

ORIGINAL

IN THE SUPREME COURT OF OHIO

Steve and Megen Hilmer, individually
and on behalf of Casey Hilmer, a minor

Plaintiffs

v.

Lance White, et al.

Defendants

CASE NO.

08-0403

On appeal from the Hamilton County
Court of Appeals, First Appellate District

Court of Appeals
Case No. C-070074

COMPUTER - TBI

Safeco Insurance Company of America

Plaintiff-Appellant

v.

Federal Insurance Company

And

Pacific Indemnity Company

Defendants-Appellees

And

Benjamin White, et al.

Defendants

FILED
FEB 27 2008
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLANT SAFECO INSURANCE COMPANY OF AMERICA'S NOTICE OF
CERTIFIED CONFLICT OF DECISION FROM THE FIRST APPELLATE DISTRICT
WITH DECISIONS FROM THE THIRD AND FIFTH APPELLATE DISTRICTS

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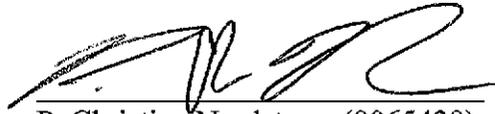
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Now comes Appellant, Safeco Insurance Company of America, and hereby gives notice of a certified conflict. Attached to this notice as Exhibits 1 through 4 are copies of the First District Court of Appeals Order Certifying a Conflict, Opinion of the First District Court of Appeals and copies of the conflicting decisions from the Third and Fifth District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was sent via ordinary mail to the following on this 21st day of February, 2008:

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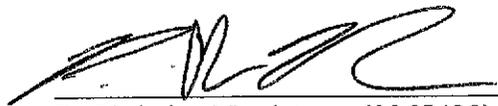
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**COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO**

ENTERED
FEB 13 2008

**Steve and Megan Hilmer, individually
and on behalf of Casey Hilmer, a minor**

Appellate Court Case No.
C-070074

Plaintiffs

Consolidated Trial Court Case Nos.
A-0403452 and A-0408943

v.

Lance White, et al.

Defendants

Safeco Insurance Company of America

Plaintiff-Appellant

v.

Benjamin White, et al.

Defendants-Appellees

ORDER

Before the Court is the February 1, 2008 Application of Appellant Safeco Insurance Company of America for Reconsideration of its Motion to Certify Conflict filed January 7, 2008. Appellees filed a Brief in Opposition to Appellant's Application for Reconsideration. Upon due consideration of the foregoing documents as well as the Court's Opinion and Judgment Entry of December 28, 2007 the Court finds that Appellant's Application for Reconsideration is GRANTED and the Motion to Certify will be GRANTED in part and DENIED in part and that the Opinion and Judgment Entry in the instant appeal should be certified pursuant to Appellate Rule 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

EXHIBIT
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Accordingly, the Court finds that a conflict exists between this Court's December 28, 2007 judgment and Torres v. Gentry (Ohio App. 5 Dist.), 2007-Ohio-4781 on the following issue:

When an insurance policy defines an 'occurrence' as an 'accident' that results in bodily injury, does an 'occurrence' include injuries that result from an intentional act when the insured seeking coverage are claimed to have been negligent in relation to that intentional act?

The Court also finds that a conflict exists between this Court's December 28, 2007 judgment and United Ohio Ins. Co. v. Metzger (Feb. 8, 1999), Putnam App. No. 12-98-1, 1999 Ohio App. LEXIS 920 on the following issue:

When an insurance policy excludes an injury 'which is expected or intended by [an or any] insured * * *'; injuries 'arising out of an illegal act committed by or at the direction of an insured'; or 'any injury caused by a violation of penal law or ordinance committed by or with the knowledge or consent of any insured,' do the exclusions become ambiguous when read in conjunction with a 'Severability of Insurance' condition, in light of the announced expectation by policyholders that their negligence will be covered?

IT IS SO ORDERED.

DATE: FEB 13 2008



Presiding Judge

The Clerk is instructed to serve this Order on all parties to App. No. C070074.

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STEVE HILMER, et al.,	:	APPEAL NO. C-070074
Plaintiffs,	:	TRIAL NO. A-0403452
vs.	:	
LANCE WHITE, et al.,	:	
Defendants.	:	

SAFECO INSURANCE COMPANY OF AMERICA,	:	TRIAL NO. A-0408943
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Plaintiff-Appellant,

OPINION.

vs.

FEDERAL INSURANCE COMPANY

and

PACIFIC INDEMNITY COMPANY,

Defendants-Appellees,

and

BENJAMIN WHITE, et al.,

Defendants.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

DEC 28 2007

COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

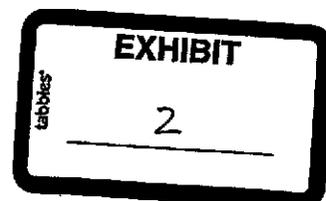
Judgment Appealed From Is: Affirmed and Conflict Certified

Date of Judgment Entry on Appeal: December 28, 2007

Jenks, Pyper & Oxley Co., L.P.A., P. Christian Nortstrom, and Scott G. Oxley, for Appellant,

Gallagher Sharp, Jay Clinton Rice, and Richard C. O. Rezie, for Appellees.

Please note: We have removed this case from the accelerated calendar.



DINKELACKER, Judge.

{¶1} In this case, we are asked to determine whether a homeowners' insurance policy and an umbrella policy obligated the issuing insurance company to defend and indemnify when its insureds were sued for negligence relating to the intentional and criminal conduct of their child, also an insured. While the issue is close, we hold that coverage was afforded under the policies.

***Felonious Assault and Attempted Murder
Result in Litigation***

{¶2} Benjamin White, who was then 17 years old, attempted to kill Casey Hilmer. He grabbed the 13-year-old while she was jogging, dragged her into the woods, and stabbed her repeatedly in the side and neck. After this attack, White pleaded guilty to attempted murder and felonious assault, and was sentenced to ten years in prison.

{¶3} Casey Hilmer and her parents sued Benjamin White and his parents, Lance and Diane White. In that lawsuit, the Hilmers claimed that Lance and Diane White had been negligent for failing to properly supervise their son and for entrusting him with a dangerous instrument. That case proceeded to a jury trial. According to a jury interrogatory, Lance and Diane White had been negligent and their negligence had proximately caused injury to the Hilmers, though the manner of the negligence was not specified. The jury awarded \$6.5 million in compensatory damages and determined that Lance and Diane White were responsible for 70% of that amount.

{¶4} At the time of the attack, the Whites had two homeowners' insurance policies and two umbrella policies. One of the homeowners' policies was issued by defendant-appellee Federal Insurance Company. One of the umbrella policies was

issued by defendant-appellee Pacific Indemnity Company. Both Federal and Pacific were members of the Chubb Group of Insurance Companies (collectively "Chubb"). The remaining policies were issued by plaintiff-appellant, Safeco Insurance Company of America.

{¶5} Shortly after the Hilmers' lawsuit was filed, Safeco filed a declaratory-judgment action claiming that it owed neither a duty to defend nor a duty to indemnify the Whites. In that suit, Safeco also asked the trial court to determine the priority of coverage between the two policies that it had issued and the two issued by Chubb. During this litigation, Chubb withdrew its opposition to coverage for "the negligence claims and the jury verdict against Lance and Diane White."

{¶6} Safeco filed a motion for summary judgment, as did Lance and Diane White. While the motions were pending, the declaratory-judgment action was consolidated with the underlying suit filed by the Hilmers. The trial court considered the arguments and found that the intentional-tort exclusions in the Safeco policies were rendered ambiguous by the "Severability of Insurance" language found in each policy. The trial court then concluded that Safeco owed coverage on a pro-rata basis with the Chubb policies and set forth the amounts owed under each policy. The trial court granted the motion of Lance and Diane White for summary judgment and denied Safeco's motion. Chubb settled with Lance and Diane White and took their place in the litigation with Safeco.

The Trial Court's Judgment Was Sufficient

{¶7} As an initial matter, Safeco argues that the decisions made by the trial court were insufficient to resolve all the matters presented to it by the declaratory-judgment action. We disagree. The trial court was asked to determine if coverage

was owed to the Whites and the priority of coverage between the Safeco and the Chubb policies. The trial court addressed those issues, declared the rights of the parties, and set forth the amounts owed under each insurance policy. Since the trial court decided all the issues before it, we overrule Safeco's first assignment of error.

The Issue of Coverage

{¶8} In its second assignment of error, Safeco argues that the trial court improperly determined that it owed coverage to Lance and Diane White.¹ To address this issue, we begin by analyzing whether such coverage was precluded as a matter of public policy in Ohio. We conclude that it was not.

Ohio Public Policy – Doe and Automobile Club Ins. Co.

{¶9} Both Safeco and Chubb refer to the Ohio Supreme Court's decision in *Doe v. Schaffer*.² In *Doe*, the court held that "Ohio public policy permits a party to obtain liability insurance coverage for negligence related to sexual molestation when that party had not committed the act of sexual molestation."³ While some courts have limited the application of this holding to cases that actually involve sexual molestation,⁴ we conclude that such a distinction is unjustified.

{¶10} One month after the *Doe* decision was released, the Ohio Supreme Court released the decision in *Automobile Club Ins. Co. v. Mills*.⁵ Neither party has referred to *Automobile Club* in their briefs. In that case, the insured mother sought coverage for a

¹ The trial court concluded that issues of fact remained regarding coverage for Benjamin White. While this decision is curious, since he pleaded guilty to attempted murder and felonious assault and since Benjamin White conceded in his answer that he was not seeking coverage under the Safeco policies, that aspect of the trial court's decision has not been appealed and is not before us.

² 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

³ *Id.* at syllabus.

⁴ See, e.g., *Torres v. Gentry*, 5th Dist. No. 06 COA 038, 2007-Ohio-4781, ¶61 ("We find the decision of the Supreme Court in *Doe v. Schaffer* * * * to be inapplicable to the present case in that such case was limited to cases involving incidents of sexual molestation and insurance coverage for a non-molester's negligence.").

⁵ 90 Ohio St.3d 574, 2001-Ohio-21, 740 N.E.2d 284.

claim of negligent supervision and failure to warn after her son had killed his fiancé.⁶ The son and his fiancé both lived in the mother's residence, and the son was an insured under the mother's homeowners' policy.⁷ The mother sought a defense and indemnification from the insurance company that had issued the homeowners' policy.⁸ The court of appeals held that the mother's negligent conduct did not fall within the definition of an "occurrence" under the policy.⁹ The court concluded that "the 'occurrence' here is Donald's act of murder," and that Ohio public policy prohibited the issuance of insurance to provide liability coverage to indemnify for damages flowing from intentional conduct or liability coverage resulting therefrom.¹⁰

{¶11} In a one-sentence decision, the Ohio Supreme Court reversed that decision on the authority of *Doe*.¹¹ Reading this sentence in the context of the appellate decision that preceded it, we cannot conclude that the *Doe* public-policy holding is limited to cases involving sexual molestation. We hold that Ohio public policy permits a party to obtain liability insurance coverage for negligence related to intentional conduct when that party does not commit the intentional act.

{¶12} But holding that such coverage is *permitted* by public policy is not the same as holding that coverage is *available* under the policies in this case. We agree with Safeco that *Doe* (and *Automobile Club*) leave room for such coverage to be excluded by the express terms of the policies.¹² The question becomes whether the policies issued by Safeco did so.

⁶ *Automobile Club Ins. Co. v. Mills* (July 10, 2000), 12th Dist. Nos. CA-99-07-064 and CA-99-07-070.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Automobile Club Ins. Co. v. Mills*, 90 Ohio St.3d 574, 2001-Ohio-21, 740 N.E.2d 284.

¹² See, e.g., *Lehrner v. Safeco Insurance/American States Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795, 872 N.E.2d 295, ¶46 ("Shaffer addressed public policy, not policy language. The fact

The Policy Language

{¶13} The Safeco homeowners' policy named Lance and Diane White as insureds. The term "insured" also included relatives if they were residents of the household. The policy provided liability coverage for a claim or suit against "an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies * * *." An "occurrence" was defined as "an accident * * * which results in bodily injury * * *." The policy excluded coverage for bodily injury "which is expected or intended by an insured or which is the reasonably foreseeable result of an act or omission intended by an insured * * *." Additionally, bodily injury "arising out of an illegal act committed by or at the direction of an insured" was also excluded.

{¶14} The Safeco umbrella policy named Lance White as an insured. The term "insured" also included any member of the named insured's household. The policy similarly provided liability coverage for an "occurrence." "Occurrence" was similarly defined—"an accident * * * which results, during the coverage period, in bodily injury * * *." The policy carried several exclusions, including "any injury caused by a violation of penal law or ordinance committed by or with the knowledge or consent of any insured." The policy also excluded from coverage "any act or damage which is expected or intended by any insured, or which is the foreseeable result of an act or omission intended by any insured * * *."

{¶15} Both policies contained the following "Severability of Insurance" condition: "This insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence."

that public policy allows the purchase of insurance for negligence related to sexual molestation says nothing about whether the Utica policy exclusion applies in this case.").

***Occurrence Means Accident – But What
Is An Accident?***

{¶16} Safeco first argues that the attack on Casey Hilmer was not an “occurrence” under its policies. An “occurrence” was defined in both policies as an “accident.” Safeco contends that the attack was not an accident.

{¶17} At least one appellate district has agreed with Safeco’s position. In *Torres v. Gentry*, the Fifth Appellate District held that “negligent supervision and negligent entrustment are not ‘occurrences’ separate and apart from the underlying intentional tort but are derivative claims arising out of the intentional acts.”¹³

{¶18} But other districts have renounced this approach. In the most recent decision on the topic, the Sixth Appellate District held that coverage was owed.¹⁴ In that case, a wife was sued for negligence after her husband had molested a neighbor’s child. The wife sought coverage under the couple’s homeowners’ policy. The court held that “a common meaning of ‘accident’ (‘an unfortunate event resulting from carelessness or ignorance’) places the allegation of negligence within the policy meaning of an ‘occurrence.’ ”¹⁵ The Eleventh Appellate District has reached the same conclusion.¹⁶

{¶19} We agree with the Sixth and Eleventh Appellate Districts. The problem with the derivative analysis embraced by the Fifth Appellate District is that it runs counter to the rationale of the Ohio Supreme Court in *Doe*. The *Doe* court

¹³ *Torres v. Gentry*, 5th Dist. No. 06 COA 038, 2007-Ohio-4781, ¶61, citing *Offhaus v. Guthrie* (2000), 140 Ohio App.3d 90, 746 N.E.2d 685, discretionary appeal not allowed (2001), 91 Ohio St.3d 1478, 744 N.E.2d 775.

¹⁴ *Allstate Ins. Co. v. Dolman*, 6th Dist. No. L-07-1113, 2007-Ohio-6361.

¹⁵ *Id.* at ¶46, citing *Owners Ins. Co. v. Reyes* (Sept. 30, 1999), 6th Dist. No. OT-99-017 (internal citations omitted).

¹⁶ See *Havel v. Chapek*, 11th Dist. No. 2004-G-2609, 2006-Ohio-7014, ¶33, (“This court, consistently with other courts, has defined ‘accident’ as ‘an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence.’ ”), citing *Chepke v. Lutheran Brotherhood* (1995), 103 Ohio App.3d 508, 511, 660 N.E.2d 477, and *Randolf v. Grange Mut. Cas. Co.* (1979), 57 Ohio St.2d 25, 29, 385 N.E.2d 1305 (“the word ‘occurrence,’ defined as an ‘accident,’ was intended to mean just that—an unexpected, unforeseeable event”).

stated that “the intentions of the molester are immaterial to determining whether the allegedly negligent party has coverage. * * * [T]he critical issue is the nature of the intent—inferred or otherwise—of the party seeking coverage.”¹⁷ Therefore, we conclude that when an insurance policy defines an “occurrence” as an “accident,” that definition will include allegations of negligence even when the negligence relates to the failure to prevent intentional conduct.

Severability-of-Insurance Clause Creates Ambiguity

{¶20} Having concluded that the negligence of Lance and Diane White constituted an “occurrence” under the Safeco policies, we must now determine if coverage was otherwise excluded by the terms of the policies. We conclude that it was not.

{¶21} Safeco’s homeowners’ policy excluded bodily injury “which is expected or intended by an insured * * *” and bodily injury “arising out of an illegal act committed by or at the direction of an insured.” The umbrella policy excluded “any injury caused by a violation of penal law or ordinance committed by or with the knowledge or consent of any insured” and “any act or damage which is expected or intended by any insured, or which is the foreseeable result of an act or omission intended by any insured * * *.” Each policy also contained a condition that “[t]his insurance applies separately to each insured.” We agree with Chubb that, at the very least, this language created an ambiguity when read in conjunction with the foregoing exclusions.

¹⁷ *Doe*, 90 Ohio St.3d at 393, 394, 2000-Ohio-186, 738 N.E.2d 1243, citing *Preferred Mut. Ins. Co. v. Thompson*, 23 Ohio St.3d 78, 81, 491 N.E.2d 688, and *Transamerica Ins. Group v. Meere* (1984), 143 Ariz. 351, 356, 694 P.2d 181.

{¶22} In *Wagner v. Midwestern Indemn. Co.*,¹⁸ the court held that in “determining whether the parties contemplated joint or several coverage, the terms of the contract are to be considered, and where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured.”¹⁹

{¶23} In *Havel v. Chapek*, the Eleventh Appellate District held that coverage was still afforded for the negligence of an insured—even when the injury was caused by the intentional conduct of another insured. In that case, the parents were sued after their son had killed his girlfriend. The parents sought coverage from their homeowners’ policy, which contained exclusions that were similar to those at issue in this case.²⁰

{¶24} The *Havel* court concluded that applying the intentional-conduct exclusions to a negligent insured “is contrary to the Ohio Supreme Court’s holding under *Doe* and is inconsistent with the Supreme Court’s holding in *Automobile Club Ins. Co. v. Mills* * * *. *Doe* distinguished its analysis as to any intentional act of an insured, but permitted appellants to obtain coverage for negligence related to the sexual molestation when they did not commit the molestation. * * * Each insured’s individual coverage under the Grange policy must be applied separately to each insured. The physical abuse and bodily injury exclusion in question only applies to an insured who actually commits an intentional act—in this case, Jeremy, who committed murder. The exclusion does not apply to potentially innocent negligent insureds, such as Jeremy’s parents, who may have negligently contributed to the injury through failure to warn or protect. Pursuant to the holdings in *Doe* and *Automobile Club*, Jeremy’s parents have coverage and Grange has an absolute duty

¹⁸ 83 Ohio St.3d 287, 1998-Ohio-111, 699 N.E.2d 507.

¹⁹ *Id.* at 291 (internal quotations and citations omitted).

²⁰ *Havel* at ¶35.

to defend under the policy.”²¹ The court rejected the position of the dissenting judge, noting that the “dissent would deny coverage for the negligent acts of an innocent insured, due to the intentional, criminal act of another insured. In effect, the dissent would deny coverage for the very purpose for which insurance is purchased, i.e., negligence resulting in bodily injury.”²²

{¶25} We agree with this analysis. When confronted with an issue of contractual interpretation, a court must give effect to the intent of the parties to the agreement.²³ The *Doe* court established that, in the context of negligence tied to sexual molestation, “[w]hile it is indeed true that the average person would likely find liability coverage for the intentional tort of sexual molestation loathsome, the same rationale cannot extend to negligence. The average person would no doubt find such coverage to be the purpose for which he obtained insurance.”²⁴

{¶26} When determining coverage, 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.²⁵ When reading the severability condition in conjunction with the exclusions in the Safeco policies, we hold that the exclusions are ambiguous. Construing that ambiguity in favor of the insureds, in light of the policyholder expectation recognized in *Doe*, we hold that the exclusions for intentional conduct do not apply to insureds who have been merely negligent, when the policies contain language indicating that coverage applies “separately to each insured.”

²¹ *Id.* (citations omitted).

²² *Id.* at ¶37.

²³ *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶11, citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 1999-Ohio-162, 714 N.E.2d 898, citing *Employers' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, 124 N.E. 223, syllabus.

²⁴ *Doe*, 90 Ohio St.3d at 395, 2000-Ohio-186, 738 N.E.2d 1243.

²⁵ *Westfield* at ¶11, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus.

{¶27} We acknowledge the admonition of the Ohio Supreme Court in *Westfield v. Galatis* that this “rule [of construction] will not be applied so as to provide an unreasonable interpretation of the words of the policy.”²⁶ But we conclude that our interpretation is reasonable in light of *Doe*. For these reasons, we overrule Safeco’s second assignment of error.

Conflicts Sua Sponte Recognized

{¶28} Having examined the decisions in our sister districts, we find that our decision in this case is in conflict and, on our own motion, certify the conflicts to the Ohio Supreme Court for its consideration.

{¶29} First, our holding that the negligence of the insureds constitutes an “occurrence” conflicts with the holding in *Torres v. Gentry* from the Fifth Appellate District, which has held that “negligent supervision and negligent entrustment are not ‘occurrences’ separate and apart from the underlying intentional tort but are derivative claims arising out of the intentional acts.”²⁷ We therefore certify the following question for review: “When an insurance policy defines an ‘occurrence’ as an ‘accident’ that results in bodily injury, does an ‘occurrence’ include injuries that result from an intentional act when the insureds seeking coverage are claimed to have been negligent in relation to that intentional act?”

{¶30} We also conclude that our holding regarding the effect of the “Severability of Insurance” language conflicts with the holding in *United Ohio Ins. Co. v. Metzger*,²⁸ which held that the existence of a severability provision did not

²⁶ *Westfield* at ¶14, citing *Morfoot v. Stake* (1963), 174 Ohio St. 506, 190 N.E.2d 573, paragraph one of the syllabus.

²⁷ *Torres v. Gentry*, 5th Dist. No. 06 COA 038, 2007-Ohio-4781, ¶61, citing *Offhaus v. Guthrie* (2000), 140 Ohio App.3d 90, 746 N.E.2d 685, discretionary appeal not allowed (2001), 91 Ohio St.3d 1478, 744 N.E.2d 775.

²⁸ (Feb. 8, 1999), 3rd Dist. No. 12-98-1; see, also, *Lehrner v. Safeco Insurance/American States Ins. Co.*, 171 Ohio App. 3d 570, 2007-Ohio-795, 872 N.E.2d 295, ¶53 (“The separation-of-insureds

change the analysis or create an ambiguity with respect to enforcement of exclusionary language referring to “an insured.”²⁹ We therefore certify the following question for review: “When an insurance policy excludes an injury ‘which is expected or intended by [an or any] insured * * *’; injuries ‘arising out of an illegal act committed by or at the direction of an insured’; or ‘any injury caused by a violation of penal law or ordinance committed by or with the knowledge or consent of any insured,’ do the exclusions become ambiguous when read in conjunction with a ‘Severability of Insurance’ condition, in light of the announced expectation by policyholders that their negligence will be covered?”

Conclusion

{¶31} For the reasons given above, the judgment of the trial court is affirmed.

Judgment affirmed.

HENDON, J., concurs.

PAINTER, P.J., concurs separately.

PAINTER, P.J., concurring separately.

{¶32} I concur with every word of Judge Dinkelacker’s excellent analysis. When different appellate districts can come to different conclusions about the meaning of language, then that fact alone is good enough evidence that the language is ambiguous. If lawyers and judges must puzzle over meaning, then of course the meaning is unclear.

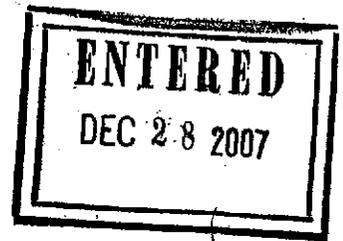
Please Note:

The court has recorded its own entry on the date of the release of this opinion.

clause makes the coverage actually provided by the policy applicable to all insureds equally. It does not purport to create coverage where a policy exclusion applies.”).

²⁹ Id.

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



STEVE HILMER, et al., : APPEAL NO. C-070074
Plaintiffs, : TRIAL NO. A-0403452
vs. :
LANCE WHITE, et al., :
Defendants. :

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SAFECO INSURANCE COMPANY OF : TRIAL NO. A-0408943
AMERICA, :
Plaintiff-Appellant, :

JUDGMENT ENTRY.

vs. :
FEDERAL INSURANCE COMPANY :
and :
PACIFIC INDEMNITY COMPANY, :
Defendants-Appellees, :
and :
BENJAMIN WHITE, et al., :
Defendants. :



This cause was heard upon the appeal, the record, the briefs, and arguments.
The judgment of the trial court is affirmed and conflict certified for the reasons set forth in the Decision filed this date.
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.
The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 28, 2007 per Order of the Court.

By: *M. J. Paul*
Presiding Judge

3 of 3 DOCUMENTS



Caution

As of: Jan 31, 2008

UNITED OHIO INSURANCE COMPANY PLAINTIFF-APPELLEE v. JOHN & KAREN METZGER, ET AL., DEFENDANTS-THIRD PARTY PLAINTIFFS-APPELLANTS AND APPELLEES; UNIVERSAL UNDERWRITERS INSURANCE COMPANY, THIRD PARTY DEFENDANT-APPELLANT

CASE NO. 12-98-1

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, PUTNAM COUNTY

1999 Ohio App. LEXIS 920

February 8, 1999, Date of Judgment Entry

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Civil appeal from Common Pleas Court.

OPINION BY: BRYANT

DISPOSITION: JUDGMENT: Judgment affirmed.

OPINION

OPINION

COUNSEL: MR. PAUL H. CUNNINGHAM, Attorney at Law, Ottawa, Ohio, For John & Karen Metzger, Defendants-Third Party Plaintiffs-Appellants.

MR. THOMAS W. GALLAGHER, Attorney at Law, Toledo, Ohio, For Edwin & Marilyn Holdgreve, Defendants-Third Party Plaintiffs-Appellants.

MR. DAVID N. RUPP, Attorney at Law, Archbold, Ohio, For United Ohio Insurance Company, Plaintiff-Appellee.

MR. WILLIAM F. SCULLY, JR., Attorney at Law, Cleveland, Ohio, For Universal Underwriters Insurance Co., Third Party Defendant-Appellant.

JUDGES: BRYANT, J. SHAW, P.J., and EVANS, J., concur.

BRYANT, J. On June 20, 1994, a gas tank owned by an outdoor equipment company and maintained on the private residence of a company shareholder, exploded during fueling. The fuel truck operator was seriously injured as a result of this explosion. The company shareholder was insured by a business policy and a home owner's policy. Each policy was issued by a different company. Both companies on appeal argue that neither are liable for any loss associated with this incident. We affirm the trial court's [*2] determination that the business policy, but not the home owner's policy, covers the loss here.

Defendants/Appellants, John and Karen Metzger (the Metzgers) and Edwin and Marilyn Holdgreve (the Holdgreves), appeal from a declaratory judgment entered in Putnam County Court of Common Pleas, in favor of Plaintiff/Appellee, United Ohio Insurance, Co. (United). Also, Third-Party Defendant/Appellant Universal Underwriters Insurance, Co. (Universal), appeals from a



declaratory judgment entered in favor of the Third-Party Plaintiffs/Appellees, the Metzgers and the Holdgreves.

In June of 1994, John Metzger was a shareholder of two corporations, Metzger Brothers, Inc. (MBI) and Metzger Brothers Implements, Inc. (MBII). Both operated outdoor equipment stores. John Metzger was the general manager of MBI located at 21713 County Road U-20, Ft. Jennings, Ohio. John and Karen Metzger resided at 16631 State Route 190, Ft. Jennings, Ohio, approximately seven miles from the MBI store.

On June 20, 1994, a fuel truck operator, Edwin Holdgreve, was seriously injured at the John and Karen Metzger residence while delivering gasoline into a fuel storage tank which exploded during fueling. The [*3] fuel tank was positioned inside a "lean-to" shed attached to the Metzgers' garage. The storage tank had been removed from a combine owned by MBI and installed in the early 1980's on the Metzgers' residential property. John Metzger used gasoline from this storage tank for both personal and business related activities. The business use of the MBI owned fuel tank was to store fuel used to power lawn mowers demonstrated by John Metzger at his personal residence to potential MBI customers.

On March 17, 1995, Edwin and Marilyn Holdgreve filed a suit alleging that both suffered injuries caused by the negligent maintenance of the fuel tank by the Metzgers, MBI and MBII. The Holdgreves' suit is a separate action and is not before us.

This action arose upon United's complaint for declaratory judgment brought against the Metzgers, the Holdgreves, MBI and MBII. United had issued a homeowner's insurance policy to the Metzgers and sought, pursuant to *R.C. § 2721.04*, a judgment declaring that their contract with the Metzgers did not cover any loss arising out of the incident involving Edwin Holdgreve. The Holdgreves answered United's complaint and filed a counter-claim against United seeking [*4] a declaratory judgment that the United policy did obligate United to cover the Metzgers for loss arising out of this incident.

Universal issued a business insurance policy to MBI, MBII and Arnold Metzger, a co-owner of both companies. John and Karen Metzger and the Holdgreves filed third-party complaints against Universal seeking a judgment declaring that the Universal policy provided

coverage for any loss suffered by the Metzgers as a result of Holdgreves' personal injury suit. Neither MBI or MBII are parties to this appeal.

This case was submitted for final decision upon stipulated facts, depositions, affidavits and the pleadings. The court granted United's complaint for declaratory judgment against all defendants and granted the Holdgreves' and Metzgers' third-party complaints for declaratory judgment against Universal.

This appeal followed.

I.

The United Policy.

The Metzgers' first assignment of error claims:

1. The trial court's declaration that Karen Metzger was not covered by United Ohio Insurance's Homeowners Policy is a finding contrary to law, against public policy, and interferes with coveture (sic).

The Holdgreves' first assignment [*5] of error claims:

1. The trial court erred in granting judgment in favor of United Ohio Insurance Company as Karen Metzger has an insurable interest in the property because her use of the property does not fall within the 'business purpose' exception and thus, appellants Edwin and Marilyn Holdgreve are entitled to recover damages under said policy.

The Metzgers' and Holdgreves' ("the appellants") first assignments of error are related and therefore will be discussed together. The appellants concede that John Metzger was properly denied coverage under the United homeowner's policy because the loss caused by the fuel storage tank's explosion arose out of or was in connection with his business. Appellants argue, however, that the trial court erred when it also precluded coverage for Karen based on the same business use exclusion.

The Holdgreves contend that the business exclusion does not apply to Karen because she is separately insured under the policy. The Metzgers claim Karen is separately insured under the contract and, as an innocent spouse, cannot be held accountable for the conduct of her husband. United responds that Karen and John Metzger

are insured jointly [*6] and when coverage is denied to any one insured it is denied to all insured.

The interpretation of an insurance contract is a matter of law, and accordingly, an appellate court's review is *de novo*. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St. 3d 107, 108, 652 N.E.2d 684, 685.

Generally, in construing contracts of insurance, words in a policy must be given their plain and ordinary meaning, and only in situations where the contract is ambiguous and thus susceptible to more than one meaning must the policy language be liberally construed in favor of the claimant who seeks the benefits of coverage.

State Farm Auto Ins. v. Rose (1991) 61 Ohio St. 3d 528, 531-532, 575 N.E.2d 459, 461 (overruled on other grounds); see also, *Randolf v. Grange Mut. Cas. Co.* (1979), 57 Ohio St. 2d 25, 28, 385 N.E.2d 1305, 1307 ("language in an insurance contract is to be understood in its ordinary, usual or popular sense").

The Metzgers held their insured property as "John F. Metzger and Karen L. Metzger, Husband and Wife." (Deed). United's homeowner's insurance policy covering their property states on the declaration page:

Named Insured [*7] and Address

John Metzger

Karen Metzger

RT 1 ST 190

Ft. Jennings, OH 45844

Further, policy definitions state in part:

1. You and your means the "named insured" shown in the Declarations and the spouse if a resident of the same household.

* * *

4. Insured means you and residents of your household who are:

a. your relatives; * * *

Finally, "Conditions" of coverage state in part:

2. Severability of Insurance. This insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence.

(United Policy p. 12, underlined emphasis added).

Whether the parties to an insurance policy "contemplated joint or several coverage" depends on "the terms of the contract." *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St. 3d 287, 291, 699 N.E.2d 507, 511. In *Wagner*, the Ohio Supreme Court affirmed this court's determination that the insurance contract in that case contemplated joint coverage for the benefit of the spouses therein. *Id.* There, the insurance policy named only one insured and coverage was extended to [*8] the insured's spouse because the term "You" and "Your" in that policy was defined as including "Your spouse." *Id.* at 291, 699 N.E.2d at 511. Further, the court recognized that the "innocent spouse rule can be contractually nullified by the terms of the insurance contract" and determined that the "the wording of [a] contract [can] specifically negate[] the innocent spouse rule." *Id.* at 290 - 291, 699 N.E.2d at 511.

In our decision in *Wagner v. Midwestern Indemn. Co.*, 1996 Ohio App. LEXIS 5285 (Oct. 31, 1996), Seneca App. No. 13-95-51, unreported, we reasoned that "unless the spouse of the named insured is also a separate named insured, there is no several coverage under the policy. The language of the policy regarding who is an insured under the policy dictates who is insured." *Id.*, citing, *Buckeye Union Insurance Company v. Phillips*, 1986 Ohio App. LEXIS 7809 (Aug. 7, 1986), Defiance App. No. 4-84-7, unreported.

In *Buckeye Union*, this court determined that contract terms in that case provided *separate* residential homeowner's insurance coverage to a husband and wife. There, the property was held jointly by husband and wife, the insurance policy listed Marlow and Bessie Phillips separately [*9] as the named insured, and the policy provided that "this insurance applies separately to each insured." 1986 Ohio App. LEXIS 7809 at p. *9.

Here, John and Karen Metzger hold their property jointly and are identified separately as the named insured within the policy's declaration page. Further, the United policy

states that "this insurance applies separately to each insured." (United policy p.12). Therefore, pursuant to the terms of the insurance agreement here, Karen Metzger is separately insured under United's policy. *Buckeye Union Insurance Co., Supra*. Karen is covered under the policy not because she happens to be a spouse of a named insured, but rather because *she is* a named insured. This conclusion, however, does not end our inquiry.

As noted earlier, the terms of a insurance agreement control who may recover under the policy. *Wagner*, 83 Ohio St. 3d at 291, 699 N.E.2d at 511. Here, while Karen is a separately insured person as defined by the policy, her recovery is nonetheless contingent on the terms of the insuring agreement.

The business exclusion raised by United reads as follows:

Section II - Exclusions

1. Coverage E - Personal Liability and Coverage [*10] F - Medical Payments to Others do not apply to bodily injury or property damage:

* * *

e. arising out of or in connection with a business engaged in by an insured. This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the business.

(United Policy pp. 9-10, emphasis added).

As noted, the Metzgers and Holdgreves concede that John Metzger was properly denied coverage under this exclusion because the loss arose out of or was in connection with a business engaged in by him. United argues, however, that the policy's exclusion also denies coverage to Karen because the policy specifically states that "Coverage E - Personal Liability . . . does not apply to bodily injury . . . arising out of or in connection with a business engaged in by an insured." (emphasis added). Accordingly, United contends that when this exclusion is invoked by the conduct of "an insured," coverage is unavailable to any and all insured.

The word "an," an indefinite article, "does not fix the identity of the noun modified" by [*11] it. The American

Heritage Dictionary, Second Ed. (1985) 105, 654. Accordingly, here the use of the word "an" before the word "insured" does not identify the insured whose act must cause the condition excluding coverage. Therefore, it is immaterial that Karen did not contribute to the business use of the fuel tank at her residence. The policy simply does not differentiate as to which insured must cause an unauthorized risk to occur before coverage is precluded. Once an unauthorized risk is caused by "an" or any insured, no coverage is owed.

Other courts have held that similar language clearly and unambiguously indicates that parties to an insurance contract intend to broadly preclude coverage for all insured individuals if the conduct by any one insured invokes a preclusion to coverage. *Allstate Ins. Co. v. Lobracco*, 1992 Ohio App. LEXIS 6120 (Nov. 24, 1992), Franklin App. Nos. 92AP-649 and 92AP-650, unreported; see also, *Vance v. Pekin Ins. Co.* (Iowa 1990), 457 N.W.2d 589, 593; see also, *Watson v. United Services Auto. Ass'n.* (Minn. 1997), 566 N.W.2d 683; *Allstate Ins. Co. v. Smiley* (Ill. App. 1995), 276 Ill. App. 3d 971, 659 N.E.2d 1345, 1352, 213 Ill. Dec. 698 (business [*12] activity exclusion for activities of "an insured" precluded recovery for any insured.); *Woodhouse v. Farmers Union Mutual Ins. Co.* (Mont. 1990), 241 Mont. 69, 785 P.2d 192, 194 (coinsured innocent spouse could not recover because policy excluded coverage if loss caused by intentional act of "an insured"); *Bryant v. Allstate Ins. Co.* (E.D. Ky. 1984), 592 F. Supp. 39, 41.

In *Lobracco*, the court determined that coverage for loss caused by a husband guilty of sexual abuse was unavailable to the wife, "not due to any common-law rule that a wife is responsible for her husband's actions, but due to the fact that the insurance contract precludes coverage for all insureds if the actual damages occur as a result of one insured's intentional acts." *Id.* The same conclusion is compelled here. Karen's coverage is not contingent on whether her co-insured spouse is able to recover because of an unauthorized risk he engaged in on their residential premises. Rather, Karen's coverage is precluded because all coverage is precluded where a loss occurs in connection with any co-insured's activity which is a risk not covered by the contract.

By contrast, some courts have held [*13] that use of the definite article "the" before the word "insured" in a policy

insuring more than one person indicates that an exclusion applies only to *the insured* who committed the unauthorized act. *Hogs Unlimited v. Farm Bureau Mut. Ins. Co.* (Minn. 1987), 401 N.W.2d 381, 384; *Morgan v. Cincinnati Ins. Co.* (Mich. 1981), 411 Mich. 267, 307 N.W.2d 53, 54-55. Here, however, the policy's exclusion states "an insured," and accordingly, does clearly and unambiguously preclude coverage for all insureds when any insured causes loss due to unauthorized activities. *Lobracco, supra*.

Accordingly, the judgment of the trial court declaring that Karen Metzger has no right to a separate recovery was proper. The Holdgreve's and Metzger's first assignments of error are overruled.

The Holdgreves raise an additional assignment of error:

2. The trial court erred in granting judgment in favor of United Ohio Insurance Company as United Ohio had waived their right to deny coverage by their payment of the property claim.

United does not dispute it paid a property damage claim filed by John Metzger for replacements costs associated with a garage structure damaged in [*14] the fuel tank explosion. United was obligated to pay for such loss pursuant to the parties' agreement in "Section I - Property Coverages" of the homeowner's insurance policy. However, unlike the coverage provided for "Personal Liability" in Section II of the policy, "Property Coverages" in Section I of the policy could not have been avoided by United on the basis of a business use exclusion. There is simply no business use exclusion to coverage contained in Section I of the policy. Accordingly, we cannot say that United waived a right they had in Section II of the policy because they failed to exercise a right *they did not have* in Section I of the policy. The Holdgreves' second assignment of error is overruled.

Finally, the Metzgers and Holdgreves also raise an alternative proposition of law, contingent on our determination of Universal's first assignment of error. However, an appellate court may only resolve assignments of error not arguments. *App. R. 12(A)*. Accordingly, we do not address the alternative propositions which allege no error.

II.

The Universal Policy.

Universal also appeals from the judgment of the trial court and raises two assignments of error. [*15] Universal's first assignment claims:

1. The trial court erred in ruling that Universal Underwriters Insurance Company is obligated under Part 950 of its policy to indemnify John and Karen Metzger for any adverse judgment arising from the explosion which occurred at the Metzger's (sic) residence.

The Universal policy, entitled Unicover V, No. 46739, was issued in parts, covering various activities of MBI, MBII and the companies' owners. The parties stipulated that only Part 500 (Garage Operations), Part 950 (General Liability) and Part 980 (Umbrella) of the Universal policy were purchased by MBI. The trial court's declaratory judgment, however, discusses the applicability of only Parts 950 and 980.

Part 950 of the Universal policy reads in pertinent part:

General Liability Insurance Insureds Our Limits

(Part 950)

Premises Hazard 01 (Metzger Brothers, Inc.) \$ 500,000

(Declarations page 1-K).

* * *

INSURING AGREEMENT - WE will pay all sums the INSURED legally must pay as DAMAGES (including punitive DAMAGES where insurable by law) because of INJURY to which this Coverage Part applies, caused by an OCCURRENCE arising out [*16] of the following hazards when shown in the declarations.

(Part 950, p. 54).

* * *

PREMISES [Hazard] - the ownership, maintenance or use of the premises scheduled in the declarations and all operations necessary or incidental thereto, except the PRODUCTS - COMPLETED

OPERATIONS HAZARD.

(Part 950, p. 54).

* * *

'OCCURRENCE' . . . means as (sic) accident . . . during the Coverage Part period neither intended nor expected from the standpoint of a reasonably prudent person.

(Part 950, p. 56).

* * *

Universal argues that the occurrence of injury here, burns relating to an explosion of an MBI owned fuel storage tank on the private property of an insured business owner, was not a risk covered under Part 950 of its policy with MBI. Specifically, Universal claims that the phrase "and all operations necessary and incidental thereto" was misinterpreted by the trial court and as a result coverage was extended to premises not scheduled in the policy's declarations. The policy's scheduled premises are the business locations of MBI and MBII. John and Karen Metzger's residential address was not listed as a scheduled premise.

Premise [*17] hazards are described in the policy as "the ownership, maintenance or use of the premises scheduled in the declarations and all operations necessary or incidental thereto, except the PRODUCTS - COMPLETED OPERATIONS HAZARD." (Part 950, p. 54)(emphasis added). Universal explains that the emphasized language merely precludes coverage for certain non-business related activities on the scheduled premises. For instance, Universal claims this coverage would not apply to liability resulting from a non-premises related activity conducted on their premises such as drag racing.

A plain reading of this clause, however, indicates that no limitation to premise hazard coverage is stated until after the word "except." All the other terms can only be read to describe included circumstances of coverage. Accordingly, Universal's argument that the phrase "and all operations necessary and incidental thereto" was meant to be a limiting phrase is not well taken. See, *United States Fid. & Gaur. Co. v. Lightning Rod Mut. Ins. Co.* (1997), 80 Ohio St. 3d 584, 586, 687 N.E.2d 717, 719 (where the court noted, "the insurer, being the one

who selects the language in the contract, must be specific [*18] in its use; an exclusion from liability must be clear and exact in order to be given effect")(citation omitted).

Universal also argues that the exception for Products - Completed Operations Hazard within the description of premises hazards, merely "emphasizes the limitation of its coverage to those premises 'scheduled in the declarations.'" (Universal Brief p. 16). However, a plain reading of this exception demonstrates just the opposite. The policy provides the following definitions:

PREMISES - the ownership, maintenance or use of the premises scheduled in the declarations and all operations necessary or incidental thereto, except the PRODUCTS - COMPLETED OPERATIONS HAZARD.

PRODUCTS - COMPLETED OPERATIONS HAZARD - INJURY occurring away from the premises YOU own or rent and resulting from YOUR WORK or YOUR PRODUCT, representations or warranties made with respect to fitness, durability, performance or use of YOUR WORK or YOUR PRODUCT, and providing or failure to provide warning or instructions for YOUR PRODUCT or YOUR WORK. * * *

(Universal Policy, Part 950, p.54). Obviously, the injury here did not arise from the matters excluded.

Nevertheless, the [*19] issue here is whether the trial court erred when it found the explosion incident at the Metzgers' residence to arise out of an operation necessary or incidental to the scheduled premises. The trial court found that the use of the fuel storage tank was an operation "necessary and incidental to the sale of lawn mowers by MBI." (emphasis ours). The clause in the policy is disjunctive rather than conjunctive, it reads "necessary or incidental." There is sufficient evidence in the record to support the trial court's determination that coverage Part 950 covers this incident because maintenance of the MBI gas tank on the private property of a MBI shareholder was, at least, an operation incidental to the business premises of MBI.

Accordingly, Universal's first assignment of error is overruled.

Universal's second assignment of error states:

2. The trial court erred in ruling that John and Karen Metzger are entitled to indemnification for any adverse judgment arising from the explosion which occurred at the Metzger's (sic) residence pursuant to the Umbrella coverage provided under part 980 of Universal's policy.

Here Universal claims the trial court [*20] erred when it determined that the Metzgers were covered under Part 980 of its insurance contract. Universal argues that because underlying insurance coverage under Part 950 was not available to the Metzgers, coverage under Part 980 is likewise not available. Having already determined that the trial court did not error in finding that John Metzger is entitled to coverage under policy Part 950, Universal's argument on this point is without merit.

Further, the introduction to Policy Part 980 states,

This Coverage Part applies only when it is shown in the declarations. Such insurance applies *only to those insureds*, security interests and locations designated for each coverage as identified in declarations item 2 by letter(s) or number. (emphasis added).

The trial court found, upon facts stipulated to by the parties, that John and Karen Metzger were "designated insureds" under policy Part 980. Though Karen is not

listed as an insured under item 2 in policy's the declarations, Universal stipulated that she was an "insured" under policy Part 980. Universal does not challenge this stipulation as an insufficient basis for the trial court's finding and we will not second [*21] guess Universal's strategy for making this stipulation now.

Because "insureds" are entitled to umbrella coverage under the policy Part 980 for any "loss . . . because of injury . . . caused by an occurrence," the trial court's judgment declaring that Part 980 of the Universal policy covered both John and Karen Metzger, for any loss occasioned by the Holdgreve's personal injury suit was not in error. Universal's second assignment of error is overruled.

Judgment of the Putnam County Court of Common Pleas declaring that the United insurance policy does not cover the Metzgers for loss is affirmed. Judgment declaring that policy Parts 950 and 980 of the Universal insurance

contract does cover the Metzgers for loss is also affirmed.

Judgment affirmed.

SHAW, P.J., and EVANS, J., concur.

LEXSEE 2007 OHIO 4781



Caution

As of: Jan 31, 2008

EMMANUEL TORRES, et al., Plaintiffs-Appellants -vs- MATTHEW GENTRY, et al., Defendants-Appellees

Case No. 06 COA 038

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, ASHLAND COUNTY

2007 Ohio 4781; 2007 Ohio App. LEXIS 4294

September 18, 2007, Date of Judgment Entry

PRIOR HISTORY: [**1]

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 04 CIV 169.

favor of Appellants against Appellee Matthew Gentry in the amount of \$ 100,000.00, and finding for Appellees Kevin and Teana Gentry on Appellants' negligence claims against them.

DISPOSITION: Affirmed.

COUNSEL: For Plaintiffs-Appellants: MARK D. MCGRAW, Cleveland, Ohio.

[*P2] Appellants also appeal the trial court's granting of Intervenor Appellee Grange Mutual Casualty's Motion for Summary Judgment and the denial of their Motion for a New Trial.

For Defendants-Appellees Gentry: ROBERT B. DAANE, DANIEL E. CLEVENGER, Canton, Ohio.

STATEMENT OF THE CASE

For Defendant-Appellee Grange Mutual: FRANK G. MAZGAJ, ROBERT L. TUCKER, R. BRIAN BORLA, Akron, Ohio.

[*P3] In March, 2003, Appellee Matthew Gentry, then fourteen years old, modified five shotgun shells by removing the pellets and replacing them with fertilizer. Matthew's mother, Appellee Teana Gentry, heard on a radio program about how shotgun shells [**2] could be modified by replacing the pellets with fertilizer, which would make a loud bang and could be used to scare animals away. This modification appealed to Teana Gentry because she had witnessed her dogs being attacked by the neighbors' dogs, and had been told at least twice by other people about her dogs being attacked.

JUDGES: Hon. Sheila G. Farmer, P. J., Hon. John W. Wise, J., Hon. Patricia A. Delaney, J. Farmer, P. J., and Delaney, J., concur.

OPINION BY: John W. Wise

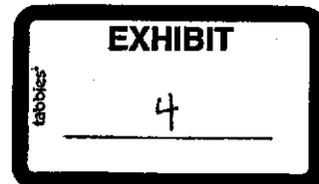
[*P4] Matthew Gentry modified five (5) shotgun shells in the kitchen of the Gentry home while his mother was present in the kitchen with him.

OPINION

Wise, J.

[*P5] After completing the modification, Teana

[*P1] Appellant appeals the jury verdict entered in the Ashland County Court of Common Pleas finding in



Gentry looked at the fertilizer shells to make sure that she could distinguish the modified shells from the regular shells. Matthew marked the modified shotgun shells as Fertilizer shells and placed them on top of the family piano where they remained unused for approximately four months. The modified shells were not kept in the Gentry's gun cabinet in order to keep them separate from the regular live ammunition.

[*P6] The Gentrys owned a .22 caliber rifle, a 12-gauge shotgun, and a pellet gun. The rifle and shotgun were always kept in a locked gun cabinet in the basement. The gun cabinet had two locks on it, and the keys to the locks were kept by Kevin and Teana Gentry in different locations.

[*P7] [**3] On May 23, 2003, Teana Gentry left her home around 2:45 p.m. to take her younger son David to his baseball game. Kevin Gentry was at work and did not return home until 6:00 p.m. Matthew Gentry remained at home with his grandfather, Gerald Billups, age eighty (80), who lived with the Gentry family.

[*P8] Later in the afternoon of May 23, 2003, Matthew was inside his home and heard a banging noise outside. Matthew went to the kitchen and obtained the key to the gun cabinet from the kitchen drawer where his mother, Teana Gentry, had put it. Matthew went downstairs and unlocked the gun cabinet. He then brought the shotgun upstairs, and loaded one of the "fertilizer shells" into the shotgun. He then went outside, yelled "get off my property" twice, and then proceeded to shoot in the direction of the noise. One of the shotgun shells, which apparently contained pellets, struck Plaintiff-Appellant Emmanuel Torres, who was then ten years old, in the head. He had been riding his bicycle in the lane between the Gentry's property and their neighbors' property.

[*P9] On May 24, 2004, Plaintiffs-Appellants Emmanuel Torres (a minor) and his father, Salvatore Torres (collectively "Plaintiffs"), filed a complaint [**4] against Kevin and Teana Gentry, and their son Matthew. The Plaintiffs' claims arise out of a shooting incident that occurred on May 23, 2003.

[*P10] This original Complaint contained a First Cause of Action against Matthew Gentry for willful and malicious behavior, a Second Cause of action against Matthew Gentry for negligence and a Third Cause of action against Teana and Kevin Gentry for negligence.

[*P11] Appellee Grange Mutual Insurance Company ("Grange"), the Gentrys' homeowner's insurance company, immediately intervened in the lawsuit seeking a declaration that it owed no duty to defend or indemnify the Gentrys.

[*P12] On July 26, 2005, Grange filed for summary judgment. In its motion, Grange argued that it owed no duty to defend or indemnify the Gentrys because 1) Matthew's conduct did not constitute an "occurrence"; and 2) Matthew's conduct constituted an "intentional act" that excluded coverage for all persons insured under the policy.

[*P13] On January 19, 2006, the trial court granted Grange's motion in its entirety declaring that Grange has no contractual obligation to defend or indemnify the Gentrys for the claims asserted in Plaintiffs' complaint.

[*P14] Plaintiffs-Appellants filed an Amended Complaint [**5] which still contained separate claims against Teana and Kevin, but dropped the claim for willful and malicious conduct against Matthew.

[*P15] The case was set for trial on August 29, 2006.

[*P16] In their opening statement, defendants admitted Matthew's negligence, but disputed the claim that Mr. and Mrs. Gentry were negligent. (T. at 8-29, 25).

[*P17] The remaining issues at trial were: 1) proximate cause and amount of damages, if any, caused by Matthew's negligence; and 2) whether or not Teana and Kevin Gentry were negligent as a result of Matthew Gentry's conduct.

[*P18] After a five day trial, the jury returned two verdicts: 1) a verdict in favor of Plaintiffs against Matthew Gentry in an amount of \$ 100,000.00; and 2) a verdict for Defendants Kevin and Teana Gentry on Plaintiffs' claims.

[*P19] Appellants now appeal, assigning the following errors for review:

ASSIGNMENTS OF ERROR

[*P20] "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING INTERVENOR-APPELLEE'S GRANGE MUTUAL CASUALTY'S MOTION FOR SUMMARY

JUDGMENT.

[*P21] "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY THAT DEFENDANTS TEANA AND KEVIN GENTRY'S NEGLIGENCE COULD ONLY BE DERIVATIVE OF MATTHEW GENTRY'S NEGLIGENCE, AND SOUND IN NEGLIGENT [**6] ENTRUSTMENT, NEGLIGENT SUPERVISION OR PARENTAL KNOWLEDGE AND CONSENT TO WRONGDOING, AND IN FAILING TO GIVE THE LIABILITY INSTRUCTIONS REQUESTED BY PLAINTIFFS.

[*P22] "III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN OVERRULING PLAINTIFFS' MOTION TO SHOW CAUSE WHY GERALD BILLUPS SHOULD NOT BE HELD IN CONTEMPT/ MOTION TO USE VIDEOTAPE OF GERALD BILLUPS AS EVIDENCE, AND PLAINTIFFS' MOTION FOR NEW TRIAL SHOULD HAVE BEEN GRANTED.

[*P23] "IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GIVING A JURY INSTRUCTION ON THE DOCTRINE OF RES IPSA LOQUITUR."

I.

[*P24] In their first assignment of error, Appellants argues the trial court erred in granting Appellee Grange Mutual Insurance Company's Motion for Summary Judgment holding that it had no duty to defend the Gentry defendants. We disagree.

"Summary Judgment Standard"

[*P25] Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc. (1987)*, 30 Ohio St.3d 35, 36, 30 Ohio B. 78, 506 N.E.2d 212. Civ.R. 56(C) provides, in pertinent part:

[*P26] "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts [**7] of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

[*P27] Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If [**8] the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997 Ohio 259, 674 N.E.2d 1164, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996 Ohio 107, 662 N.E.2d 264.

[*P28] It is based upon this standard that we review appellant's assignments of error.

[*P29] The homeowner's policy in the case sub judice contained the following language:

[*P30] "We will pay all sums, up to our limits of liability, arising out of any one loss for which an insured person becomes legally obligated to pay as damages because of bodily injury or property damage, caused by an occurrence covered by this policy."

[*P31] "Occurrence" is defined in the policy as:

[*P32] "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which result in bodily injury or property damage during the policy period.

[*P33] The Grange policy also contains the following exclusions from coverage:

[*P34] "Under Personal Liability Coverage and Medical Payments to Others Coverage, we do not cover:

[*P35] " * * *

[*P36] "4. Bodily Injury or Property Damage caused by the willful, malicious, or intentional [**9] act of a minor for which an insured person is statutorily liable.

[*P37] " * * *

[*P38] "6. Bodily Injury or Property Damage expected or intended by any insured person.

[*P39] " * * *

[*P40] "10. Bodily Injury or Property Damage arising out of sexual molestation or any sexual activity, corporal punishment or physical or mental abuse.

[*P41] " * * *

[*P42] "9. Personal Injury Coverage -- Section 2

[*P43] "Exclusions

[*P44] "Insurance provided under this endorsement does not apply to:

[*P45] " * * *

[*P46] "(b) Personal Injury arising out of a willful violation of a penal statute or ordinance committed by or with the knowledge or consent of an insured person."

[*P47] Felonious assault, as codified in *R.C. § 2903.11*, provides:

[*P48] "(A) No person shall knowingly do any of the following:

[*P49] "(1) cause serious physical harm to another or to another's unborn;

[*P50] "(2) cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordinance.

[*P51] " * * *

[*P52] "(D) Whoever violates this section is guilty of felonious assault, a felony of the second degree. If the victim of the violation of division (A) of this section is a peace officer, felonious assault is a felony of the first degree. If the victim of the offence is a peace officer, as

defined [**10] in Section 2935.01 of the Revised Code, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of Section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree."

[*P53] Based on Appellee Matthew Gentry's adjudication and the policy language as contained in the Grange Mutual policy, the trial court found:

[*P54] "1. Matthew Gentry's adjudication of delinquency precludes a conclusion by this Court that his conduct was "accidental" and therefore it cannot constitute an "occurrence" for which coverage exists under because "occurrences" are defined as accidents.

[*P55] "2. Matthew Gentry's adjudication of delinquency establishes the exclusions for "bodily injury or property damage expected or intended by any insured person" and "personal injury arising out of a willful violation of a penal statute or ordinance committed by or with the knowledge or consent of an insured person."

[*P56] The trial court went on to find that the policy excluded coverage for "all insureds, if any insured commits an intentional [**11] act." The trial court found that Matthew Gentry's act of shooting Emmanuel Torres was an "intentional act" under the policy and that Matthew Gentry was an "insured" under said policy. The trial court therefore found that such provision excluded coverage for Teana and Kevin Gentry.

[*P57] In this case, it is undisputed that Appellee Matthew Gentry was adjudicated delinquent by the Ashland County Juvenile Court by reason of committing a criminal act which, if committed by an adult, would be punishable as felonious assault under *R.C. § 2903.11*.

[*P58] The Grange policy designates Kevin and Teana Gentry as the named insureds. It states that "you" and "your" refer to the named insured shown in the declarations, and states further that "insured" means you (the named insured) and, if you are an individual, your relatives who are members of your household. Most importantly, the intentional act exclusion states that Grange will not pay for loss arising out of *any* act committed by or at the direction of *any* insured.

[*P59] "[A] criminal conviction, in and of itself,

may conclusively establish intent for purposes of applying an intentional-acts exclusion. * * * The crime of felonious assault requires the offender [**12] to act 'knowingly.' * * * In examining this issue, the Ninth District Court of Appeals found that a conviction involving the mental state of 'knowingly' is sufficient to establish an intent to injure and trigger an intentional acts exclusion, as long as the exclusion is not restricted only to intentional acts, but also includes the expected results of one's acts. * * * Thus, a conviction for felonious assault, because it involves the mental state of 'knowingly,' is sufficient to trigger an intentional acts exclusion." *Baker, 2003 Ohio 1614, P 9-10* (citations omitted). See, also, *Campobasso v. Smolko, Medina App. No. 3259-M, 2002 Ohio 3736; Woods v. Cushion (Sept. 6, 2000), Summit App. No. 19896, 2000 Ohio App. LEXIS 3995; Westfield Ins. v. Barnett, Noble App. No. 306, 2003 Ohio 6278.*

[*P60] In the case sub judice, the clear and unambiguous language of the Grange policy states that it will not pay for loss or damage arising out of *any* act committed by or at the direction of *any* insured with intent to cause a loss. Matthew Gentry was an insured under the terms of the policy, and, as stated above, his intent to cause the loss may be inferred from his intentional act of shooting a loaded firearm at Emmanuel Torres. Emmanuel [**13] Torres is without a doubt a sympathetic plaintiff, but the loss caused by Grange's insured is simply not covered under the terms of the Grange policy.

[*P61] Furthermore, this Court has previously held that negligent supervision and negligent entrustment are not "occurrences" separate and apart from the underlying intentional tort but are derivative claims arising out of the intentional acts. See *Offhaus v. Guthrie (2000), 140 Ohio App.3d 90, 746 N.E.2d 685*, discretionary appeal not allowed in (2001), *91 Ohio St. 3d 1478, 744 N.E.2d 775*.

[*P62] We find the decision of the Supreme Court in *Doe v. Shaffer, 90 Ohio St. 3d 388, 2000 Ohio 186, 738 N.E.2d 1243*, to be inapplicable to the present case in that such case was limited to cases involving incidents of sexual molestation and insurance coverage for a non-molester's negligence.

[*P63] Based on the foregoing, we find this assignment of error not well-taken.

[*P64] Appellant's first assignment of error is

overruled.

II.

[*P65] In their second assignment of error, Appellants argue the trial court erred in instructing the jury as to the theories of liability for Teana and Kevin Gentry. We disagree.

[*P66] The trial court instructed the jury that Teana and Kevin Gentry's negligence could only be derivative of Matthew Gentry's negligence [**14] based upon negligent entrustment, negligent supervision or parental knowledge and consent to wrongdoing.

[*P67] Appellant's argue that the trial court should have given an instruction which would have allowed the jury to find Teana and Kevin Gentry independently negligent.

[*P68] When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443*. The term "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140*.

[*P69] Ohio courts recognize three situations where parents' negligence results in liability in connection with the conduct of their child: (1) negligent entrustment of their child with "an instrumentality (such as a gun or car) which, because of the child's immaturity or lack of experience, may become a source of danger to others"; (2) "failure to exercise reasonable control over the child when the parent knows, or should know, that [**15] injury to another is a probable consequence"; and (3) consenting, sanctioning, or directing a child's known wrongdoing. *Huston v. Konieczny, 52 Ohio St. 3d at 217-218, 556 N.E.2d at 509*.

[*P70] At trial, Teana and Kevin Gentry testified that Matthew was not allowed to use guns without his parents' express permission. They testified that the guns in their house were kept in a locked gun safe and that the keys to such safe were hidden. They further testified that prior to May 23, 2003, to their knowledge, Matthew had never used any of the guns without their permission.

[*P71] The trial court gave the following instruction to the jury:

[*P72] "INTRODUCTION. This is a negligence case. Matthew Gentry's negligence in discharging a firearm in the vicinity of the Plaintiff Emmanuel Torres has been admitted and you are instructed to accept that admission in this case as a stipulated fact. The remaining issues in dispute may be summarized as follows:

[*P73] "B. Were the Defendants, Teana or Kevin Gentry, negligent? A PARENT'S LIABILITY FOR ACTS OF A CHILD:

[*P74] "A parent is not ordinarily liable for damages caused by a child's wrongful conduct. However, liability can attach when the injury committed by the child is the foreseeable [**16] consequence of a parent's negligent act. There are three ways in which a parent is liable for the acts of their children:

[*P75] "1. NEGLIGENT ENTRUSTMENT: Parents may incur liability when they negligently entrust their child with an instrumentality which, because of the child's immaturity or lack of experience, may become a source of danger to others. The Plaintiffs bear the burden of proving by a preponderance of the evidence that Teana or Kevin Gentry entrusted a dangerous instrumentality to Matthew Gentry and that the entrustment of the dangerous instrumentality to Matthew Gentry was a proximate cause of some injury to Emmanuel Torres.

[*P76] "'Entrust" means more than giving the instrumentality to the child; it also encompasses cases where the parent allows the child to keep or have access to a dangerous instrumentality.

[*P77] "To find that an item entrusted to a child is a dangerous instrumentality, you must find that the parent knew or should have known that the items would become a source of danger to others if entrusted to the child, given the child's age, judgment and experience, at the time of the entrustment.

[*P78] "2. NEGLIGENT SUPERVISION: Parents have a duty to exercise reasonable control over [**17] their minor children in order to prevent harm to third persons, when the parents have the ability to control the child and they know, or should know, that injury to another is a probable consequence. To prevail on a negligent supervision claim, the Plaintiffs must prove by

a preponderance of the evidence all of the following:

[*P79] "The parent had the ability to exercise control over the child;

[*P80] "The parent did not exercise the control he or she possessed over the child;

[*P81] "The parent knew, or should have known, that his or her failure to exercise control over the child was likely to result in harm to someone, because the parent was aware of specific instances of prior conduct by the child which would have put a reasonably prudent person on notice that it was likely that the child would injure a person.

[*P82] "3. PARENTAL KNOWLEDGE AND CONSENT TO WRONGDOING: A parent may be held liable in negligence when a parent knows of the child's wrongdoing and consents to it, directs it, or sanctions it."

[*P83] Upon review, under the facts of this case, we find that the above instruction was proper and that the trial court did not abuse its discretion in giving such instruction to the jury.

[*P84] Appellants' second assignment [**18] of error is overruled.

III.

[*P85] In their third assignment of error, Appellants argue the trial court erred in overruling its Motion to Show Cause. We disagree.

[*P86] In the instant case, Appellants subpoenaed Gerald Billups, who was the only adult at home with Matthew Gentry on May 23, 2003, the day of the shooting. However, instead of bringing Mr. Billups to court, as ordered by the trial court, the Gentry's brought a videotape of Mr. Billups taken that morning showing him to be disoriented. Additionally, the Gentry's provided the trial court with a letter from Mr. Billups treating physician, stating:

[*P87] "My patient, Gerald Billups, should not be able to testify about facts that happened two years ago. Mr. Billups cannot recall facts accurately due to his medical condition and he cannot sit for long periods of time."

[*P88] Based on Mr. Billups condition as

evidenced by the tape and the physician's letter, the trial court ruled that Mr. Billups had an adequate excuse for failing to comply with the subpoena and that no sanctions pursuant to Civ.R. 45(E) would issue.

[*P89] Appellants then requested that the trial court play the video tape to the jury to show what Mr. Billups condition was on the day Matthew was [**19] left alone with him.

[*P90] In response, the trial court denied such request, finding such video to be highly prejudicial.

[*P91] The admission or exclusion of evidence rests within the sound discretion of the trial court, and will not be reversed on appeal absent an abuse of discretion. *State v. Sage (1987), 31 Ohio St.3d 173, 31 Ohio B. 375, 510 N.E.2d 343, paragraph two of syllabus.* As stated above, an abuse of discretion connotes more than an error of law or judgment; it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 5 Ohio B. 481, 450 N.E.2d 1140.*

[*P92] Upon review, we find no abuse of discretion in the trial court's decision to not allow the videotape to be introduced at trial. There was no evidence that such videotape was an accurate representation of Mr. Billups condition two to three years previously.

[*P93] We also find no abuse of discretion in the trial court's decision to not impose sanctions on Mr. Billups for his inability to appear.

[*P94] Appellants' third assignment of error is overruled.

IV.

[*P95] In their fourth assignment of error, Appellants argue the trial court erred in not instructing the jury on the doctrine of res ipsa loquitur. We disagree.

[*P96] The doctrine [**20] of res ipsa loquitur is not a substantive rule of recovery, but a rule of evidence that permits, but does not require, an inference of negligence when certain predicate conditions are proven. *Jennings Buick v. City of Cincinnati (1980), 63 Ohio St. 2d 167, 406 N.E.2d 1385, 1387.* Ordinarily, the negligence of a defendant must be affirmatively proven. Where the predicate conditions of res ipsa loquitur are established, the plaintiff is not required to offer

affirmative evidence of the defendant's negligence, but may urge the finder of fact to infer the defendant's negligence from the predicate conditions. These include the defendant's exclusive control over the premises and the fact that the injury or damage occurring would not normally occur absent the defendant's negligence. The archetypical situation is a routine surgical procedure, in which the plaintiff is unconscious, under the influence of a general anesthetic, the defendant health-care practitioners have the exclusive control over the surgical theater, and it is established that the injury to the plaintiff would not normally occur in the absence of negligence. Under these circumstances, it is reasonable to permit an inference [**21] of negligence, but the defendants may present affirmative evidence that they were not negligent, and the finder of fact is never required to draw the inference of negligence, but may find, to the contrary, that the defendants were not negligent.

[*P97] Upon review, we find that Appellants failed to request an instruction as to res ipsa loquitur. The failure to request a jury instruction generally results in the waiver of the issue on appeal. *Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 121, 1997 Ohio 401, 679 N.E.2d 1099.*

[*P98] An appellate court may recognize waived error if it rises to the level of plain error. *Goldfuss, at syllabus.*

[*P99] *Crim.R. 52(B)* states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The Ohio Supreme Court has cautioned that "[n]otice of plain error under *Crim.R. 52(B)* is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.*

[*P100] Upon review, we find no obvious error and Appellant offers no evidence to support the giving of this instruction.

[*P101] Appellants' fourth [**22] assignment of error is overruled.

[*P102] For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Ashland County, Ohio, is hereby affirmed.