

IN THE SUPREME COURT OF OHIO  
CASE NO: 2009-0325

ORIGINAL

KIMBERLY NEAL-PETTIT	)	
	)	
Plaintiff-Appellee	)	On Appeal from the Cuyahoga
	)	County Court of Appeals,
vs.	)	Eighth Appellate District
	)	Case No. 91551
LINDA LAHMAN, et al.	)	
	)	
Defendant-Appellant	)	
	)	

**MERIT BRIEF OF AMICUS CURIAE WORLD HARVEST CHURCH  
IN SUPPORT OF APPELLEE KIMBERLY NEAL-PETTIT**

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## STATEMENT OF FACTS

Amicus Curiae World Harvest Church incorporates by reference the facts set forth in Appellee's Merit Brief.

### PROPOSITION OF LAW NUMBER ONE

**IT IS AGAINST PUBLIC POLICY FOR AN INSURANCE COMPANY TO PAY AN AWARD OF ATTORNEY FEES AS AN ELEMENT OF A PUNITIVE DAMAGE AWARD AGAINST AN INTOXICATED DRIVER.**

**A. R.C. §3937.182 Does Not Cover Every Insurance Policy Issued in Ohio.**

Although the wording of the first proposition of law is quite narrow, Allstate quickly expands the playing field by asserting in the first sentence of its argument that "It is against public policy in Ohio for an insurance company to pay any part of a [any?] punitive damage award." (Allstate's Merit Brief, page 3)

Ohio's public policy is not nearly this broad. O.R.C. §3937.182 only applies to

- motor vehicle insurance and casualty liability insurance;
- covered by sections 3937.01 to 3937.17 of the Revised Code;
- issued by an insurance company licensed to do business in Ohio;
- for judgments or claims against an insured;
- for punitive or exemplary damages.

These requirements demonstrate the fallacy of Allstate's over-generalization. Ohio statutory law does *not* prohibit insurance coverage for any part of any punitive

damage award. See, for example, *The Corinthian v. Hartford Fire Insurance Company* (2001), 143 Ohio App.3d 392, 758 N.E.2d 218, in which the court held that a punitive damage award against a nursing home pursuant to R.C. §3721.17(I) was covered by a liability insurance policy that “clearly and unambiguously contracted to pay Corinthian for all damages from a violation of state law.” *Id.* at 398.

The court went on to hold that:

[W]e discern no public policy reason for not covering the damages at issue here, *i.e.*, punitive damages awarded pursuant to former R.C. 3721.17(I), without any showing of intent or malice.

See also *Foster v. D.B.S Collection Agency*, 2008 WL 755082 (S.D. Ohio—Exhibit 1), in which the court held that R.C. §3937.182 did not prohibit the insurance of punitive damages in debt collection actions.

Furthermore, national companies operating in several states may have insurance on property or operations in Ohio, and yet not have a policy issued in Ohio or issued by a company licensed to do business in Ohio.

Finally, although this Court has not yet addressed the issue, there is a significant body of law that has developed outside Ohio holding that punitive damages are insurable when the judgment is based solely on vicarious liability. The rule is summarized in Widiss, *Liability Insurance Coverage for Punitive Damages? Discerning Answers to the Conundrum Created by Disputes Involving Conflicting Public Policies, Pragmatic Considerations and Political Actions*, 39 *Villanova L. Rev.* 455 (1994):

Courts in many states have concluded that the general rule that prohibits an insured from obtaining coverage for punitive damages does not apply when a judgment against the insured is predicated on vicarious liability. In these decisions, a distinction is drawn between punitive damages that are imposed on the person whose

actions directly caused injuries and punitive damages that are assessed on the basis of vicarious liability. *Id.* at 482.

See also the numerous cases cited in Windt, *Insurance Claims and Disputes*, §6:18, footnote 6 (4<sup>th</sup> Ed. 2001), (“[A]lthough coverage for punitive damages is ordinarily against public policy, it will be allowed when the insured was only vicariously liable.”) and 16 *ALR4th* 11, Liability insurance coverage as extending to liability for punitive damages, §4.

**B. The Impact of *Hutchinson* and Its Progeny.**

As pointed out in the amicus brief of the Ohio Association of Civil Trial Attorneys at pages 9-12, this Court decided in *Hutchinson v. J.C. Penney Casualty Ins. Co.* (1985), 49 Ohio St.3d 195, 478 N.E.2d 1000 that

As a matter of public policy, and in the absence of specific contractual language to the contrary, punitive or exemplary damages may be awarded to an insured under an uninsured motorist provision, where the issuer of the policy promises to pay damages for which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by a covered person and caused by an accident.

This portion of the syllabus was later overruled in *State Farm Mutual Ins. Co. v. Blevins* (1990), 49 Ohio St.3d 165, 551 N.E.2d 955, but even then this Court recognized that punitive damages could be covered by a UM policy that contained “specific contractual language” covering punitive or exemplary damages. *Blevins* did not contain any blanket public policy prohibition against insurance coverage for punitive damages.

Prior to the *Blevins* decision, the legislature decided that it did not like the *Hutchinson* result and amended R.C. §3937.18 to prohibit UM policies from covering

punitive damages. This amendment eventually morphed into the present version of R.C. §3837.182.

What is significant is that the legislature only prohibited coverage for “punitive or exemplary damages” even though *Hutchinson* had found coverage for *both* punitive damages and attorney fees. The legislature, when it originally amended the UM statute and when it later enacted R.C. §3837.182, knew that this Court had found coverage for attorney fees awarded as a result of a punitive damage award, but it never mentioned attorney fees in the statutes. The legislature only prohibited insurance coverage for “punitive and exemplary damages.” If it had intended for the statute to encompass attorney fees, it certainly could have said so. It did not.

Since the legislature chose not to prohibit insurance coverage for attorney fees rewarded as a result of a punitive damage claim, this Court should respect the intent of the legislature and not decide this case on the basis of public policy.

**C. This Case Should Be Decided Based on Policy Language, Not Public Policy.**

The cases and law discussed above demonstrate the danger in making sweeping generalizations about the insurability of punitive damage awards. Public policy is a tenuous basis for refusing to enforce the language of a contract, particularly a liability insurance contract that serves two distinct purposes—protecting the insured and compensating the victim.

In its recent insurance coverage decisions, this Court has not fallen into the trap of deciding cases based on the shifting sands of “public policy”, but has instead relied on enforcing the policy language as it is written. See *Safeco Insurance Company v. White*, 2009-Ohio-3718 and *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 738 N.E.2d 1243.

The Court should continue this trend, and decide this case simply by applying well established rules of insurance contract interpretation to Allstate’s policy language. A determination of public policy is not necessary or desirable in deciding this case.

**PROPOSITION OF LAW NUMBER TWO**

**PUNITIVE DAMAGES AND ANY ACCOMPANYING AWARD OF ATTORNEY FEES DERIVATIVE OF PUNITIVE DAMAGES ARE NOT DAMAGES “BECAUSE OF BODILY INJURY” WITHIN THE MEANING OF AN INSURANCE POLICY.**

Once again, this proposition of law asks the Court to render a decision on a matter not within the scope of this case—the insurability of punitive damages. That issue is not properly before the Court because plaintiff-appellee never sought collection of the punitive damage award from Allstate. Instead, it limited its efforts to collecting the attorney fee award, and that is the narrow issue that the Court should address.

This case then boils down to one of policy interpretation. The operative language of Allstate’s policy provides that “Allstate will pay damages which an insured person is legally obligated to pay because of . . . **bodily injury** sustained by any person.” Thus, the issues are (1) whether attorney fees can reasonably be categorized as “damages”, and (2) whether Allstate’s insured is legally obligated to pay the attorney fees because of bodily injury.

**A. Attorney Fees Can Reasonably Be Categorized as Damages.**

Damages is not a defined term, so it must be given its plain and ordinary meaning while at the same time being broadly construed in favor of the insured. *Gomolka v. State Auto. Mutual Ins. Co.* (1982), 70 Ohio St.2d 166, 436 N.E.2d 1347; *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380.

The dictionary definitions of damages are not particularly helpful. *Black's Law Dictionary*, (Revised 4<sup>th</sup> Edition—Exhibit 2) defines the term as:

A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.

*Webster's Unabridged Dictionary of the English Language*, (2d. Edition 2001—Exhibit 3) defines damages as “the estimated money equivalent for detriment or injury sustained.”

Merriam-Webster Online defines damages as “compensation in money imposed by law for loss or injury.”

None of these definitions directly answer the question of whether attorney fees can fairly be described as damages.

Ohio case law is more illuminating. Significantly, *Hutchinson* found insurance coverage for attorney fees based on nearly identical language, which read:

We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by a covered person and caused by an accident . . .

The Court necessarily found that attorney fees qualified as damages, because it remanded the issue of the amount of attorney fees to award back to the trial court. In fact, the issue seemed so clear that the Court never bothered to scrutinize and dissect the policy language.

Three appellate cases have also considered the issue and all three have decided that damages can reasonably be read to include attorney fees. The first case to so hold

was *Kirtland v. Western World Insurance Company* (1988), 43 Ohio App.3d 167, 540 N.E.2d 282 (11<sup>th</sup> District), which held:

Where the term “money damages” is not defined in an insurance contract, an insurer may be obligated under the facts and circumstances of a particular case to indemnify a municipal corporation for attorney fees awarded against it pursuant to Section 199, Title 42, U.S. Code.

*Kirtland* arose out of a §1983 action against the city of Kirtland that resulted in a verdict for the plaintiff. The judgment included an award of attorney fees. Kirtland’s insurer refused to indemnify the city for the attorney fee award, arguing that this portion of the judgment was not covered by the insurance policy.

The policy covered “all loss which the Public Entity becomes legally obligated to pay as damages”, but contained an exclusion for “fees or expenses relating to claims . . . in any form other than money damages.” Neither “damages” nor “money damages” were defined in the policy.

The court grappled with the elusiveness of the terms until it concluded that they could reasonably be interpreted so as to include attorney fees:

The language of a contract is to be construed against the maker when an ambiguity arises; this is basic contract law. Since the term “money damages” was not defined in the policy, for purposes of this discussion and under these circumstances, this court holds that the attorney fees awarded appellee were money damages. *Id.* at 169-170.

The sixth district next considered the issue in *Sylvania Township Board of Trustees v. Twin City Fire Ins. Co.*, 2004-Ohio-483 (Exhibit 4). This case involved an underlying suit alleging violations of Ohio’s open meeting law. The plaintiff prevailed and the township was ordered to pay attorney fees. The township’s insurer refused to pay the attorney fee award based on the following policy language:

We will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as **damages** because of errors or omissions injury to which this policy applies.

Unlike Allstate's policy, the Twin City policy defined "damages" as a

monetary judgment, award or settlement but does not include fines or penalties or damages for which insurance is prohibited by law applicable to the construction of this policy.

Suit was filed, and the common pleas court found for the insurer. The sixth district, in an opinion written by then-Judge Lanzinger, reversed, holding that:

Because we must construe the broad definition of "damages" as set forth in the policy in the insured's favor, an award of attorney fees is covered under the policy.

The third case to consider the issue was *Fair Housing Advocates Assoc. Inc. v. Terrace Plaza Apartments*, 2006 WL 2334851 (S.D. Ohio—Exhibit 5). The underlying case involved a fair housing claim. Plaintiff prevailed and was awarded attorney fees.

Defendant's insurance policy contained rather standard language:

We will pay those sums that the insured becomes legally obligated to pay as damages because of personal injury to which this coverage part applies.

The policy did not define the term "damages." The court found that there was coverage:

The Court finds there is ambiguity as to what constitutes damages under the Policy. An insurer is free to specify exactly what constitutes "damages" and what constitutes "costs," but chose not to do so. \* \* \* Nowhere in the Policy are attorneys' fees mentioned, therefore, it leaves open the possibility that they could be construed as damages.

Amicus counsel is not aware of any Ohio case that has reached a conclusion at odds with the three decisions discussed above. Ohio's rule is the majority rule:

The majority of courts have held that an insurance policy which provides coverage for “damages” includes coverage for punitive damages unless such coverage is specifically excluded elsewhere in the policy.

Ostrager, *Insurance Coverage Disputes*, §14.02[a].

Under basic rules of contract interpretation, the term “damages” included in Allstate’s policy must be broadly construed in favor of the insured. Since this Court and three Ohio appellate courts have all found that the term “damages” can reasonably be read to include an award of attorney fees, and no Ohio cases have found to the contrary, it stands to reason that one reasonable interpretation of the term “damages” is that it includes attorney fees awarded to the plaintiff-appellee against Allstate’s insured.

**B. The Attorney Fees Are Payable Because of Bodily Injury.**

In *Hutchinson*, this Court found that an insurance policy covered attorney fees based on language that provided that the insurer would

pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle **because of bodily injury** sustained by a covered person and caused by an accident . . .

Allstate’s policy similarly covers damages “because of bodily injury.” See Allstate’s Merit brief, page 9-10. Therefore, the attorney fees are covered by Allstate’s policy.

### PROPOSITION OF LAW NUMBER THREE

#### AN INSURANCE POLICY EXCLUSION IN ACCORDANCE WITH PUBLIC POLICY FOR “PUNITIVE OR EXEMPLARY DAMAGES, FINES OR PENALTIES” PRECLUDES COVERAGE FOR AN AWARD OF ATTORNEY FEES THAT ARE PART OF THE PUNITIVE DAMAGE AWARD.

##### A. Attorney Fees Are Compensatory Damages.

Allstate deftly shifts the focus of this proposition of law in the first sentence of its argument by reframing the issue to be whether Allstate, by virtue of the exclusion quoted above, has a “duty to provide coverage for fines or penalties *arising out of* a punitive or exemplary damage award.” (Allstate’s Merit Brief, page 12)

Of course, Allstate’s exclusion contains no “arising out of” language, merely stating that:

We will not pay any punitive or exemplary damages, fines or penalties under Bodily Injury Liability or Property Damage Liability coverage.

Exclusions are strictly construed against an insurer, so the rule of liberal construction applies with “greater force to language that purports to limit or to qualify coverage.” *Watkins v. Brown* (1994), 97 Ohio App.3d 160, 164, 646 N.E.2d 485, 487. In order to apply, exclusions must be clear and exact. *Moorman v. Prudential Ins. Co.* (1983), 4 Ohio St.3d 20, 445 N.E.2d 1122. “An exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded.” *Hybud Equip. Corp. v. Sphere Drake Ins. Co.* (1992), 64 Ohio St.3d 657, 597 N.E.2d 1096.

Attorney fees—even those awarded only because punitive damages were awarded—are compensatory damages, not punitive damages. This rule was established in Ohio in *Roberts v. Mason* (1859), 10 Ohio St. 277:

Attorney fees—even those awarded only because punitive damages were awarded—are compensatory damages, not punitive damages. This rule was established in Ohio in *Roberts v. Mason* (1859), 10 Ohio St. 277:

1. In an action to recover damages for a tort which involves the ingredients of fraud, malice, or insult, a jury may go beyond the rule of mere compensation to the party aggrieved, and award exemplary or punitive damages; and this they may do, although the defendant may have been punished criminally for the same wrong.
2. In such a case, the jury may, **in their estimate of compensatory damages**, take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action.

This Court has repeatedly affirmed the classification of attorney fees as compensatory damages:

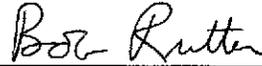
- *Zappitelli v. Miller*, 114 Ohio St.3d 102, 868 N.E.2d 968, 2007-Ohio-3251, (“It is equally clear that paragraph two of the syllabus states that when punitive damages are awarded, the award for compensatory damages may include attorney fees. We do not see how it is possible to reach a different conclusion.”);
- *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 644 N.E.2d 397, (“Attorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted.”);
- *United Power Co. v. Matheny* (1909), 81 Ohio St. 204, 90 N.E. 154.

Since attorney fees are compensatory damages, not punitive damages, they are not encompassed by Allstate’s exclusion.

## CONCLUSION

This Court should affirm the appellate court’s decision and hold that Allstate’s policy language can reasonably be interpreted to provide coverage for Allstate’s insured for the attorney fees awarded to plaintiff-appellee.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiae World Harvest Church In Support of Appellee Kimberly Neal-Pettit was served by regular U.S. Mail, postage prepaid, this 27<sup>th</sup> day of August, 2009 to the following:

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United States District Court,  
S.D. Ohio,  
Eastern Division.  
Ed FOSTER, et al., Plaintiffs,  
v.  
D.B.S. COLLECTION AGENCY, et al., Defendants.  
**No. 01-CV-514.**

March 20, 2008.

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**OPINION AND ORDER**

ALGENON L. MARBLEY, District Judge.

**I. INTRODUCTION**

\*1 This matter is before the Court on Intervenor-Defendant Northland Insurance Company's ("Northland") Motion for Declaratory Summary Judgment. Northland asks this Court to declare that it does not have to defend or indemnify Defendants D.B.S. ("D.B.S.") and Kathy Dickerson on several of the claims against them in this action. Plaintiffs oppose this Motion and Defendants D.B.S. and Dickerson failed to respond. For the reasons stated herein, Northland's Motion for Summary Judgment is **GRANTED in part and DENIED in part.**

**II. FACTS**

**A. Background**

On April 28, 1982, Mary Jane Slaughter ("Ms.Slaughter") registered the fictitious name "D.B.S. Collection Agency" ("D.B.S.") with the Ohio Secretary of State. Ms. Slaughter renewed the

registration in February 1997, thereby extending the validity of the registration until February 2002. Ms. Slaughter then transferred D.B.S. and the right to use that fictitious name to Michael Slaughter ("Mr.Slaughter") on August 10, 1998. Coffman, an attorney, handled the transaction. At that time, Mr. Slaughter did not register the transfer of the right to use the fictitious name "D.B.S. Collection Agency" or his ownership of the business operating under that name with the Ohio Secretary of State.

After the transfer to Mr. Slaughter, Defendants continued to collect consumer debts under the name, and on behalf of, D.B.S. Defendants succeeded in collecting some of those debts by regularly commencing and maintaining actions for debt collection in various Ohio courts. After prevailing in such actions, Defendants collected and executed the judgments that they were awarded, sometimes through the use of garnishment and attachment of debtors' property. Plaintiffs allege that Defendants' debt collection activities customarily involved the use of mail, telephones, and interstate facilities for data transmission.

On March 1, 1999, Mr. Slaughter transferred D.B.S. and the right to use its fictitious name to Defendant Kathy Dickerson ("Dickerson"). Again, Coffman handled the transfer. At that time, Dickerson did not register with the Ohio Secretary of State either the transfer of the right to use the fictitious name "D.B.S. Collection Agency" or her ownership of the business operating under that name.

Plaintiffs allege that after the transfer from Mr. Slaughter, Defendants continued to collect consumer debts under the name "D.B.S. Collection Agency." Defendants continued to collect debts after commencing, maintaining, and prevailing on actions that they filed in various Ohio courts. They then enforced the judgments that they were awarded by garnishing and attaching debtors' property.

*1. Coffman's Representation of D.B.S.*



In 1996, Ms. Slaughter sought legal assistance from Coffman in assuring that her sole proprietorship of D.B. S. complied with the Fair Debt Collection Practices Act, the primary federal law regulating her debt collection business. Coffman initially assigned an employee, Mr. Randy Godard, Esq., to advise Ms. Slaughter.

\*2 In early 1997, Coffman began signing complaints naming D.B.S. as the sole plaintiff in civil debt collection actions filed against consumers in at least two Zanesville, Ohio area state courts. Until approximately the end of November 2002, Coffman signed the complaints initiating D.B.S.'s debt collection lawsuits. During the five-year period when he represented D.B.S., Defendant Coffman appeared on bankruptcy, foreclosure, and subrogation matters. Coffman exclusively handled D.B. S.'s consumer collection litigation.

These debt collection suits, mostly filed in Muskingum County, used a standard civil complaint supplemented with a specially prepared "exhibit A," listing the debts D.B.S. claimed it was owed. Both the complaints and the "exhibit As" were always drawn up for Coffman's signature by D.B.S. The complaint form that Coffman signed to commence these lawsuits for D.B.S. remained substantively unchanged throughout the five-year period that he filed such cases for D.B.S. [FN1] Between 1997 and November 2002, Coffman recovered judgment for D.B.S. on approximately 500 lawsuits commenced with this standard complaint.

FN1. The complaint Defendant Coffman signed in November 2000 to initiate suit by D.B.S. against the named Plaintiffs, Ed and Carla Foster (collectively, the "Fosters"), is an example of the standard complaint with an attached "exhibit A."

Moreover, D.B.S. routinely filed debt collection lawsuits as a general business practice. None of D.B.S.'s clients--Orthopaedic Associates, Perry County Family Practice, Muskingum Emergency Physicians, Prime Care, Podiatric Associates, and

others--used their own attorneys to collect debts. Instead, they collected the debts owed to them through D.B.S. D.B.S. filed these suits in order to gain the power to garnish the wages of these debtors.

Many debtors paid their alleged debt to D.B.S. after being served with a lawsuit. Otherwise, the lawsuits would typically end in default judgment in favor of D.B.S. D.B.S.'s standard complaint contained six allegations:

- (1) that D.B. S. was the only plaintiff;
- (2) that D.B.S., a "debt collection agency," had taken assignment of their debts from the original creditors;
- (3) that the debtor now "owe[s] to Plaintiff [D.B.S.]" all debts listed in the "exhibit A" complaint attachment;
- (4) that D.B.S. was itself entitled to demand and recover judgment;
- (5) that judgment could be entered against all debtors listed in the complaint jointly; and
- (6) that the court's judgment should include "[c]ourt filing fees in the amount of Sixty Dollars (\$60.00), together with interest at the maximum legal rate from the date of judgment, for costs and for attorney fees."

#### *2. D.B.S.'s Debt Collection Lawsuit Against the Fosters*

On November 3, 2000, Defendants commenced a civil action under the name "D.B.S. Collection Agency" against the Fosters jointly in the Zanesville, Ohio Municipal Court to collect consumer debts that the Fosters allegedly owed to various third-party creditors. After service of the complaint by certified mail, Mr. Foster called D.B.S. and spoke to Dickerson. Mr. Foster alleges that Dickerson told him that D.B.S. had the right to garnish his wages \$600 to \$700 bi-weekly and Mrs. Foster's earnings \$200 to \$300 per month. Mr. Foster explained that such garnishment would financially devastate his family. He proposed, instead, that the parties arrange a \$500 per month payment plan to end the lawsuit. Mr. Foster believed that he and

Dickerson agreed upon a \$500 per month payment plan, in exchange for dismissal of the debt collection suit. [FN2] Pursuant to Mr. Foster's understanding of the conversation, he paid D.B.S. a \$500 installment check on November 17, 2000.

FN2. Mr. Foster alleges that this arrangement was entered into during a telephone conversation, despite his contention that, during the same conversation, Dickerson explicitly told Mr. Foster that she would not accept the proposed payment plan because D.B. S. had the right to garnish his wages, as discussed above.

\*3 D.B.S. did not dismiss the civil action filed against the Fosters in municipal court. Instead, on January 4, 2001, without prior notice to Plaintiffs, Dickerson prepared and filed court documents on behalf of D.B.S. for a default judgment against the Fosters. [FN3] Dickerson did not inform the court that she had an intervening telephone conversation with Mr. Foster. The municipal court entered default judgment against the Fosters.

FN3. The Fosters assert that they did not file an answer to Dickerson's complaint because they presumed the case had ended after Mr. Foster's telephone conversation with Dickerson.

After obtaining default judgment, Dickerson attached the Fosters' household checking account by sending the court orders directly to their bank, without providing notice of such action to the Fosters. Both Mr. and Mrs. Foster's employers directly deposit their paychecks into their bank accounts. Consequently, Dickerson's attachment froze the Fosters' cash assets without prior notice to them. As a result, the Fosters allege that they were left without funds for basic necessities, and that their bank dishonored outstanding checks. The Fosters also contend that Dickerson failed to schedule a court hearing on the ex parte attachment of their bank account within the time required by law, thus causing them further economic and emotional

loss. [FN4]

FN4. The Fosters have not specified how this failure to schedule a court hearing caused them damage that extended beyond the damage caused by the attachment it- self.

On January 25, 2001, the Fosters notified Defendants that the attachment of their bank account was void ab initio and that Dickerson, who regularly signs pleadings in civil actions under the name D.B.S., was illegally practicing law. The Fosters based their allegations on the fact that the records of the Ohio Secretary of State at that time showed the lawful owner and registrant of D.B.S. to be Mary Jane Slaughter. Dickerson appeared before the Zanesville Municipal Court on January 25, 2001, to oppose the release of her attachment on the Fosters' bank account. She informed the court that she owned D.B.S. pursuant to the transfer from Mr. Slaughter in March 1999. The municipal court discharged the attachment.

On February 23, 2001, the municipal court heard evidence on the Fosters' motion to vacate the default judgment entered against them. Coffman appeared as counsel for D.B.S., and Dickerson testified on behalf of D.B. S. During the hearing, Dickerson testified that she had not registered her ownership or use of the name "D.B.S. Collection Agency" with the Secretary of State.

On March 2, 2001, Mr. Slaughter registered the August 10, 1998 transfer of ownership of D.B.S. to him from Ms. Slaughter. At the same time, Dickerson registered the March 1, 1999 transfer of ownership of the "D.B. S. Collection Agency" business and name to her from Mr. Slaughter. Coffman prepared the registrations and filed copies with the municipal court. The business address listed for D.B.S. on Dickerson's application for registration listed the same address for D.B.S. that had been registered by Ms. Slaughter in 1997.

On March 28, 2001, the municipal court vacated the

January 4, 2001, default judgment against the Fosters because, at the time judgment was entered, D.B.S. and Dickerson lacked the legal capacity to commence or maintain a civil action under the name "D.B.S. Collection Agency" due to the lack of proper registration. The municipal court also recognized that, pursuant to her March 2, 2001, registration, Dickerson now had legal capacity to sue the Fosters such that the action previously filed could remain pending.

#### B. Procedural History

\*4 Based on the aforementioned facts, the Fosters filed a Complaint with this Court on May 30, 2001 (the "Complaint"), on behalf of themselves and all others similarly situated. In the Complaint, Plaintiffs sought to recover based on: (1) the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"); (2) the Ohio Consumer Sales Practices Act, O.R.C. § 1345.01 *et seq.* ("OCSPA"); (3) common law fraud; (4) the Ohio Pattern of Corrupt Activities Act, O.R.C. § 2923.31 *et seq.* ("OPCA"); and (5) 42 U.S.C. § 1983.

In an Order dated March 8, 2002, this Court granted in part and denied in part D.B.S. and Dickerson's Motion for Judgment on the Pleadings. Pursuant to that Order, the OCSPA and negligence claims were dismissed. Pursuant to an Opinion and Order dated March 25, 2002, this Court granted the Plaintiffs' Motion to Certify a Class under Rule 23(b)(3), while denying Plaintiffs' Motion to Certify a Class under Rule 23(b)(2). The Court certified a class defined as,

All persons named as a party defendant in any Ohio civil action filed between August 10, 1998, and March 1, 2001, in which "D.B.S. Collection Agency" was the named Plaintiff.

The Court also certified a subclass defined as,

All such persons as to whom one or more of the defendants did or will engage in any debt collection activity thereto on or after March 2, 2001.

On February 20, 2003, after Defendants' petition to the Sixth Circuit for leave to appeal the class certi-

fication Order was denied, this Court granted Plaintiffs' Motion for an Order to Approve and Issue Class Notice.

On March 6, 2003, the Court issued two Orders. The Court granted in part Plaintiffs' Motion for Reconsideration of the March 8, 2002, Opinion and Order on Defendants D.B.S. and Dickerson's Motion for Judgment on the Pleadings, reinstating Plaintiffs' claims under the OCSPA. The Court also granted in part and denied in part Defendant Coffman's Motion for Judgment on the Pleadings, dismissing the negligence claim but not the OCSPA claim as to Defendant Coffman.

In an Opinion and Order dated December 16, 2003, the Court granted Plaintiffs' Motion to Amend the Class Definition. Following that ruling, the Court adopted Plaintiffs' proposed definition for the certified class and subclass:

All persons named as a party defendant in any Ohio civil action filed with "D.B.S. Collection Agency" as the named plaintiff by alleged assignment at any time prior to November 30, 2002; and/or all such persons as to whom one or more of the defendants did or will engage in any debt collection activity in relation thereto on or after March 2, 2001.

On November 10, 2006, Northland moved to intervene in this action as a third-party defendant. Northland issued an insurance policy to Dickerson and D.B.S. in which Northland agreed to indemnify them against any damages resulting from legal proceedings arising from the "wrongful acts" covered by the Policy (the "Policy"). On December 27, 2006, the Court granted Northland's motion to intervene.

\*5 On February 16, 2005, the Fosters moved for partial summary judgment on behalf of themselves and the certified class on their FDCPA and OCSPA claims. On August 15, 2005, Defendant Coffman and Defendant Dickerson each moved for summary judgment on all remaining claims against them in the Complaint.

On December 5, 2006, the Court granted Plaintiffs' Motion for Partial Summary Judgment as to Defendants' liability under the FDCPA and the OCSPA, but denied it as to Plaintiffs' damages calculation. *Foster v. D.B.S. Collection Agency*, 463 F.Supp.2d 783 (S.D. Ohio 2006). The Court denied Dickerson's and Coffman's Motions for Summary Judgment in their entirety. *Id.*

On January 20, 2007, Coffman asked this Court to certify its summary judgment opinion for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because he alleged that it "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). On September 25, 2007, this Court denied Coffman's motion.

Currently before the Court is Northland's Motion for Summary Judgment. Northland asks this Court to declare that it need not indemnify D.B.S./ Dickerson on several of the claims against them in this action. Plaintiff opposes this Motion. It is now ripe for adjudication.

### III. STANDARD OF REVIEW

Summary judgment is appropriate "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Vatrett*, 477 U.S. 317, 322-23 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388-89 (6th Cir.1993). In response, the nonmoving party must present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 339-40 (6th Cir.1993). "[S]ummary judgment

will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986); see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (concluding that summary judgment is appropriate when the evidence could not lead the trier of fact to find for the nonmoving party).

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In responding to a motion for summary judgment, however, the non-moving party "may not rest upon its mere allegations ... but ... must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); see *Celotex*, 477 U.S. at 324; *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir.1995).

## IV. ANALYSIS

### A. Introduction

\*6 Northland alleges that the Policy specified that it need not defend or indemnify D.B.S./Dickerson against claims involving: (1) multiplied damages awards; (2) punitive damages; (3) violations of the Ohio Consumer Sales Practices Act; (4) fraud; (5) violations of the Ohio Corrupt Practices Act; or (6) disgorgement/reimbursement. Plaintiff contends that the Policy does not exempt these claims and/or damage awards from its coverage. The relevant portions of the Policy read as follows:

#### Section A: Insuring Agreement

[Northland] will pay on behalf of an Insured all Loss from Claims first made against an Insured ... for Wrongful Acts committed....

#### Section B: Definitions

##### 3) Claim means:

a. Any proceeding in a court of law or equity ... against an Insured for a **Wrongful Act**, including any appeal therefrom.

16) **Loss** means judgments and settlements, including punitive or exemplary damages, which an Insured is legally obligated to pay by reason of a

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Claim, and Defense Expenses. Loss shall not include:

a. Fines, sanctions, taxes, penalties imposed by law or *multiplied portion of any multiplied damages award*;

b. Matters which are uninsurable under the law of the most favorable jurisdiction pursuant to which this Policy shall be construed .... (italics added).

20) **Wrongful Act** means:

a. A violation of the Federal Fair Debt Collection Practices Act (FDCPA) or the Fair Credit Reporting Act (FCRA) and as further amended, or *other similar state statutes*;

b. Any actual or alleged act, error, omission, misstatement, misleading statement or breach of fiduciary or other duty; or

c. Any actual or alleged libel, slander, or oral or written publication of defamatory or disparaging material;

by any Insured in rendering or failing to render Professional Services. (Italics added)

#### Section C: Exclusions

[Northland] will not be liable for Loss in connection with any Claim:

1) Based upon, arising from, or in consequence of any Insured having committed:

a. Any dishonest, *fraudulent* or criminal act or omission;

b. Any willful or intentional violation of any federal or state statute, regulations, rule, decree or similar law or act; or

c. The gaining of any profit, remuneration or advantage to which the Insured was not legally entitled; (italics added)

However, this Exclusion 1, shall not apply unless there is a final judgment or adjudication that establishes that the Insured participated or acquiesced in 1a, 1b or 1c above, at which point [Northland] will have no further duty to defend the Insured, and the Insured shall reimburse [Northland] for any Defense Expenses incurred....

13) Based upon, arising from, or in consequence of disgorgement or reimbursement of monies collected by the Insured.

#### B. General Rules

In general, under Ohio choice of law rules, the law of the state of issuance governs the construction of an insurance policy. *See, e.g., Miller v. State Farm Mut. Auto. Ins. Co.*, 87 F.3d 822 (6th Cir.1996); *Nationwide Mut. Ins. Co. v. Ferrin*, 487 N.E.2d 568 (Ohio 1986). Northland issued the Policy to Dickerson in Zanesville, Ohio. The Plaintiff class consists only of persons "named as a party defendant in an Ohio civil action...." Neither party disputes that Ohio law controls. No other state serves as a conceivable nexus for the events surrounding the Policy. Thus, this Court will apply Ohio law to the construction of the Policy.

\*7 Under Ohio law, a Court shall interpret an insurance policy by applying the rules of construction applicable to contract law. *Monticello Ins. Co. v. Hale*, 284 F.Supp.2d 898, 901 (S.D. Ohio 2003). The role of the Court in interpreting an insurance policy is to give effect to the intent of the parties. *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1261 (Ohio 2003). The Court will liberally construe the policy in favor of the insured without applying an unreasonable interpretation to the terms of the policy. *Id.* at 1262. The unambiguous terms of a contract bind a court. The Court must look to the plain and ordinary meaning of the language of an insurance contract to construe this intent "unless another meaning is clearly apparent from the contents of the policy." *Id.* at 1261. If the language of the contract is clear, the Court may not accept alternate interpretations. *Id.* A particular provision of a contract is unambiguous if it can be given a definite legal meaning. *Id.*

However, if a Court finds a contract provision to be ambiguous, it must be construed strictly against the insurance company. *Id.* at 1262. Moreover, where the plaintiff is not a party to policy at issue, as in this case, the plaintiff is not in a position to urge that the contract be construed strictly against one of the parties. *Id.* Further, if a policy contains exclusions to coverage, those exclusions must "be clear and specific and a general presumption arises to the

effect that which is not clearly excluded from the operation of such contract is included in the operation thereof.' " *Monticello*, 284 F.Supp.2d at 901-02. (citation omitted).

### C. Northland's Allegations

#### 1. Treble Damages

Northland claims that the Policy excludes coverage for treble damages. Northland is correct. Section B(16)(a) of the Policy excludes any "multiplied portion of any multiplied damages award" from the Policy's coverage. Treble damages are "damages that, by statute, are three times the amount that the fact-finder determines is owed." Black's Law Dictionary (8th ed.2004). "Three times" is a multiple, and thus, treble damages fall within the above exclusion. Plaintiff concedes that the Policy does not cover treble damages. Thus, Northland's Motion for Summary Judgment, as it pertains to treble damages, is **GRANTED**. Northland need not indemnify Dickerson/D.B.S. for treble damages that a jury or court may award Plaintiff against Dickerson/D.B.S.

#### 2. Punitive Damages

Northland claims that the Policy excludes coverage for punitive damages. Specifically, Northland asserts that both O.R.C. 3937.182 and Ohio public policy prohibit insurance policies from covering punitive damages. Thus, Northland contends that punitive damages are excluded from the Policy's coverage because they are "matters ... uninsurable under the law of the most favorable jurisdiction pursuant to which this Policy shall be construed." Policy, Section B(16)(b).

\*8 Plaintiff retorts that because Section B(16) specifically includes "punitive or exemplary damages," the Policy must cover any punitive damages that may be ordered against Dickerson/D.B.S.

Northland's first contention, that O.R.C. 3937.182 prohibits an insurance policy from covering punitive damages, is without merit.

O.R.C. 3937.182 reads, in relevant part:

(B) No policy of automobile or motor vehicle in-

urance that is covered by sections 3937.01 to 3937.17 of the Revised Code, including, but not limited to, the uninsured motorist coverage, under insured motorist coverage, or both uninsured and under insured motorist coverages included in such a policy as authorized by section 3937.18 of the Revised Code, and that is issued by an insurance company licensed to do business in this state, and no other policy of casualty or liability insurance that is covered by sections 3937.01 to 3937.17 of the Revised Code and that is so issued, shall provide coverage for judgments or claims against an insured for **punitive or exemplary damages**.

(C) This section applies only to policies of automobile, motor vehicle, or other casualty or liability insurance as described in division (B) of this section that are issued or renewed on or after the effective date of this section.

(Emphasis added)

Northland, without providing any supporting evidence, claims that it is a "casualty" insurance company as specified in O.R.C. 3937.182(c) above. Casualty insurance, as defined by Black's Law Dictionary, means:

An agreement to indemnify against loss resulting from a broad group of causes such as legal liability, theft, accident, property damage, and workers' compensation. The meaning of casualty insurance has become blurred because of the rapid increase in different types of insurance coverage.

Black's Law Dictionary (8th Ed.2004)

As Black's notes, however, casualty insurance is synonymous with "accident" insurance. The Policy is designed to insure against unlawful or harmful debt collection practices, not any form of an accident. Moreover, a plain reading of O.R.C. 3937.01 through O.R.C. 3937.17 indicates that these laws are designed primarily to apply to motor vehicle insurance or other types of accident insurance. O.R.C. 3937.18 only applies to motor vehicle insurance. [FN5] *The Corinthian v. Hartford Fire Ins. Co.*, 758 N.E.2d 218, 221 (Ohio 8th Dist.2001) ("The

Ohio General Assembly in 1986 amended O.R.C. 3937.18 to expressly prohibit the payment of punitive damages in uninsured and under insured motorist coverage.") Finally, until recently, there has been substantial difference of opinion regarding whether Ohio public policy precludes insurance against punitive damages in certain cases. *See, e.g., id.* (holding that neither Ohio public policy nor statute prohibited an insurance coverage of punitive damages relating to violation of Nursing Home Patients' Bill of Rights.) If O.R.C. 3937.182(c) prohibited punitive damages in cases such as these, there would be no debate regarding whether public policy precludes their coverage--because the statute would explicitly exclude the coverage. Thus, this Court finds that O.R.C. 3937.182(c) does not prohibit the insurance of punitive damages in debt collection actions.

FN5. Sections 3937.01 to 3937.16 of the Revised Code apply to casualty insurance including fidelity, surety, and guaranty bonds, and to all forms of motor vehicle insurance, on risks or operations in this state....

\*9 Next, relying on *Lumbermens Mut. Cas. Co. v. SW Industries, Inc.*, 39 F.3d 1324, 1329 (6th Cir.1994), Northland argues that Ohio public policy precludes insurance coverage for punitive damages. In *Lumbermens*, the Sixth Circuit stated:

To date, the Ohio Supreme Court has not ruled directly on the question of whether Ohio's public policy forbids the indemnification of punitive damage awards. The Ohio Court of Appeals, however, has held that such coverage would violate Ohio public policy. *Casey v. Calhoun*, 40 Ohio App.3d 83, 531 N.E.2d 1348, 1351 (1987).

Therefore, we think it clear, and now hold, that Ohio law prohibits the indemnification of monies paid pursuant to an award of punitive damages arising out of the insured's own conduct.

Northland, however, neglects to examine subsequent case law. In *Corinthian*, an Ohio appellate court faced the question of whether an Ohio statute

or Ohio public policy precluded insuring against punitive damages that may stem from violations of the Nursing Home Patients' Bill of Rights. *Corinthian*, 758 N.E.2d 218. The *Corinthian* court, like the Sixth Circuit in *Lumbermens*, began its analysis with a discussion of the reasons public policy might prohibit insurance coverage for punitive damages. Both courts concluded that "an individual should not be able to escape punishment for his or her intentionally malicious acts and that the deterrent effect of punitive damages would be diminished if tortfeasors can be indemnified against them." *Id.* at 223. The *Corinthian* court then reasoned, however, that this logic is not valid "where punitive damages are awarded pursuant to statute, without any finding of malice, ill will, or other culpability" because a deterrent effect is not served absent a malicious state of mind. *Id.*

Subsequently, the court examined the plain language of the policy. It noted that the insurance company, as the drafter of the policy, had the opportunity to exclude punitive damages from coverage but chose not to. *Id.* *See also Medical Liability Mut. Ins. Co. v. Alan Curtis Enterprises, Inc.*, 2006 WL 3542986, (E.D. Ark. Dec. 8, 2006) ("The greater risk to good public policy--in this Court's opinion--is for insurance companies to issue policies which appear to provide coverage for punitive damages, and then call upon the courts to rewrite the policy to eliminate coverage for which the insured contracted, paid and relied upon."). In this case, the Policy goes a step farther than that in *Corinthian*. It explicitly includes punitive damages within its coverage. Policy, Section B(16) ("Loss means judgments and settlements, including punitive or exemplary damages."). In *Corinthian*, the fact that the policy did not exclude punitive damages, combined with the court's conclusion that Ohio law does not prohibit insurance coverage of punitive damages in all cases, led the court to hold that the policy in question could indemnify the defendants against an award of punitive damages, so long as the punitive damages were awarded pursuant to a statute and without any finding of malice, ill will, or other

culpability. *Corinthian*, 758 N.E.2d at 223.

\*10 This Court must rule in accord with the most recent Ohio law. *Corinthian* is that law. Thus, this Court holds that to the extent that Plaintiffs are awarded punitive damages pursuant to a statute without any finding of malice, ill will, or other similar culpability, Northland must indemnify Dickerson/D.B.S. against those damages. If punitive damages are awarded after a finding of malice, ill will, or other similar culpability, or are awarded other than pursuant to a statute, Ohio public policy forbids their indemnification.

### 3. Ohio Consumer Sales Practices Act Claim

Northland avers that it need not defend or indemnify Dickerson/D.B.S. against Plaintiffs' OCSPA claim because Section C(1)(b) of the Policy excludes coverage for any "willful or intentional violations ..." of law. In support of this argument, Northland cites Plaintiffs' Complaint which accuses Defendants of violating the OCSPA in a "knowing, intentional, and deliberate" manner. Thus, Northland argues that Plaintiffs' OCSPA claim falls under the Section C(1)(b) exception to coverage. Plaintiffs retort that a plaintiff need not prove willfulness or intent in order to succeed on OCSPA claim. As such, they argue that their OCSPA claim does not necessarily fall within the Section C(1)(b) exception.

Northland's argument is meritorious. The Ohio Consumer Sales Practices Act is remedial legislation and is to be construed liberally. *Renner v. Procter & Gamble Co.*, 561 N.E.2d 959, 965-966 (Ohio 1988). This legislation prohibits a supplier from committing unfair or deceptive acts in a consumer transaction. O.R.C. 1345.02(A). "Intent or knowledge is not an element of a Consumer Sales Practices Act ('CSPA') laundry list claim unless the Act itself requires intent." *Fletcher v. Don Foss of Cleveland, Inc.*, 628 N.E.2d 60, 62 (Ohio 1993); see also *Renner v. Derin Acquisition Corp.*, 676 N.E.2d 151, 157 (Ohio 8th Dist.1996); *Thomas v. Sun Furniture & Appliance Co.*, (1978) 399 N.E.2d 567 (Ohio 1978) (holding that it is not a defense to

a OCSPA claim to show that the act was not done intentionally, or without knowledge that it was false, misleading or deceptive.) Rather, "it is sufficient that the conduct complained of 'has the likelihood of inducing in the mind of the consumer a belief which is not in accord with the facts.'" *Renner v. Derin Acquisition Corp.*, 676 N.E.2d at 157 (citations omitted).

The Court's inquiry, however, does not end here. Just because a defendant's intent or knowledge is irrelevant to whether a plaintiff may succeed on an OCSPA claim does not mean that Dickerson/D.B.S.'s intent or knowledge is irrelevant in this case. If Dickerson/D.B.S. committed their violations of the OCSPA willfully or intentionally, then this claim would be exempt from the Policy's coverage pursuant to the Section C(1)(b) exception.

It matters not what Plaintiffs alleged in their Complaint but rather the facts upon which a jury or court used to find Defendants liable for violating the OCSPA. In order to determine whether Dickerson/D.B.S.'s violations of the OCSPA were intentional or willful, this Court turns to its conclusions in its previous summary judgment opinion in this case. In that opinion, this Court held that Defendants' debt "collection practices constitute deceptive acts under the OCSPA for the reasons set forth above [in the analysis of Defendants' violations of the FDCPA] ..." and thus granted summary judgment for Plaintiffs on their OCSPA claim. The Court found that Dickerson/D.B.S. committed four types of unfair or deceptive acts. First, they failed to register the name "D.B.S. Collection Agency" with the Ohio Secretary of State and therefore lacked the legal capacity to collect debts. Second, they stated in court papers that they had the right to collect attorney's fees when they did not have the legal ability to do so. Third, they filed debt collection actions against debtors' spouses when the spouses did not have the legal obligation to pay the debts. Fourth, their debt collection practices constituted the unauthorized practice of law because D.B.S. never owned valid assignments from the ori-

ginal creditors under Ohio law.

\*11 In concluding that these four actions constituted violations of the OCSPA, this Court did not find, or even infer, that D.B.S./Dickerson acted intentionally or willfully. The Court, however, did reject their bona fide error defense. Defendants may escape liability if they can prove that they can show "by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c); *Edwards v. McCormick*, 136 F.Supp.2d 795, 800 (S.D. Ohio 2001). The Court found that Defendants failed to prove by a preponderance of the evidence that their illicit actions resulted from a bona fide error. This conclusion, however, does not serve as a finding that Defendants did act with willfulness or intent when violating the OCSPA.

A finding of intent is absent from this Court's grant of summary judgment in favor of Plaintiffs on their OCSPA claim. Northland presents no additional evidence which supports the conclusion that Dickerson/D.B.S. acted intentionally, willfully, or maliciously when it failed to register with the Ohio Secretary of State nor when it filed complaints against various debtors in state court. Thus, simply put, Northland has failed to show that Dickerson/D.B.S. acted in an intentional manner when they violated the OCSPA such that the Section C(1)(b) exception would apply. Therefore, the Court **DENIES** Northland's Motion for Summary Judgment as it applies to the OCSPA claims.

#### 4. Common Law Fraud Claim

Northland contends that it need not defend or indemnify Dickerson/D.B.S. against Plaintiffs' fraud claim because Section C(1)(b) of the Policy excludes coverage for any "willful or intentional violations ..." of law and Section C(1)(a) excludes "any dishonest, *fraudulent* or criminal act or omission." (italics added).

Unlike an OCSPA claim, intent is a required ele-

ment of a fraud claim under Ohio law. See *Kreiner, Uhlinger & Edmonds Co., L.P.A. v. State Farm Fire & Cas. Co.*, 1991 WL 302446, at \*3 (Ohio 5th Dist. Dec. 23, 1991) ("fraud is an intentional tort, with "intent" as one of its elements"); *Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 505 (6th Cir.2003) ("To establish a claim for intentional misrepresentation/fraud under Ohio law, the plaintiff must show: ... (d) [defendant acted] with the intent of misleading another into relying upon it"). Thus, Plaintiffs' fraud claim is excluded from coverage pursuant to Section C(1)(b) of the Policy. Moreover, if Plaintiffs are to succeed on their fraud claim, they necessarily must show that Defendants acted fraudulently. Thus, this claim would also be excluded pursuant to Section C(1)(a) which precludes "fraudulent acts" from coverage.

Plaintiffs retort that the Policy covers all "wrongful acts," including fraud. Section B(20)(b) of the Policy defines a "wrongful act" as, among other things, "any actual or alleged act, error, omission, misstatement, misleading statement or breach of fiduciary or other duty." Plaintiffs contend that because fraud falls within this definition of a "wrongful act," the Policy must indemnify Dickerson/D.B.S. in the event that Plaintiffs succeed on their fraud claim.

\*12 Plaintiffs are correct in their contention that "fraud" is a wrongful act within the Policy's ambit. Plaintiffs, however, misread the Policy's exclusions. First, the Policy generally describes what acts are covered. Then, it excludes specific acts. An insurance policy is to be read from beginning to end with the more specific provisions governing the general ones. See *Monsler v. Cincinnati Cas. Co.*, 598 N.E.2d 1203, 1209 (Ohio 10th Dist.1991) ("A fundamental principle of contract construction requires that the document be read as a whole in order to identify the intent of the parties. A specific provision controls over a general one."). The Policy does not cover the acts it specifically excludes from coverage such as the intentional tort of fraud.

The only question that remains is whether the end

of Section C(1) prevents this Court from granting summary judgment to Northland pertaining to Plaintiffs' fraud claim. The end of Section C(1)

However, this Exclusion 1, shall not apply unless there is a final judgment or adjudication that establishes that the Insured participated or acquiesced in 1a, 1b or 1c above, at which point [Northland] will have no further duty to defend the Insured, and the Insured shall reimburse [Northland] for any Defense Expenses incurred....

Plaintiffs contend that because Plaintiffs' fraud claim has not been adjudicated, the exclusions in Section C(1) do not apply. Northland responds that it is only asking this Court to declare that "if Plaintiffs obtain judgment against Dickerson for fraud, Northland will have no obligation to indemnify Dickerson for that judgment." Based on a plain reading of Section C(1), the exclusion for fraud does not apply until a final judgment has been issued on a particular claim. But, Plaintiffs cannot succeed on their fraud claim in a manner that does not invoke the exemptions in Section C(1). The Court concludes that there would be a waste of judicial resources by requiring Northland to make an additional motion once the fraud claim has been fully adjudicated. Thus, the Court **GRANTS** Northland's Motion for Summary Judgment as it pertains to the fraud claim and finds that if Plaintiffs succeed on their fraud claim against Defendants, Northland need not indemnify Dickerson/D.B.S.

Additionally, under Ohio law, an insurance contract may not indemnify a party for damages resulting from a suit for an intentional tort. *Wedge Products, Inc. v. Hartford Equity Sales Co.*, 509 N.E.2d 74, 76 (Ohio 1987). Thus, pursuant to Section B(16)(b) of the Policy, which exempts from coverage matters which are uninsurable under state law, Northland need not indemnify Dickerson/D.B.S. against Plaintiffs' tort claim. The Policy contains no requirement of full adjudication of a claim before a Court may apply Section B(16).

#### 5. Ohio Corrupt Practices Act Claim

Northland avers that it need not defend or indemnify Dickerson/D.B.S. against Plaintiffs' OPCA claim because Section C(1) of the Policy excludes from coverage, among other things, "any dishonest, *fraudulent* or criminal act or omission." (italics added). In support of this argument, Northland cites Plaintiffs' Complaint which accuses Defendants of violating the OPCA by committing forms of "fraud" and other "illegal" acts. *See* Complaint 77-8. Plaintiffs counter that Northland has not established that a successful OPCA claim *must* involve proof that Dickerson committed an act within the ambit of one of the Section C(1) exemptions. Specifically, without citing any precedent for the proposition, Plaintiffs allege that it is possible for a jury to find Dickerson liable for a violation of the OPCA only vicariously, solely due to her association with Coffman. Plaintiffs argue that if a jury finds Dickerson vicariously liable, the OPCA claims somehow fall out of the purview of the Section C(1) exemptions.

\*13 To sustain a successful OPCA claim, a plaintiff must prove: "(1) conduct of the defendant which involves the commission of two or more of specifically prohibited state or federal criminal offenses; (2) the prohibited criminal conduct of the defendant constitutes a pattern of corrupt activity; and (3) the defendant has participated in the affairs of an enterprise or has acquired and maintained an interest in or control of an enterprise." *Universal Coach, Inc.*, 629 N.E.2d at 32 (citing *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985)). Under the OPCA, a "pattern of corrupt activity" consists of "two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event." O.R.C. § 2923.31(E).

In their Complaint, Plaintiffs allege that Defendants, two individuals and a sole proprietorship, have participated in and constituted an association in fact to collect consumer debts allegedly owed to

third parties since August 10, 1998. They claim that the enterprise regularly pursued its endeavor by filing approximately ten to twenty Ohio court actions to collect consumer debt each month between August 1998 and March 2001. Plaintiffs contend that the suits commenced and maintained by Defendants are void ab initio due to Defendants' lack of legal capacity to bring those suits. Further, Plaintiffs assert that Defendants' actions constitute a pattern of corrupt activity, in that commencing, maintaining, and collecting on judgments derived from civil suits that are void involves separate occurrences of mail fraud, telecommunications fraud, and theft. Plaintiffs allege that Defendants performed these acts knowingly and in reckless disregard of the Plaintiffs' rights.

Simply put, it is impossible for Plaintiffs to succeed on their OPCA claim without establishing that Defendants committed two or more criminal offenses. Plaintiffs offer no precedent which establishes that they can succeed on a OPCA against Dickerson based on vicarious liability. Even if they did so, Dickerson would also have committed a criminal offense--under Ohio's Corrupt Activities Act assisting the commission of a crime is itself a crime--and thus be just as liable for the crime as the one who committed it. *See State v. Siferd*, 783 N.E.2d 591 (Ohio 3rd Dist.2002).

Section C(1) of the Policy exempts from coverage any claim involving a "criminal act or omission." Plaintiffs must prove that Defendants committed a crime in order to succeed on their OPCA claim. Thus, the Court **GRANTS** summary judgment in favor of Northland as it pertains to the OPCA claim and declare that Northland need not indemnify Dickerson/D.B.S. against damages resulting from Plaintiffs' OPCA claim.

#### 6. Disgorgement/Reimbursement as Damages

Northland asks this court to declare that the Policy does not cover "any claim for reimbursement of amounts Dickerson wrongfully collected from Plaintiffs." In doing so, Northland cites Section C(13) of the Policy that states that Northland will

not be liable for any loss in connection with a claim:

\*14 Based upon, arising from, or in consequence of disgorgement or reimbursement of monies collected by the Insured.

Plaintiffs argue that the Policy covers "actual damages recoverable under the FDCPA."

Northland's request for relief is unclear. To the extent that there is a specific award of "reimbursement or disgorgement" Section C(13) specifies that Northland need not indemnify Dickerson/D.B.S. Beyond that, Section C(13) is ambiguous. The Court is unclear what a claim "based upon" disgorgement or reimbursement means and Northland provides no specific explanation. It certainly does not exempt any civil damages recoverable under the FDCPA from the Policy's coverage. As evinced by Section B(20)(a), the Policy is specifically designed to insure against claims arising from debt collecting activity, specifically including violations of the FDCPA. It would be contradictory to insure a debt collector against an FDCPA claim, but not insure it against the damages resulting therefrom. [FN6] Additionally, none of Plaintiffs' other claims is based on reimbursement. They are all based on specific provisions of law, which the penalties for violating are statutory and civil damages. Thus, Section C(13) does not appear to exclude anything arising from Plaintiffs' claims from the coverage of the Policy. However, if this Court specifically orders reimbursement or disgorgement against Defendants, Northland will not have to indemnify Dickerson/D.B.S. for those monies.

FN6. 15 U.S.C.A. § 1692k states that the damages for a violation of the FDCP are:

- (1) any actual damage sustained by such person as a result of such failure;
- (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or
- (B) in the case of a class action, (I) such amount for each named plaintiff as could

be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 percent of the net worth of the debt collector.

#### D. Procedural Arguments

Plaintiffs assert two additional reasons this Court should rely on in denying Northland's Motion in its entirety. First, Plaintiffs claim that Northland is not a party to the Policy, and that a company named Gulf Insurance Group is the "real" insurer. As such, they argue that Northland does not have standing to bring this Motion. But, while Gulf Insurance Group may have drafted the policy, the declarations accompanying the policy clearly and unambiguously state that "Northland Insurance Company" issued and will insure the policy. Thus, Plaintiffs' first argument is without merit.

Second, Plaintiffs argue that Northland did not certify itself as a "defendant class" under Rule 23 and therefore has no standing in this action. This argument is also without merit. Plaintiffs have properly been certified as a class. Northland has properly moved for, and been granted, intervention into this action as a third-party defendant. Northland has properly asserted its rights against other Defendants Dickerson/D.B.S. Technically, given that Northland is asserting its rights against Dickerson/D.B.S., Plaintiffs need not even be involved in the adjudication of this Motion. In any event, nothing transpired in this case requiring Northland to certify itself as a defendant class.

#### V. CONCLUSION

For the reasons stated herein, the Court **GRANTS in part and DENIES in part** Northland's Motion for Summary Judgment. In summary, the Court has held that:

\*15 (1) Northland need not indemnify Dickerson/D.B.S. for treble damages that a jury or court may award Plaintiff against Dickerson/D.B.S.;

(2) To the extent that Plaintiffs are awarded punitive damages pursuant to a statute without any finding of malice, ill will, or other similar culpability, Northland must indemnify Dickerson/D.B.S. against those damages. If punitive damages are awarded after a finding of malice, ill will, or other similar culpability, or are awarded other than pursuant to a statute, Ohio public policy forbids their indemnification;

(3) Northland's Motion for Summary Judgment as it applies to the OCSPA claims is denied;

(4) Northland need not indemnify Dickerson/D.B.S. against Plaintiffs' tort claim;

(5) Northland need not indemnify Dickerson/D.B.S. against damages resulting from Plaintiffs' OPCA claim; and

(6) If this Court specifically orders reimbursement or disgorgement against Defendants, Northland will not have to indemnify Dickerson/D.B.S. for those monies. The Court, however, denies Northland's Motion insofar as it requests that this Court find that any of Plaintiffs' claims are "based on disgorgement or reimbursement."

**IT IS SO ORDERED.**

Slip Copy, 2008 WL 755082 (S.D. Ohio)

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# BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of  
American and English Jurisprudence,  
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors,  
Bankruptcy, Mortgages, Constitutional Law, Interpretation  
of Laws, Rescission and Cancellation of Contracts, Etc.

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EXHIBIT

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## DAIRY

which could be earned by working ordinary number of hours, irrespective of enforced idleness during working hours and overtime employment. *Carlson v. Condon-Kiewit Co.*, 135 Neb. 587, 283 N.W. 220, 221.

**DAIRY.** An establishment for the sale or distribution of milk or milk products. *State v. McCosh*, 134 Neb. 780, 279 N.W. 775, 777.

**DAKER, or DIKER.** Ten hides. Blount.

**DALE and SALE.** Fictitious names of places, used in the English books, as examples "The manor of *Dale* and the manor of *Sale*, lying both in Vale."

**DALUS, DAILUS, DAILIA.** A certain measure of land; such narrow slips of pasture as are left between the plowed furrows in arable land. Cowell.

**DAM.** A construction of wood, stone, reinforced concrete or other materials, made across a stream for the purpose of penning back the waters. This word is used in two different senses. It properly means the work or structure, raised to obstruct the flow of the water in a river; but, by a well-settled usage, it is often applied to designate the pond of water created by this obstruction. *Burnham v. Kempton*, 44 N.H. 89; *Colwell v. Water Power Co.*, 19 N.J.Eq. 248; *Mining Co. v. Hancock*, 101 Cal. 42, 31 P. 112; *State ex rel. Priegel v. Northern States Power Co.*, 242 Wis. 345, 8 N.W. 2d 350, 352.

**DAMAGE.** Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property. The word is to be distinguished from its plural,—"damages,"—which means a compensation in money for a loss or damage. An injury produces a right in them who have suffered any damage by it to demand reparation of such damage from the authors of the injury. By damage, we understand every loss or diminution of what is a man's own, occasioned by the fault of another. 1 Ruth. Inst. 399.

The harm, detriment, or loss sustained by reason of an injury. *Yazoo & M. V. R. Co. v. Fields*, 188 Miss. 725, 195 So. 489, 490.

Synonymous with "condemnation money." *State v. Hale*, Tex.Civ.App., 96 S.W.2d 135, 139. "Injury". *Dohring v. Kansas City*, 228 Mo.App. 519, 71 S.W.2d 170, 171. "Loss." *Gilinz v. State*, 70 N.D. 776, 298 N.W. 238, 239; *Wells v. Thomas W. Garland, Inc.*, Mo., 39 S.W.2d 409, 411.

**DAMAGE-CLEER.** A fee assessed of the tenth part in the common pleas, and the twentieth part in the queen's bench and exchequer, out of all damages exceeding five marks recovered in those courts, in actions upon the case, covenant, trespass, etc., wherein the damages were uncertain; which the plaintiff was obliged to pay to the prothonotary or the officer of the court wherein he recovered, before he could have execution for the damages. This was originally a gratuity given to the prothonotaries and their clerks for drawing special writs and pleadings; but it was taken

away by statute, since which, if any officer in these courts took any money in the name of damage-clear, or anything in lieu thereof, he forfeited treble the value. Wharton.

**DAMAGE FEASANT or FAISANT.** Doing damage. A term applied to a person's cattle or beasts found upon another's land, doing damage by treading down the grass, grain, etc. 3 Bl. Comm. 7, 211; Tomlins. This phrase seems to have been introduced in the reign of Edward III, in place of the older expression "*en son damage*," (*in damno suo*.) Crabb, Eng. Law, 292.

**DAMAGE TO PERSON.** Bodily or physical injury directly resulting from wrongful act, whether lying in trespass or trespass on the case, and does not include torts directly affecting the person but affecting only the feelings and reputation. *Young v. Aylesworth*, 35 R.I. 259, 86 A. 555, 556; *Texas Employers' Ins. Ass'n v. Jimenez*, Tex.Civ. App., 267 S.W. 752, 758; *Howard v. Lunenburg*, 192 Wis. 507, 213 N.W. 301, 303; *Wilson v. Grace*, 273 Mass. 146, 173 N.E. 524, 528.

**DAMAGE TO TWO PERSONS.** In bond for payment of damages that limited amount payable for any one accident. Where widow sued to recover damages to deceased and his estate and also her pecuniary loss, there was "damage to two persons" within the bond. *Ehlers v. Gold*, 169 Wis. 494, 173 N.W. 325, 327.

**DAMAGED.** Made less valuable, less useful, or less desirable. *Cleveland, C., C. & St. L. Ry. Co. v. Mumford*, 208 Ind. 655, 197 N.E. 826, 835.

Synonymous with term "injuriously affected" within eminent domain statutes. *Alabama Power Co. v. City of Guntersville*, 235 Ala. 136, 177 So. 332, 337, 114 A.L.R. 181; term "injuriously affected" as used in condemnation statutes, is synonymous. *Hirt v. City of Casper*, 56 Wyo. 57, 103 P.2d 394, 398.

**DAMAGED GOODS.** Goods, subject to duties, which have received some injury either in the voyage home or while bonded in warehouse.

**DAMAGES.** A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another. *Scott v. Donald*, 165 U.S. 53, 17 S.Ct. 265, 41 L.Ed. 632; *Waincott v. Loan Ass'n*, 98 Cal. 253, 33 P. 88; *Strong v. Neidermeier*, 230 Mich. 117, 202 N.W. 938, 940; *Greer v. Board of Com'rs of Knox County*, 33 Ohio App. 539, 169 N.E. 709, 710.

Compensation for the loss or injury suffered. *Holmes Electric Protective Co. of Philadelphia v. Goldstein*, 147 Pa. Super. 506, 24 A.2d 161, 165; *In re Rushford's Estate*, 111 Vt. 494, 18 A.2d 175, 176; *Brown v. Cummins Distilleries Corporation*, D.C.Ky., 56 F.Supp. 941, 942. A just compensation or reparation for a loss or injury sustained. *McNaghten Loan Co. v. Sandifer*, 137 Kan. 353, 20 P.2d 523, 526. All factors going to make up total amount which plaintiff may recover under correct principles of law. *Binder v. Harris*, 267 Mass. 162, 166 N.E. 707, 708. Reasonable compensation for legal injury. *Sechrist v. Bowman*, 307 Pa. 301, 161 A. 332, 335. The award made to a person because of a legal wrong done to him by another. *Eklund v. Evans*, 211 Minn. 164, 300 N.W. 617, 619. The estimated reparation in money for detriment or injury sustained, and

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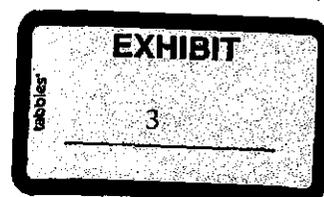
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Not Reported in N.E.2d, 2004 WL 226115 (Ohio App. 6 Dist.), 2004 -Ohio- 483

Sylvania Tp. Bd. of Trustees v. Twin City Fire Ins. Co.

Ohio App. 6 Dist., 2004.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Lucas County.

The SYLVANIA TOWNSHIP BOARD OF TRUSTEES, et al., Appellants

v.

TWIN CITY FIRE INSURANCE CO., Appellee.

No. L-03-1075.

Decided Feb. 6, 2004.

**Background:** Declaratory judgment action was brought to determine whether errors or omissions insurance policy provided coverage to township board of trustees in action alleging violations of Public Records Act and Open Meeting Law. The Court of Common Pleas, Lucas County, entered summary judgment in favor of insurer, and board appealed.

**Holding:** The Court of Appeals, Lanzinger, J., held that: award in underlying action requiring board to pay attorney fees was "damages" under definition of term in policy.  
Reversed.

West Headnotes

**Insurance 217**  2269

217 Insurance

217XVII Coverage-- Liability Insurance

217XVII(A) In General

217k2267 Insurer's Duty to Indemnify in General

217k2269 k. Insured's Liability for Damages. Most Cited Cases

Award in underlying action, alleging violations of Public Records Act and Open Meeting Law, requiring township board of trustees to pay attorney fees was award of "damages" under definition of term in errors or omissions insurance policy; attorney fees constituted a "monetary judgment" or "award," under policy, and trial court's findings concentrated on establishing public benefit and did not indicate intention to punish township trustees.

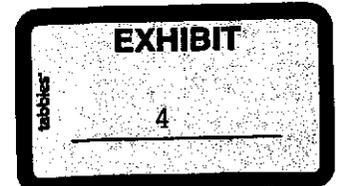
Reginald S. Jackson, Jr., Steven R. Smith, and Jason A. Hill, for appellants.

Harold Reader and Gary S. Greenlee, for appellee.

LANZINGER, J.

\*1 {¶ 1} Appellants, The Sylvania Township Board of Trustees; Donald J. Finnegan, Jr.; Dock D. Treece; George D. Fanning, Jr.; and James C. Maxwell ("Township Trustees"), appeal the decision of the Lucas County Court of Common Pleas finding that coverage did not exist under the insurance policy issued by appellee, Twin City Fire Insurance Company ("Twin City"). Because we must construe the broad definition of "damages" as set forth in the policy in the insured's favor, an award of attorney fees is covered under the policy. We, therefore, reverse.

{¶ 2} The issue in this case is whether a particular insurance policy covers attorney fees awarded against the Township Trustees. Two separate lawsuits are pertinent to our discussion. Twin City issued a policy entitled "Public Officials Errors or Omissions Liability Insurance Policy" to Sylvania Township with effective dates from December 1, 1997 to December 1, 1998. In a lawsuit filed by Sherry J. Specht and other township residents within the policy's term, *Specht v. Finnegan*, Lucas County Case No. CI98-2134, it was alleged that the Township Trustees had engaged in multiple violations of Ohio's Public Records Act, R.C. 149.43, and Ohio's Open Meeting Law ("Sunshine Act"), R.C. 121.22, and had wasted and mishandled township funds. The residents' complaint sought injunct-



ive relief, a writ of mandamus, damages, costs, and reasonable attorney fees. The Township Trustees notified Twin City of the pending action, but Twin City denied coverage after concluding that none of the underlying claims sought "damages" as defined within the policy. As a result, the Township Trustees filed their own declaratory judgment action and breach of contract claim against their insurer, Twin City, and cross-motions for summary judgment were filed in that case. While the motions were pending, the *Specht* court issued its opinion on December 27, 2000, finding that the Township Trustees committed three violations of the Public Records Act and five violations of the Sunshine Act. Later, in its opinion and judgment entry filed December 18, 2001, the Township Trustees were ordered to pay reasonable attorney fees in the amount of \$16,500 in the *Specht* suit.<sup>FN1</sup>

FN1. These decisions in the *Specht* case were affirmed in *Specht v. Finnegan*, 149 Ohio App.3d 201, 776 N.E.2d 564, 2002-Ohio-4660.

{¶ 3} On February 12, 2003, the trial court, in the declaratory judgment action, granted Twin City's motion for summary judgment and denied the Township Trustees'. It is from that judgment that the Township Trustees now appeal and present the following sole assignment of error:

{¶ 4} "The trial court erred in granting defendant Twin City Fire Insurance Company's Motion for Summary Judgment and in denying Sylvania Township's Motion for Summary Judgment."

#### A. Summary Judgment Standard

{¶ 5} A review of the trial court's granting of summary judgment is de novo, and thus, we apply the same standard as the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most

strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294, 662 N.E.2d 264. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon mere allegations or denials of his pleadings, but his 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); *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111, 570 N.E.2d 1095.

#### B. Law on the Interpretation of an Insurance Policy

\*2 {¶ 6} An insurance policy is a contract, and its construction is interpreted as a matter of law. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146. In determining the meaning of the insurance contract, we look at the policy language, giving terms their plain and ordinary meaning, to ascertain a reasonable understanding of the contract. *Gomolka v. State Auto. Mutl. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-168, 436 N.E.2d 1347. If the provisions of the contract may have more than one interpretation, the provisions "will be construed strictly against the insurer and liberally in favor of the insured." *Beaver Excavating Co. v. United States Fid. & Guar. Co.* (1998), 126 Ohio App.3d 9, 14, 709 N.E.2d 858, citing, *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380. Furthermore, under Ohio law, "an exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded." *Westfield Companies v. O.K.L. Can Line*, 1st Dist. No. C-030151, C-030197, C-030298, 2003-Ohio-7151 at ¶ 26 citing *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096.

### C. Terms of the Twin City Policy

{¶ 7} In this appeal, we are asked to determine whether the errors or omissions policy before us provided coverage for a lawsuit seeking monetary relief in the form of attorney fees and costs.<sup>FN2</sup>

FN2. The *Specht* complaint also sought civil forfeiture of \$500 for violation of R.C. 121.22. The Township Trustees do not dispute that the claim for civil forfeiture is not covered under the policy.

{¶ 8} The insuring agreement provides as follows: "We will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of errors or omissions injury to which this policy applies." The policy further refines coverage by stating "The errors or omission injury must be caused by an occurrence. The occurrence must take place in the coverage territory." In addition, the policy provides that Twin City has "the right and duty to defend any claim or suit seeking such damages;" however, the duty to defend is conditional under the limits of liability and the right to investigate and settle a claim or suit. Finally, the policy states that "No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under this policy."

{¶ 9} "Error or omissions injury" is defined in the policy to mean "injury or damage that arises out of an insured's rendering of or failure to render service within the scope of your facilities or operations including but not limited to: a. Discrimination, not committed by or at the insured's direction, when insurance therefore is permitted by law; b. False or improper service of process; and c. Violation of civil rights." The parties do not dispute that the earlier *Specht* lawsuit alleged error or omissions injuries that occurred in the coverage territory. Rather, the dispute is whether the residents' suit contained a claim for damages. The policy defines "damages" as "monetary judgment, award or settlement but does not include fines or penalties or damages for which insurance is prohibited by law ap-

plicable to the construction of this policy." The terms "monetary judgment," "award," "settlement," "fines," and "penalty" are not defined further.

### D. Position of the Parties

\*3 {¶ 10} The Township Trustees argue that Twin City had a duty to defend and indemnify them in the *Specht* lawsuit because a claim for, and an award of, attorney fees constituted "damages" under the terms of the policy. The Township Trustees maintain that the trial court should have broadly interpreted the policy in its favor because the terms "monetary judgment" and "award" in the definition of "damages" are not further defined in the policy, and while the definition of "damages" specifically excludes fines and penalties, it does not specifically exclude attorney fees or costs. The Township Trustees also contend that attorney fees and costs constitute a "monetary judgment" or "award" that is not a "fine" or "penalty," and therefore are "damages" under the policy.

{¶ 11} Twin City denies that there was coverage under the policy or a duty to defend the *Specht* suit because (1) the attorney fee award was "punitive" in nature and thus is excluded by the definition of "damages;"<sup>FN3</sup> (2) pursuant to *Vlach v. Kent State Univ.* (1990), 70 Ohio App.3d 407, 591 N.E.2d 348, the award of attorney fees, although monetary, does not qualify as "monetary damages;" (3) there was no absolute duty to defend as there was no coverage; and (4) the award would be subject to a \$10,000 deductible per occurrence, and there were eight violations.

FN3. The Township Trustees contend that Twin City did not raise its argument characterizing attorney fees as punitive in nature before the trial court on summary judgment. In its combined reply brief and brief in opposition to the Township Trustees' motion for summary, however, Twin City does make a broad statement that

“any monetary relief afforded pursuant to Ohio Rev.Code §§ 121.22 and/or 149.43 constitutes a ‘fine’ or ‘penalty,’ or otherwise falls outside the scope of the term ‘damages.’ “ Therefore, we will consider this argument.

#### E. Duty to Defend

{¶ 12} An insurer's duty to defend is separate and distinct from its duty to indemnify, and the duty to defend is broader than the duty to indemnify. *Socony-Vacuum Oil Co. v. Continental Cas. Co.* (1945), 144 Ohio St. 382, 59 N.E.2d 199, paragraph one of the syllabus. In *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, the Supreme Court of Ohio reviewed the law on the duty to defend: “In *Motorists Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41, 62 O.O.2d 402, 294 N.E.2d 874, this court held that under a liability insurance policy the scope of the allegations in the complaint against the insured determines whether an insurance company has a duty to defend the insured. We held that ‘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.’ *Id.* at paragraph two of the syllabus.” *Anders*, 99 Ohio St.3d at ¶ 17. The *Anders* court then noted that the holding in *Motorists* was expanded by *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St.3d 177, 459 N.E.2d 555, which held that “where the allegations state a claim that falls either potentially or arguably within the liability insurance coverage, the insurer must defend the insured in the actions.” *Anders*, 99 Ohio St.3d at ¶ 18, 788 N.E.2d 1035 citing *Willoughby Hills*, 9 Ohio St.3d at 180, 459 N.E.2d 555.

{¶ 13} *Willoughby Hills*, however, was distinguished in *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, 30 OBR 424, 507 N.E.2d 1118. *Anders*, 99 Ohio St.3d at ¶ 20. In *Preferred Risk*, the Ohio Supreme Court stated “ \* \* \* where the conduct which prompted the underlying \* \* \* suit is so indisputably outside coverage, we discern no basis

for requiring the insurance company to defend and indemnify its insured simply because the underlying complaint alleges conduct within coverage.” *Preferred Risk*, 30 Ohio St.3d at 113, 507 N.E.2d 1118.

\*4 {¶ 14} While Twin City argues it does not have an absolute duty to defend based on *Preferred Risk*, we cannot find that *Preferred Risk* applies because in this case the statutory violations alleged in the *Specht* complaint and the corresponding claim for attorney fees are not so indisputably outside the terms of the policy.

#### F. Trial Court's Ruling

{¶ 15} The trial court identified the issue before it as “whether the underlying lawsuit involved claims against plaintiffs which could result in a ‘monetary judgment, award or settlement’ that does not consist of ‘fines or penalties.’ “ It then determined that the *Specht* complaint sought only statutory relief pursuant to R.C. 121.22 and 149.43. Relying on this conclusion, it went on to state: “The Ohio Supreme Court has held that costs, attorney fees, and civil forfeitures granted pursuant to R.C. 121.22 do not constitute ‘monetary damages.’ *Vlach [v. Kent State Univ.* (1990), 70 Ohio App.3d 407].<sup>FN4</sup> Based on the foregoing, this Court finds that the allegations in the *Specht* suit did not constitute ‘monetary damages’ as defined in the Twin City policy. Therefore, Twin City did not have a duty to defend and indemnify plaintiffs with respect to the underlying lawsuit.”

FN4. The trial court mistakenly stated in its judgment entry that *Vlach* was decided by the Ohio Supreme Court when it actually was from the Eleventh Appellate District. We assume that this is simply a typographical error.

{¶ 16} The trial court's reliance on the *Vlach* decision is misplaced. The issue in *Vlach* was whether jurisdiction was proper in either the Portage County

Court of Common Pleas or the Court of Claims because the plaintiffs sought to recover their attorney fees and costs and a civil forfeiture of \$100 for a violation of R.C. 121.22. Here, the trial court employed *Vlach* to exclude attorney fees and costs broadly from the term “monetary damages.” More importantly, it ignored the contract language of the policy that must govern this case. In *Vlach*, the Eleventh District merely distinguished the statutorily entitled relief sought by the plaintiffs from a suit seeking compensatory damages based on a private cause of action. It then held that the court of common pleas had jurisdiction to award all court costs and reasonable attorney fees pursuant to R.C. 121.22. *Id.* at 410,591 N.E.2d 348. The issue here does not involve the common law concept of “damages” to determine competing jurisdiction between the court of common pleas and the court of claims, but whether attorney fees and costs are encompassed in the definition of “damages” as set forth in a written insurance policy.

{¶ 17} “G. Indemnification

{¶ 18} Arguing that the terms “monetary judgment” and “award” include an award of attorney fees, the Township Trustees rely on *Kirkland v. Western World Ins. Co.* (1988), 43 Ohio App.3d 167, 540 N.E.2d 282. In that case, the city of Kirkland brought an action against its insurer, Western World Insurance Company, for indemnification for the payment of attorney fees it was ordered to pay as the result of an equitable action filed against the city. Under the terms of the policy, Western World Insurance Company was obligated to pay “all loss which the Public Entity becomes legally obligated to pay as damages” and had the right and duty to defend “any suit against the Insured seeking damages on account of such Wrongful Act.” *Id.* at 168, 540 N.E.2d 282. The policy also excluded any liability on the part of Western World Insurance Company if the loss arose out of “claims, demands or actions seeking relief, or redress, in any form other than money damages.” *Id.* at 169, 540 N.E.2d 282. The city of Kirkland argued that attorney fees were

a form of “money damages” because attorney fees are a cost and costs are also a form of “money damages.” The appellate court stated “Since the term ‘money damages’ was not defined in the policy, for purposes of this discussion and under these circumstances, this court holds that attorney fees awarded appellee were money damages.” *Id.* at 170, 540 N.E.2d 282.

\*5 {¶ 19} Twin City argues that *Kirkland* is inapplicable because its policy does define “damages,” while the Western World policy did not. Turning to the Twin City policy, we see that “damages” is contractually defined. “Damages” means “monetary judgment, award or settlement but does not include fines or penalties or damages for which insurance is prohibited by law applicable to the construction of this policy.” However like *Kirkland*, Twin City’s policy does not uniquely define key terms—“monetary judgment” or “award.” Therefore, we look to the common meaning of those terms. See *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (Undefined terms in an insurance policy must be given their plain and ordinary meaning.)

{¶ 20} “Judgment” is “a court’s final determination of the rights and obligations of the parties in a case.” Black’s Law Dictionary (7 Ed.1999) 846. The *Specht* court awarded a judgment for attorney fees in the amount of \$16,500 against the Township Trustees. Therefore, attorney fees constitute a “monetary judgment” or “award.” However, if they also can be classified as a “fine” or “penalty,” then they are excluded from coverage under the policy. So unless one of the narrow exclusions in the definition of “damages” applies, Twin City had an obligation to defend and indemnify the Township Trustees in the *Specht* lawsuit.

{¶ 21} The Twin City policy also does not define the terms “fine” or “penalty” and so the common meaning of those terms should apply. Twin City contends that the *Specht* court specifically found that the attorney fee award rendered against the Township Trustees was “punitive” in nature and

that by definition punitive damages constitute "fines or penalties" as a matter of law.

{¶ 22} A careful review of the *Specht* court's decision, however, shows that the trial court did not actually find that the award of \$16,500 was punitive in nature. Rather, the court noted that the award of attorney fees was discretionary and set forth what must be considered before any award of attorney fees was granted to the residents. It explained: "Further, in a [Public Records Act] action, a sufficient benefit to the public must be shown in order to warrant an award of attorney fees. *Fox [v. Cuyahoga Cty. Hosp. System]* (1988), 39 Ohio St.3d 108] at 112, 529 N.E.2d 443. Because the punitive nature of such an award, it is permissible to consider the reasonableness of a parties refusal to comply with the [Public Records Act.] *Id.*"The *Specht* court did state that the Township lacked a legal basis supporting the failure to produce. The trial court's findings, however, concentrated on establishing a public benefit and did not indicate an intention to punish the Township Trustees.

{¶ 23} Furthermore, in *State ex rel. Beacon Journal Publishing Company v. Ohio Dept. of Health* (1990), 51 Ohio St.3d 1, 553 N.E.2d 1345, one of the questions asked was whether R.C. 149.43(C)'s award of attorney fees violated the prohibition against retroactive application in Section 28, Article II of the Ohio Constitution. The Ohio Supreme Court specifically declined to find that the imposition of attorney fees equated to an award of punitive damages. Instead, the Ohio Supreme Court held that "Attorney fees are costs, statutes relating to costs are remedial, \* \* \*." *Id.* at 3,553 N.E.2d 1345.

\*6 {¶ 24} In this case, attorney fees were awarded pursuant to R.C. 149.43(C) and 121.22. Because this award was handled pursuant to statute, the attorney fee award is regarded as a part of costs. Therefore, the award of attorney fees did not constitute a "fine" or a "penalty," and as a result, none of the exceptions to the broad definition of "damages" applied. We, therefore, find that the Twin City policy provided coverage for the *Specht*

lawsuit and that Twin City had a duty to defend Sylvania Township.<sup>FN5</sup>Sylvania Township's sole assignment of error is well-taken.

FN5. Twin City also contends that, even if coverage is found, the award is subject to the policy's deductible of \$10,000 per occurrence. This issue was argued in Twin City's reply brief before the trial court. The trial court, however, did not determine this issue. Upon remand, the trial court should address this argument in determining damages.

{¶ 25} Based on the above, we find that substantial justice was not done the parties complaining. The judgment of the Lucas County Court of Common Pleas is reversed, and the case is remanded to the trial court for further proceedings consistent with this decision and the law. Costs assessed to appellee.

JUDGMENT REVERSED.

PETER M. HANDWORK, P.J., JUDITH ANN LANZINGER and ARLENE SINGER, JJ., concur.

Ohio App. 6 Dist., 2004.

Sylvania Tp. Bd. of Trustees v. Twin City Fire Ins. Co.

Not Reported in N.E.2d, 2004 WL 226115 (Ohio App. 6 Dist.), 2004 -Ohio- 483

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 (Cite as: 2006 WL 2334851 (S.D. Ohio))

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Only the Westlaw citation is currently available.

United States District Court,  
 S.D. Ohio,  
 Eastern Division.  
 FAIR HOUSING ADVOCATES ASSOC. INC., et  
 al., Plaintiffs,  
 v.  
 TERRACE PLAZA APARTMENTS, et al., De-  
 fendants.  
 No. 2:03-CV-0563.

Aug. 10, 2006.

Andrew L. Margolius, Cleveland, OH, John  
 Spenceley Marshall, Columbus, OH, for Plaintiffs.

Matthew Jon Smith, Smith Rolfes & Skavdahl  
 Company LPA, Cincinnati, OH, William Lloyd  
 Willis, Jr., Havens Willis LLC, Columbus, OH, for  
 Defendants.

### OPINION AND ORDER

GEORGE C. SMITH, District Judge.

\*1 This matter is before the Court on Third-Party Defendant Owners Insurance Co.'s Motion for Summary Judgment (Doc. 65), Defendant/Third-Party Plaintiff Phyllis Hardy's Motion for Summary Judgment (Doc. 69), Defendants' Objections to the Magistrate's August 13, 2004 Order (Doc. 43), Plaintiffs' Motion for Sanctions (Doc. 49), and Plaintiffs' Motion for Costs and Attorneys Fees (Doc. 55). For the reasons that follow, the Court **GRANTS** Defendant Third-Party Plaintiff Phyllis Hardy's Motion for Summary Judgment; **DENIES** Third-Party Defendant Owners Insurance Co.'s Motion for Summary Judgment; **GRANTS** Plaintiffs' Motion for Ruling on Sanctions Issue and **OVERRULES** Defendants' Objections to the Magistrate Judge's August 13, 2004 Order; and **GRANTS** Plaintiffs' Motion for Attorneys' Fees and Costs.

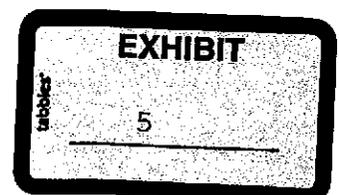
### I. BACKGROUND

The Plaintiffs Fair Housing Advocates Association, Inc. ("Fair Housing"), Karen Brown, and Loretta Brown ("the Browns") initiated this declaratory judgment action against Defendants Terrace Plaza Apartments ("Terrace Plaza"), Martha Fattler ("Fattler"), Carla Myers ("Myers"), and Phyllis Hardy ("Hardy") on June 20, 2003. Plaintiffs claimed that Defendants discriminated against the Browns on the basis of familial status, specifically that they refused to rent to them because they had small children, in violation of Federal and Ohio Fair Housing Acts, 42 U.S.C. §§ 3604 and 3618 and Ohio Revised Code § 4112 *et seq.*

During the course of discovery, it was revealed that the Plaintiffs' claims were based on certain statements made by Carla Myers, the manager of the Terrace Plaza Apartments, to Plaintiffs Karen and Loretta Brown, implying that Terrace Plaza would not rent apartments to people with children. After this was revealed, the parties were able to reach a settlement in this matter. There is no dispute that Plaintiffs are entitled to attorneys' fees as it is statutorily guaranteed in 42 U.S.C. § 3604, the federal and state fair housing laws. The only issue remaining in this case is whether the insurance policy for Terrace Plaza covers Plaintiffs' attorneys' fees.

Defendant Hardy is insured with Owners Insurance Company for her operation of Terrace Plaza. Owners issued a commercial property and commercial general liability policy to Ms. Hardy, policy number 004603-05204971-01, with a personal injury limit of one million dollars (the "Policy"). The Policy is subject to an endorsement entitled Commercial General Liability Plus Endorsement, number 55091. It is under this endorsement that Owners is defending the action because paragraph 5 includes personal injury extension coverage which includes discrimination and humiliation within the definition of personal injury.

The parties agree upon the applicable Policy sections in this case, but the dispute arises over the



scope of coverage under the Policy. The applicable sections of the Policy are as follows:

Section I, Coverage B specifically states:

\*2 We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" to which this coverage part applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (Section III); and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverage A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS COVERAGE A AND B.

Supplementary Payments-coverage A and B specifically states:

We will pay with respect to any claim or "suit" we defend:

1. All expenses we incur.
2. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
3. The cost of bond to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
4. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit," including actual loss of earnings up to \$100 a day because of time off from work.
5. All costs taxed against the insured in the "suit."
6. Prejudgment interest awarded against the in-

sured on the party of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

7. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

Over the course of the litigation of this case, Owners issued three reservation of rights letters to Ms. Hardy to explain what claims were not covered, such as punitive damages and costs to correct Federal Fair Housing Violations. The first and second letters (September 2003 and March 30, 2004) were standard and basically contained the same information including a general reservation of all rights under the policy:

All rights, terms, conditions and exclusions in your policy are in full force and effect and are completely reserved. No action by any employee, agent, attorney or other person on behalf of Owners Insurance Company or hired by the company on your behalf or others shall waive or be construed as having waived any right, term, condition, exclusion or any other provision of the policy.

\*3 The third and final reservation of rights letter (April 21, 2005), [FNI] differs slightly from the previous two in that it specifically references Owners' position with respect to attorneys fees. Specifically, the letter states that "Plaintiffs Attorney is seeking compensation of his legal fees associated with this suit. The insuring agreement for "personal injury" states the following in your policy: No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS-COVERAGES A AND B."

FNI. Attached to Owners' Motion as Exhibit D, incorrectly referred to as Exhibit C in Owners' Motion for Summary Judgment

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Ms. Hardy, in her Third-Party Complaint, is seeking a declaratory judgment on the issue of coverage under the Policy for attorneys' fees as part of the costs in the underlying lawsuit.

## II. SUMMARY JUDGMENT STANDARD

The standard governing summary judgment is set forth in Fed.R.Civ.P. 56(c), which provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). [FN2] The Court disregards all evidence favorable to the moving party that the jury would not be not required to believe. *Id.* Stated otherwise, the Court must credit evidence favoring the nonmoving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. *Id.*

FN2. *Reeves* involved a motion for judgment as a matter of law made during the course of a trial under Fed.R.Civ.P. 50

rather than a pretrial summary judgment under Fed.R.Civ.P. 56. Nonetheless, standards applied to both kinds of motions are substantially the same. One notable difference, however, is that in ruling on a motion for judgment as a matter of law, the Court, having already heard the evidence admitted in the trial, views the entire record, *Reeves*, 530 U.S. at 150. In contrast, in ruling on a summary judgment motion, the Court will not have heard all of the evidence, and accordingly the non-moving party has the duty to point out those portions of the paper record upon which it relies in asserting a genuine issue of material fact, and the court need not comb the paper record for the benefit of the nonmoving party. *In re Morris*, 260 F.3d 654, 665 (6th Cir.2001). As such, *Reeves* did not announce a new standard of review for summary judgment motions.

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby*, *Celotex*, and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir.1989). The court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479.

\*4 Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting *Liberty Lobby*, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "show that there is some metaphysical

doubt as to the material facts.' " *Id.* (quoting *Matsushita*, 475 U.S. at 586).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris*, 260 F.3d 654, 665 (6th Cir.2001).

### III. DISCUSSION

Third-Party Plaintiff Ms. Hardy asserts that attorneys' fees are recoverable under the Policy either as damages Ms. Hardy is obligated to pay or as costs taxed against Ms. Hardy in this lawsuit. Ms. Hardy is therefore seeking a declaration that Owners is required under the Policy to pay Plaintiffs' attorneys fees.

Third-Party Defendant Owners Insurance Company, on the other hand, argues that it is entitled to summary judgment on the declaratory judgment action because no such coverage for attorneys' fees exists. Owners also argues that the Court should deny coverage for attorneys' fees because Ms. Hardy and her agents failed to cooperate in defending the lawsuit causing Owners to incur additional expenses in defending the lawsuit rather than just working to settle it.

#### A. Insurance Coverage

The insurance Policy at issue in this case is silent as to attorneys' fees. The Policy specifically states that "[Owners] will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury'... to which this coverage part applies." See Section I-coverage b. Personal injury is defined to include discrimination and humiliation. The insured, Ms. Hardy, argues that this language in the Policy can be read to include the payment of attorneys' fees. Specifically, Ms. Hardy argues that Plaintiffs' attorneys' fees are either dam-

ages assessed against the losing party or costs that should be assessed against the loser to compensate the victor for their efforts.

Under Ohio law, an insurance policy is a contract and interpretation of the contract is a matter of law. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978). If the intent of the parties is clear and unambiguous on the face of the contract, a court must enforce the contract as written. *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657 (1992). Ohio law provides that, where a contract term is free of ambiguity, the contract is to be construed according to its ordinary meaning. See *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107 (1995). However, if the language of the insurance policy is ambiguous, as in the case at bar, the contract must be strictly construed against the insurer. *Columbiana County Bd. of Commissioners v. Nationwide Ins. Co.*, 1998 WL 668727, \*3, Ohio App.3d (7th Dist.1998).

\*5 The Court finds there is ambiguity as to what constitutes damages under the Policy. An insurer is free to specify exactly what constitutes "damages" and what constitutes "costs," but chose not to do so. When an insurance contract does not provide legal definitions of terms like those at issue, the question of whether something falls within a particular category is one of state insurance law. *City of Sandusky v. Coregis Ins. Co.*, 2006 U.S.App. LEXIS 18002, 10-14 (6th Cir.2006).

No where in the Policy are attorneys' fees mentioned, therefore, it leaves open the possibility that they could be construed as damages. See, e.g., *City of Kirtland v. Western World Ins. Co.*, 43 Ohio App.3d 167 (Ohio App.1988)(where "money damages" was not defined, the term was ambiguous and could include a § 1988 award the insured was forced to pay to plaintiffs in an underlying action); *Sylvania Twp. Bd. of Trustees v. Twin City Fire Ins. Co.*, 102 Ohio St.3d 1416 (2004)(finding "damages" to be ambiguous and therefore possibly including an award of attorney fees that the insured had to pay as a result of a state statute).

The fact that the insurance Policy states that it will pay those sums the insured becomes legally obligated to pay as damages, suggests that the sums include all damages that arise due to the success of Plaintiffs' lawsuit. In this case, there is no question that the Plaintiffs are prevailing parties and therefore as a result of Defendant's discrimination, Plaintiffs are entitled to attorneys' fees. Pursuant to the Fair Housing Act of 1988, 42 U.S.C. § 3604 et seq., a prevailing party is permitted to recover reasonable attorneys' fees and costs. The award of attorneys' fees under the Fair Housing Act is not an independent claim that is to be evaluated and determined if it is covered under the insurance Policy, but rather, it is dependent upon the success of other claims for relief.

Owners argues that under the Federal Fair Housing Act, the Policy should not be construed to include an award of attorneys' fees. Specifically, Owners argues that since the Federal and Ohio Fair Housing Acts separate attorneys' fees from damages, then attorneys' fees should not be covered as damages under the insurance Policy at issue in this case. While the facts of some cases may dictate a finding that Owners is seeking, the facts of this case do not. Owners cites several cases in support of its position as to why attorneys' fees are not considered damages, and those cases appear to reach the correct conclusion. However, in this case, the language of the insurance Policy is ambiguous. Owners has contracted to pay those damages the insured becomes legally obligated to pay. The insured could construe this language to mean any amount that the insured is ordered by the court to pay to the prevailing party, including attorneys' fees. Owners could have specifically excluded attorneys' fees in the Policy but chose not to do so. Therefore, finding that the language of the Policy is ambiguous and could be interpreted to include attorneys' fees, the Policy must be construed in favor of the insured. Ms. Hardy is therefore entitled to coverage for the attorneys' fees she must pay to the Plaintiffs in this case.

#### B. Insured's Duty to Cooperate

\*6 Owners' argues that Ms. Hardy and her agents are not entitled to insurance coverage because they failed to cooperate in their defense as required under the Policy. Ms. Hardy, however, argues that she fully cooperated with Owners in every stage of the litigation.

When cooperation is a policy condition, as it is in the case at bar, and an insured fails to cooperate, "the insurer may be relieved of further obligation with respect to a claim with which the insurer did not cooperate." *Gabor v. State Farm Mut. Auto. Ins. Co.*, 66 Ohio App.3d 141, 143 (1990).

Owners argues that Ms. Hardy and her agent consistently denied any discriminatory conduct which was a material misrepresentation and resulted in prejudice to Owners. Ms. Hardy, however, claims that she does not recall a conversation where she allegedly stated that she wished Terrace Plaza Apartments did not have to rent to people with children. Ms. Hardy did, however, make full and fair disclosures to Owners as soon as she had knowledge of any and all material information. While Owners may have incurred some additional attorneys' fees in defending the action before this information was revealed and it decided to work toward settlement, this was not a result of any failure to cooperate by Ms. Hardy. It is not uncommon during the course of litigation for facts to come to light that may have been forgotten due to the passage of time. Further, Ms. Hardy did not have any knowledge that Ms. Myers unilaterally denied an apartment to Plaintiffs based on the comment by Ms. Hardy until well into the litigation. Therefore, there has been no prejudice to Owners and Ms. Hardy is entitled to coverage under the Policy.

#### C. Owners' Reservation of Rights

Owners asserts that it anticipates that Ms. Hardy will claim that Owners waived its right to deny coverage for a late reservation of rights to the attorneys' fees issue. Ms. Hardy, however, does not appear to raise this argument in her briefs. Even if this issue were raised, after careful review of Owners'

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reservation of rights letters, Owners has reserved all rights under the Policy by stating in each letter, "All rights, terms, conditions and exclusions in your policy are in full force and effect and are completely reserved ." Therefore, Owners reserved all rights under the Policy in all of the reservation of rights letters sent to Ms. Hardy and did not waive any rights.

#### **IV. PLAINTIFFS' MOTION FOR RULING ON SANCTIONS ISSUE AND DEFENDANTS' OBJECTIONS TO THE MAGISTRATES AUGUST 13, 2004 ORDER**

On August 13, 2004, the Magistrate Judge granted plaintiffs Fair Housing Advocates Association, Inc., ("FHAA") Karen Brown, and Loretta Brown's June 3, 2004 Motion to Strike All or Part of Defendants' Rule 68 Offer of Judgment and Motion for Sanctions (Doc. 36). *See* Doc. 42. On August 27, 2004, Defendants Terrace Plaza Apartments, Phyllis Hardy, Martha Fattler, and Carla Myers objected to the Magistrate Judge's Order. *See* Doc. 43. Plaintiffs filed a Memorandum in Opposition to Defendants' objections on September 2, 2004 (Doc. 44).

\*7 Defendants object to the Magistrate Judge's decision to grant Plaintiffs' Motion for Sanctions requiring Defendants to pay Plaintiffs' attorneys' fees and costs in bringing their motion. Defendants argue that the Local Rules encourage, and sometimes require, communication between counsel prior to seeking judicial intervention, and Plaintiffs failed to attempt to resolve the dispute through informal efforts. Defendants argue that Plaintiffs should not be rewarded with attorneys' fees after failing to engage in informal methods to resolve the dispute. Defendants maintain that there has been no showing of "unreasonable or vexatious" conduct by defense counsel.

Defendants also request that the Court stay any ruling on attorneys' fees until the case is resolved because they have admitted a violation of fair housing practices and plaintiffs may recover attorneys' fees

as a result. Defendants maintain that the Court should not hear arguments on attorneys' fees more than once; and judicial economy would be served by allowing just one hearing on the issue of attorneys' fees. In the event that the Court determines that it is appropriate to decide the issue of attorneys' fees at the present time, Defendants request a hearing to challenge the reasonableness of Plaintiffs' attorneys' fees in the amount of \$3,670.01 for 14.97 hours of legal work billed at \$245.00 per hour.

Plaintiffs maintain that Defendants' conduct was inexcusable and warrants sanctions. Plaintiffs argue that Defendants' aggressive defense of this case made it unfathomable to attempt informal means of resolving the dispute. Plaintiffs seek sanctions for including extraneous material in the Rule 68 offer of judgment and known confidential information.

Plaintiffs argue that Defendants improperly revealed confidential discussions and negotiations from court-ordered mediation. Plaintiffs also argue that Defendants improperly attached a confidential memorandum between FHAA and its legal counsel in contravention of Opinion 93-11 of the Ohio Board of Commissioners on Grievances and Discipline. Plaintiffs maintain that Defendants' aggressive defense of this case has included neglecting to review the evidence, ridiculing and belittling Plaintiffs, cancelling depositions unilaterally, and threatening sanctions.

Plaintiffs also argue that Defendants' request to stay the ruling on the basis that the Plaintiffs will eventually receive attorney fees is unreasonable. Delay in enforcing the sanctions would only benefit Defendants who acted improperly.

Here, sanctions were not awarded under Rule 37, which requires consultation between counsel before filing a discovery motion, but under 28 U.S.C. § 1927, which does not. Section 1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceed-

ings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

\*8 28 U.S.C. § 1927. Sanctions under § 1927 are warranted "when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, [and] a trial court does not err by assessing fees attributable to such actions against the attorney." *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir.1986)(holding that 28 U.S.C. § 1927 authorizes a court to assess fees against an attorney for "unreasonable and vexatious" multiplication of litigation despite the absence of any conscious impropriety). A showing of bad faith is not required. *Id.*

It was improper for Defendants to file their offer of judgment because it was not accepted by Plaintiffs; and the offer of judgment itself included confidential information from court-ordered mediation. There is a strong public interest supporting the confidentiality of settlement negotiations:

The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of "impeachment evidence," by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.

*Goodyear Tire & Rubber Co. v. Chiles Power Sup-*

*ply, Inc.*, 332 F.3d 976, 980 (6th Cir.2003). Furthermore, Local Rule 16.3(c)(1) provides in pertinent part:

evidence of conduct or statements made in settlement negotiations is not admissible to prove liability for or invalidity of a claim or its amount. In order to promote candor and protect the integrity of this Court's ADR processes, in addition to other protections afforded by law all communications made by any person (including, but not limited to parties, counsel, and judicial officers or other neutral participants) during ADR proceedings conducted under the authority of this Court are confidential, and are subject to disclosure only as provided in subsection (c)(3) of this Rule.

Local Rule 16.3(c)(3)(A) provides for disclosure by neutrals in limited circumstances which are not applicable to this case because defendants' counsel, rather than a neutral, made the disclosure.

Although a Court may strike an improperly filed Rule 68 offer of judgment *sua sponte*, in this case, Plaintiffs were forced to act because within Defendants' improperly filed offer of judgment Defendants had breached the confidential nature of settlement proceedings. Because Defendants should have known that it was improper for them to file an offer of judgment prior to acceptance and to disclose confidential information from court-ordered mediation, sanctions are warranted.

\*9 Defendants' Objections are therefore **OVERRULED**. Plaintiffs shall submit to Defendants a detailed list of attorneys' fees incurred in relation to the Defendants' acts of improperly filing the offer of judgment. The Magistrate Judge shall then schedule a hearing to address Defendants' arguments regarding the reasonableness of the attorneys' fees requested by Plaintiffs.

#### V. PLAINTIFFS' MOTION FOR COSTS AND ATTORNEYS' FEES

Plaintiffs have moved pursuant to 42 U.S.C. 3613(c)(2) and O.R.C. 4112.051, for an order granting costs and attorneys fees in this matter. Al-

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though the Court and the parties discussed this issue as one to be resolved subsequent to a proposed declaratory action between Defendants and their insurance company, Plaintiffs' assert that they filed this Motion for purposes of potential timeliness concerns.

Fees are expressly authorized by statute as the Plaintiffs are prevailing parties in this fair housing action. *Price v. Pelka*, 690 F.2d 98, 101 (6th Cir.1982). Fees are appropriate if a prevailing party succeeds, or succeeds on any significant issue in the litigation "which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckert*, 461 U.S. 424, 433, 435 (1983).

Now that all other issues in this case have been addressed, the only remaining issue is the reasonableness of the attorneys' fees requested by Plaintiffs as the prevailing party. Plaintiffs shall therefore submit their attorneys' fees to Defendant within ten (10) days of receipt of this Order. The Magistrate Judge will then schedule a hearing to address Defendants' arguments regarding the reasonableness of the attorneys' fees requested by Plaintiffs with respect to the offer of judgment issue and the remaining attorneys' fees incurred by Plaintiffs throughout the case.

## VI. CONCLUSION

Based on the above, the Court **GRANTS** Defendant/Third-Party Plaintiff Phyllis Hardy's Motion for Summary Judgment; **DENIES** Third-Party Defendant Owners Insurance Co.'s Motion for Summary Judgment; **GRANTS** Plaintiffs' Motion for Ruling on Sanctions Issue and **OVERRULES** Defendants' Objections to the Magistrate Judge's August 13, 2004 Order; and **GRANTS** Plaintiffs' Motion for Attorneys' Fees and Costs.

The Clerk shall remove Doc. 43, Doc. 49, Doc. 55, Doc. 65, and Doc. 69 from the Court's pending motions list.

IT IS SO ORDERED.

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