

**COMMONWEALTH OF MASSACHUSETTS**

SUPREME JUDICIAL COURT

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**No. FAR - \_\_\_\_\_**

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DORCHESTER MUTUAL INSURANCE COMPANY,  
Plaintiff - Appellant,

v.

LEONARD MIVILLE, ET AL.,  
Defendants - Appellees.

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On Appeal From The Appeals Court Decision And Order  
Dated April 13, 2022

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**PLAINTIFF - APPELLANT'S APPLICATION FOR  
FURTHER APPELLATE REVIEW**

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Dated: 04/29/2022

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**TABLE OF AUTHORITIES**

**CASES :**

Dorchester Mutual Ins. Co. v. Krusell,  
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### **REQUEST FOR FURTHER APPELLATE REVIEW**

Pursuant to Mass. R. App. P. 27.1, the plaintiff, appellant, Dorchester Mutual Fire Insurance Company ("Dorchester Mutual"), requests leave to obtain further appellate review of the Appeals Court's decision which overruled a Superior Court judge and incorrectly found that the "Sexual Molestation, Corporal Punishment Or Physical Or Mental Abuse" policy exclusion did not bar coverage for an obviously abusive physical attack by Dorchester Mutual's insured.

### **STATEMENT OF PRIOR PROCEEDINGS**

On June 20, 2017, Dorchester Mutual filed a complaint in the Norfolk Superior Court for declaratory judgment against Leonard Miville, ("Miville"), William, Kim, and Laurence Brengle, ("collectively, the "Brengles") seeking a declaration that a homeowners policy it had issued to the defendants, Laurence and Kim Brengle, provided no coverage for claims of bodily injury brought by Miville in a complaint of negligence filed in the Essex County Superior Court, entitled Leonard C. Miville v. William Brengle, Kim Brengle, and Laurence

Brengle, Docket No. 1977CV01384 (the underlying action").<sup>1</sup>

Dorchester Mutual alleged that coverage for Miville's claims was barred by Exclusion E.7, which provides that Coverage E - Personal Liability coverage does not apply to bodily injury "arising out . . . of physical or mental abuse." (the "physical abuse exclusion").

On August 12, 2019, Dorchester Mutual filed a motion for summary judgment along with the parties' consolidated statement of material facts and the parties' joint appendix of exhibits. Defendant Miville filed an opposition to Dorchester Mutual's motion for summary judgment. The Norfolk Superior Court continued the summary judgment hearing pending the Supreme Judicial Court's decision in another Dorchester Mutual case concerning the same exclusion. On August 13, 2020, the SJC issued its decision in Dorchester Mutual Ins. Co. v. Krusell, 485 Mass. 431 (2020) (Krusell). (Attached hereto in Addendum). Thereafter, on March 24, 2021, Dorchester Mutual filed a supplemental

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<sup>1</sup> Dorchester Mutual's original complaint was only against defendants William Brengle and Leonard Miville. Dorchester Mutual filed an amended complaint on June 25, 2020, to include defendants Laurence and Kim Brengle.

memorandum in support of its motion for summary judgment, to which the Defendant responded, and Dorchester Mutual replied. On June 7, 2021, the Superior Court (Connolly, J.) allowed Dorchester Mutual's motion for summary judgment. (Memorandum of Decision and Order on Plaintiff's Motion for Summary Judgment attached hereto in Addendum).

On June 28, 2021, defendant Miville filed a notice of appeal.

On April 13, 2022, the Appeals Court reversed the Superior Court's decision in favor of Dorchester Mutual. See Dorchester Mutual Insurance Company v. William Brengle et al., 21-P-656 (2022) (attached hereto in Addendum). The Appeals Court disagreed with the Superior Court judge's view that Dorchester Mutual's policy exclusion bars coverage, and remanded the case for entry of a new judgment declaring that Dorchester Mutual has a duty to defend, and if necessary, indemnify, the Brengles in Miville's personal injury suit.

#### **STATEMENT OF FACTS RELEVANT TO APPEAL**

##### **The Incident**

Pursuant to the provisions of Mass. R. App. P. 27.1(b), facts correctly stated in the decision of the

Appeals Court, which is appended hereto, are not restated in this Section.

During an unprovoked assault, William Brengle punched Miville in the face so hard that an eyewitness heard the sound of the punch from inside his home and described it as a "bone crack." While Miville was on the ground seemingly unconscious after being punched by William Brengle, Brengle, with his shod foot, kicked Miville multiple times in the jaw, clavicle, and left leg. As Brengle was kicking him, Miville asked him to stop. As a result of Brengle's assault, Miville sustained severe and permanent injuries including a fractured cheek and fractured orbital, requiring the insertion of a surgical plate, damage to his nasal cavity, and permanent damage to his eyesight.

#### **The Underlying Action**

On October 3, 2019, Miville filed a complaint in the Essex Superior Court alleging four counts: (1) assault and battery against William Brengle; (2) negligence against William Brengle; (3) negligence against Kim Brengle; and (4) negligence against Laurence Brengle.

## **The Dorchester Mutual Policy**

Dorchester Mutual issued a homeowners policy number D507417 to the named insureds, Laurence J. Brengle and Kim W. Brengle, for the period April 25, 2016, through April 25, 2017 (the "policy"). The policy contains a Homeowners 3-Special Form, number HO 00 03 10 00, which provides, in pertinent part, as follows:

### **DEFINITIONS**

- A.** In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household. "We", "us" and "our" refer to the Company providing this insurance.
- B.** In addition, certain words and phrases are defined as follows:

\* \* \* \*

- 2.** "Bodily injury" means bodily harm, sickness or disease, including required care, loss of services and death that results.

\* \* \* \*

- 8.** "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:

- a.** "Bodily injury"; or
- b.** "Property damage".



\* \* \* \*

## SECTION II - LIABILITY COVERAGES

### A. Coverage E - Personal Liability

If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which an "insured" is legally liable. Damages include prejudgment interest awarded against an "insured"; and
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent...

\* \* \* \*

## SECTION II - EXCLUSIONS

\* \* \* \*

### E. Coverage E - Personal Liability And Coverage

#### F - Medical Payments To Others

Coverages **E** and **F** do not apply to the following:

\* \* \* \*

#### 7. Sexual Molestation, Corporal Punishment Or Physical Or Mental Abuse

"Bodily injury" or "property damage" arising out of sexual molestation, corporal punishment or physical or mental abuse...

\* \* \* \*

**STATEMENT OF ISSUES UPON WHICH  
FURTHER APPELLATE REVIEW IS SOUGHT**

Dorchester Mutual seeks further review of the Appeals Court's decision, made on a *de novo* review, that a homeowners' insurance policy provides coverage for an abusive, unjustified and otherwise purposeless attack in spite of an exclusion precluding coverage for this type of event.

**REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE**

Pursuant to Mass. R. App. P. 27.1(e), further appellate review may be granted in cases where the justices believe that there are substantial reasons affecting the public interest or the interests of justice. For the reasons explained, Dorchester Mutual believes that this case substantially affects the public interest and, as a consequence, the interests of justice, and seeks review on that basis.

**I. FURTHER APPELLATE REVIEW SHOULD BE GRANTED BECAUSE THE DECISION IN THIS CASE AFFECTS THE PUBLIC GENERALLY, AND NOT JUST THE LITIGANTS INVOLVED IN THE CASE.**

The Supreme Judicial Court should grant further appellate review of this case because of its broad effect on the citizens of Massachusetts. The issues in this case significantly affect the public interest for two reasons: First, homeowners' insurance is a

ubiquitous product purchased by millions of citizens in the Commonwealth. Although homeowners' insurance is not statutorily mandated like auto insurance, homeowners' insurance is required by mortgage lenders, meaning that it is a *de facto* requirement for most homeowners much like auto insurance. As a result, cases involving the interpretation of homeowners' insurance coverage broadly affect the general public. The proper interpretation of a homeowners' insurance policy is an issue of general public interest, and is deserving of review by the Supreme Judicial Court, just as was done in Krusell.

Second, the Appeals Court's holding forces all policy holders to underwrite the costs of criminal activities like William Brengle's attack on Leonard Miville. Although Mr. Brengle and Mr. Miville would prefer a finding of coverage in this case, the insurance-buying public would probably prefer the opposite result. Most homeowners are capable of controlling themselves such that they will never cause "physical abuse," and would prefer not to have to pay a premium (even a small premium) to cover a risk that they can easily and freely avoid.

The "physical abuse" exclusion is thus an important provision which prevents the general public from underwriting criminal activity. As a consequence, this case affects more than just the litigants involved - it affects all homeowners in Massachusetts (which is to say millions of people). It is in the public interest that the Supreme Judicial Court review this case, and reinstate the correct decision of the Superior Court.

**II. FURTHER APPELLATE REVIEW SHOULD BE GRANTED TO RECONCILE THE CONFLICTING APPROACHES OF THE TRIAL COURT AND THE APPEALS COURT TO THE SAME SET OF FACTS AND APPLICABLE LAW.**

In Dorchester Mutual Ins. Co. v. Krusell, 485 Mass. 431 (2020), this Court interpreted the phrase "physical abuse" in an identical insurance policy. This Court held that "physical abuse" did not include all assaults, but instead required either an "abusive quality such as a misuse of power" or possibly "conduct so extreme as to indicate an abuser's disposition towards inflicting pain and suffering." This Court did not hold that the "physical abuse" exclusion was void, or that it could not be enforced if the facts warranted.

The facts of Mr. Brengle's criminal attack on Mr. Miville were not disputed, and were presented in detail to the Superior Court judge during summary judgment. The Superior Court had the benefit of this Court's decision in Krusell when it considered Dorchester Mutual's summary judgment motion. Applying the Krusell standard, the Superior Court judge found that Mr. Brengle's criminal attack was "conduct so extreme as to indicate an abuser's disposition towards inflicting pain" and granted summary judgment.

There was ample evidence to support this decision. Mr. Brengle attacked without provocation. He continued his attack even after Mr. Miville was seemingly unconscious. The extent of Mr. Miville's injuries demonstrates the extreme violence of the attack. Mr. Miville was a defenseless 61-year-old man. There was no purpose to Mr. Brengle's attack other than to inflict pain. Taken together, the Superior Court had no difficulty fitting the facts of this case into the "extreme conduct" standard recently announced by this Court in Krusell.

The Appeals Court, considering the exact same facts and law on a *de novo* review, came to a different conclusion. This is not a case where the Appeals

Court overturned a grant of summary judgment because of a potential disputed issue of material fact, or where the Appeals Court noted that the trial court applied an incorrect legal standard. Rather, this is a case where the trial court judge and the Appeals Court came to diametrically opposite decisions after considering the exact same facts and legal standard. Because different judges reached such different conclusions based on the same legal standard, the matter deserves clarification by the Supreme Judicial Court.

**III. FURTHER APPELLATE REVIEW SHOULD BE GRANTED TO CLARIFY THIS COURT'S "SIMPLE ASSAULT" STANDARD.**

The Appeals Court, borrowing a phrase from the Krusell decision, deemed Mr. Brengle's attack on Mr. Miville a "simple assault."<sup>2</sup> The Supreme Judicial Court should grant further appellate review to clarify what is meant by the phrase "simple assault".  
Dorchester Mutual understood the phrase "simple

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<sup>2</sup> It seems unlikely that when the underlying Miville v. Brengle dispute is tried, Mr. Miville will refer to this incident as merely a "simple assault." It is completely unfair to Dorchester Mutual to have Mr. Miville and Mr. Brengle argue in this declaratory judgment case that this was only a "simple assault" and then have Mr. Miville argue in the underlying tort case that this was a vicious, violent, extreme, unprovoked attack.

assault" to mean a situation, like in Krusell, where the defendant pushes or strikes the plaintiff, but does nothing more. In the present case, Mr. Brengle initially struck Mr. Miville in the face with sufficient force to cause a blowout fracture of Miville's left orbit, a fractured nasal bone, a zygomatic arch fracture, a corneal abrasion, and other associated soft tissue injuries. After Mr. Miville collapsed to the ground, Mr. Brengle kicked Mr. Miville and fractured his clavicle. Considering the duration of the attack, that it continued after Mr. Miville was on the ground, that it included both punching and kicking, the extreme violence of the attack, and the extent of the injuries, calling this a "simple assault" renders this Court's distinction between "abuse" and "simple assault" completely meaningless. This Court should grant further appellate review to clarify the meaning of the "simple assault" standard announced in Krusell.

#### **CONCLUSION**

For the above reasons, Dorchester Mutual requests the Court to grant its application for further appellate review.

Respectfully submitted,

The plaintiff, appellant,  
**Dorchester Mutual Insurance Company,**

By its attorneys,  
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*/s/ John P. Graceffa*

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Dated: 04/29/2022



**CERTIFICATE OF COMPLIANCE**

I, John P. Graceffa, counsel for the plaintiff, appellant, Dorchester Mutual Insurance Company, hereby certify that the foregoing application complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including, without limitation,

Mass.R.A.P. 16(a)(13) (addendum);

Mass.R.A.P. 16(e) (references to the record);

Mass.R.A.P. 18 (appendix to the brief);

Mass.R.A.P. 20 (form and length of briefs, appendices, and other documents); and

Mass.R.A.P. 21 (redaction);

Mass.R.A.P. 27 (further appellate review).

I further certify that the foregoing application complies with the applicable length limit of Mass.R.A.P. 20, as it is produced in the monospaced font Courier New, size twelve (12) point, ten (10) characters per inch, and contains twelve (12) non-excluded pages.

*/s/ John P. Graceffa*

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**CERTIFICATE OF SERVICE**

I, John P. Graceffa, counsel for the plaintiff, appellant, Dorchester Mutual Insurance Company, hereby certify, pursuant to Mass.R.A.P. 13(d), that I have served the foregoing application on all counsel of record by U.S. First-Class Mail, postage prepaid, and by the Electronic Filing System to the following:

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