

IN THE SUPREME COURT OF OHIO

AUSTIN KREWINA, :
Appellee, : Case No. 2022-0322
v. : On Appeal from the First Appellate District,
UNITED SPECIALTY INS. CO., : Hamilton County
Appellant. : (C.A. Case No. C-210163)

**MERIT BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE,
IN SUPPORT OF APPELLEE, AUSTIN KREWINA**

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Nationwide Ins. Co. v. Estate of Kollstedt,
71 Ohio St.3d 624, 646 N.E.2d 816 (1995) *passim*

INTRODUCTION

On December 17, 2021, the First District Court of Appeals issued its Opinion in this case following this Court’s precedent in *Nationwide Ins. Co. v. Estate of Kollstedt*, 71 Ohio St.3d 624, 646 N.E.2d 816 (1995). Even the concurring judge acknowledged that *Kollstedt* “compels” the Court of Appeals’ result in this case. Yet, Appellant and two amici curiae now ask this Court to turn 27 years of precedent on its head and chart a new course for interpretation of insurance contracts. Rather than taking such a drastic step in contravention of *stare decisis*, this Court should recognize that the remedy for Appellee and amici is simply better drafting of insurance contracts.

IDENTIFICATION OF AMICUS CURIAE

The Ohio Association for Justice (“OAJ”) is a statewide association of attorneys whose mission is to preserve the legal rights of all Ohioans by protecting their access to the civil justice system. Members of OAJ seek to preserve access to the courtroom and to promote public confidence in the legal system.

OAJ submits this brief to underscore the importance of requiring the enforceability of insurance contracts when insureds are entitled to coverage. The insurance industry has been aware of *Kollstedt* for decades and is in a better position to draft and negotiate coverage to exclude scenarios it does not want to insure. The fact that Appellant did not correctly draft an exclusion for the foreseeable scenario presented in this case does not justify a broad restructuring of the law.

STATEMENT OF THE CASE AND FACTS

The Ohio Association of Justice adopts the Appellee’s statement of the case and facts.

ARGUMENT

Appellant advances only a single Proposition of Law, urging this Court to adopt an “ordinary person” standard applicable to the interpretation of insurance exclusions for assault and battery. Appellant and amici present doomsday scenarios that the First District’s Opinion will have on the insurance industry, claiming that the First District created “new law.” The reverse is true: The First District merely applied *Kollstedt*, and the irony of the arguments of Appellant and amici is that departure from *Kollstedt* would create an uncertain future for claims of this nature. Indeed, the ordinary person standard would not establish any bright lines; rather, “ordinary” is dependent upon the eye of the beholder, will differ from case to case, and will likely need to be litigated in each instance. This is hardly a step forward for consistency and expectancy.

Kollstedt was a short, simple, clear, unanimous holding of this Court. The gist of the holding is that an intentional tort exclusion cannot apply when the tortfeasor was mentally incapable of committing the intentional act. *Id.*, syllabus paragraph 1. The proper response to the holding from the insurance industry seems as short, simple and clear – draft expanded exclusions which apply “even when the tortfeasor is deemed mentally incapable of committing the intentional act.” The act in this case was committed in 2014, 19 years after the holding in *Kollstedt*, and no such expanded exclusion had been written into the insurance contract. Such an oversight hardly justifies departure from *Kollstedt* and creating an entirely new legal landscape for interpretation of insurance contracts.

Indeed, most of the insurance industry changed exclusions in response to *Kollstedt*, according to insurance counsel in *Imhoff v. Encompass Insurance*, Fifth Dist. Ct. App. No. 09-AP-09-0048, 2010-Ohio-2760, 2010 WL 2412152. In *Imhoff*, a resident of a nursing home

physical and sexually assaulted two other residents. *Id.*, ¶ 4. The attacker suffered from Alzheimer’s disease, dementia and depression with psychosis. *Id.* The victims sued him, and the attacker’s homeowner’s insurance policy declined a defense and coverage based on contractual exclusions. *Id.*, ¶ 5. At issue before the trial court was whether the exclusions were unenforceable under *Kollstedt* because the attacker had limited mental capacity. The trial court applied *Kollstedt* and found that the insurer should have provided a defense and coverage. On appeal, counsel for the insurer explained to the court that “the insurance industry modified the language in its coverage exclusions in response to the *Kollstedt* decision.” *Id.*, ¶ 27. Counsel for the insurer noted that the exclusions applied “even if such covered person lacked the mental capacity to govern his or her conduct.” *Id.*, ¶¶ 15, 16, 21, 22. The court of appeals reversed, finding that the exclusions had been properly written to avoid *Kollstedt* application. *Id.*, ¶ 28.

Appellant and amici argue that *Kollstedt* does not apply to this case. Further, they misrepresent the concurring opinion from the First District. The concurring judge explicitly stated that “we must reverse” due to the precedent of *Kollstedt* and that *Kollstedt* “compels” the reversal. *Opinion*, ¶¶ 48, 49. So all three judges agreed that *Kollstedt* is not only applicable but also controlling.

Appellant and amici clearly don’t like the result in this case. But this Court is not an intermediate court of appeals which reviews particular results from trial court decisions. This Court addresses matters of general public interest. The scenario presented in this case is so rare and so fixable that it is hardly of general public interest. OAJ encourages the Court to consider dismissing the appeal as having been improvidently granted.

Amicus Ohio Insurance Institute presents a hypothetical in its brief which it claims “demonstrates the **absurdity**” of the First District’s ruling. (boldface in original)¹. *Brief of Amicus Curiae Ohio Insurance Institute* at 11. The hypothetical is based on the exclusion as written in this case, rather than the easy fix the insurance industry can apply in expanding its exclusions with redrafting. With an exclusion which explicitly applies “even when the tortfeasor is deemed mentally incapable of committing the intentional act” there is absolutely no difference between Residents A and B in the hypothetical.

CONCLUSION

The Ohio Association for Justice respectfully requests that this Honorable Court dismiss the appeal as having been improvidently granted. Alternatively, OAJ requests that the Court affirm the decision of the First District Court of Appeals.

Respectfully submitted,

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¹ The hyperbole of Amicus The Ohio Insurance Institute, as demonstrated by its rampant use of boldface and italics stretched the bounds of credibility.

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiaë, The Ohio Association for Justice in Support of Appellant was served by electronic mail this 4th day of October 2022 to counsel listed on the caption of this Brief.

s/ Konrad Kircher

Konrad Kircher (0059249)