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In the Supreme Court of Pennsylvania

103 MAP 2021

STEWART KRAMER AND VALERIE CONICELLO

v.

NATIONWIDE PROPERTY AND CASUALTY INSURANCE CO. AND LAURIE CRUZ, ADMINISTRATOR FOR THE ESTATE OF MICHAEL T. MURPHY, JR., DECEASED, AND ADAM KRAMER

APPEAL OF: NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY

BRIEF FOR *AMICI CURIAE* THE PENNSYLVANIA DEFENSE INSTITUTE, THE INSURANCE FEDERATION OF PENNSYLVANIA, INC., AND THE PENNSYLVANIA ASSOCIATION OF MUTUAL INSURANCE COMPANIES

Appeal from the Order of the Superior Court, dated December 2, 2021, Reconsideration denied February 10, 2022, at Docket No. 726 EDA 2021, which affirmed the Order of the Court of Common Pleas of Montgomery County dated February19, 2021, at Docket No. 2020-17901

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STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of the Pennsylvania Defense Institute (PDI), the Pennsylvania Association of Mutual Insurance Companies (PAMIC), and the Insurance Federation of Pennsylvania, Inc. (the Federation), as *amici curiae*.

PDI is a non-profit association of Pennsylvania defense counsel and insurance company executives. PAMIC represents mutual insurance carriers throughout Pennsylvania with over 115 members. The Federation is the Commonwealth's leading trade organization for commercial insurers of all types. The Federation consists of nearly 200 member companies and it speaks on behalf of the industry in matters of legislative and regulatory significance. It also advocates on behalf of its members and their insureds in important judicial proceedings.

These *amici* speak on behalf of the liability insurance industry and the insurance industry in general, advocating on behalf of insurers and consumers throughout the Commonwealth.

[1] Pursuant to Pa.R.A.P. 531(b), *amici curiae* state that this brief has been prepared on a *pro bono* basis, and no person or entity other than the *amici*, their members, or counsel made a monetary contribution to the preparation or submission of this brief or authored any part of this brief.

The liability coverage sections of homeowners insurance policies contain insuring agreements that provide coverage for an insured's liability arising out of "bodily injury" or "property damage" caused by accidental conduct. These *amici* submit their brief because there is no public policy reason to compel an insurer to cover emotional distress damages as "bodily injury," and where homeowners policies are not highly regulated by legislative mandates, insurers should be free to write an insurance contract to remove emotional distress damages from the scope of coverage. As such, insurance contracts that expressly exclude emotional distress from their definition of "bodily injury" should be interpreted and enforced as written.

Amici also request that this Court exercise restraint and refrain from addressing whether emotional distress constitutes "bodily injury" for the purposes of liability insurance policies through the instant appeal. General liability, auto and homeowners insurance policies commonly provide coverage for "bodily injury" liability caused by accidents such that the question of when and whether emotional distress qualifies as "bodily injury" for liability insurance purposes is a significant issue that would impact a broad range of insurers. The insurance policy definition of "bodily injury" at issue in this case is not the standard definition commonly used in the industry in that it expressly excludes emotional distress from the definition and given

the Superior Court's *sua sponte* ruling, the record in this matter is inadequate for this Court to address an issue of this magnitude with such potentially broad ramifications.

Insofar as this Court were to address the emotional distress at issue in this matter—that is, emotional distress suffered by third parties who themselves did not sustain any physical harm—the same does not qualify as "bodily injury" under the Nationwide insurance policy.

ARGUMENT

I. A Homeowners Insurer is Free to Write an Insurance Contract to Remove Emotional Distress Damages from the Scope of Coverage, and Where There is No Public Policy Reason to the Contrary, the Insurance Contract Must be Interpreted and Enforced as Written.

In Pennsylvania, unlike automobile insurance policies—whose provisions are subject to legislative requirements and prohibitions underpinned by public policy concerns—homeowners policies are not highly regulated by legislative dictates such that insurers are relatively free to decide the nature and scope of risks to undertake or reject in the homeowners coverage offered to consumers in their policies. *Neil v. Allstate Ins. Co.*, 549 A.2d 1304, 1306 (Pa. Super. 1988), *app. denied*, 559 A.2d 39 ("Unlike the area of automobile insurance, which is legislatively regulated, there is no legislative enactment in Pennsylvania governing or requiring that

insurance companies provide a specified level of insurance coverage to homeowners.") Indeed, "private parties are generally free to decide what insurance coverage they want and will pay for, and insurance companies are free to decide what risks to undertake and what risks to reject." *Id.* at 1307.

Accordingly, Nationwide was free to decide to expressly exclude emotional distress from its policy's definition of "bodily injury" for the purposes of the policy's coverage for personal liability:

> 1. "BODILY INJURY" means bodily harm, including resulting care, sickness or disease, loss of services or death. **Bodily injury does not include emotional distress, mental anguish, humiliation, mental distress or injury,** or any similar injury unless the direct result of bodily harm.

(R. at 53a) (emphasis added).

"The right of a company to limit its contract of coverage may not be questioned...provided the limitation is not prohibited by public policy or statute." *Neil*, 549 A.2d at 1308. In the absence of any judicial authority or legislative enactment to establish or even suggest that an insurance policy provision contravenes public policy, Pennsylvania courts are bound to enforce the same. *Id.* at 1308-09 (upholding an exclusion in an automobile policy where the policyholders failed to demonstrate that the exclusion violated public policy). Here, there is no Pennsylvania court decision or

statute suggesting that a homeowners policy's exclusion of emotional distress from its definition of "bodily injury" for the purposes of liability coverage is violative of public policy. The insurance contract provision must be interpreted and enforced as written.

To be sure, insurance policies are contracts, the interpretation of which is governed by the mutual intention of the parties at the time they formed the contract. *Am. & Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, 2 A.3d 526, 540 (Pa. 2010). The purpose of interpreting those contracts is to ascertain the intent of the parties as manifested by the terms used in the written instrument. *401 Fourth Street, Inc. v. Investors Ins. Gr.*, 879 A.2d 166, 171 (Pa. 2005). The clear, unambiguous language of the policy must be given effect and cannot be interpreted to mean other than what it plainly says. *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999); *Guardian Life Ins. Co. of Am. v. Zerance*, 479 A.2d 949, 953 (Pa. 1984).

Here, the clear and unambiguous language of the Nationwide policy must be given effect—that is, it must be interpreted and enforced so as to recognize that emotional distress does not fall within the policy's definition of "bodily injury." To do otherwise would effectively re-write the policy, would be anathema to Pennsylvania insurance contract interpretation, and would

inappropriately expand coverage beyond the scope to which the parties agreed. *See Neil*, 549 A.*2d* at 1310 ("We similarly decline to rewrite the contract of the parties…To do so on the grounds appellants have suggested would disturb established principles of law regarding the rights and liabilities of parties who freely contract, and would place insurance companies in the impracticable situation of insuring losses which they have specifically not contemplated and for which they have not funded reserves.")[2]

II. The Court Should Exercise Restraint and Avoid Using This Case to Address Whether Emotional Distress Constitutes "Bodily Injury" for the Purposes of Liability Insurance Policies.

In granting the Petition for Allowance of Appeal and certifying the question to be addressed in this matter, the Court already recognized that emotional distress does not qualify as "bodily injury" under the Nationwide policy:

> Did the Superior Court incorrectly rule that emotional distress damages are covered under an insurance policy providing liability coverage only for "bodily injury" **even when the policy itself excludes**

[2] Public policy considerations actually warrant the *reversal* of the Superior Court's decision. As the Superior Court's decision is contrary to Pennsylvania contract interpretation and improperly expands the scope of coverage beyond the parties' intent, the holding "would extend the law of Pennsylvania beyond anything heretofore and would impose an interpretation on homeowner policies far beyond what was intended by the parties. To permit the [lower] court's decision to stand would effectively negate existing sound public policy." *Germantown Ins. Co. v. Martin*, 595 A.2d 1172, 1175 (Pa. Super. 1991), *app. denied*, 612 A.2d 985 (Pa. 1992).

emotional distress from the definition of bodily injury?[3]

(*See* Order Granting Allowance of Appeal, *Kramer v. Nationwide Prop. & Cas. Ins. Co.*, No. 113 MAL 2022, 2022 WL 10331513 (Pa. Oct. 18, 2022)) (emphasis added).

As framed, the certified question before the Court is whether the insurance policy at issue must cover damages that do not constitute "bodily injury." This is an extraordinarily narrow issue to be determined. As such, this matter cannot serve as a panacea for the broad question of whether emotional distress falls within the definition of "bodily injury" for the purposes of a liability policy, when the same is not even before the Court.

The question of when and whether emotional distress constitutes "bodily injury" for insurance purposes is a significant issue that would impact a broad range of insurers. To the extent that the Court would desire to consider an issue of this magnitude, the same must be addressed on an adequate record with adequate briefing and must be interpreted under a policy of insurance that does not expressly *exclude* emotional distress from its definition of "bodily injury."[4] *See Commonwealth v. Gamby*, 283 A.3d 298,

[3] Indeed, the Superior Court itself recognized that emotional distress is not "bodily injury" under Nationwide policy's definition. *Kramer v. Nationwide Prop. & Cas. Ins. Co.*, 271 A.3d 431, 436 (Pa. Super. 2021).

[4] The definition of "bodily injury" contained in the Nationwide policy is a customized definition that is unique to this particular insurer; it is not a standard definition commonly used in the industry as found, for example, in the Insurance Services Offices, Inc. (ISO) General Liability Coverage Form, which defines "bodily injury" as "bodily injury, sickness

317-18 (Pa. 2022) (declining to address and resolve certain important issues due to lack of advocacy, complexity of the issues, and potential for uncontemplated consequences).

Such is not the case here. The Superior Court veered away from considering the allegations of the underlying Complaint in assessing the insurer's coverage obligations and ignored both the controversy between the parties as briefed and the question it was requested to review on appeal from the trial court. In so doing, the Superior Court took a relatively straightforward case of contract interpretation involving a particularized "controlled substance" exclusion in an insurance policy and manufactured an approach designed to serve as a means to a desired end—that is, the affirmance of the trial court's holding. Indeed, the underlying Complaint filed against the homeowners did not contain any allegations of emotional distress, or the scope, character or physical manifestations of any emotional distress. Nor was the question of whether emotional distress can constitute "bodily injury" for the purposes of a liability policy raised, briefed or in any way preserved by the parties.

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or disease sustained by a person, including death resulting from any of these at any time" without any additional qualifications or exceptions. *See* ISO General Liability Coverage Form No. CG 00 01 04 13. Consequently, this matter should not be viewed by the Court as an opportunity to issue broad pronouncement of novel Pennsylvania insurance law.

Additionally, the Court need not reach this important issue in this matter because the determination of whether emotional distress qualifies as "bodily injury" will not change the outcome of this case. In this regard, if emotional distress constitutes "bodily injury," the same is plainly excluded under the policy's "controlled substances" exclusion, which provides that personal liability coverage under the policy does not apply to "'bodily injury…(m) resulting from the use, sale, manufacture, delivery transfer or possession by a person of a controlled substance(s)" (R. at 56a-57a). On the other hand, if emotional distress does not constitute "bodily injury," there is no personal liability coverage under the policy's insuring agreement, which provides coverage for damages an insured is legally obligated to pay due to an "occurrence," where an "occurrence" is defined in the policy as, *inter alia*, "'bodily injury'…resulting from an accident…" (R. at 53a-54a). Either way, there is no coverage under the policy at issue with respect to the subject loss. It necessarily follows that this case is not a proper vehicle to decide an issue that would have far reaching ramifications under Pennsylvania insurance law. *See Gulnac by Gulnac v. South Butler Cty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991) (reinforcing principle of jurisprudence that courts should refrain from rendering advisory opinions in cases where a real controversy involving the issue does not exist).

Accordingly, *amici* respectfully submit that the Court need not reach the issue of whether emotional distress constitutes "bodily injury" for the purpose of liability insurance in this matter and that the Court reserve this determination for a more appropriate case in the future.[5]

III. Alternatively, If the Court Were to Address the Issue in this Case, Purely Emotional Harm Suffered by Third Parties is Not "Bodily Injury" for the Purposes of Liability Insurance Policies.

This case does not relate to the general and sweeping question of whether any emotional distress—and in particular, emotional distress sustained directly by a claimant—constitutes "bodily injury" under the standard definition in the insurance industry. The only emotional distress potentially at issue for consideration in this appeal is emotional distress suffered by third parties—here, wrongful death beneficiaries—who themselves did not suffer bodily harm. The question of whether any emotional distress suffered by these third parties qualifies as "bodily injury" under the Nationwide policy is not necessary for the resolution of this appeal, where the Superior Court did not even conclude that any emotional distress

[5] This Court has previously exercised such restraint under similar circumstances. *See, e.g., Sinn v. Burd*, 404 A.2d 672 (Pa. 1979) (limiting the Court's decision by noting that certain issues would best be addressed on a more appropriate record); *Rike v. Com., Sec. of Educ.*, 494 A.2d 1388, 1392 (Pa. 1985) (declining to address an issue "not squarely presented in the facts of the instant controversy").

sustained by the wrongful death beneficiaries in this case was "bodily injury" under the customized definition in the Nationwide policy. Regardless, if the Court chooses to address this narrow issue, an examination of the specific language contained in the Nationwide policy in conjunction with instructive Superior Court cases addressing the emotional distress of third parties—absent direct and actual physical harm to those third parties—supports the conclusion that such emotional distress does not qualify as "bodily injury."[6]

The Nationwide policy's definition of "bodily injury" includes "bodily harm, including resulting care, sickness or disease, loss of service or death[,]" but also specifically excludes "emotional distress, mental anguish, humiliation, mental distress or injury or any similar injury, unless the direct result of bodily harm." (R. at 53a). As such, the Nationwide policy definition makes clear that if emotional distress is not a direct result of bodily harm, it cannot qualify as "bodily injury." It therefore follows that a claimant must directly suffer some form of bodily harm in order for any emotional distress

[6] In *Lipsky v. State Farm Mut. Ins. Co.*, 624 Pa. 224, 84 A.3d 1056 (2014), this Court entered a *per curiam* order affirming a 2011 unpublished non-precedential Superior Court memorandum decision relating to this issue by operation of law, where the votes among the eligible Justices were equally divided. *Id.* Because it is an unpublished non-precedential memorandum decision, the Superior Court itself has declined to cite or discuss it. *See Steadfast Ins. Co. v. Tomei*, 2016 WL 2989982, n. 5 at *5 (Pa. Super. May 24, 2016) ("An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding…Therefore, we cannot consider *Lipsky.*"); *see also* 210 Pa. Code § 65.37(B) (confirming that a 2011 non-precedential Superior Court decision cannot be relied upon or cited).

sustained by that claimant to constitute "bodily injury" under the Nationwide policy. If a third party such as a bystander or wrongful death beneficiary does not directly suffer bodily harm themselves, any emotional distress claimed by that third party is not "bodily injury" under the policy.[7]

In *Needleman v. Liberty Mut. Fire Ins. Co.*, 507 A.2d 1233 (Pa. Super. 1985), the Superior Court addressed whether the emotional distress of family members who witnessed the death of a child who was struck by a vehicle qualified as "bodily injury" under the Pennsylvania No Fault Act, which defined "injury" as "bodily harm to an individual and that individual's illness, disease or death resulting therefrom." *Id.* at 292, 507 A.2d at 1235-36. The Superior Court held that the surviving family members did not suffer bodily injury for the purposes of the No Fault Act, relying on the dictionary definitions of "bodily" as "physical, corporeal," "contrast[ing] with mental or spiritual," and "not mental but corporeal[,]" and the definition of "bodily injury" as "physical pain, illness or any impairment of a physical condition." *Id.* at 293, 507 A.2d at 1236.

[7] *See, e.g., Nationwide Mut. Ins. Co. v. Jones*, 2006 WL 361336 (D. Md. Feb. 15, 2006) (applying the language of the Nationwide policy and finding that a claim of "shock, fright, alarm, anxiety, emotional distress, and physical and psychological pain and suffering" in connection with witnessing abuse from a position "in the zone of danger" did not qualify as "bodily injury" as the same was not sustained by the claimant that was actually physically harmed).

In *Jackson v. Travelers Ins. Co.*, 414 Pa. Super. 336, 606 A.2d 1384 (1991), the Superior Court applied its rationale from *Needleman* to a similar scenario under the Motor Vehicle Financial Responsibility Law. In *Jackson*, a husband witnessed his wife being struck and killed by a vehicle and while he did not suffer physical harm himself, he claimed emotional distress in having witnessed his wife's injury. *Id.* at 337-38, 606 A.2d at 337. The Superior Court held under the same definition considered in *Needleman* that the husband did not suffer "bodily injury." *Id.* at 344-45, 606 A.2d at 1389.[8]

For the same reasons—should the Court decide to take up the issue—the Court should find that emotional distress suffered by third parties who themselves did not sustain any physical harm does not qualify as "bodily injury" under the Nationwide policy.

CONCLUSION

The liability coverage under the Nationwide homeowners policy at issue must be interpreted and enforced as written—that is, with the express

[8] The Superior Court in *Glikman v. Progressive Cas. Ins. Co.*, 917 A.2d 872 (Pa. Super. 2007) addressed a definition of "bodily injury" that included "disease" but did not require the same to "result from" bodily harm. *Id.* at 873. The plaintiff in *Glikman* sought to recover for PTSD arising out of her witnessing her husband being struck and killed by a vehicle. *Id.* Because it was undisputed that PTSD is a "disease"—and because there was no requirement under the policy definition that the disease "result from" bodily harm—the Superior Court found that the PTSD qualified as "bodily injury" under that policy's definition. Here, because PTSD is not at issue and the Nationwide policy requires that emotional distress be a "direct result of" bodily harm, *Glikman* is inapposite and thus not instructive.

exclusion of emotional distress from its definition of “bodily injury.” There is no statutory or judicial prohibition underpinned by public policy to preclude a homeowners insurer from removing emotional distress from its definition of “bodily injury” and thus delineating the scope of coverage afforded under the insurance contract.

The Nationwide policy definition of “bodily injury” is customized and not reflective of the standard definition commonly used in the insurance industry for liability coverage. Additionally, the procedural posture of this appeal is such that the record is devoid of any discussion or briefing concerning whether emotional distress can constitute “bodily injury” under a liability policy. In light of the particularized policy language at issue and the inadequate record, this Court should decline to address the broad issue of whether emotional distress qualifies as “bodily injury” for the purposes of liability insurance.

Should the Court decide to address the emotional distress suffered by the wrongful death beneficiaries in this matter who did not themselves suffer any physical harm, consideration of the specific policy language in question and instructive case law on this narrow issue compels the conclusion that the same is not “bodily injury” under the Nationwide policy.

Accordingly, the decision below should be reversed.

Respectfully submitted,

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COMBINED CERTIFICATES OF COMPLIANCE

1. I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

2. I further certify that according to the word count feature of the word processing program used to prepare it, this brief contains 3368 words, excluding those supplementary matters set forth in Pa.R.A.P. 531(b) and 2135(b).

HOUSTON HARBAUGH, P.C.

Dated: January 27, 2023

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PROOF OF SERVICE

It is hereby certified that a true and correct copy of the foregoing document was served upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 123:

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