

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1049

DAVID WARD, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 UNITED FOUNDRIES, INC., et al.,)
)
 Defendant/Plaintiff/Appellant,)
)
 vs.)
)
 GULF UNDERWRITERS INSURANCE)
 COMPANY,)
)
 Defendant/Appellee.)
)
)
)
)

CASE NO. _____

*On Appeal from the
Stark County Court of Appeals,
Fifth Appellate District*

*Court of Appeals
Case No. 2009-CA-00019*

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT UNITED FOUNDRIES, INC.**

FILED
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SUPREME COURT OF OHIO

Ronald B. Lee (#0004957)
Roetzel & Andress, LPA
222 South Main Street
Akron, Ohio 44308
Telephone: 330-376-2700
Facsimile: 330-376-4577
rlee@ralaw.com

Counsel for Defendant/Appellee Gulf Underwriters Insurance Company

Michael R. Cashman (#206945 (MN))
Zelle Hofmann Voelbel & Mason LLP
500 Washington Avenue South
Suite 4000
Minneapolis, Minnesota 55415
Telephone: 612-339-2020
Facsimile: 612-336-9100
mcashman@zelle.com

Counsel for Defendant/Appellee Gulf Underwriters Insurance Company

Craig G. Pelini (#0019221)
Kristen E. Campbell (#0066452)
Pelini, Campbell, Williams
& Traub LLC
Bretton Commons – Suite 400
8040 Cleveland Avenue NW
North Canton, Ohio 44720
Telephone (330) 305-6400
Facsimile (330) 305-0042
E-Mail: kec@pelini-law.com
Counsel for Plaintiff/Appellant United Foundries, Inc.

Joseph F. Nicholas, Jr. (#0038063)
Elaine Tso (#0081474)
Mazanec, Raskin, Ryder & Keller Co., LPA
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
Telephone: 440-248-7906
Facsimile: 440-248-8861
jnicolas@mrrklaw.com
etso@mrrklaw.com
Counsel for Defendants United Agencies, Inc. And Terry Dragan

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Proposition of Law No. I:

An exclusion in a commercial general liability insurance policy stop gap endorsement form, stating that the insurance does not apply to “bodily injury intentionally caused or aggravated by you, or bodily injury resulting from an act which is determined to have been committed by you with the belief that an injury is substantially certain to occur” requires a final determination by either a judge or a jury regarding the substantial certainty intentional tort case before the defense of the claim can be denied.

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Opinion of the Stark County Court of Appeals Opinion (May 3, 2010)

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST

This case has widespread implications for both insurance companies and corporate employers who purchase insurance coverage for the specific purpose of addressing substantial certainty employer intentional torts. This Court has previously held that it is not necessarily against public policy for an insurance company to exclude coverage for such torts, despite the insurance company's issuance of a stop gap coverage endorsement. *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373. However, this Court has never sanctioned the automatic application of exclusions in a stop gap coverage form, or any other provision of an insurance contract, without the necessity of the lower courts reading and applying the express terms, conditions, definitions, and exclusions actually set forth in the insurance contract. Rather, this Court has held that when confronted with a matter of contract interpretation, courts must examine the contract as a whole to ascertain the intent of the parties. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130; *Karabin v. State Auto. Mut. Ins. Co.* (1984), 10 Ohio St.3d 163, 167. Further, all of the words in the contract are to be given their plain and ordinary meaning and cannot be simply ignored at the whim of the parties. *Karabin, supra; Mapeltown Foods, Inc., v. Motorists Mut. Ins. Co.*, (1995), 104 Ohio App.3d 345, 347-348. The present case reflects the potential for abuse of the judicial process resulting from the blanket application of exclusions in the coverage form of a commercial general liability insurance contract as opposed to an actual analysis of the contract involved.

This Court has established a long-standing, well-settled principle that insurance contracts are to be read and interpreted as any other contracts. *See, e.g., Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. Allowing parties or lower courts to apply standard, boilerplate exclusions to cases involving substantial certainty employer intentional torts, without an analysis

of the specific facts of the case or the actual terms and provisions of the specific applicable insurance contract, violates and abuses this longstanding tradition. Moreover, this case sets the distasteful precedent that an insurance company can lazily piggyback on courts' interpretation and application of the terms and conditions of other insurance policies, without being held accountable for the express language that the insurance company chooses to set forth in its own insurance contracts. Further, allowing insurance companies to demand and accept huge premiums under the auspice of providing stop gap coverage which, although not set forth by the express terms and provisions of the insurance contract, is later argued to be excluded, is inequitable and unjust.

In the present case, the insurance company skirted its responsibility to provide insurance coverage that was not expressly excluded by the terms and exclusions set forth in the insurance policy purchased by United Foundries. Allowing the Court of Appeals decision to stand subjects companies throughout the state of Ohio, who are similarly situated to Appellant, to the untenable position of being exposed to substantial certainty employer intentional tort claims, without defense or indemnity from their insurance companies, despite the fact that they took every reasonable measure to procure stop gap insurance coverage, which was expressly marketed as a means to offer protection against these very lawsuits. Appellant respectfully requests this Court to step in and prevent the injustice against corporate employers such as the one set forth in the case herein from continuing. Rather, this Court has the opportunity to hold insurance companies responsible for the language they choose to utilize in their insurance contracts and for which they collect substantial premiums from their purported insureds.

The Fifth District Court of Appeals decision also directly conflicts with the Third District Court of Appeals decision in a nearly identical case entitled *Cooper Tire & Rubber Co. v. The*

Travelers Cas. & Sur. Co., 3rd App. No. 5-06-40, 2007-Ohio-1905. Specifically, Appellee (the insurer) in the present case argued that the stop gap exclusion which read “bodily injury intentionally caused or aggravated by you, or bodily injury resulting from an act which is determined to have been committed by you with the belief that an injury is substantially certain to occur,” precluded the duty to defend the corporate insured against the allegations in the employer intentional tort complaint. Appellant (the insured) argued that since the appropriate fact finder has not yet “determined” whether there has been an employer intentional tort, the duty to defend had been triggered. The trial court rejected the insurance company’s argument, holding that a denial of coverage rendered the stop gap coverage endorsement illusory. While the dissent agreed with the trial court opinion, a majority panel of the Fifth District Court reversed; applying the “scope of the allegations” test, the Court determined that if the allegations set forth in the tort complaint proved to be true, coverage was not owed due to the stop gap endorsement exclusion set forth above.

The Third District Court in *Cooper, supra*, addressed the identical policy coverage exclusion. In *Cooper*, the Court specifically noted that the mere allegation of an intentional tort made in a complaint is not a “determination” that an employer intentional tort did, in fact, occur. The Court held that, since the insurance policy exclusion at issue only applied to cases “***determined to have been*** committed by you with the belief that an injury is substantially certain to occur,” and since there had been no express determination by a court or jury that such a tort did occur, the exclusion was not triggered, and therefore, the insurance company was required to provide a defense to the complaint. In the present case, the Fifth District Court rejected the rationale that the Third District Court utilized in *Cooper*. Therefore, there is clearly a conflict among the Districts as to the interpretation of this particular contract exclusion in a stop gap coverage form.

STATEMENT OF THE CASE AND FACTS

David Ward is employed as a furnace operator by United Foundries, Inc. (Ward Complaint ¶ 4). Ward suffered a workplace injury on or about June 6, 2003. (Ward Complaint ¶ 5). Ward and his wife filed a complaint against United Foundries, alleging a “substantial certainty” employer intentional tort. (United Foundries Complaint ¶ 9). United Foundries submitted a claim to Gulf Insurance Company, which had issued a policy of insurance to United Foundries, effective July 1, 2002 – July 1, 2003. (United Foundries Complaint ¶¶ 7, 10). United Foundries’ claim was denied by Gulf on the grounds that the claim was not covered under the Gulf policy, despite the inclusion of a stop gap coverage form for which Gulf charged United Foundries \$5,000 (United Foundries Complaint ¶¶ 8, 11, 14.)

Prior to June 3, 2003, United Foundries had been sued by injured employees based on the theory of “substantial certainty” employer intentional torts. In obtaining the Gulf policy, it was United Foundries’ express intent to procure insurance which would provide a defense and indemnity for claims of substantial certainty employer intentional torts. The policy issued by Gulf, effective July 1, 2002 through July 1, 2003, indicated through the declarations page that “employer’s liability/stop gap” coverage for employee injuries was provided. It was United Foundries’ understanding that stop gap coverage provided a defense and indemnity coverage for substantial certainty employer intentional torts. (Ron Martin Affidavit, attached to United Foundries Motion for Summary Judgment.)

Based on the foregoing, United Foundries brought suit against Gulf and Terry Dragan, the insurance agent who failed to procure stop gap coverage pursuant to the express and direct request of United Foundries. (United Foundries Complaint.) The employer intentional tort case of *Ward v. United Foundries, Inc.* was then consolidated with the declaratory judgment action of

United Foundries, Inc. v. Dragan and Gulf. (Judgment Entry dated November 26, 2007.) The trial court stayed the liability portion of the employer intentional tort claim and instead focused on whether Gulf had a duty to defend United Foundries in that action. The trial court granted a motion for summary judgment filed by United Foundries and found that Gulf did have such duty to defend, albeit not necessarily a duty to indemnify, United Foundries against the Gulf employer intentional tort action. (Judgment Entry dated January 5, 2009.)

Gulf appealed the trial court's decision to the Fifth District Court of Appeals. In an opinion dated May 3, 2010, the Fifth District Court of Appeals reversed the trial court and held that exclusions in the stop gap coverage form precluded any coverage for Ward's substantial certainty employer intentional tort case. (See Appendix.) On May 12, 2010, United Foundries requested the Fifth District Court of Appeals to certify a conflict with the Third District Court of Appeals, based on inconsistent decisions as to whether exclusions in the stop gap coverage form required a duty to defend. The Fifth District Court of Appeals has not yet ruled on that motion.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law

An exclusion in a commercial general liability insurance policy stop gap endorsement form, stating that the insurance does not apply to “bodily injury intentionally caused or aggravated by you, or bodily injury resulting from an act which is determined to have been committed by you with the belief that an injury is substantially certain to occur” requires a final determination by either a judge or a jury regarding the substantial certainty intentional tort case before the defense of the claim can be denied.

A. The Stop Gap Exclusion Does Not Defeat Appellee’s Duty To Defend Appellant In The Employer Intentional Tort Action.

Appellee’s argument that it owes no coverage is fatally flawed because the fact-finder has not yet determined whether a substantial certainty employer intentional tort has occurred. Courts addressing coverage under this policy language have specifically held that the phrase “which is determined to have been committed” requires a final determination made by either a judge or a jury. “Since no judicial determination can be made prior to the conclusion of the case, [the insurer] may still have a duty to defend without the subsequent liability.” *Cooper Tire & Rubber Co. v. Travelers Casualty & Surety Co.*, 3rd App. No. 5-06-40, 2007-Ohio-1905. The court in *Cooper* specifically noted that “the mere allegation claimed in a complaint is not a determination.”

As previously stated by this Court, “the duty to defend an action is not determined by the actions’ ultimate outcome or the insurer’s ultimate liability.” *Motorists Mutual Insurance Co. v. Trainor* (1973), 33 Ohio St.2d 41, syllabus ¶ 2. Further, “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.” *Motorists Mut. Ins. Co. v. Trainor*, *supra*. This Court has also held that:

Where the allegations in a complaint state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer *must* accept the defense of the claim.

Willoughby Hills v. Cincinnati Insurance Co. (1984), 9 Ohio St.3d 177, 180. In *Sanderson v. Ohio Edison Co.* (1994), 69 Ohio St.3d 582, the Court held that an insurer has an absolute duty to defend an action where the complaint contains an allegation in any one of its claims that could arguably be covered by the insurance policy. Further, in *Willoughby Hills*, the Court provided that if there is some doubt about whether a theory of recovery within the scope of the policy coverage has been pleaded, the insurer must accept defense of the claim. *Id.* at 180.

In the courts below, Appellee asserted that the subject exclusion in the stop gap endorsement universally precludes its duty to defend the underlying lawsuit. However, in the cases of *Trochelman v. Cauffiel Mach. Corp.*, 1999-Ohio-983; *Moore v. Cardinal Packaging, Inc.* (2000), 136 Ohio App.3d 101, and *State Auto Ins. Co. v. Golden* (1998), 125 Ohio App.3d 674, which were expressly relied upon by Appellee, ***the insurers provided a defense to the insured for the underlying intentional tort claim.*** See also, *Lt. Moses Willard v. American States* (Feb. 6, 1995), Clermont App. No. CA-94-06-049. Clearly, the insurers in those cases acknowledged that the duty to defend is much broader than any duty to indemnify the insured. As it has not yet “been determined” whether the insured committed an employer intentional tort, which would trigger the subject exclusion and prevent indemnity for the claim, the same principle should have been applied by the insurer in the subject case.

Based on the foregoing, it is clear that Appellee had a duty to defend Appellant in the underlying employer intentional tort case.

B. There Is A Conflict Among Appellate Jurisdictions In The Interpretation Of The Subject Exclusion In The Stop Gap Coverage Form.

The Court in *Cooper Tire & Rubber Co. v. The Travelers Cas. & Sur. Co.*, 3rd App. No. 5-06-40, 2007-Ohio-1905, addressed the identical policy coverage exclusion. In *Cooper*, the Third District Court of Appeals specifically noted that the mere allegation of an intentional tort made in a complaint is not a “determination” that an employer intentional tort did, in fact, occur. The Court held that, since the insurance policy exclusion at issue only applied to cases determined to have been committed by you with the belief that an injury is substantially certain to occur, and since there had been no determination by a court or jury that such a tort did occur, the exclusion was not triggered, and therefore, the insurance company was required to provide a defense to the complaint. In the present case, the Fifth District Court rejected the rationale that the Court utilized in *Cooper*. Rather, the Fifth District majority applied the “scope of the allegations” test and decided that, if the employer intentional tort allegations proved true, there would be no coverage. However, this rationale ignores the express language of the exclusion involved in the subject case, which only excludes coverage for torts which “have been determined” to have been substantial certainty employer intentional torts. Because that determination cannot be made until the case has been presented to the fact finder, Appellee had a duty to defend the tort case.

C. Appellee’s Interpretation Of The Insurance Contract Would Render The Stop Gap Coverage Endorsement Illusory.

Appellee argued that the exclusion set forth in the employer’s liability/stop gap coverage form precludes coverage in this case. However, if that were the case, the coverage form would be completely illusory. Generally, courts disfavor contract interpretations which render contracts

illusory or unenforceable. *Talbert v. Continental Cas. Co.*, 2004-Ohio-2608. There would certainly not be coverage in this case substantial enough to warrant the \$5,000 premium paid by Appellant. As recognized by the dissenting Judge in the Fifth District Court of Appeals decision in this case, Appellee's argument begs the question of what did Appellant receive in return for the payment of the \$5,000 premium?

A similar exclusion was at issue in *GNFH, Inc. v. West Am. Ins. Co.*, 2007-Ohio-2722. Of three policies issued to the corporate employer, two had Stop Gap endorsements which modified the general liability coverage forms. The Court noted that the only purpose of the stop gap coverage was to provide coverage for substantial certainty employer intentional torts. "That purpose is defeated if the provisions are interpreted to exclude coverage for both 'direct intent' and 'substantial certainty' intentional torts. Because there would be nothing left to cover, we are unable to ascertain any logical reason for adding the endorsement to the policy." Therefore, the Court held that the insurer was mistaken in rejecting the duty to defend the underlying claim.

The present case is also similar to *Talbert, supra*. In that case, the employer purchased an insurance policy with Continental to cover bodily injury claims that were not otherwise covered by workers' compensation. However, when the employer was sued for an employer intentional tort, the insurer denied coverage. The Court noted that, if the insurer's interpretation were correct, the employer would have purchased nothing when it paid for this policy, and that the policy would be rendered illusory.

Likewise, in the present case, the only intended purpose of purchasing the stop gap coverage was to obtain coverage for substantial certainty employer intentional torts, which had been the subject of prior lawsuits and coverage actions. That sole purpose would be completely defeated if the stop gap endorsement is interpreted in a manner which would exclude coverage

for those actions. If Appellee's interpretation of the policy is correct, then the entire separate endorsement is illusory and meaningless.

Unlike some of the cases where courts have found that stop gap endorsements are not illusory even if substantial certainty torts are excluded, the Gulf policy does not provide any separate or additional coverage through its stop gap form. There is no separate provision of express coverage in the endorsement; rather, the form merely *adds additional or new exclusions* with respect to bodily injury included within the "employer's liability hazard" set out in the commercial general liability form. Therefore, in exchange for the receipt of \$5,000, rather than expanding the liability coverage, Appellee actually prevented any coverage with respect to employees injured in the course and scope of employment. Gulf's failure to expressly provide any coverage in the stop gap endorsement makes the present insurance contract distinguishable from the insurance policies in the cases relied upon by Appellee. As such, the rationale of those cases is inapplicable to the case at bar.

Moreover, even in the cases where there was deemed no duty to indemnify the employer, the insurers did voluntarily assume the defense of the underlying tort case. *See, e.g., Trochelman v. Cauffiel Mach. Corp.*, 1999-Ohio-983; *Moore v. Cardinal Packaging, Inc.* (2000), 136 Ohio App.3d 101, and *State Auto Ins. Co. v. Golden* (1998), 125 Ohio App.3d 674; *Lt. Moses Willard v. American States* (Feb. 6, 1995), Clermont App. No. CA-94-06-049. In those cases, the provision of a defense is what kept the coverage from being considered illusory. In the case at bar, Appellant has received no such benefit. Furthermore, the Court in *Lakota v. Westfield Ins. Co.* (1998), 132 Ohio App.3d 138 noted that "it should not be a surprise that the benefit might be modest in light of the fact that the total annual cost of the coverage was only \$250." Appellant,

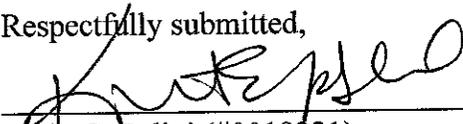
on the other hand, paid \$5,000 in exchange for being denied all coverage under the stop gap endorsement.

Based on the forgoing, it is clear that Appellee had a duty to defend Appellant in the employer intentional tort case.

CONCLUSION

This case has significant widespread effect upon the principle of contract interpretation versus an automatic exclusion or denial of insurance coverage for corporate employers who have expended significant corporate funds for the purchase of a stop gap coverage endorsement, despite the fact that the endorsement purportedly excludes the very coverage for which it was purchased in the first place. This case also reflects a conflict among Appellate Districts as to the interpretation of an exclusion found in many stop gap coverage endorsements. Based on the foregoing, Appellant United Foundries, Inc. requests that this Court accept jurisdiction in the case so that the important issues presented herein can be reviewed on the merits.

Respectfully submitted,



Craig G. Pelini (#0019221)
Kristen E. Campbell (#0066452)
Pelini, Campbell, Williams
& Traub LLC
Bretton Commons – Suite 400
8040 Cleveland Avenue NW
North Canton, OH 44720
Telephone: (330) 305-6400
Facsimile (330) 305-0042
E-Mail: cgp@pelini-law.com
E-Mail: kec@pelini-law.com

Counsel for Appellant,
United Foundries, Inc.

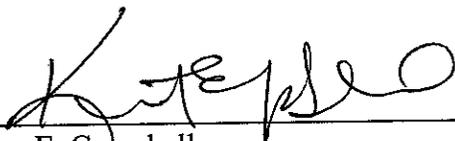
CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 15th day of June, 2010 to:

Ronald B. Lee (#0004957)
Roetzel & Address, LPA
222 South Main Street
Akron, Ohio 44308
Counsel for Defendant/Appellee Gulf Underwriters Insurance Company

Michael R. Cashman (#206945 (MN))
Zelle Hofmann Voelbel & Mason LLP
500 Washington Avenue South
Suite 4000
Minneapolis, Minnesota 55415
Counsel for Defendant/Appellee Gulf Underwriters Insurance Company

Joseph F. Nicholas, Jr. (#0038063)
Elaine Tso (#0081474)
Mazanec, Raskin, Ryder & Keller Co., LPA
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
Counsel for Defendants United Agencies, Inc. And Terry Dragan



Kristen E. Campbell

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NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DAVID WARD, et al.

Plaintiffs

-vs-

UNITED FOUNDRIES, INC., et al.

Defendants/Plaintiffs-Appellees

-vs-

GULF UNDERWRITERS
INSURANCE COMPANY

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2009 CA 00019

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 2006 CV 01666
(consolidated with 2006 CV 04347)

JUDGMENT:

Reversed and Remanded

(F)

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Appellee United Foundries

For Appellant Gulf Underwriters

CRAIG G. PELINI
KRISTEN E. CAMPBELL
PELINI, CAMPBELL, WILLIAMS
& TRAUB LLC
Bretton Commons – Suite 400
8040 Cleveland Avenue NW
North Canton, Ohio 44720

RONALD B. LEE
ROETZEL & ANDRESS
220 South Main Street
Akron, Ohio 44308

MICHAEL R. CASHMAN
500 Washington Avenue S., Suite 4000
Minneapolis, Minnesota 55415

A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By *T. F. ...* Deputy
Date *5/4/10*

Hoffman, P.J.

{¶1} Appellant Gulf Underwriter's Insurance Company appeals the July 6, 2009 Judgment Entry of the Stark County Court of Common Pleas, denying its motion for summary judgment and granting Appellee United Foundries, Inc.'s motion for summary judgment on the issue of duty to defend.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On or about June 6, 2003, David Ward, an employee of United, Foundries, Inc. ("United") suffered a workplace injury.

{¶3} On June 7, 2004, Ward filed an intentional tort suit against United alleging he was injured by a melting furnace that was a dangerous condition, and that United had actual knowledge of that dangerous condition. According to Ward, United also subjected him to this dangerous condition "despite knowledge that he and others similarly situated were substantially certain to be injured in the process of performing his job duties." In summarizing this claim for relief, Ward alleged he was injured "as a direct and proximate result of the intentional and wrongful misconduct" of United. Ward also sought punitive damages. Specifically, Ward alleged the conduct by United was "willful, wanton, intentional and/or with actual malice and the Plaintiff is entitled to punitive damages." The complaint also contained a derivative claim by Mary Ward, who alleged she "has suffered the loss of the care, companionship, consortium, services and society of her husband."

{¶4} At the time of this occurrence, Gulf Underwriters Insurance Company ("Gulf") insured United under a policy that was effective from July 1, 2002, to July 1,

2003. Commercial general liability coverage was included in the Gulf Policy. In pertinent part, the "Commercial General Liability Coverage Part" states as follows:

{¶5} "Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

{¶6} "SECTION I – COVERAGES

{¶7} "COVERAGE A BODILY INJURY AND PROPERTY DAMAGE.

LIABILITY

{¶8} "1. Insuring Agreement

{¶9} "a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply.

{¶10} "No other obligation or liability to pay sums or perform acts or services is covered.

{¶11} "b. This insurance applies to 'bodily injury' and 'property damage' only if:

{¶12} "(1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the "coverage territory"; and

{¶13} "(2) The 'bodily injury' or 'property damage' occurs during the policy period.

{¶14} "c. Damages because of 'bodily injury' include damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'bodily injury.'

{¶15} "2. Exclusions

{¶16} "This insurance does not apply to:

{¶17} "a. Expected or Intended Injury

{¶18} " 'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured . . .

{¶19} " * * *

{¶20} "e. Employer's Liability

{¶21} " 'Bodily injury' to:

{¶22} "An 'employee' of the insured arising out of and in the course of:

{¶23} "(a) Employment by the insured; or

{¶24} "(b) Performing duties related to the conduct of the insured's insurers; or

{¶25} "(2) The spouse, child, parent, brother, or sister of that "employee" as a consequence of Paragraph (1) above.

{¶26} "This exclusion applies:

{¶27} "(1) Whether the insured may be liable as an employer or in any other capacity¹; and

{¶28} "(2) To any obligation to share damages with or repay someone else who must pay damages because of injury.²

¹ This provision is referred to as a "dual capacity" exclusion within the insurance industry.

{¶29} “* * *

{¶30} “ SECTION V – DEFINITIONS

{¶31} “3. ‘Bodily injury’ means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

{¶32} “* * *

{¶33} “13. ‘Occurrence’ means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

{¶34} United also purchased employers liability coverage from Gulf via an Employers Liability Stop Gap Endorsement, which states, in pertinent part:

{¶35} “EMPLOYER’S LIABILITY COVERAGE

{¶36} “THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

{¶37} “This endorsement modifies insurance provided under the following:

{¶38} “COMMERCIAL GENERAL LIABILITY COVERAGE PART

{¶39} “A. SCHEDULE

{¶40} “1. Designated State(s): OHIO

{¶41} “* * *

{¶42} “B. PROVISIONS

{¶43} “The following provisions apply to SECTION I - COVERAGE A. - with respect to ‘bodily injury’ included within the ‘employer’s liability hazard.’

{¶44} “1. The exclusions in paragraph 2 of SECTION I - COVERAGE A. - are replaced by the following:

² This provision is referred to as a “third party over-suit” exclusion within the insurance industry.

{¶45} "This insurance does not apply to:

{¶46} " * * *

{¶47} "e. 'Bodily injury' intentionally caused or aggravated by you, or 'bodily injury' resulting from an act which is determined to have been committed by you with the belief that an injury is substantially certain to occur;

{¶48} " * * *

{¶49} "3. The following additional definition applies:

{¶50} " 'Employer's liability hazard' includes:

{¶51} "a. 'Bodily injury' sustained by one of your employees if such "bodily injury" arises out of and in the course of such employee's employment by you which is necessary or incidental to your work in a state designated in the Schedule on endorsement CG T3 13 10 89; and

{¶52} "b. Consequential 'bodily injury' to a spouse, child, parent, brother or sister of the injured employee provided that such 'bodily injury' is the direct consequence of 'bodily injury' included within a. above.

{¶53} " 'Bodily injury' under a. and b. above is included whether or not:

{¶54} "i. The insured may be liable as an employer or in any other capacity; and

{¶55} "ii. It involves an obligation to share damages with or repay someone else who must pay damages because of the injury."

{¶56} The Gulf Policy was also endorsed with a Punitive Damages Exclusion, which provides:

{¶57} "In consideration of the premium charged, and notwithstanding anything contained in this policy to the contrary, it is agreed that this policy does not apply to liability for punitive or exemplary damages, in whatever form assessed."

{¶58} On or about June 11, 2004, United forwarded a copy of the 2004 complaint filed by the Wards to Gulf. Gulf responded on June 25, 2004, and denied defense and indemnity coverage.

{¶59} The Wards' complaint was dismissed without prejudice on or about February 27, 2006, but was re-filed on April 24, 2006. The new complaint was identical to the previous complaint. Consequently, Gulf maintained its denial of defense and indemnity coverage.

{¶60} On or about June 1, 2007, United filed the instant lawsuit against Appellant Gulf, seeking a declaration Gulf was obligated to provide a defense and indemnity coverage.

{¶61} On November 26, 2007, the trial court consolidated the defense/coverage declaration action with the underlying intentional tort complaint for pretrial discovery. Subsequently the trial court issued an order on June 24, 2008, instructing the parties to file dispositive motions solely on the issue of whether Gulf had a duty to defend United.

{¶62} On July 3, 2008, United filed a motion for summary judgment alleging a duty to defend existed under the Employers Stop Gap Endorsement.

{¶63} On July 17, 2008, Gulf filed a cross-motion for summary judgment alleging there was no possibility of coverage and thus it had no duty to defend.

{¶64} On or about January 5, 2009, the trial court issued an order finding there were no genuine issues of material fact on the duty to defend, and granted summary judgment for United.

{¶65} It is from this decision Gulf now appeals, assigning the following errors for review.

ASSIGNMENTS OF ERROR

{¶66} "I. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT FOR APPELLANT GULF ON THE DUTY TO DEFEND WHEN THE UNDISPUTED EVIDENCE ESTABLISHED NO POSSIBILITY OF COVERAGE.

{¶67} "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR APPELLEE UNITED ON THE DUTY TO DEFEND WHEN IT CONCLUDED THAT THE EMPLOYERS LIABILITY STOP GAP ENDORSEMENT WAS ILLUSORY."

I., II.

{¶68} We shall address Gulf's assignments of error together as they are interrelated.

{¶69} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

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

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

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

{¶72} It is based upon this standard that we review Gulf’s assignments of error.

{¶73} As set forth above, the underlying complaint filed by the Wards against United alleges David Ward was injured as a result of a dangerous condition of which United had knowledge, and United subjected him to this dangerous condition despite knowledge it was substantially certain he would be injured in the process of performing his job duties.

{¶74} United filed the within action to determine whether Gulf owed a duty to defend, indemnify, or otherwise provide coverage to United for any and all allegations stemming from the underlying intentional tort lawsuit. Gulf maintains it had no duty to defend in this matter and the stop-gap coverage provided to United was not illusory.

{¶75} When a complaint alleges a claim that could potentially be covered by an insurance policy, the duty to defend arises. *Cincinnati Ins. Co. v. CPS Holdings, Inc.* (2007), 115 Ohio St.3d 306, 875 N.E.2d 31. “[When] the complaint brings the action within the coverage of the policy, the insurer is required to make the defense, regardless of the ultimate outcome of the action or its liability to the insured.” *Id.* Even when the action is not clearly within the policy coverage, but the allegations could arguably or potentially state a claim within the policy coverage, the insurer still has a responsibility to defend the entire action. *Sanderson v. Ohio Edison Co.* (1994), 69 Ohio St.3d 582, 586, 635 N.E.2d 19; *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St.3d 177, 459 N.E.2d 555.

{¶76} However, an insured is not obligated to defend a claim “clearly and indisputably outside the contracted policy coverage.” *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, *supra*. “Only if there is no possibility of coverage under the policy based on the allegations in the complaint will the insurer not have a duty to defend the action.” *Erie Ins. Exch. v. Colony Dev. Corp.* (1999), 136 Ohio App.3d 406, 413, 736 N.E.2d 941.

{¶77} An insurer's duty to defend is broader than the duty to indemnify. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 874 N.E.2d 1155, 2007-Ohio-4948, ¶ 19. The duty of the insurance company to defend is separate from the duty of

the insurance company to indemnify. *Willoughby Hills*, supra. Once a duty to defend is recognized, "speculation about the insurer's ultimate obligation to indemnify is premature until facts excluding coverage are revealed during the defense of the litigation and the insurer timely reserves its rights to deny coverage." *Erie Ins. Exch. Supra* at 413.

{¶78} In its motion for summary judgment, United maintains, "[i]n obtaining the Gulf policy, it was United Foundries' express intent to procure insurance which would provide a defense and indemnity for claims of substantial certainty employer intentional torts." (United's Motion for Summary Judgment, Affidavit of Ronald Martin). United further stated it believed the \$5,000 premium it paid for "Stop-Gap" coverage provided defense and indemnity coverage for substantial certainty employer intentional torts. *Id.*

{¶79} Gulf argues the language in the "Stop Gap" endorsement excludes substantial certainty employer intentional torts which "have been determined to have been committed by [United]".

{¶80} United argues such coverage was the sole purpose of purchasing the endorsement and, without such coverage, the endorsement is useless. Without it, United asserts it paid a significant premium for nothing.

{¶81} Gulf maintains while the Stop Gap endorsement does not provide coverage for substantial certainty intentional torts, it is not illusory because it does provide coverage for dual capacity suits, third party over-suits, consequential bodily injury and unknown employer liability hazards. We agree.

{¶82} Because the claim as alleged in the Wards' complaint would not bring the action within the coverage of the policy, we find Gulf is not required to defend nor

indemnify United under the terms of the policy. The complaint clearly alleges an intentional tort claim against the employer. Such claim is clearly excluded from coverage under the Commercial General Liability Policy as modified by the Employers Liability Stop Gap Endorsement to exclude coverage for: “Bodily injury’ intentionally caused or aggravated by you, or ‘bodily injury’ resulting from an act which is determined to have been committed by you with the belief that an injury is substantially certain to occur.” If a contract’s terms are clear and unambiguous, no issue of fact remains and the contract must be interpreted as a matter of law. *Inland Refuse Transfer Co. v. Browning Ferris Indus. of Ohio, Inc.* (1984), 15 Ohio St.3d, 321, 322. Because we find the exclusion is unambiguous, United’s purpose or understanding it was acquiring coverage for such a claim under the Stop Gap Endorsement is irrelevant.³

{¶83} United argues because the plaintiff-employee’s claim has yet to be “determined to have been committed,” it is entitled to a defense even if coverage is later determined to be unavailable. We find this argument unpersuasive. If the allegations in Wards’ complaint are ultimately determined to be true, coverage is specifically excluded. Applying the “scope of the allegations” test, we find the claim stated in the complaint is neither potentially nor arguably covered under the terms of the policy. As such, we conclude Gulf has no duty to defend nor indemnify.

{¶84} In his dissent, Judge Wise finds coverage exists based upon the definition of “employer’s liability hazard.” Judge Wise interprets such definitional language as providing coverage to employees for injuries arising out of their employment not

³ The insured’s purpose and understanding may well be relevant in a claim by the insured against the issuing insurance agent/agency.

otherwise covered by workers' compensation.⁴ Thus, he concludes the only thing the Stop Gap Endorsement could provide coverage for is substantial-certainty intentional torts.⁵ As such, Judge Wise, as did the trial court, concludes the Stop Gap Endorsement is illusory. We respectfully disagree.

{¶85} Gulf asserts the Stop-Gap endorsement provides additional coverage for "dual capacity torts" and "third party over-suits" which are specifically excluded under the General Commercial Liability Policy. While acknowledging Gulf's assertion, United replies, because its only intended purpose for purchasing the Stop-Gap Endorsement was to cover substantial certainty employer intentional torts, the endorsement is illusory.⁶ While United's "understanding"⁷ was the endorsement would provide defense and indemnity coverage for substantial certainty employer intentional torts, such understanding goes to the extent of the additional coverage purchased rather than whether additional coverage exists. Although the expanded coverage is not necessarily what United thought it would be, we do not find it to be illusory.

{¶86} Gulf's two assignments of error are sustained.

⁴ As noted by Judge Wise, employee claims against an employer for negligence are barred under Ohio's Workers' Compensation Laws.

⁵ Wise, J., dissent ¶94.

⁶ Appellee's Brief at p.6.

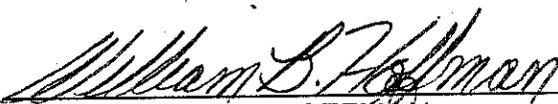
⁷ Appellee's Brief at p.1.

{¶187} The judgment of the Stark County Court of Common Pleas is reversed and the matter remanded to that court for further proceedings in accordance with this Opinion and the law.

By: Hoffman, P.J.

Farmer, J. concurs,

Wise, J. dissents



HON. WILLIAM B. HOFFMAN



HON. SHEILA G. FARMER

HON. JOHN W. WISE

Wise, J., dissenting

{¶88} I respectfully dissent from the majority opinion.

{¶89} In the instant case, Appellee argues that coverage for substantial certainty intentional torts was the sole purpose of purchasing the endorsement and that without such coverage, the endorsement is useless and further, that it paid a significant premium for nothing.

{¶90} Appellant Gulf argues that while the Stop Gap endorsement does not provide coverage for substantial certainty intentional torts, it is not illusory because it does provide coverage for dual capacity suits, third party over-suits, consequential bodily injury and unknown employer liability hazards.

{¶91} Pursuant to the Employer's Liability Coverage/Stop-Gap endorsement, such coverage included:

{¶92} "Bodily injury" sustained by one of your employees if such "bodily injury" arises out of and in the course of such employee's employment by you which is necessary or incidental to your work in a state designated in the Schedule on endorsement CG T3 13 10 89; and

{¶93} "b. ***

{¶94} This writer reads this to mean that this endorsement provided coverage for injuries to employees of Appellee United Foundries arising out of their employment with Appellee that is not covered by the workers' compensation system. In Ohio, the only injuries that would not be covered by workers' compensation are intentional torts and, as the only type of intentional tort that one can insure against without violating Ohio

public policy is substantial-certainty intentional torts, the only thing the stop-gap endorsement could provide coverage for is substantial-certainty intentional torts.

{¶195} While Appellant Gulf argues that other claims such as “dual capacity torts” and “third party over-suits” would be covered under this Endorsement, this writer’s understanding of “dual capacity torts” and “third party over-suits” is such that a foundry would have no use for this type of coverage as it does not produce an end product which would subject it to liability for those types of claims.

{¶196} Based on the language as contained in the endorsement, I would find that to give effect to the exclusion would render its policy illusory.

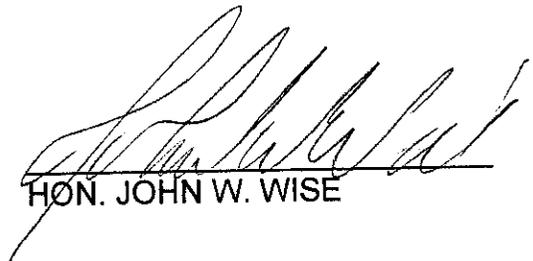
{¶197} When interpreting an insurance contract, the main goal of the court is to achieve a “ ‘reasonable construction [of the contract] in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed.’ ” *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 211, 519 N.E.2d 1380, quoting *Dealers Dairy Products Co. v. Royal Ins. Co.* (1960), 170 Ohio St. 336, 164 N.E.2d 745. If a contract’s terms are clear and unambiguous, no issue of fact remains and the contract must be interpreted as a matter of law. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271. However, when an ambiguity exists, the contract’s ambiguous terms must be strictly construed against the insurer and liberally in favor of the policyholder. *King*, supra, 35 Ohio St.3d at 211, 519 N.E.2d 1380.

{¶198} When “construing an agreement, the court should prefer a meaning which gives it vitality rather than a meaning which renders its performance illegal or impossible.” *Kebe v. Nutro Machinery Corp.* (1985), 30 Ohio App.3d 175, 30 OBR 316,

507 N.E.2d 369. Generally, "courts disfavor contract interpretations which render contracts illusory or unenforceable." *Harasyn v. Normandy Metals, Inc.* (July 28, 1988), Cuyahoga App. No. 53212, 1988 WL 86966, quoting *Liqui*Lawn Corp. v. The Andersons* (Apr. 10, 1986), Cuyahoga App. No. 50240, 1986 WL 4394.

{¶199} I am not inclined to give the insurance policy a reading that would render it useless. Appellee paid a significant premium for this policy, and we fail to see what it paid for if it was not coverage for substantial-certainty intentional torts.

{¶100} Accordingly, I would find the trial court did not err in finding there is no genuine issue of material fact, and Appellee United Foundries was entitled to judgment as a matter of law.



HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MAILED
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
10 MAY -3 PM 3:01

DAVID WARD, et al.

Plaintiffs

-vs-

UNITED FOUNDRIES, INC., et al.

Defendants/Plaintiffs-Appellees

-vs-

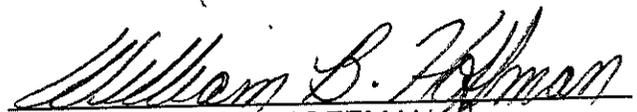
GULF UNDERWRITERS
INSURANCE COMPANY

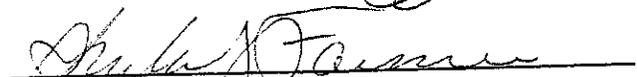
Defendant-Appellant

JUDGMENT ENTRY

Case No. 2009 CA 00019

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed and the matter remanded to that court for further proceedings in accordance with our opinion and the law. Costs assessed to Appellant.


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER

HON. JOHN W. WISE