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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2012-2013

1110993

Admiral Insurance Company

v.

Ryan Price-Williams

Appeal from Mobile Circuit Court
(CV-09-901938)

On Application for Rehearing

STUART, Justice.

The opinion of January 11, 2013, is withdrawn, and the following is substituted therefor.

Ryan Price-Williams sued Admiral Insurance Company and Gabriel Dean and Charles Baber in the Mobile Circuit Court

pursuant to Alabama's direct-action statute, § 27-23-2, Ala. Code 1975.[1] Both Dean and Baber were alleged by Price-Williams to be covered under a commercial general-liability insurance policy Admiral had issued the national Kappa Sigma fraternity to which Dean and Baber belonged. Price-Williams alleged that Admiral was obligated to pay a judgment that had been entered in favor of Price-Williams and against Dean and Baber in a previous action ("the underlying action"). Following a bench trial, the trial court entered a judgment in favor of Price-Williams and against Admiral, holding that the Admiral policy provided coverage to Dean and Baber for the

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[1]Price-Williams named Dean and Baber as defendants based on their status as indispensable parties under § 27-23-2, Ala. Code 1975. Section 27-23-2 provides:

> "Upon the recovery of a final judgment against any person ... by any person ... for loss or damage on account of bodily injury, ... if the defendant in such action was insured against the loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money provided for in the contract of insurance between the insurer and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within 30 days after the date when it is entered, the judgment creditor may proceed against the defendant and the insurer to reach and apply the insurance money to the satisfaction of the judgment."

negligent and/or wanton acts that formed the basis of the underlying action. We reverse and remand.

I.

On January 31, 2004, Price-Williams was attacked and beaten at a fraternity house maintained by the University of South Alabama chapter of Kappa Sigma in Mobile (the local chapter is hereinafter referred to as "Kappa Nu"; the national fraternity is referred to as "Kappa Sigma"). Price-Williams suffered significant, permanent injuries as a result of the assault and incurred medical expenses of approximately $27,145. On November 28, 2005, Price-Williams sued Kappa Sigma and Kappa Nu and Dean, Baber, and Michael Howard, the three individuals alleged to have committed the assault, in the Mobile Circuit Court.[2] Price-Williams's complaint sought recovery based on the assault and asserted negligence and/or wantonness claims based on Dean's and Baber's failure as officers of Kappa Nu to implement the risk-management program Kappa Sigma required of local chapters, which program, Price-Williams alleged, would have either prevented the assault

[2]Dean and Baber were, respectively, president and vice president of Kappa Nu at the time of the assault. Neither Price-Williams nor Howard were members of Kappa Nu.

entirely or, at a minimum, limited its duration and intensity.[3]

Shortly after it received the complaint, Kappa Sigma notified its insurer Admiral of a possible occurrence under its commercial general-liability policy; however, because its policy with Admiral contained a self-insured retention clause, Kappa Sigma took initial responsibility for the defense of Price-Williams's claims.[4] Kappa Sigma therefore retained its own counsel, which also represented Kappa Nu. However, that counsel did not represent either Dean or Baber, neither of whom made a claim upon Admiral for coverage based upon their status as officers of Kappa Nu. In fact, Dean, Baber, and Howard never retained counsel, never answered the complaint, and never appeared in the action, and a default judgment was accordingly entered against them. A summary judgment was also

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[3]In the weeks after the assault, Dean, Baber, and Howard were arrested and charged with second-degree assault. Approximately four months later, Dean and Baber were expelled from Kappa Sigma because their involvement in the assault violated the Kappa Sigma code of conduct.

[4]See generally Black's Law Dictionary 1482 (9th ed. 2009) (defining "self-insured retention" as "[t]he amount of an otherwise-covered loss that is not covered by an insurance policy and that usu[ally] must be paid before the insurer will pay benefits").

entered in favor of Kappa Sigma, and, by the time the jury trial began on November 17, 2008, Kappa Nu was the only remaining defendant.[5]

After closing arguments were made at the conclusion of the trial, Kappa Nu reached a settlement with Price-Williams. Upon notifying the trial court of the settlement agreement, Price-Williams moved the trial court to withdraw his jury demand and to enter a final judgment against Dean, Baber, and Howard based upon the evidence adduced at trial.[6] The trial court granted the motion, dismissed the jury, and thereafter entered a 10-page order containing the following findings of fact and judgment:

> "11. As to [Price-Williams's] second and third causes of action, the court finds that both Dean and Baber, as officers of the local fraternity, had assumed and/or were under a duty to create, implement, supervise, and enforce what was described during trial as the chapter's 'risk management program.' The court further finds, based upon the testimony offered at trial as well as documentary

[5]Admiral assumed responsibility for the investigation and defense of Price-Williams's claims in approximately July 2008 after Kappa Sigma's costs related to that claim exceeded the amount set forth in the self-insured retention clause in the Admiral policy.

[6]Apparently, the trial court had set aside the default judgment previously entered against the three individual defendants.

evidence introduced during trial, including the Executive Officers' Manual ... and the Kappa Sigma Fraternity Risk Management Manual ..., that these defendants both negligently and wantonly breached their individual duties to create, implement, supervise, and enforce a risk management program, and that as a proximate consequence of said breaches, [Price-Williams] was caused to suffer those injuries and damages as proven in this case.

"12. More particularly, the court finds that both Dean and Baber, in accepting their roles as executive officers of the local fraternity, agreed and assumed the duties imposed upon them that are found in the Executive Officers' Manual and the Kappa Sigma Fraternity Risk Management Manual, which included the implementation and enforcement of a risk management program. ...

"13. The evidence introduced at trial established that Dean, the president of the local fraternity, was considered the chief executive officer of the chapter. As president, Dean assumed and carried the ultimate duty both individually and on behalf of the local and national fraternity for the implementation and supervision of the chapter's risk management program. This means that it was his responsibility, acting within the scope of his duties as president, to take steps toward creating and enforcing a risk management program for the local fraternity at the University of South Alabama. He was responsible for working with the risk management committee chairman on the development of the chapter's risk management program, and in carrying out the goals of preventing injuries at the chapter house.

"14. Additionally, substantial evidence was introduced that established that Baber, as the vice president, was the second in command at the fraternity house on the night in question. The court finds that his duties included not only the

implementation of a risk management program, but also the actual enforcement of the program on the night in question. ... [Price-Williams] proved through the evidence at trial that neither of these officers took any steps in carrying out their duties of ensuring that order was maintained at the fraternity house on the evening in question.

"15. To the contrary, the evidence clearly and convincingly established that both Dean and Baber had been drinking this particular night, and that one or both of them knew that an assault was probably going to occur on [Price-Williams] once he walked through the front door of the fraternity house. The fact that no risk management program or education had been implemented only aggravated the situation once the assault began, since neither Dean nor Baber had left any responsible individual in charge of maintaining order at the fraternity house as was required under a reasonable risk management program which, in the court's opinion, would have minimized and/or prevented the assault from occurring in the first instance. ...

"16. The Kappa Sigma national fraternity, a former defendant in this action, granted to the local fraternity the authority and right to establish and operate a local fraternity at the University of South Alabama. The evidence at trial clearly established that both Dean and Baber, as the president and vice president of the local fraternity, pursuant to the authority bestowed upon them by the national and local fraternity, assumed the duty to create, implement, supervise, and enforce a risk management program relative to the operation of the local fraternity. These individuals were obligated to act in accordance with these duties which were required to be performed as part of their duties on behalf of the local and national fraternity. The court finds that these two individual defendants, Dean and Baber, both negligently and wantonly breached their individual

> duties by failing to create, implement, supervise, and enforce an appropriate risk management program as alleged by [Price-Williams] in his complaint. The court further finds that these two individual's negligence and wantonness was committed while acting within the scope of these two individual's duties on behalf of the fraternity.
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> "Accordingly, the court hereby finds in favor of the plaintiff, Ryan Price-Williams, and against the three individual defendants, jointly and severally, as to the claims raised in [Price-Williams's] complaint. The court hereby awards to [Price-Williams] and against the individual defendants total compensatory damages in the amount of $500,000. The court further finds that an award of punitive damages is warranted based upon the clear and convincing evidence of wantonness of the individual defendants as to all three claims raised in [Price-Williams's] complaint, and hereby awards to [Price-Williams] and against the individual defendants punitive damages in the amount of $750,000, which is one and one-half times the amount of compensatory damages to be awarded to [Price-Williams]. The total amount of the verdict is therefore $1,250,000. It is the intention of this Court that this verdict represents the total damages to be awarded to [Price-Williams] in this case for all damage[] suffered by him as a result of the January 31, 2004, incident, and that the individual defendants are entitled to a setoff of the amount paid to [Price-Williams] by [Kappa Nu] as a result of the confidential pro tanto settlement."

Subsequently, there was a dispute between Price-Williams and Kappa Nu regarding the settlement agreement and, specifically, whether as part of the settlement Price-Williams had agreed to release only Kappa Sigma and Kappa Nu or, as

Kappa Nu maintained, to release Kappa Sigma, Kappa Nu, and Dean and Baber in their capacities as agents of Kappa Nu. Motions were filed by both parties with the trial court, which eventually ruled in favor of Price-Williams. Kappa Nu appealed that judgment to this Court, which affirmed the decision of the trial court, stating:

> "At the hearing on the parties' motions to enforce the settlement agreement held on February 6, 2009, the trial court correctly noted that counsel for [Kappa Nu] did not represent the individual defendants and that counsel therefore had no basis on which to argue on behalf of the individual defendants. The trial court also correctly concluded that a release by Price-Williams of all claims against [Kappa Nu], including all claims based on theories of vicarious liability, would fully protect the chapter from liability -- even liability arising from actions of the individual defendants to the extent they are agents of the chapter. In light of the colloquy that took place on November 20, 2008 [when the parties announced that a settlement had been reached], we conclude that the trial court's interpretation of the settlement agreement was not clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of evidence."

Kappa Sigma Fraternity v. Price-Williams, 40 So. 3d 683, 693 (Ala. 2009).

On October 6, 2009, approximately two months before our decision in Kappa Sigma was released, Price-Williams filed the instant action pursuant to § 27-23-2, alleging that, by virtue

of their status as officers of Kappa Nu, Dean and Baber were additional insureds under the commercial general-liability insurance policy Kappa Sigma held with Admiral on the date of the assault. Admiral filed a response denying that Dean and Baber were covered under Kappa Sigma's policy.[7] On May 3, 2011, the trial court conducted a bench trial; however, Admiral did not attend the trial, having been under the mistaken belief that the case would be decided through the submission of briefs.[8] Notwithstanding Admiral's absence, the trial court proceeded to hear testimony from Baber and to receive exhibits, depositions, and documentary evidence from the parties in attendance.

Admiral and Price-Williams thereafter submitted trial briefs in support of their positions, and, on March 9, 2012, the trial court entered an order stating its findings of fact and conclusions of law and entering a judgment in favor of Price-Williams. In that final judgment, the trial court

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[7]Baber filed a cross-claim against Admiral seeking a ruling that Admiral was required to indemnify him for the judgment entered against him in the underlying action. The trial court decided this claim in favor of Admiral, and Baber has not appealed that judgment.

[8]Counsel for Admiral was contacted by the trial court on the morning of the trial.

recognized that an assault-and-battery exclusion in the Admiral policy excluded coverage for any bodily injury resulting from Dean's and Baber's assault on Price-Williams but held that the exclusion did not apply to bodily injury caused by Howard's assault or bodily injury attributable to Dean's and Baber's negligence and wantonness in failing to implement a proper risk-management program, which failure, the trial court concluded, "actually facilitated Howard's conduct of assaulting [Price-Williams]." No postjudgment motions were filed, and, on April 19, 2012, Admiral filed its notice of appeal to this Court.

II.

The trial court in this case considered both oral and written evidence; however, our resolution of the issues on appeal hinges solely on the application of unambiguous language in the Admiral commercial general-liability insurance policy to undisputed facts. Accordingly, the ore tenus rule is inapplicable here, and the trial court's judgment is afforded no presumption of correctness. Our review, therefore, is de novo. See also McDonald v. U.S. Die Casting & Dev. Co., 585 So. 2d 853, 855 (Ala. 1991) ("If the terms

within a contract are plain and unambiguous, the construction of the contract and its legal effect become questions of law for the court ....").

III.

Admiral argues that the trial court's judgment should be reversed because, it says, the gravamen of Price-Williams's claims is that he suffered bodily injury as a result of an assault and battery and Kappa Sigma's policy with Admiral contains the following exclusion: "This insurance does not apply to 'bodily injury,' 'property damage,' 'personal injury,' or 'advertising injury' arising out of any act of assault and/or battery by any insured or additional insured." Accordingly, Admiral argues, the trial court erred in finding that coverage existed because it is undisputed that Price-Williams's injuries arose out of an assault in which Dean and Baber participated.

In support of this argument, Admiral cites Gregory v. Western World Insurance Co., 481 So. 2d 878 (Ala. 1985), in which this Court affirmed a judgment declaring that a plaintiff's negligence and wantonness claims against a bar based on injuries he received after being assaulted by a

patron at the bar were not covered by the bar's insurance policy because the policy specifically excluded any claim alleging "'bodily injury or property damage arising out of assault and battery ..., whether caused by or at the instigation or direction of the insured, his employees, patrons, or any other person.'" 481 So. 2d at 878 (quoting insurance policy).

Price-Williams concedes that, based on the clear terms of the assault-and-battery exclusion in the policy, injuries attributable to Dean's and Baber's participation in the assault were not covered under the Admiral policy. However, he nevertheless argues that coverage exists for his claim because the Admiral policy excludes only coverage for bodily injury "arising out of any act of assault and/or battery by any insured or additional insured" and he was assaulted not only by Dean and Baber -- who were additional insureds under the Admiral policy -- but also by Howard, who was not an insured or additional insured under the Admiral policy (emphasis added). Price-Williams argues that this limiting language in the assault-and-battery exclusion differentiates the Admiral policy from the broader assault-and-battery

exclusion in the insurance policy at issue in Gregory -- which excluded coverage for any claim alleging bodily injury arising out of assault and battery "'whether caused by or at the instigation or direction of the insured, his employees, patrons, or any other person.'" 481 So. 2d at 878 (quoting insurance policy (emphasis added)). Thus, Price-Williams argues, this case is distinguishable from Gregory.[9]

However, Price-Williams's argument that Howard's involvement in the assault avoids the application of the assault-and-battery exclusion in the Admiral policy fails to recognize that his action against Admiral was brought pursuant

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[9]The trial court agreed with Price-Williams's argument in this regard, stating in its final judgment:

> "The assault and battery exclusion is unambiguous and clearly excludes coverage for any bodily injury suffered by [Price-Williams] caused by Dean and Baber's conduct of assaulting him. This exclusion, however, is self-limiting, as it applies only to any damage[] due to the assault and battery by Dean and Baber, not any injuries caused by Michael Howard (since Howard was not an insured under the policy). Both Admiral and [Price-Williams] agree that three individuals were involved in assaulting [Price-Williams]: Dean, Baber, and Howard. Although Dean and Baber's conduct of assault and battery is excluded under the policy, because Howard was not an insured under the policy, this exclusionary clause does not apply to the damage[] caused by Howard's conduct."

to § 27-23-2 to seek payment of a judgment previously entered against Admiral insureds Dean and Barber in the underlying action. In Haston v. Transamerica Insurance Services, 662 So. 2d 1138, 1139-40 (Ala. 1995) (reversed on other grounds by Travelers Indemnity Co. of Connecticut v. Miller, 86 So. 3d 338 (Ala. 2011)), this Court stated:

> "A claim under §§ 27-23-1 and -2[, Ala. Code 1975,] to apply the proceeds of a contract of insurance to satisfy a judgment has been described by this Court as follows:
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> > "'Under Alabama law, the injured party acquires a vested interest (secondary) in the nature of a hypothecation of the insured's rights under the policy.
> >
> > "'....
> >
> > "'Once an injured party has recovered a judgment against the insured, the injured party may compel the insurer to pay the judgment. The injured party, however, can bring an action against the insurer only after he has recovered a judgment against the insured and only if the insured was covered against the loss or damage at the time the injured party's right of action arose against the insured tort-feasor.'
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> "Maness v. Alabama Farm Bureau Mut. Casualty Ins. Co., 416 So. 2d 979, 981-82 (Ala. 1982). The injured party's 'vested interest' is subject to the further qualification that 'the terms of the policy imposing obligations on the insured are effective as against the injured party.' George v. Employers' Liab. Assurance Corp., 219 Ala. 307, 310, 122 So.

> 175, 177 (1929); see James & Hackworth v. Continental Casualty Co., 522 F. Supp. 785, 787 (N.D. Ala. 1980). Thus, defenses to liability available to the insurer in an action brought by the insured would also be available to the insurer in an action brought pursuant to §§ 27-23-1 and -2 by the injured party. Employers Ins. Co. v. Crook, 276 Ala. 177, 183, 160 So. 2d 463, 469-70 (1964); Employers Ins. Co. v. Johnston, 238 Ala. 26, 31, 189 So. 58, 62 (1939); see Fleming v. Pan American Fire & Casualty Co., 495 F.2d 535, 541 (5th Cir. 1974); Southeastern Fire Ins. Co. v. Helton, 192 F. Supp. 441, 444-45 (S.D. Ala. 1961)."

(Emphasis added.) Thus, in this § 27-23-2 action, Price-Williams effectively stands in the shoes of the insured tortfeasors Dean and Baber in making his claim, and he is entitled to recover from Admiral only to the extent of Dean's and Baber's coverage for the claims asserted against them. It is acknowledged by all parties that Dean and Baber did not have coverage for their act of assault because of the assault-and-battery exclusion in the Admiral commercial general-liability insurance policy, and that exclusion therefore prevents Price-Williams from recovering from Admiral as well.

The fact that Howard, a non-insured, also participated in the assault is ultimately of no effect. Price-Williams's attempt to distinguish Gregory on the basis of the more broad assault-and-battery exclusion in that case misses the mark

because Price-Williams is not attempting to require Admiral to fulfill a judgment entered against its insured Kappa Nu for injuries he received in an assault committed solely by a non-insured such as Howard; rather, he is attempting to require Admiral to fulfill a judgment entered against its insureds Dean and Baber for injuries he received as the result of an assault in which they participated. As we stated in Gregory: "[I]nsurance companies are entitled to have their policy contracts enforced as written ...." 481 So. 2d at 881. The assault-and-battery exclusion in the Admiral policy excludes coverage for an act of assault committed by an insured such as Dean or Baber, and § 27-23-2 cannot be used to require Admiral to pay a judgment entered against an insured for injuries inflicted in a non-covered assault simply because a non-insured also participated in the assault.

Moreover, the assault-and-battery exclusion bars Price-Williams from recovering from Admiral on the basis of the negligence and wantonness claims he asserted against Dean and Baber based on their failure to implement a risk-management program for Kappa Nu even though that negligent or wanton conduct is not itself excluded from coverage. As the trial

court stated in its final judgment, Dean's and Baber's negligent or wanton acts in failing to implement a risk-management program combined with the assault to result in "one indivisible injury" to Price-Williams. Stated another way, it is impossible to allocate some portion of Price-Williams's injuries and the award of damages based on those injuries to the failure to implement a risk-management program and some other portion to the assault. Compare Crews v. McLing, 38 So. 3d 688, 694 (Ala. 2009) (affirming the trial court's judgment that there was not a "single indivisible injury" where expert witnesses were able to distinguish between damage to a mobile home attributable to the manufacturer and other damage attributable to the installer).[10] All of Price-

[10]This Court further explained the concept of an indivisible injury in State Farm Fire & Casualty Co. v. Slade, 747 So. 2d 293 (Ala. 1999). In Slade, the plaintiffs sued a number of contractors involved in the construction of their house, as well as State Farm, which had issued a homeowners' insurance policy on that house, after foundation problems became apparent. This Court concluded that these defendants had not combined to cause one indivisible injury, stating:

> "In the present case, there was no 'single, indivisible injury' caused by the construction defendants and State Farm. In fact, there were two injuries flowing from two separate allegedly tortious acts: (1) damage caused by the alleged negligent and/or wanton construction that was done by the construction defendants and (2) damage caused

Williams's injuries arose from and were the product of the assault -- notwithstanding the fact that the negligent or wanton failure to implement a risk-management program may have been an additional proximate cause. See Springer v. Jefferson Cnty., 595 So. 2d 1381, 1384 (Ala. 1992) (recognizing that an injury may have several concurrent proximate causes).

The assault-and-battery exclusion in the Admiral policy states that there is no coverage for "'bodily injury' ... arising out of any act of assault and/or battery by any insured or additional insured." All of Price-Williams's injuries without question resulted from an act of assault in which additional insureds Dean and Baber participated. Therefore, regardless of the fact that there may have been a

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> by the alleged bad-faith refusal to pay an insurance claim. Also, the injuries the [plaintiffs] claim to have suffered were not indivisible. Moreover, the acts of the two groups of defendants did not combine to cause any one injury. State Farm took no part in the construction of the home, and the construction defendants took no part in the refusal to pay an insurance claim."

747 So. 2d at 325. In the present case, two separate tortious acts have also been alleged; however, unlike Slade, there is no basis for dividing the plaintiff's injuries between those two acts, and the same individuals responsible for one act (the negligent or wanton act) also participated in the second act (the assault and battery).

separate act that also contributed to Price-Williams's injuries, there is no coverage in this case. The clear terms of the assault-and-battery exclusion must be enforced. See Auto-Owners Ins. Co. v. American Cent. Ins. Co., 739 So. 2d 1078, 1081 (Ala. 1999) ("If a policy provision is unambiguous, then a court must enforce the policy as it is written and cannot defeat express provisions, including exclusions from coverage.").

IV.

Price-Williams sued Admiral pursuant to § 27-23-2 after obtaining a judgment against Dean and Baber, who he alleged were insured by Admiral under a policy Admiral had issued to Kappa Sigma, by virtue of their positions as officers of Kappa Nu. Following a bench trial, the trial court entered a judgment in favor of Price-Williams, obligating Admiral to fulfill the judgment entered against Dean and Baber in the underlying action. However, because the Admiral policy did not provide coverage to Dean and Baber for "any act of assault and/or battery" and because Price-Williams's injuries undisputedly arose from an assault in which Dean and Baber participated, the trial court erred in holding Admiral

responsible for the judgment entered against Dean and Baber in the underlying action. The trial court's judgment is accordingly reversed and the cause remanded.

APPLICATION GRANTED; OPINION OF JANUARY 11, 2013, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED.

Bolin, Parker, Main, Wise, and Bryan, JJ., concur.

Murdock, J., concurs specially.

Moore, C.J., and Shaw, J., concur in the result.

MURDOCK, Justice (concurring specially).

I concur in the disposition by the main opinion of the issues addressed therein. I write separately to further explain my reasons for doing so and to comment on the context in which the issues addressed in the main opinion arise.

Preliminary Observations

Before explaining my agreement with the disposition by the main opinion of the issues addressed therein, I believe it important to note certain aspects of the context in which these issues are presented in this case. First, the formulation and implementation of a risk-management policy was something the national fraternity, Kappa Sigma, asked of the officers of local chapters in their capacity as agents of the national fraternity. Gabriel Dean and Charles Baber, in their capacities as president and vice president, respectively, of the local chapter, therefore, may have assumed a responsibility to the national fraternity to promulgate such a policy in order to aid the national fraternity in fulfilling the duties imposed by law upon it in relation to visitors to the fraternity house. We do not appear to be presented in this appeal with the question whether Dean and Baber, in their

individual capacities, owed a personal duty to Ryan Price-Williams to promulgate and implement a risk-management policy. Obviously, they owed a personal duty to Price-Williams not to assault and batter him. A duty specifically to create and implement a risk-management policy for his benefit is a different issue, however. See generally Restatement (Third) of Agency: Duty to Principal; Duty to Third Party § 7.02 (2006) ("An agent's breach of a duty owed to the principal is not an independent basis for the agent's tort liability to a third party. An agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party."); cf. Commercial Union Ins. Co. v. DeShazo 845 So. 2d 766, 770 (Ala. 2002) ("Furthermore, the 'inspection and audit' clauses also indicate that any inspection was solely for the benefit of the defendants, and not, as described in the clauses, made 'on behalf of or for the benefit of the named insured or others.'" (emphasis omitted)).

Second, the Court decides this case today on the basis of an "exclusionary clause" applicable to injuries resulting from an assault and battery. It may be noted as well that the

"coverage" language in the policy applies in the first place only to "occurrences" or, as that term is defined, "accidents." "[A] CGL policy is intended '"to protect an insured from bearing financial responsibility for unexpected and accidental damage to people or property ...."'" Town & Country Prop., L.L.C. v. Amerisure Ins. Co., [Ms. 1100009, Oct. 21, 2011] __ So. 3d __, __ (Ala. 2011) (quoting Essex Ins. Co. v. Holder, 372 Ark. 535, 539, 261 S.W.3d 456, 459 (2007), quoting in turn Nabholz Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 354 F. Supp. 2d 917, 923 (E.D. Ark. 2005)). From the standpoint of the insureds, Dean and Baber (in whose shoes Price-Williams must stand in pursuing his direct-action claim against their insurer to recover the damages he has been awarded against them personally), the "damage" to Price-Williams was anything but "unexpected and accidental." Dean and Baber intentionally, physically attacked and "battered" the victim, Price-Williams.

The result achieved in this case thus is in accord not only with the public policy in Alabama and elsewhere against indemnifying an insured for a loss resulting from his or her own intentional wrongdoing, but also with the fact that an

"assault and battery" is an intentional act and therefore cannot properly be considered an "accident" within the meaning of liability policies:

> "Insurance liability policies traditionally have been construed as not providing coverage for assaults and batteries committed by the insured, due to the public policy against indemnifying one for his or her own wrongdoing. Moreover, 'occurrence'- or 'accident'-based policies often have been interpreted to not encompass claims arising from assaults and batteries."

Kimberly J. Winbush, Annotation, Validity, Construction and Effect of Assault and Battery Exclusion in Liability Insurance Policy at Issue, 44 A.L.R.5th 91 (1996).[11]

Issues Addressed in the Main Opinion

As to the issues addressed in the main opinion, the outcome in this case is governed by two facts. First, the plaintiff has a single, nonseverable claim. As the main opinion notes, Price-Williams's claim is for bodily injury that cannot be divided and allocated between Dean's and Baber's alleged negligence in not promulgating and implementing a risk-management policy and their subsequent act

[11]The policy at issue also contains an exclusion for "'bodily injury' or 'property damage' expected or intended from the standpoint of the insured," which would appear to be sufficient in and of itself to require a judgment in Admiral's favor.

of intentionally assaulting and battering Price-Williams. Nor can it be divided between those blows struck by Michael Howard and those struck by Dean and Baber during the assault. Price-Williams's single, nonseverable claim is either covered -- in its entirety -- by the Admiral insurance policy, or it is not. Second, regardless of whatever other acts or omissions by Dean and Baber or by a third party (i.e., Howard) may have facilitated or contributed to Price-Williams's bodily injury, it is undeniable that this indivisible bodily injury did arise out of an assault and battery committed by Dean and Baber.

To be applied to these two facts is the following simple policy language: "This insurance does not apply to 'bodily injury,' ... [or] 'personal injury' ... arising out of any act of assault and/or battery by any insured or additional insured." Courts in other states that have addressed the issue are essentially unanimous in understanding assault-and-battery exclusions to bar coverage when a loss arises from an assault and battery, regardless of whether there are other acts or "causes of action" that have contributed to that loss.[12] Even more specifically, most of these

[12]The above-cited annotation further explains that, notwithstanding the above-noted principles regarding the

construction of "coverage" clauses,

> "many liability insurance contracts, particularly those issued to bars, restaurants, and similar establishments include specific assault and battery exclusions, aimed at precluding coverage of damages caused by these types of torts. These exclusions have spawned a wide variety of challenges, both to their validity and to their applicability to particular conduct and individuals. For example, in Liquor Liability Joint Underwriting Ass'n v. Hermitage Ins. Co. (1995) 419 Mass. 316, 644 N.E.2d 964, 44 A.L.R.5th 787, the court declared that an assault victim's claims of negligence against the insured bar ... did not fall within an assault and battery exclusion in that tavern's insurance policy. However, most other courts have disagreed, finding that all claims, whether rooted in the actual assault and battery, or couched in negligence language, that arise from an assault and battery fall within the parameters of an assault and battery exclusion."

Winbush, 44 A.L.R.5th 91. The annotation includes a cumulative supplement listing 44 cases from 16 different jurisdictions it describes as holding "either implicitly or explicitly ... that assault and battery exclusions encompassed claims alleging that the insured's negligence caused the damages in litigation."

In contrast, the annotation lists a total of eight cases it introduces with the following statement: "Assault and battery exclusions in the following cases were ruled to not relieve insurance companies from their duties to defend or indemnify insureds for claims arising from their assault-and-battery-related negligence." Of these eight cases, however, all but two are cases from jurisdictions listed in the previous section that lists for those jurisdictions more recent cases embracing the majority rule or that are distinguishable. The remaining two include the one case cited in the quoted passage above, Liquor Liability Joint

cases stand for the proposition that liability-policy clauses that exclude losses arising from an assault and battery are effective to bar payments for any such loss, even when the only improper conduct of the insured is a purely negligent act or omission that simply made possible or facilitated the subsequent intentional assault or battery. A fortiori, this basic understanding applies in a case such as this in which it is the insured himself who commits the subsequent intentional assault and battery.

Admiral relies on such cases as Auto-Owners Insurance Co. v. American Central Insurance Co., 739 So. 2d 1078 (Ala. 1999), Horace Mann Insurance Co. v. D.A.C., 710 So. 2d 1274 (Ala. Civ. App. 1998), and Gregory v. Western World Insurance Co., 481 So. 2d 878 (Ala. 1985). Price-Williams argues that these cases are distinguishable because, he says, they involve separate "claims" arising out of the same "act," whereas in this case it is possible to distinguish between

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Underwriting Ass'n of Massachusetts v. Hermitage Insurance Co., 419 Mass. 316, 644 N.E.2d 964 (1995), and Mount Vernon Fire Insurance Co. v. Creative Housing Ltd., 70 F.3d 720 (2d Cir. 1995). The former is probably distinguishable based on the court's interpretation of the clause at issue; the latter applies the law of the State of New York, a state that also has produced cases embracing the majority rule.

Price-Williams's claim alleging an intentional assault and his claims alleging negligence because the claims are based on two separate and distinct acts. This argument misunderstands the rationale of Auto-Owners.

First, it appears that there were in fact two different acts by the insured in Auto-Owners. As the trial court in Auto-Owners found: "'While the claims in the underlying case involve both intentional and unintentional acts, the defendant has provided case law supporting the nonseverability of the claims.'" Id. at 1080 (emphasis added). The trial court did not say that the case involved alternative legal theories or causes of action in relation to the same act; it said that the complaint alleged "both intentional acts and unintentional acts." The claims against the insured in Auto-Owners involved allegations that he allowed other fraternity members to commit intentional acts and that he himself committed such acts. This Court acknowledged that separate acts were involved:

> "We also agree with the trial court that although the claims in the underlying action alleged both intentional and unintentional acts, those claims were not severable so as to obligate American Central to provide a defense and indemnity as to some claims but not as to others."

Auto-Owners, 739 So. 2d at 1082 (emphasis added).[13]

That said, however, the underlying reason the claims in Auto-Owners were not severable is exactly the same as in the present case: there was only one set of indivisible injuries suffered by the victim of an assault. Those injuries cannot be severed and allocated to different causes, whether those "causes" are separate legal theories or "claims" relating to the same act or are actually separate acts that combined to cause the injuries. This simple fact was true in Auto-Owners, just as it is true in this case and in dozens of indistinguishable cases throughout the country.

Price-Williams also seeks to distinguish Gregory, invoking the fact that a third party, Howard, also landed some blows to Price-Williams during the assault. Price-Williams argues that the exclusion provision at issue applies only to injuries arising out of any act of assault and battery "by any

[13]Moreover, each of the cases cited in Auto-Owners in support of the conclusion that the claims there were nonseverable involved claims of negligent supervision or other nonintentional acts by an employer and separate intentional acts by an employee. See id., citing Commercial Union Ins. Cos. v. Sky, Inc., 810 F. Supp. 249, 255 (W.D. Ark. 1992); Old Republic Ins. Co. v. Comprehensive Health Care Assocs., 786 F. Supp. 629 (N.D. Tex. 1992); and Board of Educ. v. Continental Ins. Co., 198 A.D.2d 816, 604 N.Y.S.2d 399 (1993).

insured or additional insured" and that Howard is not an "insured or additional insured."

This attempt to distinguish Gregory ignores basic principles of tort law regarding joint and several liability of multiple tortfeasors contributing to a single, indivisible injury. If the separate acts of two or more tortfeasors combine to cause an indivisible injury, then all actors are jointly and severally liable for that entire injury. See Breland v. Rich, 69 So. 3d 803, 825 (Ala. 2011) (observing that "'where separate causes act contemporaneously to produce a given result, the causes of injury are concurrent within the rule making separate wrongdoers equally liable for the resultant injury'" (quoting Davison v. Mobile Infirmary, 456 So. 2d 14, 26 (Ala. 1984))); Franklin v. City of Athens, 938 So. 2d 950, 953 (Ala. Civ. App. 2005) (stating that "[t]he negligence of two or more tortfeasors may combine to result in a single, indivisible injury for which both tortfeasors are liable"); and Holcim (US), Inc. v. Ohio Cas. Ins. Co., 38 So. 3d 722, 729 (Ala. 2009) (explaining that "[u]nder Alabama law governing joint and several liability, '[a] tort-feasor whose negligent act or acts proximately contribute in causing an

injury may be held liable for the entire resulting loss'" (quoting Nelson Bros., Inc. v. Busby, 513 So. 2d 1015, 1017 (Ala. 1987) (emphasis omitted))).

In other words, it is the indivisible nature of an injury that is the focus of tort law in deciding that more than one actor or act is to be deemed responsible for a given loss. And it is this single, indivisible nature of the bodily injury in this case that is dispositive. Aside from whatever other combining cause may have been involved, the undeniable fact remains that the individual insureds assaulted and battered the victim. As the main opinion aptly notes, if portions of the resulting injury and related hospital bills could be attributed solely to the earlier negligent actions of Dean and Baber in not promulgating a risk-management policy or to the acts of Howard during the actual attack on Price-Williams (the latter being alleged by Price-Williams to have been made possible by the prior negligent actions of Dean and Baber), we would have a different case. We do not have that case.

In Board of Education of East Syracuse-Minoa Central School District v. Continental Insurance Co., 198 A.D.2d 816, 604 N.Y.S.2d 399 (1993), the court applied policy language

limiting "coverage" to "accidents" as well as an exclusion for bodily injury occurring during the course of the injured party's employment. In that case, very much as in this one, the insured pinned its hopes for coverage upon certain wrongdoing on its part that, standing alone, might provide a basis for coverage. Those arguments were rejected with sound reasoning apparently embraced by this Court in Auto-Owners:

> "The allegations against the School District ... do not constitute an 'occurrence' within the meaning of its general liability policy. An 'occurrence' is defined in the policy as an 'accident ....' There is nothing accidental about the charges contained in the complaint [citations omitted]. Sexual harassment, like sexual abuse and child abuse, is intentional in nature [citations omitted]. While the complaint contains allegations that 'the District knew or should have known of the complained of conduct' and 'failed to stop or prevent such conduct,' those allegations do not change the gravamen of the complaint from one alleging intentional acts and violations of Federal and State statutes to one involving negligent conduct (see, e.g., New York Cas. Ins. Co. v. Ward, 139 A.D.2d 922, 527 N.Y.S.2d 913 [(1988)])."

198 A.D.2d at 817, 604 N.Y.S.2d at 400.

Likewise in this case, the argument that Dean and Baber committed acts separate from the assault and battery that directly injured Price-Williams and that by those previous acts of negligence they "failed to stop or prevent" their own

intentional assault and battery of the victim or the participation of a third party in that subsequent assault and battery must fail. In this regard, I find helpful the following explanation of Texas law, which I submit is no different than the law of Alabama and basically every other state:

> "Texas courts ... when determining whether an exclusion in an insurance contract applies, examine the factual allegations showing the origin of the damage[] rather than the legal theories asserted by the plaintiff. Duncanville Diagnostic Ctr., Inc. v. Atlantic Lloyds Ins. Co. of Tex., 875 S.W.2d 788, 789 (Tex. App.-Eastland 1994, writ denied); ... Burlington Ins. Co. v. Mexican American Unity Council, Inc., 905 S.W.2d 359, 360 (Tex. App.-San Antonio 1995, no writ) (same). Where the legal claims asserted by the plaintiffs are not independent and mutually exclusive, but rather related to and dependent upon excluded conduct, the claims are not covered, even if asserted against an insured who did not himself engage in the prohibited conduct. Burlington Ins. Co., 905 S.W.2d at 362."

Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 99 F.3d 695, 703-04 (5th Cir. 1996) (emphasis added).

The same is true here. The "legal claims asserted are not independent ..., but [are] related to and dependent upon excluded conduct," i.e., the assault and battery. The only difference between this case and the Texas case quoted above

(and most other cases addressing this issue) is that the exclusion is deemed to apply in the other cases to bar a claim against a negligent insured even though the actual assault and battery was not committed by that insured. Here, the actual assault and battery was committed by the same insureds who seek recovery.