injury***, even **a threat or an alleged threat** of violence **triggers the exclusion**.

The **key question** under this policy language was **whether the plaintiff was injured** from an actual, threatened, or alleged assault or battery, as those terms are commonly understood, **not whether a person who causes those injuries could form the intent necessary for them to be convicted of a crime** by the same name. Appellant below convinced the Court of Appeals that the terms "assault" and "battery" in the policy must be evaluated in light of the technical legal definitions that require proof of *mens rea*. However, the phrase "'**any actual,**

battery coverage.

threatened or alleged assault or battery' unambiguously 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**." *Badders v. Century Ins. Co.*, 2d Dist. Montgomery No. 28170, 2019-Ohio-1900, ¶18.

Ordinary and commonly understood meaning of the terms "assault" and "battery" are rooted in perception of the person threatened or experiencing an attack, not in the subjective intent of the assailant

The coverage under an **insurance policy** requires **construction of the contract** "in conformity with the intention of the parties as gathered **from the ordinary and commonly understood meaning of the language employed**." *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 211, 519 N.E.2d 1380 (1988); *Gomolka v. State Auto. Mut. Ins. Co.,* 70 Ohio St.2d 166, 167-168, 436 N.E.2d 1347 (1982) ("words and phrases used in an insurance policy must be given their natural and commonly accepted meaning"). The appellant below presented **no reasoning on how the legalistic technical definition of the terms "assault" and "battery**" based on R.C. 2903.13 **reflects the "ordinary and commonly understood meaning"** of those terms. As the Second District recently explained:

> In dictionaries of **general usage, as opposed to a specialized reference** like *Black's Law Dictionary*, the word "**assault" is defined as "[a]n attack or violent onset,** whether by an individual [person], a company, or an army." *Webster's New Twentieth Century Dictionary of the English Language* 107 (1964). **To most persons, other than lawyers and legal professionals, this latter definition is almost certainly the "plain and ordinary meaning" of the word "assault."** In fact, *Black's Law Dictionary* notes that the word is "[f]requently used to describe illegal force which is technically a battery." *Black's Law Dictionary* 105 (5th Ed.1979).

Badders, 2019-Ohio-1900, ¶14 (emphasis added). The current Meriam-Webster definition of "**assault" is a "violent physical or verbal attack**."[5] Similarly, the **ordinary and common meaning of "battery" is "the act of beating someone** or something with successive blows," or "**offensive touching" without the person's consent**.[6] With respect to both terms, **perception or actual experience of unwanted contact by the person under attack is the relevant factor** for determining if an assault or battery took place, **not whether the attacker had the capacity to form the intent sufficient to be held criminally liable**.

Grafting criminal liability standards onto civil contracts is a recipe for confusion that no party to an insurance policy contemplates at contract formation. As one court explained:

> **the perpetrator of an assault and battery is civilly liable regardless of that person's sanity**. The rule that one who suffers from deficient mental capacity is not immune from tort liability solely for that reason has roots stretching back several centuries into the early common law. W. L. Prosser, *The Law of Torts* § 135 (4th ed. 1971). Several reasons support the rule -- **between two innocent persons who must suffer loss, liability should rest on the one who causes it. The custodians of the mentally ill will thus be encouraged to restrain them from injuring others**. Additionally, **courts are hesitant to introduce into the civil law the confusion surrounding proof of insanity which already exists in criminal law.**

Miele v. United States, 800 F.2d 50, 53 (2d Cir.1986) (emphases added).

Ordinary general liability insurance policies are not designed or priced to cover risks associated with predictable and preventable injuries occurring in high-risk environments

Before an insurer writes a general liability insurance **policy**, it separately **evaluates many factors, including the nature of the insurer's business, any similar incident history, and**

[5] "assault." *Meriam-Webster.com.* 2022. https://www.merriam-webster.com/dictionary/assault (accessed August 15, 2022).

other specific factors necessary to properly price the relevant risk.[7] Just as with any type of insurance coverage, **its price depends on the relevant risk profile of the business**. Any insurance broker working with a group home housing persons with mental illness and potentially violent persons, or a business serving alcohol until late hours, would recommend that since coverage for violent altercations is excluded from such entity's general liability coverage, additional coverage should be purchased.[8]

During the general liability **policy underwriting process**, the proposed insured is **evaluated for specific exposure risks**—such as serving alcohol, having a lot of foot traffic, having its own bouncer or security team that may get involved in an altercation with a customer, working with high-risk individuals (i.e. a group home or a security firm). **All such factors go into the formulation of the ultimate price of the policy if it is to include coverage for injuries resulting from assault and battery.** It is a virtual certainty that **none of the relevant risks were considered or priced during the underwriting of the general liability policy at issue here because it contains the assault and battery exclusion**.

The facility at issue, despite being a high-risk environment, did not bargain for removal of the assault and battery exclusion and did not purchase a special assault and battery policy

The Brown County Care Center ("BCCC"), the defendant in the action below, **is a care facility that houses individuals with, among other conditions, mental challenges, who**

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[6] *See* "battery." *Meriam-Webster.com.* 2022. https://www.merriam-webster.com/dictionary/battery (accessed August 15, 2022). The word's origins date back to 1531, to Anglo-French *baterie*, from *batre* to beat, from Latin *battuere.*

[7] *See* https://prince-insurance.com/assault-and-battery/, listing among entities with assault and battery gaps in traditional coverage that must be filled with additional policies: bars, clubs, restaurants, any other lines of business that put insureds "at risk of violent assaults," including such professions as "private investigation and personal security personnel."

may periodically suffer from violent outbursts. Due to the nature of its business, BCCC, more than any other type of entity, should have been prepared for a violent altercation among its residents. **BCCC did not design sufficient safeguards, nor properly trained its employees, and otherwise failed to take necessary precautions** to prevent the type of incident that led to appellant's grave injuries.

In fact, **BCCC admitted** in its settlement with the appellant (Mr. Krewina) that:

1. At all times during plaintiff's stay in its facility, **it "was in control of the premises and was responsible for ensuring the safety of Krewina**."
2. **At all relevant times, Krewina alleged that BCCC knew** or should have known that Mr. Krewina's **attacker** (also a BCCC resident) "**posed a danger to Krewina** or another resident, and **should have anticipated**, under the circumstances, **the injury to Krewina** or another resident would result."
3. As "a direct and proximate result of **BCCC's failure to provide Krewina with a safe living environment** and to keep residents free from abuse, physical harm, pain, and mental anguish, **Krewina suffered severe and permanent injuries**."

(MSJ at Exhibit A, Settlement Agreement, at ¶¶1.f-k and 2.b)

These admissions and stipulations should have, at a minimum, decided the issue of the applicability of the clause limiting any such coverage, if found, to $25,000. This was simply a failure by BCCC to safeguard its residents. And **knowing its risk of exposure, BCCC failed to secure a proper insurance policy that filled the gap left by the assault and battery exclusion in its general liability policy**. Damages related to the attack on Mr. Krewina could have then been covered by a policy that covers such risks.

The **Court of Appeals** held **BCCC in its civil case to the same criminal standard of not guilty by reason of insanity as was used in the criminal case**. Yet the admitted and stipulated to failure of BCCC to properly supervise and protect its residents is a totally separate

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[8] *See id* at fn. 3.

issue from the question of whether the attacker was criminally liable. The Court of Appeals' summary dismissal of BCCC's stipulated responsibility, defies the plain reading of the policy and common sense. **BCCC failed to protect Krewina from abuse, pure and simple. The exclusion applies**.

A simple hypothetical demonstrates the **absurdity of the Court of Appeal's ruling:** a facility admits that it did not provide proper supervision of **Resident A and Resident B. Both Resident A and Resident B assault other residents**. **Resident A is found not guilty by reason of insanity**, and **Resident B is found guilty** of assault.

Under the Court of Appeals position, because **Resident A** lacked the requisite intent to commit an assault under the criminal punishment standard, **there is coverage** and the exclusion does not apply. To the contrary, with respect to **Resident B, the exclusion applies and there is no coverage** for assault on the second person. The **conduct of the staff** in f**ailing to prevent the abuse was not dependent upon the mental state of the staff**. Their failure to supervise, as even stipulated to here would be the same in both cases. These inconsistent results fly in the face of the language of the standard exclusion.

Reliance on Kollstedt is misplaced since that case concerned different policy language that specifically required an evaluation of the first party insured's state of mind to determine coverage

The **Court of Appeals' confusion** appears to result from **a misreading of this Court's *Kollstedt* decision**. *See Nationwide Ins. Co. v. Estate of Kollstedt,* 71 Ohio St. 3d 624, 1995-Ohio-245, fn. 1 In that case, the homeowner's liability policy applied to "activities of the insured" (the homeowner) and excluded from coverage "bodily injury . . . which is expected or

intended by the insured." *Id.* at 625, fn. 1. Because the **plain language of the policy required a determination** of whether the insured intended the injury, consideration of **the insured's capacity to form the intent to injure** was appropriate in *Kollstedt*.

The language of the policy at issue below is entirely different. **BCCC's policy required a determination of whether <u>an injury</u> occurred on the insured's premises that was caused by an "actual, threatened or alleged assault or battery" that the insured failed to "prevent or suppress."**

The differences in the language between the two policies alone should have been sufficient for the Court of Appeals to reject Mr. Krewina's strained attempt to apply the very narrow rule in *Kollstedt* to his situation. In the case below, there is no mention of "intent" by the insured. There is also **no other language in BCCC's policy that requires an evaluation of the subjective mental state of a non-insured third party who the insured failed to control despite known risks** and who completed a violent act commonly known as assault and battery and caused an actual injury.

Because the plain language of the policy controls, the **Court should not look beyond the plain words of the policy to stretch unambiguous provisions to reach a result not intended by the parties**. *Gomolka*, 70 Ohio St.2d at 168 ("courts may not indulge themselves in enlarging the contract by implication in order to embrace an object distinct from that contemplated by the parties"). The entirety of **the policy in question, and especially the exclusions, clearly convey the parties' intent** for coverage to apply to purely accidental injuries and **to exclude from coverage preventable injuries that result from predictable acts of violence**.

Even if consideration of "intent" were necessary to assess the policy at issue, the "intent" that matters is the intent to complete the underlying act of violence, which even legally incapable persons possess;

what they lack is capacity to understand that their violence is morally wrong, and thus cannot be punished the same way as "sane" persons

In its judgment entry, the Trial Court found the defendant below not guilty by reason of insanity, but the Trial Court did not make any finding that the defendant was incompetent to stand trial. Incompetency is not an issue in this case. The **Court of Appeals' confusion in the** decision below is further exacerbated by **an unfounded assumption that a "willful" or "intentional" act**—a typical descriptor of a violent crime or a tort—**is bound up in the actor's ability to form criminal intent**. But **even when a person is adjudged to be criminally insane**, wields a knife and threatens to (assault) or actually strikes another person (battery), **they are acting willfully, they *intend* to complete the act, they *intend* for that knife to scare the victim or to connect and cause an injury**. **What the person lacks is the ability to tell right from wrong; they believe they are morally justified in their actions that they fully *intended* to take and that is why they cannot be held criminally liable**. *See Kahler v. Kansas*, 140 S.Ct. 1021, 1026, 206 L.Ed.2d 312 (2020) ("Assume, for example, that a defendant killed someone because of an 'insane delusion that God ha[d] ordained the sacrifice.' The defendant knew what he was doing (killing another person) [and intended that result], but he could not tell moral right from wrong; indeed, he thought the murder morally justified…" [and that is why under certain states' laws, such persons cannot be jailed for their crimes]). **This lack of ability to tell right from wrong is** what criminal law calls **inability to form criminal intent**. **For purposes of**

general liability policies, the **morality** of the person completing the act **is irrelevant**, **only the fact that they cause an injury by completing the offensive act that they intend—in the ordinary meaning of this term—to complete, is relevant**.

Ohio law is very clear on this point:

> insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances . . .
>
> **Insanity is a defense to a criminal charge**. **In a criminal case, upon conviction, there is a penalty involved** which is recognized as punishment for the wrong committed. **The policy of the law has been that an insane person should not be held guilty of a criminal act committed while he was insane** . . . **in a [civil] case . . . where no punishment is involved** the rule is based upon the public policy that as between two parties to an accident, where one party is mentally sound, blameless and injured and the other is at fault and mentally ill or insane, **the loss which must be borne by someone should be suffered by the person at fault. This public policy also takes cognizance of the fact that mental illness is difficult of proof and susceptible of being feigned**.

Kuhn v. Zabotsky, 9 Ohio St.2d 129, 133-134, 224 N.E.2d 137 (1967) (emphasis added); *see also Frederic v. Willoughby*, 11th Dist. Portage No. 2007-P-0084, 2008-Ohio-3259, ¶ 80-86 (collecting cases) ("an insane or otherwise mentally disordered person is civilly liable for injuries resulting from an assault and battery . . . **mentally deficient individuals are capable of committing intentional torts such as assault and battery**.") (emphasis added).

Courts in **other jurisdictions** agree that "**insanity negates criminal intent or *mens rea*** . . . However, insanity **does not negate the criminal act or *actus reus***. Therefore, in the case at bar, nothing changes the fact that [the insured] perpetrated 'criminal acts,' and that **such acts are not covered by the insurance policy** . . . *Swift v. Fitchburg Mut. Ins. Co.,* 96-1420, 1997 Mass. Super. LEXIS 136, at *4-5 (May 22, 1997) (emphasis added); *see also Miele* 800 F.2d at 53 ("**The gravamen of an action for assault and battery** under New York law **is the intent to**

make contact . . . The general rule is that an insane person is just as responsible for his torts as a sane person . . . **A defendant, even if temporarily insane, is [civilly] responsible for an assault to the same extent as though he were sane**.") (internal citations omitted, emphasis added).

Therefore, **even if** consideration of the **subjective "intent" of Mr. Krewina's assailant were relevant to the coverage determination** in this case, as a matter of established law, **the assailant possessed the requisite intent** to be found liable to Mr. Krewina **for an assault and battery resulting in an injury that is excluded from BCCC's insurance coverage**.

If the Court of Appeals' decision is allowed to stand, this **new interpretation of the standard general liability coverage will lead to uncertainty with respect to existing policies and what they cover. Such a standard will increase costs of future policies**. Existing policies may now be required to cover significant, unanticipated damages that were never included in the pricing of the policy. **Some coverages may be delayed months or years** waiting for the perpetrator to be possibly restored before liability can be determined. Future policies' **underwriting** must now **try to anticipate and price risks associated with third party behavior** at the covered premises that may or **not** be in the category of **typical high risk environments**. This will lead to **fewer and more expensive coverage options, with some entities entirely priced out of the general liability market**. **The Trial Court's decision preserves common sense predictable and fair coverage on which hundreds of thousands of Ohio businesses have come to rely**.

CONCLUSION

Consequently, OII respectfully requests that this Court should: (1) clarify that an ordinary general liability policy exclusion for injuries arising out of "assault" or "battery" do not require

consideration of the assailant's subjective intent, only a determination that an injury occurred as a result of an act of violence, or (2) find that an insanity defense by the assailant does not relieve an assailant of liability for injuries resulting from acts of violence ordinarily described as "assault" and "battery" and does not negate an insurance policy exclusion for such injuries, and (3) affirm the Trial Court's ruling.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on all counsel of record by electronic mail on this 15th date of August.

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