

**IN THE SUPREME COURT OF OHIO**

|                                     |   |                                    |
|-------------------------------------|---|------------------------------------|
| THE CINCINNATI INSURANCE CO., et al | ) | Case No.06-0722                    |
|                                     | ) |                                    |
| Plaintiffs-Appellants               | ) |                                    |
|                                     | ) |                                    |
| vs.                                 | ) | On Appeal from Cuyahoga County     |
|                                     | ) | Court of Appeals, Eighth Appellate |
| CPS HOLDINGS, INC, ET AL.           | ) | District, Case Nos. 85967/ 85969   |
|                                     | ) |                                    |
| Defendants-Appellees                | ) |                                    |

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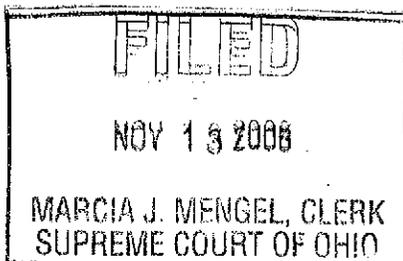
**MERIT BRIEF OF APPELLANT THE CINCINNATI INSURANCE COMPANY**

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## STATEMENT OF THE CASE AND FACTS

### I. INTRODUCTION

This appeal requires the interpretation of umbrella insurance coverage provided under standardized forms created by the Insurance Services Office, Inc. (“ISO”) and used throughout the insurance industry. Appellees CPS Holdings, Inc., CPS Holding Co., Ltd, CPS Utilities, IQ Solutions, LLC, NCP Limited Partnership, Robert Kendall and Linda Kendall (collectively “CPS”) and State of Ohio, Department of Administrative Services (“State”), seek umbrella insurance coverage from Appellant The Cincinnati Insurance Company (“CIC”) for nearly \$6 million dollars in funds allegedly stolen, converted, mis-administered or otherwise lost by CPS while administering contracts between the State and various natural gas providers. When it became apparent to the State that CPS was unwilling or unable to repay the converted funds (and that the performance bond set by the State as security for CPS’ services was woefully inadequate), the State and CPS joined forces to seek recovery of the financial losses from CPS’ insurers.

This pool of insurance included general liability (both commercial general liability [CGL] and homeowners), errors & omissions and umbrella liability policies. Not surprisingly, the Trial Court, for a variety of reasons, found that such policies did not provide coverage for the financial malfeasance alleged by the State. Therefore, on appeal, the State and CPS abandoned their shotgun approach to insurance coverage, and focused on coverage under two policies: (1) an errors & omissions policy issued by Gulf Underwriter’s Insurance Company (“Gulf”) and (2) an umbrella liability policy issued by CIC.

The Eighth Appellate District found that Gulf had a duty to defend CPS against the State’s allegations under its errors & omissions policy. While this result is questionable, there is no question

that the Eighth Appellate District committed clear reversible error when it held that CIC's umbrella liability policy must also provide coverage for the State's allegations on the argument that the standard ISO language in the policy was ambiguous such that umbrella liability coverage would be deemed to be available whenever *any* other policy of any kind also provided coverage. This holding, the first of its kind in Ohio, ignored the plain language of the insuring agreement in CIC's umbrella policy and potentially exposed insurers to hundreds of millions of dollars of unbargained for, unanticipated liabilities through judicial re-writing of the standard ISO forms. In this sense, this case is not just about CIC's exposure in this specific case, but is about the future of liability insurance in Ohio.

As explained below, this Court should reverse the Eighth Appellate District's decision and remand this case to the Trial Court with instructions to re-enter judgment for CIC.

## II. PROCEDURAL HISTORY AND UNDERLYING FACTS

On May 30, 2003, the State filed suit against CPS in *State of Ohio, Department of Administrative Services v. IQ Solutions, LLC, et al.*, Case No. 03-CVH05-6054, in the Court of Common Pleas for Franklin County, Ohio seeking damages allegedly arising from CPS' misadministration of contracts between the State and various natural gas providers ("Franklin County Litigation").

On December 9, 2003, the State filed its First Amended Complaint in the Franklin County Litigation, which provides the allegations pertinent to this appeal (Pagination of the Record ["T.d."], 1, 10, 38 [Ex. C]; Supplement, pp. 00081 to 00099), and which provides, in pertinent part:

- (1) All of the CPS entities and individuals “are the alter egos of one other” and Robert Kendall controlled CPS “*in such a manner as to commit wrongful and/or illegal acts against [the State].*” (Emphasis added; *Id.*, pp. 00084 to 00087).
- (2) From 1998 until 2001, CPS contracted to serve as the third party administrator (“TPA”) for the State’s \$25 million per year “award-winning natural gas procurement program on behalf of State agencies and eligible political subdivisions (the “Program”).” (*Id.*, p. 00088).<sup>1</sup>
- (3) *Pursuant to its TPA contract*, CPS was required to “provide cash management and billing services . . . to pay natural gas suppliers in a timely manner on behalf of [the State]—[the State] ensured that [CPS] was paid all money for the natural gas supplied under the Gas Contracts, and [CPS], in turn, was required to pay the natural gas suppliers those amounts.” (Emphasis added; *Id.*, pp. 00088 to 00089).
- (4) “Beginning in approximately February 2001, but unknown to [the State], [CPS] stopped making payments to certain natural gas suppliers.” However, the State continued to pay CPS the “full amount owed for the natural gas consumed under the Gas Contracts . . . in the good faith belief that [CPS] would properly forward such payments to the natural gas suppliers.” The State did not discover the non-payments until 2002 because CPS “*withheld that information from [the State].*” (Emphasis added; *Id.*, p. 00089).
- (5) When the State discovered CPS’ malfeasance/nonfeasance it notified CPS of “its obligations and its opportunity to cure as required by the 2001 . . . Contract.” It was then discovered that CPS “*removed public funds from the Bank Account established by [CPS] to manage its contractual obligations, and co-mingled those public funds with other funds in the Bank Account, such that the public funds cannot now be accounted for.*” It is alleged that CPS “*spent public funds . . . to pay other obligations or losses of [CPS], or for*

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<sup>1</sup>The Special Audit by the State Auditor indicates “CPS had served as the [TPA] since December of 1995 through three consecutive three-year contracts awarded through competitive bid.” Ohio Department of Administrative Services—IQ Solutions, Franklin County, Special Audit for the period September 1, 2001 through January 31, 2003 (“Special Audit”), p. 6. The Special Audit was incorporated into, and appended to, the State’s First Amended Complaint in the Franklin County Litigation, but is not of record in this case. (Supplement, p. 00081).

***purposes other than making the required payments to the natural gas suppliers.***” (Emphasis added; *Id.*, pp. 00088 to 00089).

- (6) CPS has “admitted that it was in breach of the 2001 . . . Contract”, failed to cure its non-payment and exposed the State to contractual liability for the natural gas supplied “in at least the amount in excess of . . . (\$5,771,302.00).” (*Id.*, p. 00090).
- (7) The State Auditor found CPS: “***(1) did not pay the natural gas suppliers as required by the . . . Contracts; (2) co-mingled public funds received from the . . . Contracts with other funds in the Joint Bank Account, such that the public funds cannot be accounted for; and (3) converted those public funds to pay for other purposes, including other obligations or operating losses***” of CPS. (Emphasis added; *Id.*, p. 00091).

The State’s First Amended Complaint brings nine causes of actions against CPS, including: (1) negligence; (2) professional negligence; (3) breach of implied warranty; (4) breach of contract; (5) breach of express warranty; (6) conversion; (7) unjust enrichment; (8) recovery of public funds under R. C. 117.28<sup>2</sup>; and (9) piercing the corporate veil against the individual defendants.<sup>3</sup> The State seeks compensatory damages, punitive damages<sup>4</sup>, prejudgment and post-judgment interest and attorney fees.

In its Memorandum in Opposition to Jurisdiction filed with this Court on May 15, 2006, the State further explained its allegations as follows:

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<sup>2</sup>R. C. 117.28 provides, in pertinent part: “Where an audit report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving a copy of the report . . . may . . . institute a civil action . . . for the recovery of the money or property . . .”

<sup>3</sup>Count (9) restates the allegation that Robert Kendall controlled CPS “in such a manner as to commit wrongful and/or illegal acts against” the State. (Supplement, p. 00097).

<sup>4</sup>The State’s claims for punitive damages are uninsurable as a matter of law and public policy. R. C. 3937.182.

CPS/IQ contracted with DAS to act as a third-party administrator for the State's natural gas procurement program. CPS/IQ had represented to DAS that it was an expert in the field of natural gas procurement and management. Under the program, natural gas is supplied to State agencies and eligible subdivisions by natural gas suppliers. Per the contracts, DAS forwarded state gas supplier funds to CPS/IQ, and CPS/IQ was required to pay natural gas suppliers in a timely manner on behalf of DAS.

Initially unknown to DAS, CPS/IQ kept and commingled the DAS gas supplier funds with its own funds, instead of paying the gas suppliers. DAS learned about CPS/IQ's failure to pay when the gas suppliers began to contact DAS demanding payment. DAS first wrote CPS/IQ that it had not made timely payments as required by the contract, and demanded a cure from CPS/IQ. DAS also advised CPS/IQ that it would be liable for the cost of any replacement services and other damages if it failed to cure. DAS thereafter notified CPS/IQ it was claiming damages for CPS/IQ's breach of its contractual duty.

CPS/IQ did not cure its failure to pay gas suppliers, and DAS terminated its contract with CPS/IQ. As a result of CPS/IQ's failure to pay the gas suppliers, DAS has lost over \$5,771,302.

DAS subsequently sued CPS/IQ, its affiliated businesses and certain officers and directors in Franklin County Common Pleas Court of negligence, professional negligence, breach of implied warranty, breach of contract, breach of express warranty, conversion, unjust enrichment, recovery of public funds and piercing the corporate/business entity veil.

*Id.*, pp. 2-3.

At times pertinent to the Franklin County Litigation, CPS carried insurance under a variety of policies, including: (1) a commercial general liability ("CGL") policy issued by CIC ("CIC CGL Policy," T.d. 38, Ex. A; Supplement, pp. 00002 to 00047); (2) an errors & omissions (or professional negligence) policy issued by Gulf ("Gulf E&O Policy"); and (3) Commercial Umbrella Liability Policy No. CCC 447 75 48 issued by CIC ("CIC Umbrella Policy," T.d. 38, Ex. B; Supplement, pp. 00048 to 00080). When CPS requested CIC to provide a defense and indemnity with respect to the Franklin County Litigation, CIC reviewed its policies and determined that neither the CIC CGL Policy nor the

CIC Umbrella Policy provided coverage for the economic losses alleged by the State for a variety of reasons--the most important of which were the absence of allegations of "property damage" or an "occurrence", which were necessary to trigger the policies' insuring agreements. In this regard, with the exceptions of the limits of liability, the scope of substantive coverage provided by the CIC policies was coextensive with each other and with the other general liability policies under which the State and CPS sought coverage.<sup>5</sup> As a result, CIC denied coverage and initiated the instant declaratory judgment action. (T.d. 1, 10).<sup>6</sup>

CPS subsequently joined the State and a variety of insurance companies (including Gulf). (T.d. 12-13). From this point on, the State actively litigated for insurance coverage on behalf of CPS. The parties subsequently filed cross-dispositive motions to address the insurance coverage issues. (T.d. 38-40, 48-50, 52-54, 56-58). CIC argued, in pertinent part, that its policies did not provide coverage for the allegations in the Franklin County Litigation because of the absence of any allegation of "property damage" or an "occurrence." This is consistent with the arguments raised by the other general liability insurers (*Id.*)

On January 24, 2005, the Trial Court entered judgment for all of the insurers, including CIC and Gulf. In a well-reasoned decision, the Trial Court explained:

Multiple Defendants worked in conjunction with the State of Ohio Department of Administrative Services ("DAS") to provide natural gas services to the state. However these Defendants allegedly siphoned monies owed to DAS through a scheme to defraud the State . . . These Defendants asked their insurance carriers to defend them in the Franklin County suit and to insure them under their respective policies.

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<sup>5</sup>The substantive provisions of the CIC Policies are discussed in pertinent detail below.

<sup>6</sup>As CPS was principally located in Cuyahoga County, Ohio, venue was proper in the Court of Common Pleas for Cuyahoga County, Ohio.

\* \* \*

Plaintiff CIC insures . . . CPS . . . under a primary policy (#0723237) and an excess policy (#4477548). *Parties agree that the excess policy increases the coverage limits, but not the scope of coverage. Therefore, the Court will first analyze the primary policy to determine whether coverage exists, and if so will apply the limits of both policies.*

The primary CIC policy insures against . . . “property damage.” *The sole issue related to this policy (and the excess policy) is whether the alleged breach of contract and conversion (the Franklin County case) constitutes an occurrence of . . . property damage as defined by the policy . . .* The policy defines property damage as “Physical injury to tangible property, including all resulting loss of use of that property,” or “loss of use of tangible property that is not physically injured.”

CPS’ . . . allegedly intentional acts to breach their contract and steal money from DAS will indeed harm financial welfare to these two Defendants. However, the court cannot say that [CPS’] action which opened themselves up to liability constitute property damage. *The loss of money does not equal property damage. Walther v. Central Trust Co. (1990, 2d Dist.), 70 Ohio App.3d 26 . . . [T]his Court adopts the Walther decision and declares that the Defendants’ actions to allegedly convert public funds for private use is not an instance of property damage. Plaintiff CIC has not duty to defend or insure . . . CPS on the primary policy. Therefore, there is no coverage under the excess policy.*

\* \* \*

Moreover, public policy does not support the theory that an insurance company must defend and insure the intentional acts of insureds. Although the complaint is styled to allege negligence, the substance of the claim is theft. *The Court refuses to declare that an insurer must defend for criminal acts of its insureds.* (Emphasis added).

(Trial Court Opinion, T.d. 63, Appx. p. 00002, ¶¶1, 4-6, 18). CPS and the State timely appealed to the Eighth Appellate District. (T.d. 64-65).

On appeal, the State and CPS “conceded” that there was not any coverage provided under the CIC CGL policy, and also tacitly conceded that there was not any coverage under CIC’s umbrella

liability policy *if* no other insurance provided coverage. *The Cincinnati Ins. Co. v. CPS Holding, Inc.*, 8<sup>th</sup> Dist. No. 85967/ 85969, 2006 Ohio 713, at ¶23 (Appx. p. 00010). Nevertheless, the State and CPS asserted that CIC’s umbrella liability policy provided coverage for the Franklin County Litigation because the ISO-based forms used by CIC were ambiguous, and therefore the umbrella liability policy provided excess coverage *whenever any other insurance policy provided coverage*. They argued that because the Gulf E&O policy arguably provided coverage for the Franklin County Litigation, CIC’s umbrella liability policy must provide excess coverage for the Franklin County Litigation. Surprisingly, a majority of the Eighth Appellate District panel agreed, and reversed the Trial Court—finding that the ISO-based forms were ambiguous such that any umbrella policy using them would be triggered if any other policy provided coverage. *Id.*, at ¶¶23-27. The decision, however, was not without criticism. In a withering dissent that exceeded the majority opinion in both length and substance, Judge Conway Cooney pointed out that the majority had ignored the fact that CIC’s umbrella liability policy provides coverage “only for bodily injury, property damage, personal injury or advertising injury which are not covered by underlying insurance or by other insurance.” *Id.*, at ¶¶49-57. She also correctly pointed out that the State and CPS “fail[ed] to support their argument with any caselaw.” *Id.*, at ¶55.

This appeal now follows. (Appx. p. 00010).

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**PROPOSITION OF LAW NO. 1:** Where an umbrella liability policy, in pertinent part, provides coverage for “damages in excess of [all other insurance policies applicable to the ‘occurrence’], such coverage is not triggered for claims that are not caused by “occurrences” even if unscheduled underlying insurance policies may apply to such losses.

### **I. PERTINENT LEGAL STANDARDS**

An insurer is obligated to defend its insured only where the allegations of the complaint are potentially or arguably within the coverage of the policy. *City of Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St.3d 177, 178-179, 459 N.E.2d 555; *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003 Ohio 3048, at ¶¶16-21. Where the allegations in the complaint fall outside of the coverage provisions of the liability policy, taking into account both the coverage provisions and exclusions, there is no duty to defend. *Zanco v. Michigan Mut. Ins. Co.*(1984), 11 Ohio St.3d 114, 115-116, 464 N.E.2d 513; *Willoughby Hills*, 9 Ohio St.3d at 180; *Anders, supra*.

Of course, to determine whether an insurer has a duty to defend, it is necessary to analyze the substantive provisions of the pertinent insurance contract.<sup>7</sup> When interpreting such provisions, this Court has explained:

An insurance policy is a contract . . . . When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 273, 714 N.E.2d 898, citing *Employers' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, 124 N.E.223, syllabus. See, also, Section 28, Article II, Ohio Constitution. We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 7 O.O.3d 403, 374 N.E.2d 146, paragraph two of the syllabus. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *Id.* As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. *Gulf Ins. Co. v. Burns Motors, Inc.* (Tex.2000), 22 S.W.3d 417, 423.

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A court . . . is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties . . . *Blosser v. Enderlin* (1925), 113

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<sup>7</sup>The duty to defend is contractual. If there is no contract to defend, there is no duty to defend. Therefore, in determining the duty of an insurer to defend its insured, courts will look to the contractual language agreed to by the parties. See *Crown Center Redevelopment Corp. v. Occidental Fire and Casualty Co. of North Carolina* (Mo.App.Ct.1986), 716 S.W.2d 348, 357; *Grieb v. Citizens Casualty Co. of New York* (Sup.Ct. 1967), 33 Wis.2d 552, 558, 148 N.W.2d 103 (“When there is an express undertaking to defend in the policy, such express defense coverage-clause negates any implication of a duty to defend which enlarges or is inconsistent with such coverage.”); See also 14 G. Couch, R. Anderson and M. Roads, *Couch Cyclopedia of Insurance Law* §51:35 (2d Rev. Ed. 1982)[hereinafter “Couch”]; B. Ostrager & T. Newman, *Handbook on Insurance Coverage Disputes* §5.01 (9th Ed. 1998)[hereinafter “Ostrager”]; Annotation, *Duty of Insurer to Pay for Independent Counsel When Conflict of Interest Exists Between Insured and Insurer*, 50 A.L.R. 4th 932 (1986) at §2. As noted by the court in *All-Star Ins. Corp. v. Steelbar Inc.* (N.D.Ind.1971), 324 F.Supp. 160, 163, “the nature of [the] insurer’s duty to defend is purely contractual. There is no common law duty as to which the courts are free to devise rules.”

Ohio St.121, 148 N.E. 393, paragraph one of the syllabus (“there can be no intendment or implication inconsistent with the express terms [of a written contract]”).

\* \* \*

[W]here the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party. *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St2d 411, 413, 16 O.O.3d 441, 406 N.E.2d 515. Thus, an ambiguity in an insurance contract is ordinarily interpreted against the insurer and in favor of the insured. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380.

There are limitations to the preceding rule. “Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, the rule will not be applied so as to provide an unreasonable interpretation of the policy.” *Morfoot v. Stake* (1963), 174 Ohio St. 506, 23 O.O.2d 144, 190 N.E.2d 573, paragraph one of the syllabus.

*Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003 Ohio 5849, at ¶¶9-14. As explained in *Galatis*, these rules are not just a matter of common law, but are a matter of constitutional import because the parties’ freedom to contract is protected by both the state and federal constitutions. *Id.*, at ¶¶9-10, 39.

Based upon the foregoing, the resolution of the insurance coverage dispute in this case will be determined by the interaction between: (1) the provisions of the CIC Umbrella Policy and (2) the allegations in the Franklin County Litigation. This interaction will affirmatively demonstrate that the CIC Umbrella Policy does not provide coverage for the Franklin County Litigation.

## II. PERTINENT PROVISIONS OF THE CIC UMBRELLA POLICY

The CIC Umbrella Policy is based upon standard policy language copyrighted by ISO and used, in one form or another, throughout the insurance industry in umbrella liability policies. The basic insuring agreement provides, in pertinent part:

## SECTION I-COVERAGES

### A. Insuring Agreement

We will pay on behalf of the insured the “ultimate net loss” which the insured is legally obligated to pay as damages in excess of the “underlying insurance” or for an “occurrence” covered by this policy which is either excluded or not covered by “underlying insurance” because of:

1. . . . “[P]roperty damage” covered by this policy occurring during the policy period and caused by an “occurrence” . . . [8]

(Supplement, p. 00053). The following important definitions are necessary to understand the foregoing provisions:

## SECTION V-DEFINITIONS

\* \* \*

### 9. “Occurrence” means:

- a. An accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in . . . “property damage.”

\* \* \*

### 12. “Property damage” means:

- a. Physical injury to or destruction of tangible property including all resulting loss of use. All such loss of use shall be deemed to occur at the time of the physical injury or destruction that caused it.

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<sup>8</sup>Although the insuring agreement also purports to provide coverage for “personal injury,” “advertising injury” and “bodily injury,” the CIC Umbrella Policy was endorsed to specifically exclude “personal injury” and “advertising injury” (Supplement, pp. 00048 to 00080), and there is no reasonable interpretation of the allegations in the Franklin County Litigation that could include “personal injury,” “advertising injury” or “bodily injury.” Consequently, the analysis in this Merit Brief is limited to potential “property damage”.

- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

\* \* \*

15. "Ultimate net loss" means the sum actually paid or payable in the settlement or satisfaction of the insured's legal obligation for damages, covered by this insurance, either by adjudication or compromise . . .

16. "Underlying insurance" means the policies listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance policies applicable to the "occurrence".

(Supplement, p. 00065). Thus, an "occurrence" means "an accident . . . that results in 'property damage'". "Underlying insurance" means specifically scheduled policies or unscheduled policies "applicable to the 'occurrence'".

Putting these definitions together with the insuring agreement, it is clear that CIC has agreed to pay on behalf of CPS the sum actually paid or payable in the settlement or satisfaction of CPS' legal obligation for damages that is:

- (1) excess of:
  - (A) the policies listed in the Schedule of Underlying Policies, and/or
  - (B) the insurance available to the insured under all other policies applicable to [an accident . . . that results in "property damage"], **OR**
- (2) for [an accident . . . that results in "bodily injury" or "property damage"] that is covered by this policy which is either excluded or not covered by:
  - (A) [the policies listed in the Schedule of Underlying Policies, and/or

- (B) the insurance available to the insured under all other policies applicable to [an accident . . . that results in “property damage”].

Simplifying it even further, it can be accurately stated that the CIC Umbrella Policy provides coverage under only four circumstances pertinent to this case:

- (1) excess of specifically scheduled underlying insurance policies;
- (2) excess of unscheduled underlying insurance policies that provide coverage for accidents that result in “property damage”;
- (3) for accidents that result in “property damage” that are not covered by specifically scheduled underlying insurance;
- (4) for accidents that result in “property damage” that are not covered by unscheduled underlying insurance that are applicable to accidents that result in “property damage”.

Under the first circumstance, there need only be applicable specifically scheduled underlying insurance that has been exhausted. Under the next three circumstances, there must be an accident that results in “property damage”. As explained below, none of these circumstances is present in the Franklin County Litigation, and therefore the CIC Umbrella Policy does not provide coverage with respect to that action.

### **III. THE CIC UMBRELLA POLICY DOES NOT PROVIDE COVERAGE FOR THE FRANKLIN COUNTY LITIGATION.**

#### **A. The CIC Umbrella Policy Does Not Provide Coverage Because No Specifically Scheduled Underlying Insurance Is Triggered.**

The CIC Umbrella Policy specifically schedules only one underlying policy: the CIC CGL Policy.<sup>9</sup> It is undisputed that the CIC CGL Policy does not provide coverage with respect to the

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<sup>9</sup>The CIC CGL Policy also included coverage for automobile liability coverage and employee benefit liability coverage—neither of which is pertinent to this case.

Franklin County Litigation. Indeed, CIC prevailed on this issue at the Trial Court level and no appeal was ever taken by CPS or the State. Therefore, the non-applicability of CIC CGL Policy is settled as a matter of law. *See Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004 Ohio 6769, at ¶¶21-22. Accordingly, as a matter of law, CPS can not obtain coverage under the CIC Umbrella Policy for damages excess of specifically scheduled underlying insurance policies.

**B. The CIC Umbrella Policy Does Not Provide Coverage Because The State Is Not Seeking Damages For Property Damage.**

As there is no specifically scheduled underlying insurance triggered by the Franklin County Litigation, the CIC Umbrella Policy can only provide coverage if: (1) there is unscheduled insurance that provides coverage for accidents that result in “property damage” or (2) there is an accident that results in “property damage” that is otherwise covered by the CIC Umbrella Policy, but is not covered by specifically scheduled underlying insurance or unscheduled insurance that provides coverage for the accident resulting in “property damage”. In either case, the key is the definition of “occurrence”, which means “an accident . . . that results in ‘property damage’”.

This is not an unusual definition of “occurrence”. Similar definitions of occurrence have been readily applied by Ohio courts, including the Eighth Appellate District, for decades.<sup>10</sup> Indeed, this Court *unanimously* found a virtually identical definition of “occurrence” in another CIC policy to

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<sup>10</sup>*See Rodeen v. Royaltowne Wood Works, Inc.*, 8<sup>th</sup> Dist. No. 59601, 1992 WL 2587, at \*1 (“occurrence means an accident . . . which results in bodily injury or property damage”); *Clapper v. Columbia Mfg. Co.*, 3<sup>d</sup> Dist. No. 5-87-41, 1989 WL 77020, at \*2 (“occurrence means an accident . . . which results in bodily injury or property damage”); *Sanborn v. St. Paul Fire & Marine Ins. Co.* (11<sup>th</sup> Dist. 1993), 84 Ohio App.3d 302, 309, 616 N.E.2d 988 (“Occurrence means an accident . . . which results in bodily injury or property damage”); *The Ohio Cas. Co. v. Jos. Sylvester Constr. Co.*, 11<sup>th</sup> Dist. No. 90-T-4439, 1991 WL 206628, at \*3 (“occurrence means an accident . . . which results in bodily injury or property damage”); *Cincinnati Indemn. Co. v. Martin*, 12<sup>th</sup> Dist. No. CA97-12-248, 1998 WL 281338, at \*1 (“occurrence means an accident . . . which results, during the policy period, in . . . bodily injury”).

be clear and unambiguous. *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003 Ohio 3048, at ¶¶29-35 (defining “occurrence” as “an accident . . . which results, during policy period, in . . . property damage”). In so holding, this Court explained: “***For liability coverage to exist, the property damage must ‘aris[e] out of an occurrence,’ that is, an accident resulting in property damage.***”(Emphasis added). *Id.*, at ¶35. Thus, it is beyond question that this definition of “occurrence” is clear and unambiguous, and that “property damage” must be alleged in order for an “occurrence” to be alleged.<sup>11</sup>

It is also beyond question that the Franklin County Litigation does not seek damages because of “property damage” as defined in the CIC Umbrella Policy. In this regard, the overwhelming weight of Ohio and national authority holds that economic or financial losses, such as the financial losses alleged in the Franklin County Litigation, do not constitute “property damage” within the meaning of the CIC Umbrella Policy. *See e.g., Am. Mfrs. Mut. Ins. Co. v. Den-Mat Cerinate Dental Labs.*, 7<sup>th</sup> Dist. No. 99 C.A. 123, 2001 Ohio 3539, at \*4 (holding that economic losses like lost profits, loss of goodwill, loss of anticipated benefit of a bargain and loss of an investment do not constitute “property damage”); *Monarch Constr. Co. v. Great Am. Ins. Co.*, 1<sup>st</sup> Dist. No. C-960645, 1997 WL 346097, at \*3 (holding that “lost opportunity to enjoy tangible property in the form of cash assets” or “the inability to use tangible property which could have been used elsewhere” does not constitute “property damage”); *Rodeen v. Royaltowne Wood Works, Inc.*, 8<sup>th</sup> Dist. No. 59601, 1992 WL 2587, at \*2 (holding that damages for refusal to complete construction of house at agreed price,

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<sup>11</sup> The Trial Court found a similar definition of “occurrence” in the homeowners policy issued by Fireman’s Fund Insurance Company (“FFI”) precluded coverage under the FFI homeowners policy. (T.d. 53). The definition provided: “Accidental loss of or damage to . . . which results, during the policy period, in bodily injury or property damage”. (*Id.*) Neither CPS nor the State appealed the Trial Court’s ruling on this issue.

defective labor and materials, money not applied to construction contract, delay in construction, repair of defects and emotional distress did not constitute “property damage”); *B.C. & G Weithman v. The Ohio Cas. Grp. of Ins. Cos.*, 3<sup>rd</sup> Dist. No. 3-92-51, 1993 WL 128169, at \*2-3 (holding that sub-contractor’s suit against general contractor to recovery monies withheld by contractor to effect repairs due to sub-contractor’s poor workmanship on construction project was not a claim for “property damage” even assuming repair of sub-contractor’s work was necessary); *The Home Ins. Co. of Illinois v. OM Grp., Inc.*, 1<sup>st</sup> Dist. No. C-20643, 2003 Ohio 3666, at ¶¶9-10, *appeal not allowed by* 100 Ohio St.3d 1486, 2003 Ohio 5992 (holding that claims against product manufacturer that product failed to protect utility poles from natural decay did not constitute claims that product manufacturer caused “property damage” to utility poles and therefore did not trigger CGL policy); *US Fire Ins. Co. v. Chardon Rubber Co.* (6<sup>th</sup> Cir. (Oh.) 1992), 961 F.2d 1580, at \*\*4 (holding that business interruption costs did not constitute “property damage”); *Wiltberger v. Davis* (10<sup>th</sup> Dist. 1996), 110 Ohio App.3d 46, 54-55, 673 N.E.2d 628 (holding that conversion claim was not recognized with respect to theft of money because money was not tangible personal property); *Coulter v. CIGNA Prop. & Cas. Cos.* (N.D. Iowa 1996), 934 F.Supp. 1101, 1111-1117 (claims of economic loss and diminution of value of estates did not constitute claims of “property damage”); *In Re: Russell* (M.D. Mar. 2001), 285 B.R. 877, 884 (claims for economic losses based upon conversion and dissipation of funds did not constitute “property damage”); *Johnson v. Amica Mut. Ins. Co.*, 733 A.2d 977, 1999 ME 106, at ¶¶4-5 (claims for conversion of bank account funds did not constitute “property damage”); *Security State Bank of K.C. v. Aetna Cas. & Sur. Co.* (D. Kan. 1993), 825 F.Supp. 944, 947 (holding that wrongfully withheld escrow payments did not constitute “property damage”).

Neither the State nor CPS dispute the foregoing authorities. Indeed, they have conceded the issue. In this regard, in its rulings regarding other policies, the Trial Court specifically held that the damages sought by the State did not qualify as “property damage.” These policies defined “property damage” in the same manner as the CIC Umbrella Policy. After the Trial Court ruling, neither the State nor CPS appealed this issue. Accordingly, as a matter of law, it is settled that the Franklin County Litigation does not include claims for “property damage”. *Hopkins, supra*. Without damages because of “property damage” and without triggered scheduled underlying insurance, there should have been no way for CPS to access coverage under the CIC Umbrella Policy.

Nevertheless, the Eighth Appellate District found the CIC Umbrella Policy provided coverage for the allegations against CPS *solely* because the Gulf E&O Policy was deemed to provide coverage to CPS—even though Gulf’s policy was not specifically scheduled. In so holding, the majority found that the Gulf E&O Policy was “insurance available to the insured under all other insurance policies applicable to [an accident . . . that results in ‘property damage’].” Somehow, the majority found this language could “be read as covering parallel policies such as CPS’ Gulf policy,” and therefore used the rule of *contra proferentem* to interpret the provision to trigger the CIC Umbrella Policy. However, this reasoning was flawed for several reasons.

First, as previously explained, the majority’s interpretation cannot be reached without ignoring or rewriting the plain language of the CIC Umbrella Policy. Such judicial rewriting violates the common law and constitutional guarantees against the impairment of contracts. The CIC Umbrella Policy expressly defines “occurrence” as “*an accident . . . that results in . . . ‘property damage’*”, and the only policies, other than scheduled policies, that can qualify as “underlying insurance” are those that are applicable to accidents that result in property damage. Because it is undisputed that

there are no allegations of “property damage” in the Franklin County Litigation, the Gulf E&O Policy cannot qualify as “underlying insurance.”

Second, there is no ambiguity in the CIC Umbrella Policy. As explained in *Galatis*, at ¶11: “*As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.*” In this case, the definitions of “occurrence” and “underlying insurance” can be given definite legal meanings. The express meaning of the phrase “applicable to the ‘occurrence’” is “applicable to “*an accident . . . that results in . . . ‘property damage’*”. *Anders, supra*. There is no reasonable basis to interpret this phrase in any other manner.

Finally, it is clear that the majority below ignored or misunderstood the purpose of the CIC Umbrella Policy provisions they purported to interpret. These provisions do not expand the substantive scope of insurance coverage provided by the CIC Umbrella Policy, but instead simply clarify at what monetary level that substantive coverage is triggered. This issue was well examined by the Tenth Appellate District in *Rath v. Grange Mut. Ins. Co.*, 10<sup>th</sup> Dist. No. 95APE12-1654, 1996 WL 339964, *appeal not allowed by* 77 Ohio St.3d 1492, 673 N.E.2d 148. In *Rath*, David Russell (“Russell”) negligently crashed his van into another vehicle killing Doris Rath (“Doris”) and injuring Sidney Rath (“Rath”). Russell’s van was insured by Motorists Mutual Insurance Company (“MMIC”), which provided automobile liability coverage with limits of \$50,000.00 per person/\$100,000.00 per accident. *Id.*, at \*1. Russell was also insured under two liability policies issued by Grange Mutual Insurance Company (“Grange”)—an automobile liability policy and an umbrella policy. *Id.* Grange denied coverage, and the Raths’ filed suit against Russell and Grange.<sup>12</sup>

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<sup>12</sup>Doris and Russell died. Therefore, the claims for and against them were made by their personal representatives.

The Raths conceded there was not any coverage under the Grange automobile liability policy, but instead argued that the Grange umbrella policy provided coverage excess to the MMIC policy. The Raths argued “that ambiguities exist within the umbrella policy, and therefore, the policy should be interpreted in their favor and that the court should find that coverage exists.” *Id.* On cross-motions for summary judgment, the trial court agreed with the Raths and, ***using an analysis identical to Eighth Appellate District’s analysis in this case***, found Grange’s umbrella policy provided coverage:

The trial court determined that the definition of “Retained Limit” was so broad that coverage could be interpreted to apply after any underlying insurance provided coverage for the loss. The trial court concluded:

“\* \* \* According to the language governing ‘coverages’ under the Grange Personal Umbrella Policy, the policy applies when the insured is legally obligated to pay damages for a loss using the formula—Net Loss less the Retained Limit up to the Personal Liability Limit. The policy defines ‘Retained Limit’ as:

- (i) the total limits of any applicable underlying insurance; or
- (ii) the self-insured retention amount i.e. \$250.

The policy also notes that the limits shown on the Declarations Page must be maintained for Required Underlying Insurance. ***Thus, the policy distinguishes between ‘any’ underlying insurance and ‘required’ underlying insurance.***

\* \* \*

***Interpreting the policy language defining ‘retained limit,’ the Court finds a reasonable interpretation is that the policy is triggered when the total limits of any applicable underlying insurance are exhausted.*** (Emphasis added).

*Id.*, at \*3. Based upon the foregoing, the trial court concluded that the Grange umbrella policy must apply (even though the accident did not otherwise fall within its insuring agreement) because the MMIC Policy applied to the accident.

On appeal, however, the Tenth Appellate District disagreed and reversed, explaining:

***[T]he definition of “Retained Limit” does not control the coverage of the policy.*** The trial court erred in its determination of the formula to which the policy applies. Whereas the trial court determined the formula to be: “Net Loss less the Retained Limit up to the Personal Liability Limit,” the “Coverage” section of the policy actually defines the coverage formula by stating that Grange will pay “the Net Loss *to which this insurance applies* minus the Retained Limit” up to the Personal Liability Limit.

***Thus, the initial question is whether this insurance applies, then if it does apply, the amount of the loss is determined using the retained limit. The retained limit does not determine whether the insurance applies but, rather, it determines the amount of loss that Grange will pay.*** We have already determined that this insurance contract did not apply [due to an exclusion]. Since there was no “Net Loss to which this insurance applies,” there is no need to deduct a retained limit . . . Thus, the trial court erred in determining that the Grange umbrella policy was ambiguous and that coverage applied. (Emphasis added).

*Id.*, at \*3-4. Thus, coverage under the MMIC policy did not trigger coverage that was not otherwise provided by the Grange umbrella policy.

In *Rath*, the Grange umbrella policy provided coverage excess of unscheduled underlying insurance only under express limited circumstances--if the umbrella liability policy otherwise “applied” to the loss. In the instant case, the CIC Umbrella Policy only provides coverage excess of unscheduled underlying insurance only under express limited circumstances--excess of “[the insurance available to the insured under all other insurance policies applicable to (an accident . . . that results in “bodily injury” or “property damage”).” While such language is more specific than the broad language in *Rath*, it is otherwise legally indistinguishable--that is, the CIC Umbrella Policy only

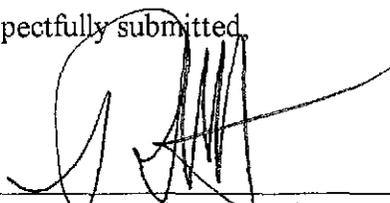
provides coverage excess to unscheduled underlying insurance under express limited circumstances (where the unscheduled underlying insurance is applicable to an accident that result in “property damage”). As discussed in *Rath*, such policy language is not ambiguous and does not expand the substantive coverage provided by the CIC Umbrella Policy. It simply determines the amount of loss that CIC will pay if coverage is otherwise triggered. The Eighth Appellate District committed reversible error when it held to the contrary.

### CONCLUSION

The standard ISO policy language in the CIC Umbrella Policy provides coverage under limited circumstances: (1) in excess of specifically scheduled underlying insurance or (2) where there is an accident that results in “property damage”, i.e., an occurrence. Neither circumstance exists in this case. Consequently, the Eighth Appellate District committed reversible error when it compelled CIC to provide coverage for the Franklin County Litigation. Based upon the foregoing, this Court should

reverse the Eighth Appellate District's decision and remand this case to the Trial Court with instructions to re-enter judgment for CIC.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing has been served by ordinary U.S. Mail, this 9 day of November

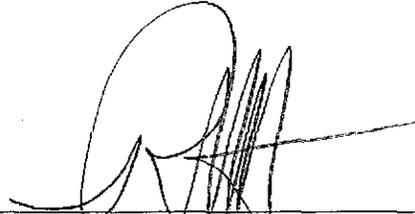
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IN THE SUPREME COURT OF OHIO

06 - 0722

THE CINCINNATI INSURANCE CO., et al )
)
Plaintiffs-Appellants )
)
vs. )
)
CPS HOLDINGS, INC, ET AL. )
)
Defendants-Appellees )

Case No.
On Appeal from Cuyahoga County
Court of Appeals, Eighth Appellate
District, Case Nos. 85967/ 85969

NOTICE OF APPEAL OF APPELLANT THE CINCINNATI INSURANCE COMPANY

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STATE OF OHIO ) IN THE COURT OF COMMON PLEAS  
 ) SS:  
 CUYAHOGA COUNTY ) CASE NO.: 519559

THE CINCINNATI INSURANCE )  
 COMPANY )  
 Plaintiff )  
 )  
 )  
 )  
 v. )  
 )  
 CPS HOLDINGS, INC., et al., )  
 )  
 Defendants )

OPINION & ORDER

William J. Coyne, J.:

FACTS

{1} Multiple Defendants worked in conjunction with the State of Ohio Department of Administrative Services (“DAS”) to provide natural gas services to the state. However these Defendants allegedly siphoned monies owed to DAS through a scheme to defraud the State. DAS sued CPS Holdings, Inc. (“CPS”), IQ Solutions (“IQ”), NCP Limited Partnership (“NCP”), Robert Kendall and others in Franklin County (case #03-CVH05-6054) for breach of contract, breach of implied warranty, breach of express warranty, conversion, unjust enrichment, negligence, professional negligence, liability under R.C. §117.28 and piercing the corporate veil. These Defendants asked their insurance carriers to defend them in the Franklin County suit and to insure them under their respective policies.

{¶2} While the underlying action is properly located in Franklin County and the actions giving rise to the instant suit are best litigated in Franklin County, Cincinnati Insurance Company (“CIC”) for some unknown reason filed the instant action in Cuyahoga County, requesting a declaration that it need not defend or insure for the actions alleged in the Franklin County suit. Several other insurance Companies joined the instant suit seeking the same relief. The defendants in the Franklin County suit responded by requesting a declaration from this Court that their respective insurance companies have a duty to defend and offer insurance coverage in the Franklin County case.

{¶3} The duty to defend is determined by the allegations alleged in the Franklin County complaint. See *Motorist Mutual Insurance v. Trainor* (1973), 33 Ohio St.3d 41. If the complaint states a claim that potentially is within the policy coverage, the insurer must defend the insured from the outset of the case. *Id.* However, the “substance of the claims rather than the allegations of the complaint” are controlling. See *Ippolito v. First Energy Corp.* (2004, 8 Dist.), 2004 WL 2495665, at \*1. Indeed, Judge Michael Corrigan affirmed the dismissal of a legal malpractice case “Despite couching [plaintiff’s] claims as ‘breach of contract,’ ‘misrepresentation,’ and ‘promissory estoppel’ . . .” *Leski v. Ricotta* (2004, 8 Dist.), 2004 WL 1232536, at \*2. The substance of the instant case is the intentional act of conversion, notwithstanding the allegations in the complaint. However, the parties have not asked this Court to make a declaration as to the deficiencies of the pleadings. Therefore, the Court will analyze whether any of the instant insurance policies have a duty to defend (and more narrowly to indemnify) their insureds under the allegations of the instant complaint.

#### CIC’S INSURANCE POLICIES AS TO CPS AND IQ

{¶4} Plaintiff CIC insures Defendants CPS and IQ in Franklin County under a primary policy (#0723237) and an excess policy (#4477548). Parties agree that the excess policy increases the coverage limits but not the scope of coverage. Therefore, the Court will first analyze the primary policy to determine whether coverage exists, and if so will apply the limits of both policies.

{¶5} The primary CIC policy insures against “personal injury” and “property damage.” The sole issue related to this policy (and the excess policy) is whether the alleged breach of contract

and conversion (the Franklin County case) constitutes an occurrence of personal injury or property damage as defined by the policy. The policy defines bodily injury to include sickness disease or death. CPS and IQ do not allege any physical or mental illness or harm related to the Franklin County case that would trigger coverage for bodily injury. The policy defines property damage as “Physical injury to tangible property, including all resulting loss of use of that property,” or “Loss of use of tangible property that is not physically injured.”

{¶6} CPS and IQ’s allegedly intentional acts to breach their contract and steal money from DAS will indeed harm the financial welfare to these two Defendants. However, the Court cannot say that the Plaintiff’s actions which opened themselves up to liability constitute property damage. The loss of money does not equal property damage. *Walther v. Central Trust Co.* (1990, 2 Dist.), 70 Ohio App.3d 26 affirmed the trial court’s decision to dismiss a replevin claim for funds in a bank account. The Second District Court of Appeals held that money deposited in an account is not specific personal property subject to a replevin action. Defendants CPS and IQ have not presented any law to suggest that the Second District’s ruling would not apply to cases other than replevin actions. Accordingly, this Court adopts the *Walther* decision and declares that the Defendants’ actions to allegedly convert public funds for private use is not an instance of property damage. Plaintiff CIC has no duty to defend or insure Defendants CPS and IQ on the primary policy. Therefore, there is no coverage under the excess policy. Conversely, Defendant’s CPS and IQ’s motion for declaratory relief is denied.

#### CIC’S INSURANCE POLICIES AS TO NCP LIMITED PARTNERSHIP

{¶7} Plaintiff CIC also insured NCP Limited Partnership (“NCP”) under two policies: the primary policy (#0439658) and the excess policy (#4416994). These two policies are the same as those analyzed above except they insure for damages in the event of “personal and advertising liability,” as well as “bodily injury” and “property damage.” As discussed above, the Court declines to accept the theory that the alleged conversion and breach of contract in the Franklin County case constitute either bodily injury or property damage. Moreover, the addition of “personal and advertising liability” does not create a duty to defend or indemnify under the primary policy. Indeed, Defendant NCP does not argue that the Franklin County case relates to “personal or advertising liability.”

{¶8} Plaintiff and Defendant NCP agree that the excess policy would only apply if there were a duty to defend under the primary policy. Since there is no duty to defend on the primary policy, there is likewise no duty under the excess policy. Defendant NCP's motion for declaratory relief is therefore denied.

FIREMAN'S FUND INSURANCE POLICIES AS TO DEFENDANTS ROBERT AND LINDA KENDALL

{¶9} Defendants Robert and Linda Kendall owned and operated CPS and IQ. The State of Ohio alleges that these Defendants stole money from the State through a series of contracts whereby the Kendalls and their companies were to provide natural gas to the State. FFI holds the homeowner's policy for the Kendalls. The Kendalls filed a motion for declaratory relief seeking a declaration that FFI must insure and defend them for the underlying action. However, the alleged conversion, theft and fraud perpetrated by the Kendalls are not "occurrences" as defined by the homeowner's policy. Nor does the homeowner's policy cover acts committed under a business.

{¶10} The FFI Policy states that there is no coverage for "damages resulting from bodily injury, person injury or property damage arising out of:

1. any criminal, willful malicious or other act or omission that is reasonably expected or intended by any insured to cause damage.
7. business activities or business property of any insured" (emphasis added).

Parties do not dispute that the Kendalls are insureds under the FFI Policy. But the conversion alleged by the State is wholly a result of the business activities of the Defendants. Even if the State can pierce the corporate veil, the individual Defendants incurred liability due to their criminal acts through the businesses. The Kendalls are precluded from coverage on both grounds. Therefore, FFI has no duty to defend or cover the tortious business actions of the Kendalls.

GULF UNDERWRITERS INSURANCE POLICY AS TO CPS AND IQ

{¶11} Gulf Underwriters Insurance Company ("Gulf") issued two insurance policies to CPS and IQ. (The Court will consider both companies together under these policies.) The first policy (#GU6617496) was effective from November 13, 2001 to November 13, 2002 (the parties later

amended the time period to span December 13, 2001 through December 13, 2002). The second Gulf policy (#GU6617496-A) renewed the first policy for the term of December 13, 2002 through December 13, 2003. The policies have a retroactive date of November 13, 1997 to be applied all claims for wrongful acts, as discussed below. These parties seek a declaration from this Court relating to coverage and duties to defend under the policies.

{¶12} Gulf and its insured agree that the policies are claims made policies, where coverage applies upon a claim being made by the insured. “Claims made policies, unlike occurrence policies, are designed to limit liability to a fixed period of time. Only claims made against the insured during the policy period, therefore, will be considered within the scope of coverage, even if the acts giving rise to liability occurred before the policy went into effect.” *LaValley v. Virginia Sur. Co.* (2000, N.D. Ohio), 85 F.Supp.2d 740, 744. Therefore, the chronology of events is important to understand. On November 14, 2002 DAS asked CPS/IQ to pay the past due invoices from the natural gas suppliers and offered CPS/IQ 30-days to cure its breach. DAS then notified CPS/IQ of its claim for damages on January 8, 2003. CPS/IQ amended their obligations to DAS in an agreement dated January 31, 2003. Counsel for CPS/IQ sent a letter to Media Professional Insurance (the company that represents Gulf) notifying Gulf of the DAS claim of November 14, 2002, but failed to mention the demand of January 8, 2003. Media Professional acknowledged receipt of the letter by return letter dated March 19, 2003. Gulf disputes having received a claim on the policies on April 7, 2003. DAS files the Franklin County case on May 30, 2003. DAS amended the complaint and CPS/IQ filed an answer on December 23, 2003. CPS/IQ entered into settlement negotiations with DAS and admitted liability in December of 2003. CPS/IQ first notified Gulf on January 2, 2004 about the Franklin County suit and the prior claim on the policy. Gulf contends that this notice triggers the claims made police but was made after the applicable policy period.

{¶13} Gulf also argues that the policies due not afford CPS/IQ coverage or a defense because (1) CPS/IQ failed to cooperate with Gulf by withholding information, (2) the policy excludes coverage for these particular claims, and (3) CPS/IQ admitted liability in the Franklin County case prior to Gulf’s knowledge of the claims.

{¶14} As a condition precedent to coverage, CPS/IQ had to notify Gulf in writing of any claim for damages. Gulf Policy at p. 10, 5.C.2. While DAS requested compliance on November 14, 2002, it was not a demand. Rather, DAS offered CPS/IQ 30-days to cure the breach. DAS made a formal demand two months later on January 8, 2003. CPS/IQ first corresponded with Gulf in March 2003 and informed Gulf of the November 14<sup>th</sup> request. However, CPS/IQ failed to mention the formal demand for damages made on January 8, 2003. Gulf received written notice on January 2, 2004, after the policy period of the 2001 policy.

{¶15} DAS made a formal claim against CPS/IQ during the 2002 policy period, even though CPS/IQ did not relay this information to Gulf until after the policy period expired. The policy insures for “wrongful acts” which includes negligence. The Franklin County case alleges negligent acts as well as intentional acts. The Gulf policy does not cover (or even mention) intentional acts; therefore the Court will discuss the claims of negligence only. The “wrongful acts” condition of the policy applies to written claims first made on acts committed “between the Retroactive date and the inception date of the policy” if each of three conditions are met. Policy p.10, C.2.b. First, if a written claim is made during the policy period, Gulf will consider it made when it is received by the insured. Second, the insured did not know of the occurrences that could “reasonably be expected” to raise a claim prior to the inception date of the policy. Third, no other valid insurance exists for the claim.

{¶16} Gulf’s wrongful acts clause will cover claims arising from November 13, 1997 through November 13, 2002. (The Court already discussed the 2001 policy.) Parties do not dispute that DAS made a claim against CPS/IQ during the 2002 policy period (January 8, 2003). Gulf considers the claim made on January 8, 2003. However, CPS/IQ could reasonably have anticipated a claim prior to the inception of the 2002 policy. DAS notified CPS/IQ that it was in breach one month prior to the inception date. CPS/IQ knew on November 14, 2002 that circumstances existed upon which they reasonably should have foreseen a claim would arise from its alleged wrongful acts. The 2002 Gulf policy does not afford CPS/IQ a defense or indemnification for these wrongful acts that they should have known about prior to December 13, 2002.

CONCLUSION

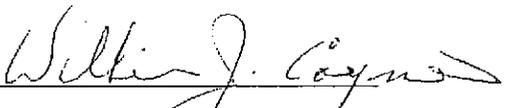
{¶17} For the foregoing reasons, the Court finds and declares that CIC owes no duty to defend or indemnify CPS, IQ or NCP. Nor does FFI have a duty to defend or indemnify Robert and Linda Kendall. Lastly, Gulf does not have a duty to defend or indemnify CPS or IQ under either policy.

{¶18} Moreover, public policy does not support the theory that an insurance company must defend and insure the intentional acts of its insureds. Although the complaint is styled to allege negligence, the substance of the claim is theft. The Court refuses to declare that an insurer must defend for criminal acts of its insureds.

IT IS SO ORDERED. FINAL.

1-24-05

Date

  
\_\_\_\_\_  
WILLIAM J. COYNE, JUDGE

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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent to the following parties by regular U.S. mail, postage paid, this 24 day of January 2005, to:

Richard Garner  
Dennis Fogarty  
101 Prospect Avenue West  
1700 Midland Building  
Cleveland, OH 44113

Lilly Stacy  
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Robert Rutter  
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Richard Brooks  
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WILLIAM J. COYNE, JUDGE

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

Nos. 85967 and 85969

THE CINCINNATI INSURANCE CO. :  
 : JOURNAL ENTRY  
 Plaintiff-Appellee :  
 : AND  
 vs. :  
 : OPINION  
 CPS HOLDINGS, INC., ET AL. :  
 :  
 Defendants-Appellants :  
 :  
 :  
 DATE OF ANNOUNCEMENT :  
 OF DECISION : FEBRUARY 16, 2006  
 :  
 CHARACTER OF PROCEEDINGS :  
 : Civil appeal from  
 : Common Pleas Court  
 : Case No. CV-519559  
 :  
 JUDGMENT :  
 : REVERSED AND REMANDED.  
 :  
 DATE OF JOURNALIZATION : FEB 27 2006

APPEARANCES:

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-CONTINUED-

VOL 608 NO 0036

00010



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FRANK D. CELEBREZZE, JR., P.J.:

Appellants, CPS Holdings, Inc., CPS Holding Company, Ltd., and I.Q. Solutions, L.L.C. (hereafter collectively "CPS"), along with the State of Ohio, Department of Administrative Services ("DAS"), appeal the trial court's decision in favor of appellees, Cincinnati Insurance Company ("CIC") and Gulf Underwriters Insurance Company ("Gulf"). The parties filed competing cross-motions for summary judgment/declaratory relief, and the trial court denied appellants' motion and granted appellees' motion. Upon review of the record and the arguments of the parties, we now reverse and remand the matter to the trial court for the reasons set forth below.

This appeal stems from a dispute between appellants CPS and DAS. CPS, as a third-party administrator, originally contracted with DAS to provide natural gas services to state agencies. DAS claims that during the course of this relationship, CPS mismanaged state funds and breached its contractual duties. Essentially, DAS contends that CPS failed to use the money it was paid to obtain natural gas services and instead kept and commingled those funds with its own funds. DAS claims a total loss in excess of \$5,771,302.

On May 30, 2003, DAS filed suit in Franklin County Common Pleas Court. The original complaint set forth claims for negligence, professional negligence, breach of implied warranty, breach of contract, breach of express warranty, conversion, and

unjust enrichment. On December 8, 2003, DAS filed an amended complaint, adding parties and claims for the recovery of public funds, pursuant to R.C. 117.28, and piercing the corporate veil.

CPS sought a defense of the lawsuit from its liability insurers, appellees Gulf and CIC among them, and both insurers denied any defense obligation. As previously mentioned, the underlying litigation was filed and is properly located in Franklin County. However, in an unexplained tactic, CIC filed for declaratory judgment against CPS in the Cuyahoga County Court of Common Pleas. While it was acknowledged that the instant suit would probably best be litigated in Franklin County, the trial court accepted the filing and this matter went forward in Cuyahoga County. CPS then filed a counterclaim against CIC, Gulf, and other insurers. Both sides filed cross-motions for summary judgment and declaratory relief. On October 29, 2004, the trial court held a hearing to permit all parties to present arguments on the summary judgment and declaratory relief issues. The trial court issued its opinion and judgment entry against CPS and in favor of the insurers on January 24, 2005.

Appeals were brought by both CPS (Cuy. App. No. 85967) and DAS (Cuy. App. No. 85969) solely against appellees CIC and Gulf. Those appeals have been consolidated in the interest of judicial economy. Both appellants assert essentially the same assignments of errors, which are listed in the appendix of this opinion.

### Standard of Review

In general, Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-96, 604 N.E.2d 138.

This court reviews the lower court's granting of summary judgment de novo. *Brown v. County Comm'rs* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the granting of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record \*\*\* in a light most favorable to the nonmoving party \*\*\*. The motion must be overruled if reasonable minds could find for the party opposing the

motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140. However, a determination as to the duty to defend is a legal issue to be decided by the court, not a factual issue for a jury to resolve. *Leber v. Smith* (1994), 70 Ohio St.3d 548, 639 N.E.2d 1159; *Erie Ins. Group v. Fisher* (1984), 15 Ohio St.3d 380, 474 N.E.2d 320.

#### Policy Analysis in General

In *Hionis v. Nationwide Inc. Co.*, Cuyahoga App. No. 80516, 2003-Ohio-1333, this court held the following when construing contracts of insurance:

"Where the terms of an insurance policy are clear and unambiguous, those terms must be applied to the facts without engaging in any construction. *Santana v. Auto Owners Ins. Co.* (1993), 91 Ohio App.3d 490, 632 N.E.2d 1308, appeal dismissed, 69 Ohio St.3d 182, 1994-Ohio-418, 631 N.E.2d 123. When the policy terms have a plain and ordinary meaning, it is not necessary or permissible for a court to construe a different meaning. *Ambrose v. State Farm Fire & Cas.* (1990), 70 Ohio App.3d 797, 800, 592 N.E.2d 868, jurisdictional motion overruled (1991), 60 Ohio St.3d 709, 573 N.E.2d 671. In other words, 'the plain meaning of unambiguous language will be enforced as written.' *Mehl v. Motorists Mut. Ins. Co.* (1992), 79 Ohio App.3d 550, 607 N.E.2d 897.

*Nationwide Mut. Ins. Co. v. Finley* (1996), 112 Ohio App.3d 712, 679 N.E.2d 1189. Further:

"Insurance policies are generally interpreted by applicable rules of contract law. *Burriss v. Grange Mut. Cos.* (1989), 46 Ohio St.3d 84, 545 N.E.2d 83. If the language of the insurance policy is doubtful, uncertain, or ambiguous, the language will be construed strictly against the insurer and liberally in favor of the insured. *Faruque v. Provident Life & Acc. Ins. Co.* (1987), 31 Ohio St.3d 34, 31 Ohio B. 83, 508 N.E.2d 949. However, the general rule of liberal construction cannot be employed to create an ambiguity where there is none. *Karabin v. State Auto. Mut. Ins. Co.* (1984), 10 Ohio St.3d 163, 166-167, 10 Ohio B. 497, 462 N.E.2d 403. If the terms of a policy are clear and unambiguous, the interpretation of the contract is a matter of law. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 15 Ohio B. 448, 474 N.E.2d 271." *Progressive Ins. Co. v. Heritage Ins. Co.* (1996), 113 Ohio App.3d 781, 784-785, 682 N.E.2d 33." Id.

#### The Gulf Policy

There were two "claims made" policies issued to CPS by Gulf. The first policy was effective from November 13, 2001 to November 13, 2002. The parties later amended the effective dates to include December 13, 2001 through December 13, 2002. The second policy renewed the first policy with effective dates of December 13, 2002

through December 13, 2003. Both policies contained a retroactive date of November 13, 1997. After review of the facts, policy language, and applicable law, the trial court, in a very extensive opinion, entered a ruling in favor of Gulf. While this court recognizes the thoroughness of the trial court in this matter as evidenced by its opinion, we respectfully disagree with its findings.

The trial court's decision focused on the chronology of events in conjunction with a "claims made" policy. With "claims made" policies, "[o]nly claims made against the insured during the policy period \*\*\* will be considered within the scope of coverage, even if the acts giving rise to liability occurred before the policy went into effect." (J.E. pg. 5, citing *LaValley v. Virginia Sur. Co.* [2000, N.D. Ohio], 85 F.Supp.2d 740, 744.)

Under the Gulf policy, a "claim" is defined as: "\*\*\* a demand or assertion of a legal right seeking **Damages** made against any of **You**." (Gulf policy, pg. 14.)

The Gulf policy further reads: "We will consider a **Claim** to be first made against **You** when a written **Claim** is first received by any of **You**." (Gulf policy, pg. 10.)

CPS first became aware of the accusations forming the basis of DAS' eventual complaint through a letter it received from DAS dated November 14, 2002, which was within the first policy period. In that letter, DAS advised that CPS had failed to uphold its

contractual obligations. DAS specifically claimed that CPS had not made timely payments in accordance with the contract and demanded payment of those obligations. DAS concluded the letter by demanding a cure from CPS, stating that if CPS failed to cure, CPS "[would] be liable for any additional cost that the state incurs for replacement services as well as any other damages related to the breach."

The trial court found that this communication did not constitute a demand as defined by the policy; however, a review of the record leads this court to conclude that the November 14, 2002 letter was indeed a "demand or assertion of a legal right seeking damages" because the letter clearly made assertions of damages incurred due to the actions of CPS. The letter also asserted the legal liability of CPS to compensate the injured parties for those damages.

The lower court held that a claim was not officially asserted by DAS until its letter to CPS dated January 8, 2003. The substance of that letter was confined to one sentence, which reads: "The purpose of this letter is to formally put you on notice of our claim for damages as a result of your breach of duty relating to the above captioned contract with the State of Ohio." This court, however, finds that the November 14, 2002 letter more fully articulated DAS' claim of damages, thus placing DAS' complaint within the appropriate time frame to trigger Gulf's duty to defend.

The claims asserted in DAS' complaint also fall within the scope of Gulf's duty to defend. According to the terms of the policy, Gulf has a "right and duty to appoint an attorney and defend a covered Claim, even if the allegations are groundless, false or fraudulent." (Gulf policy, pg. 8.) Covered claims under the policy include "Wrongful Acts," such as: "1. A negligent act, error or omission." (Gulf policy, pg. 15.)

The claims asserted by DAS in its underlying complaint include claims of negligence and professional negligence. These claims are clearly covered under the wrongful acts portion of the Gulf policy. In *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St.3d 177, the Ohio Supreme Court held the following:

"Where the pleadings unequivocally bring the action within the coverage afforded by the policy, the duty to defend will attach. However, where the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage had been pleaded, the insurer must accept the defense of the claim. Thus, the scope of the allegations may encompass matters well outside the four corners of the pleadings." *Id.*, syllabus.

This court finds that DAS's November 14, 2002 letter triggered Gulf's duty to defend under the terms of the policy. Any analysis

of the substantive facts giving rise to DAS' complaint by the trial court is beyond the scope of consideration at a summary judgment/ declaratory judgment proceeding. Further, such proceeding is not the proper forum at which to determine Gulf's duty to indemnify since the underlying complaint is still pending. This court finds merit in appellants' assignments of error concerning Gulf's duty to defend. The lower court's finding that Gulf has no duty to defend is therefore reversed.

#### The CIC Policy

CIC insured CPS under a primary commercial general liability policy (No. 0723237) and an umbrella policy (No. 4477548). The primary policy provided comprehensive commercial coverage between June 1, 2000 and June 1, 2003, insuring CPS against personal injury and property damage claims. Upon review of the terms as defined by the policy, the trial court found that the claims made by DAS were not covered by this primary policy. Appellants have now conceded that determination; however, they challenge the trial court's finding that the umbrella policy "increases the coverage limits but not the scope of coverage." (J.E., pg. 2.)

It is appellants' contention that if there is potential coverage for CPS under the terms of the Gulf policy, then there is potential coverage under the CIC umbrella policy. They argue that the umbrella policy requires CIC to pay any damages in excess of the underlying insurance, which the policy defines as:

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\*\*\*\* the policies of insurance listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance policies applicable to the occurrence. Underlying insurance also includes any type of self-insurance or alternative method by which the insured arranges funding for legal liabilities that affords coverage that this policy covers." (Emphasis added.)

The only policy listed in the Schedule of Underlying Policies is the CPS Primary Policy (No. 0723237). However, the underlying insurance language, "and the insurance available to the insured under all other insurance policies applicable to the occurrence," can be read as covering parallel policies such as CPS' Gulf policy. "If a court finds that the language in question in an insurance policy is reasonably susceptible of more than one meaning, the court will construe it liberally in favor of the insured and strictly as against the insurer." *Buckeye Union Ins. Co. v. Price* (1974), 39 Ohio St.2d 95, 311 N.E.2d 844, syllabus.

Since this court has found that the Gulf policy requires a duty to defend, that policy arguably falls within the underlying insurance language. We, therefore, agree with appellants' contention that CIC does have a duty to defend since the Gulf policy falls under CIC's umbrella policy. Thus, the lower court's finding that CIC has no duty to defend is reversed.

**Conclusion**

We respectfully find that the lower court erred in determining that appellees' insurance policies did not create a duty to defend and/or indemnify appellants.

Judgment reversed and case remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover of appellees costs herein taxed.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

*Frank D. Celebrezze, Jr.*  
FRANK D. CELEBREZZE, JR.  
PRESIDING JUDGE

MARY EILEEN KILBANE, J., CONCURS;

COLLEEN CONWAY COONEY, J., DISSENTS  
(WITH SEPARATE DISSENTING OPINION).

ANNOUNCEMENT OF DECISION  
PER APP. R. 22(E), 22(D) AND 26(A)  
RECEIVED

FILED AND JOURNALIZED  
PER APP. R. 22(E)

FEB 16 2006

FEB 27 2006

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *GF* DER.

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *GF* DER.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A) (1).

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85967

CINCINNATI INSURANCE COMPANY :  
 :  
 Plaintiff-Appellee : D I S S E N T I N G  
 :  
 vs. : O P I N I O N  
 :  
 CPS HOLDINGS, INC., et al. :  
 :  
 Defendants-Appellants :

DATE: FEBRUARY 16, 2006

COLLEEN CONWAY COONEY, J., DISSENTING:

I respectfully dissent.

In this consolidated appeal, defendants-appellants, State of Ohio, Department of Administrative Services ("DAS") and CPS Holdings, Inc., CPS Holding Company, Ltd., and IQ Solutions, L.L.C. ("CPS"), appeal the trial court's decision granting summary judgment in favor of plaintiffs-appellees, Cincinnati Insurance Company ("Cincinnati") and Gulf Underwriters Insurance Company ("Gulf"). Finding no merit to the appeal, I would affirm.

Cincinnati filed a declaratory action against CPS, which counterclaimed and brought claims against DAS and Gulf. Cincinnati sought a judgment declaring that it did not owe CPS a duty to indemnify or defend.

The substance of the matter is that CPS had professional insurance policies with Cincinnati and Gulf. DAS contracted with

CPS to provide services to its natural gas suppliers, including making payments to those suppliers. CPS failed to make the requisite payments and converted DAS' funds for corporate use. DAS sued CPS and its insurance companies. Cincinnati and Gulf both denied coverage because the liability stemmed from an intentional breach of contract, which was excluded from both policies.

The trial court granted summary judgment in favor of Cincinnati and Gulf on the declaratory action, finding that no duty to defend or indemnify CPS existed.

DAS and CPS appeal this decision. DAS raises three assignments of error and CPS raises two assignments of error, which will be addressed together where appropriate.

Standard of Review

Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. La Pine Truck Sales & Equipment* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, as follows:

"Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the

burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264."

Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

Gulf Underwriters Insurance

In the first assignments of error raised by DAS and CPS, they argue that the trial court erred in finding that Gulf did not have a duty to defend or indemnify CPS against the DAS lawsuit.

"The test of the duty of an insurance company, under a policy of liability insurance, to defend an action against an insured, is the scope of the allegations of the complaint in the action against the insured, and where the complaint brings the action within the coverage of the policy the insurer is required to make defense, regardless of the ultimate outcome of the action or its liability to the insured. (*Socony-Vacuum Oil Co. v. Continental Cas. Co.*, 144 Ohio St. 382, approved and followed.)" *Motorists Mutual Ins.*

Co. v. Trainor (1973), 33 Ohio St.2d 41, 294 N.E.2d 874, paragraph two of the syllabus.

In the instant case, DAS is suing CPS for breach of contract, breach of express and implied warranty, conversion, unjust enrichment, negligence, professional negligence, liability under R.C. 117.28, and piercing the corporate veil. It is undisputed that Gulf's policy does not cover actions for breach of contract or warranty; thus, DAS and CPS maintain this assigned error under the negligence and professional negligence claims.

Pursuant to the terms of the policy, Gulf provides an absolute duty to defend "a covered claim, even if the allegations are groundless, false or fraudulent." A covered claim under this policy is defined as a "wrongful act" which includes "a negligent act, error or omission." The policy expressly excludes intentional acts, claims arising out of ill-gotten gains or profits, and liability assumed under a contract.

Following the syllabus in *Trainor*, supra, we must look at the allegations contained in the complaint to determine whether a duty to defend exists. The complaint, while alleging negligence and professional negligence, essentially stems from CPS' breach of contract with DAS and the improper recovery of profits for CPS' use. The actual substance of the complaint, not how it is categorized, determines the nature of the claims. *Ippolito v. First Energy Corp*, Cuyahoga App. No. 84267, 2004-Ohio-5876. "The

term 'claim,' as used in the context of Civ. R. 54(B), refers to a set of facts which give rise to legal rights, not to the various legal theories of recovery which may be based upon those facts. *CMAX, Inc. v. Drewry Photocolor Corp.* (9th Cir. 1961), 295 F.2d 695, 697. Unless a separate and distinct recovery is possible on each claim asserted, multiple claims do not exist. *Local P-171 v. Thompson Farms Co.* (7th Cir. 1981), 642 F.2d 1065, 1070-71." *Aldrete v. Foxboro Company* (1988), 49 Ohio App.3d 81, 550 N.E.2d 208.

Although DAS has alleged claims for negligence and professional negligence, the claims stem from the facts and circumstances of CPS' breach of contract. Moreover, in order to maintain a negligence action, DAS must prove that CPS owed them a duty. The only duty that arises under this cause of action is a contractual one, which takes the negligence action outside of Gulf's policy coverage. In fact, the complaint alleges under the "negligence" and "professional negligence" claims that CPS "owed Plaintiff a duty to provide reasonable care to act in a competent manner in the course of providing cash management and billing services to Plaintiff." This duty arises under the contract between CPS and DAS because the contract was to provide cash management and billing services. Under "Schedule of Insured Services," Gulf's policy states: "Providing energy management

consulting and energy management services to others, including accounting, auditing and administrative services."

Therefore, because the gravamen of the complaint involves a breach of contract and conversion, Gulf's policies do not cover this action and Gulf has no duty to defend CPS.

Additionally, the Ohio Supreme Court recently addressed the issue of filing a negligence action for recovery of economic losses when a contract exists, stating:

"The economic-loss rule generally prevents recovery in tort of damages for purely economic loss. See *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 45, 537 N.E.2d 624; *Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Ass'n* (1990), 54 Ohio St.3d 1, 3, 560 N.E.2d 206. "The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Chemtrol*, 42 Ohio St.3d at 44, 537 N.E.2d 624, quoting *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.* (Iowa 1984), 345 N.W.2d 124, 126. See, also, *Floor Craft*, 54 Ohio St.3d at 3, 560 N.E.2d 206. This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that 'parties to a commercial transaction should remain free to govern their own affairs.' *Chemtrol*, 42 Ohio St.3d at 42, 537 N.E.2d 624. See, also, *Floor Craft*, 54 Ohio St.3d at 7, 560 N.E.2d 206, quoting *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.* (1988), 236 Va. 419, 425, 374 S.E.2d 55, 5 Va. Law Rep. 1040. "Tort law is not designed \* \* \* to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts." *Floor Craft*, 54 Ohio St.3d at 7, 560 N.E.2d 206, quoting *Sensenbrenner*, 236 Va. at 425, 374 S.E.2d 55." *Corporex Development & Construction Mgmt. v. Shook, Inc.*,

106 Ohio St.3d 412, 414, 2005-Ohio-5409, 835 N.E.2d 701 (Emphasis added).

Therefore, under this theory, DAS is precluded from filing a negligence action against CPS for breach of contract.

In the alternative, DAS has asked this court to adopt the reasonable-expectation doctrine concerning an insured's expectation of insurance coverage. The Ohio Supreme Court recently addressed this doctrine and declined to adopt it in *Wallace v. Balint*, 94 Ohio St.3d 182, 189, 2002-Ohio-480, 761 N.E.2d 598, stating:

"This doctrine is explained in 2 Restatement of Law 2d, Contracts (1981), Section 211(3), which provides:

'Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.'

Professor Keeton has described the reasonable-expectation doctrine: 'The objectively reasonable expectations of applicants and beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.' Keeton, *Insurance Law Rights at Variance with Policy Provisions* (1970), 83 Harv.L.Rev. 961.

Because we have found that Gulf's policy specifically excludes coverage for liabilities arising out of contract, and CPS and DAS concede this fact, there is no basis to adopt the reasonable-expectation doctrine. Gulf does not have a duty to defend because of some obscure term that was or was not included. Rather, Gulf does not have a duty to defend because CPS breached its written contract with DAS. Lack of coverage results from CPS' actions, not

the parties lack of intent or expectation. Therefore, we should find that the reasonable-expectation doctrine is inapplicable in this instance. Moreover, we should nevertheless decline to adopt this doctrine because the Ohio Supreme Court has recently decided not to adopt it. See, *Wallace*, supra.

Accordingly, I would overrule the first assignments of error.

Cincinnati Insurance

In the second assignments of error raised by DAS and CPS, they argue that the trial court erred in finding that Cincinnati did not potentially have a duty to defend or indemnify CPS against DAS' lawsuit.

Cincinnati issued a general commercial liability policy and an umbrella policy to CPS. DAS and CPS both have abandoned any claim regarding the general liability policy. Instead, they claim that the umbrella policy covers this lawsuit and therefore triggers Cincinnati's duty to defend or indemnify.

Construction of an insurance policy is a matter of law. *Chicago Title Ins. Co. v. Huntington National Bank* (1999), 87 Ohio St.3d 270, 273, citing *Latina v. Woodpath Developments Co.* (1991), 57 Ohio St.3d 212, 214, 567 N.E.2d 262. In interpreting policies, the plain and ordinary meaning of the language used in the policy is reviewed, unless another meaning is clearly apparent. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus.

DAS and CPS both contend that the umbrella policy affords broad blanket coverage, covering any available insurance to the insured, including the general liability policy and Gulf's policy. DAS and CPS both claim that Cincinnati's umbrella policy provides excess coverage to the Gulf policy, extending the limits and scope of the policy. They base this contention on what the umbrella policy specifically excludes and fails to exclude from coverage. "Although the CIC umbrella policy specifically excludes certain designated professional services provided by CPS/IQ (i.e., computer programming and consulting; computer manufacturing and software; electronic data processing services), the policy does not specifically exclude the professional services provided by IQ to the State \* \* \*." This argument is flawed for two reasons.

First, the umbrella policy covers damages only for bodily injury, property damage, personal injury or advertising injury which are not covered by underlying insurance or other insurance. In the instant case, DAS is seeking only monetary damages, which are not property damages.

Therefore, because DAS is seeking monetary damages, the umbrella policy does not cover the claims; thus, Cincinnati does not owe CPS a duty to defend.

Second, merely because the policy does not specifically exclude the services listed under the Gulf policy does not mean that the policy includes these services. Giving credence to DAS'

and CPS' arguments would open the door to ANY service not specifically listed. This could include legal services, landscaping services, transportation services, or psychological services. DAS' and CPS' reasoning is completely without merit. Moreover, they fail to support their argument with any case law that holds that anything specifically excluded is inherently included.

Therefore, I would find that Cincinnati, under its umbrella policy, does not owe CPS a duty to defend.

Accordingly, the second assignments of error are overruled.

DAS' Final Assignment of Error

In DAS' final assignment of error, it argues that the trial court erred in construing its lawsuit against CPS as sounding in intentional and criminal liability only, and disregarding DAS' claims for negligence and professional negligence.

As explained above, DAS' claims for negligence and professional negligence are couched under the theory of breach of contract. Therefore, it was not error for the trial court to disregard those claims.

Accordingly, DAS's third assignment of error should be overruled and judgment affirmed.

APPENDIX A

**Appellant CPS's Assignments of Error:**

I. THE TRIAL COURT ERRED IN FINDING THAT GULF UNDERWRITERS INSURANCE COMPANY DID NOT HAVE A DUTY TO DEFEND CPS/IQ IN THE DAS LAWSUIT SINCE SOME -- ALTHOUGH ADMITTEDLY NOT ALL -- OF THE ALLEGATIONS IN DAS'S FIRST AMENDED COMPLAINT COULD ARGUABLY OR POTENTIALLY BE COVERED BY GULF'S POLICIES.

II. THE TRIAL COURT ERRED IN FINDING THAT CINCINNATI INSURANCE COMPANY DID NOT POTENTIALLY HAVE A DUTY TO DEFEND CPS/IQ IN THE DAS LAWSUIT SINCE SOME -- ALTHOUGH ADMITTEDLY NOT ALL -- OF THE ALLEGATIONS IN DAS'S FIRST AMENDED COMPLAINT COULD ARGUABLY OR POTENTIALLY BE COVERED BY CINCINNATI'S UMBRELLA POLICY.

**Appellant DAS's Assignments of Error:**

I. THE TRIAL COURT ERRED IN HOLDING THAT GULF OWES NO DUTY TO DEFEND OR INDEMNIFY CPS/IQ AGAINST DAS' LAWSUIT.

II. THE TRIAL COURT ERRED IN HOLDING THAT CIC OWES NO DUTY TO DEFEND OR INDEMNIFY CPS/IQ AGAINST DAS' LAWSUIT.

III. THE TRIAL COURT ERRED IN CONSTRUING DAS' LAWSUIT AGAINST CPS/IQ AS SOUNDING IN INTENTIONAL AND CRIMINAL LIABILITY ONLY, AND DISREGARDING THE DAS' CLAIMS FOR NEGLIGENCE AND PROFESSIONAL NEGLIGENCE.