

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

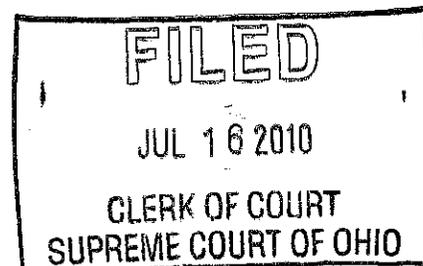
DAVID WARD, et al., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
UNITED FOUNDRIES, INC., et al., )  
 )  
Defendant/Plaintiff/Appellant, )  
 )  
v. )  
 )  
GULF UNDERWRITERS INSURANCE )  
COMPANY, )  
 )  
Defendant/Appellee. )

CASE NO. 2010 -1049

ON APPEAL FROM STARK COUNTY  
COURT OF APPEALS, FIFTH  
APPELLATE DISTRICT

Court of Appeals Case No. 2009 CA 00019

**DEFENDANT/APPELLEE GULF UNDERWRITERS  
INSURANCE COMPANY'S RESPONSE IN OPPOSITION TO  
MEMORANDUM IN SUPPORT OF JURISDICTION BY  
APPELLANT UNITED FOUNDRIES INC.**



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## **INTRODUCTION**

Appellant United Foundries, Inc. (“United”) argues that this is a case of public or general interest. That contention has no merit. This case involves unambiguous insurance policy language and undisputed facts, with the Fifth District Court of Appeals applying the “scope of the allegations” test to the allegations in an underlying substantially certain to occur intentional tort lawsuit and concluding that Appellee Gulf Underwriters Inc. (“Gulf”) had no duty to defend that substantial certainty intentional tort lawsuit because there was no possibility for indemnity coverage under an Employers Liability Stop Gap Endorsement that clearly and explicitly excludes 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.” In other words, if the substantial certainty intentional tort claims were proven or “determined” to be true in the underlying lawsuit, coverage is clearly and explicitly excluded under the insurance policy issued by Appellee Gulf. The Fifth District correctly identified and applied the law established by this Court. Because this case does not present any issues of public or general interest, Gulf respectfully submits that the request for jurisdiction should be denied.

## **STATEMENT OF THE CASE AND FACTS**

Appellee Gulf insured Appellant United under a policy that was effective from July 1, 2002 to July 1, 2003 (“the Gulf Policy”). Fifth Appellate District Court of Appeals Appendix (“App.”) 0007-0008. Commercial general liability was amongst the coverages included in the Gulf Policy. App. 0007-0058. In pertinent part, the “Commercial General Liability Coverage Part” stated as follows:

### **SECTION I – COVERAGES**

**COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

**1. Insuring Agreement**

- 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.

\* \* \*

**2. Exclusions**

This insurance does not apply to:

**a. Expected or Intended Injury**

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured . . .

\* \* \*

**e. Employer’s Liability**

“Bodily injury” to:

- (1) An “employee” of the insured arising out of and in the course of:
  - (a) Employment by the insured; or
  - (b) Performing duties related to the conduct of the insured’s insurers; or
- (2) The spouse, child, parent, brother, or sister of that “employee” as a consequence of Paragraph (1) above.

This exclusion applies:

- (1) whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of injury.

App. 0012-0023.

The Gulf Policy also contained an Employers Liability Stop Gap Endorsement. In pertinent part it states as follows:

EMPLOYER'S LIABILITY COVERAGE

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. SCHEDULE

1. Designated State(s): OHIO

\* \* \*

B. PROVISIONS

The following provisions apply to SECTION I – COVERAGE A. – with respect to “bodily injury” included within the “employer’s liability hazard.”

1. The exclusions in paragraph 2 of SECTION I – COVERAGE A. – are replaced by the following:

\* \* \*

- e. [This 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;

\* \* \*

Definition

“Employer’s liability hazard” includes:

- 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

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.

“Bodily injury” under a. and b. above is included whether or not:

- i. The insured may be liable as an employer or in any other capacity;  
and
- ii. It involves an obligation to share damages with or repay someone else who must pay damages because of the injury.

App. 0034-0036.

On June 7, 2004 David Ward filed suit against United Foundries alleging intentional and substantially certain to occur intentional tort claims. Ward was a United employee at the time. App. 0101. Ward alleged that he was injured on June 6, 2003, by a melting furnace that was a dangerous condition, and that United had actual knowledge of that dangerous condition. App. 0102-0103. According to Ward, United also subjected him to this dangerous condition “despite knowledge that Plaintiff and others similarly situated were substantially certain to be injured in the process of performing his job duties.” App. 0103. Ward alleged he was injured “as a direct and proximate result of the intentional and wrongful misconduct” of United. App. 0103.

On or about June 11, 2004, United forwarded a copy of the 2004 Ward Complaint to Gulf. Gulf responded on June 25, 2004, and denied defense and indemnity coverage. App. 0107-0110. The Complaint was dismissed without prejudice on or about February 27, 2006. However, on April 24, 2006, Ward re-filed his complaint against United. App. 0111-0117. The 2006 Ward Complaint is identical to the 2004 Ward Complaint. Both allege that Ward was a United employee and that he was injured in the course of his employment. *See* App. 0102-0103 and App. 0112-0114. Both allege that his injuries were intentional or substantially certain to occur. *See* App. 0103 and App. 0114. Consequently, Gulf maintained its denial of defense and indemnity coverage.

United filed this lawsuit against Gulf on or about June 1, 2007, seeking defense and indemnity coverage. On or about January 5, 2009 the trial court granted summary judgment for United on the duty to defend. The trial court stated that its order was final and appealable.

Gulf appealed to the Court of Appeal for Stark County, Ohio, Fifth Appellate District asserting that the trial court had erred in denying summary judgment for Gulf on the duty to defend when the undisputed evidence established no possibility of indemnity coverage under the terms of the Gulf Policy. Further, Gulf argued on appeal that the trial court erred in granting summary judgment for United on the duty to defend on the basis that the Employers Liability Stop Gap Endorsement to the Gulf Policy was illusory. The Fifth District Court of Appeals sustained both assignments of error. On May 3, 2010, the Court of Appeals for Stark County, Ohio, Fifth Appellate District issued an order reversing the judgment of the trial court and remanded the matter to that court for further proceedings in accordance with the opinion of the Fifth Appellate District and the law.

On the first assignment of error, the Fifth District Court of Appeals held:

Because the claim alleged in the Wards' complaint would not bring the action within the coverage of the policy, we find Gulf is not required to defend or 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 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.

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 deemed to be unavailable. We find this argument unpersuasive. **If the allegations in the Wards' complaint are ultimately deemed to be true, coverage is specifically**

**excluded. Applying the “scope of the allegations” test, we find the claim stated in the complaint as neither potentially or arguably covered under the terms of the policy. As such, we conclude Gulf has no duty to defend or indemnify.**

Opinion, ¶¶82-83 (emphasis added).

With respect to the second assignment of error, the Fifth District found that the Employers Liability Stop Gap Endorsement extended “dual capacity” and “third party over” coverage that would have otherwise been specifically excluded under the Gulf Policy. United did not dispute this fact on appeal before the Fifth District. Rather, United argued only that the Employers Liability Stop Gap Endorsement was illusory because it excluded coverage for substantial certainty employer intentional tort. The Fifth District rejected that argument finding the Employers Liability Stop Gap Endorsement was not illusory because it was undisputed that it provided dual capacity and third party over coverage. Opinion, ¶85. Appellant United does not dispute the existence of dual capacity and third party over coverage in its request for this Court to assume jurisdiction.

## ARGUMENT

**A. There Can Be No Duty To Defend A Substantially Certain To Occur Lawsuit Under The “Scope of the Allegations” Test Because There Is No Possibility Of Coverage If The Allegations Are Ultimately Proven Or “Determined” To Be True.**

Appellant United alleges that the Gulf Employers Liability Stop Gap Endorsement does not exclude defense coverage because there has not yet been a determination on the underlying substantially certain to occur intentional tort claim, relying primarily on the decision of the Third District Court of Appeals decision in *Cooper Tire & Rubber Co. v. Traveler’s Casualty & Surety Co.*, No. 5-06-40, 2007 WL 1175183 (Ohio Ct. App., April 23, 2007). See Mem. In Support Of Juris. Of Appellant United Foundries, Inc., Sections A and B. However, the Fifth District correctly identified and correctly applied applicable Ohio case law when it concluded that Gulf

did not have a duty to defend a substantially certain to occur intentional tort claim under an Employers Liability Stop Gap Endorsement to the Commercial General Liability Policy that Gulf issued to United. Specifically, the applicable language in the Stop Gap Endorsement stated that “this 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.” As the Fifth District observed, the complaint in the underlying lawsuit for which United seeks defense coverage “clearly alleges an intentional tort claim against the employer.” Applying the “scope of the allegations” test, the Fifth District correctly concluded that the allegations in the complaint did not “potentially or arguably” state a claim within the policy coverage. *Id.*, ¶¶76, 82 and 83. The Fifth District reached that conclusion because “if the allegations in the [underlying] complaint are ultimately determined to be true, coverage is specifically excluded.” *Id.*, ¶83. “An insurer is not obligated to defend a claim ‘clearly and indisputably outside the policy coverage.’” *Id.*, at ¶76. In other words, if the substantial certainty claims alleged against United in the underlying claim were “determined” to be true, there obviously would be no indemnity coverage for that claim, and hence, no duty to defend.

In contrast, *Cooper Tire* did not properly apply the “scope of the allegations” test for ascertaining whether a duty to defend exists under Ohio law. Under the scope of the allegations test articulated by the Ohio Supreme Court in *Motorists Mutual Ins. Co. v. Trainor*, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973); *Wedge Products, Inc. v. Hartford Equity Sales Co.*, 31 Ohio St.3d 65, 509 N.E.2d 74 (1987) and their progeny, the question is whether the allegations in the underlying complaint set forth a claim that would arguably or potentially be covered under the terms and conditions of the policy. *See also, Sanderson v. Ohio Edison Co.*, 69 Ohio St. 3d 582,

586, 635 N.E.2d 19 (1994); *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St. 3d 177, 159 N.E.2d 555 (1984). As recently reaffirmed in *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St. 3d 306, 875 N.E.2d 31 (2007), where the underlying complaint alleges claims that are indisputably outside the scope of coverage, there is no basis for imposing a duty to defend. Because the underlying complaint here alleged claims that would be outside the coverage of the policy if the allegations were determined to be true, there is no duty to defend. It is irrelevant under the scope of the allegations test if or when the “determination” of truth or merit on the substantial certainty claim is made. The relevant inquiry is whether there would be coverage if a determination is made that the injury was substantially certain to occur. Because the answer is unquestionably no, there can be no duty to defend.

Had *Cooper Tire* actually applied the scope of the allegations analysis to the complaint at issue there, it could not have reached the result it did. That is because it was undisputed in *Cooper Tire* that the underlying complaint in that case was based on allegations that bodily injury was substantially certain to occur. As such, the allegations set forth in the underlying complaint stated a claim that was clearly and unequivocally outside the scope of coverage.

As the court in *Arch Specialty Insurance Co., v. J.G. Martin, Inc.*, No. 1:06 CV 704, 2007 WL 4013351 at \*7 (N.D. Ohio, Nov. 15, 2007), stated when it interpreted an intentional tort exclusion identical to the exclusion in the Employers Stop Gap Endorsement at issue here:

[A] careful reading and analysis of the legal standards [for substantially certain to occur intentional torts in Ohio] in light of the language of the exclusion reveals that the language of the policy is over-inclusive. That is, it would exclude coverage for a substantial certainty tort for which an insurer might be liable under applicable law as well as coverage for suits for which the [insured] would not be liable.

So long as the underlying complaint alleges a substantially certain to occur intentional tort, there is no potential or arguable basis for coverage under the policy terms and conditions,

specifically the substantially certain to occur exclusion in the Stop Gap Endorsement. *See, e.g., Arch*, 2007 WL 4013351 at \*7; *Royal Paper Stock Co., Inc. v. Meridian Insurance Co.*, 94 Ohio App.3d 327, 331-33, 640 N.E.2d 886, 889-90.

The court in *Royal Paper*, 94 Ohio App.3d at 331-33, 640 N.E.2d at 889-90, also rejected the very same argument that Appellee United is making here:

[I]t is not necessary for [an insurer with a substantial certainty exclusion with language such as that in the Gulf Policy] to prove [the insured] intentionally caused the injuries. The endorsement and underlying tort complaint constitute evidence clearly entitling [the insurer] to judgment as a matter of law. . . . Regardless of the test applied (whether “scope of the allegations” . . . or the “true facts” test . . . there is . . . no set of facts under which [the insured] would be covered under the policy. . . . Consequently, there is no coverage here, and [the insurer] has no duty to defend.

The *Cooper Tire* decision by the Third District does not create a conflict. The result it reached was in error because it did not apply the scope of the allegations test for determining whether or not a duty to defend exists. The Fifth District did apply that test.

**B. The Fifth District Court Of Appeals Correctly Determined That The Employers Liability Stop Gap Endorsement Is Not Illusory Because It Is Undisputed That Such Stop Gap Endorsement Provided Coverage For Dual Capacity And Third Party Over Suits That Would Otherwise Have Been Excluded Under The Commercial General Liability Policy.**

United argues that the Employers Stop Gap Endorsement is illusory. However, United ignores the fact that the Employers Liability Stop Gap Endorsement provides coverage for dual capacity and third party over lawsuits. The Fifth District noted that United did not dispute the existence of dual capacity and third party over coverage – insurance that had been excluded under the Commercial General Liability Policy but provided under the Employers Liability Stop Gap Endorsement. United does not now dispute the existence of dual capacity and third party over coverage. The existence of such coverage demolishes the contention that the Employers Liability Stop Gap Endorsement is illusory.

Employers Liability Stop Gap Endorsement is not illusory merely because it excludes insurance for intentional conduct. “An important distinction must be made between an insurance policy that offers no coverage whatsoever in any circumstance, and an insurance policy that offers no coverage for the loss at hand.” *Meeker v. Bituminous Casualty Corp.*, No. C-970977, 1999 WL 49169 at \*2 (Ohio App. 1st Dist., Feb. 5, 1999). Numerous cases applying Ohio law have recognized that Employers Liability Stop Gap Endorsements that exclude coverage for intentional and substantially certain to occur intentional torts are not illusory. *E.g., Arch Specialty Ins. Co. v. J.G. Martin, Inc.*, No. 1:06 CV 704, 2007 WL 4013351 (N.D. Ohio Nov. 15, 2007); *Comcorp Technologies, Inc. v. Crum & Forster Ins.*, No. F-02-016, 2002 WL 31846263, \*2-4 (Ohio Ct. App. Dec. 20, 2002); *Lakota v. Westfield Insurance Co.*, 132 Ohio App.3d 138, 724 N.E.2d 815 (1998); *Meeker v. Bituminous Casualty Corp.*, No. C-970977, 1999 WL 49169, at \*2 (Ohio App. 1 Dist. Feb. 5, 1999); *Moore v. Cardinal Packaging*, 136 Ohio App.3d 101, 735 N.E.2d 990 (2000); *State Auto Ins. Co. v. Golden*, 125 Ohio App.3d 674, 709 N.E.2d 529 (1998).

Appellant United cites *GNFH, Inc. v. West American Insurance Co.*, 172 Ohio App.3d 127, 873 N.E.2d 345 (2007) as the primary basis for its contention that the Gulf Employers Liability Stop Gap Endorsement is illusory. *GNFH* is inapposite. Unlike the present case, the *GNFH* court was not presented with evidence demonstrating that other employer liability hazards such as dual capacity and third party over suits were covered. The *GNFH* court incorrectly assumed that Stop Gap endorsements apply only to intentional tort claims against employers. That was the sole basis for its conclusion that the Stop Gap endorsement was illusory, and its decision to override the manifest meaning of the policy terms. That critical assumption is patently incorrect. Here, in contrast, evidence was presented establishing the existence of

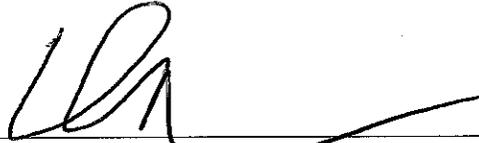
coverage under the Employers Liability Stop Gap Endorsement, and the Fifth District so found. Therefore, the Endorsement is not illusory.

**CONCLUSION**

Application of the scope of the allegations test establishes that there is no potential or arguable basis for coverage under the language of the Employers Liability Stop Gap Endorsement even if the substantially certain to occur allegations in the underlying complaint are determined to be true. Hence, there is no duty to defend. The Endorsement is not illusory because it did provide dual capacity and third party over coverage. Appellee Gulf respectfully submits that jurisdiction should be denied.

Dated: July 16, 2010

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